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Special Issue: Law, Education, and Entrepreneurship in the Age of Brexit

Selected Papers from the EU-CARICOM Law Conference 2019

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Editorial

We are pleased to publish the first issue of the twenty-fifth volume of the *Coventry Law Journal*, a special issue featuring selected papers from the EU-CARICOM Law Conference held at Coventry University on 10th and 11th October 2019. The theme of the conference was 'Beyond Brexit: Sustaining Business and Law Relations'. Academic readers of this journal will be familiar with the tenuous resemblance that conference themes often bear to the papers presented, however, in this instance the conference papers were all faithful to the theme. Nevertheless, the themes emerging from a conference often evolve and this is reflected in the theme of this special issue: 'Law, Education, and Entrepreneurship in the Age of Brexit'.

The first article of this special issue provides an historical and contemporary overview of the origins of Brexit. Anna-Theresia Krein contrasts the United Kingdom's looser relationship with the European Union to that of Germany's, concluding that seeds of Brexit were sown long before 2016. An apt introduction to the articles that follow.

'Trade in goods after Brexit' takes us, appropriately, beyond Brexit, considering the various options for the United Kingdom's relationship for trade in goods with the European Union. Dr MacLennan identifies many of the hurdles that have to be overcome in such a future relationship and concludes that there is no easy solution to these problems.

One of the challenges identified by Dr MacLennan – customs procedures – is elaborated upon by Leonie Zappel. 'Customs procedures after Brexit' identifies a number of potential procedural changes that might be used to overcome these challenges.

'Electronic bills of lading in international trade transactions' explores the opportunities presented by new technological approaches to bills of lading. While acknowledging the promise of new technologies like 'blockchain' for the development of bills of lading, Dr Marxen sounds a cautious note in contrast to the enthusiasm and excitement prevalent in some circles of the international trade (finance) industry.

In 'The impact of Brexit on the United Kingdom's start-up ecosystem' Professor Dr Asghari and Mathis Vetter consider the effects of Brexit on entrepreneurship. They consider, in particular, the macroeconomic and microeconomic effects on start-ups. They further consider how changes in a complex, modern, open economy might impact start-ups concerning the loss of important framework conditions.

Finally, Dr Ben Stanford and Dr Steve Foster share their experience of using publishing opportunities to improve legal writing skills in 'Enhancing student knowledge and skills with publishing opportunities'. The product of this experience can be seen in the student case notes on ground-breaking cases in the English Legal System that conclude this issue, written as part of their assessment for their module on Academic and Career Development. These case notes were selected as the top case notes for that assignment. Well done to those students.

We hope you enjoy reading this issue and we look forward to your contributions in future issues. If you wish to contribute to the Journal and want any advice or assistance in getting published, then please contact the editors: the next publication date is December 2020 and contributions need to be forwarded by early November.

The editors: Dr Stuart MacLennan and Dr Steve Foster.

ARTICLES

EU LAW

The Origins of Brexit: A British-German juxtaposition of historic reasons

Anna-Theresia Krein*

Introduction

The 2016 public referendum in Britain concerning the cessation of Britain's membership of the European Union has arguably brought in an era of increased instability, insecurity and fragmentation in Europe. Since that time, economic, political and social divides between European countries and indeed, within those countries, have been evident. This article aims to prove that some of these splits have their roots in the past, and have been waiting to erupt. This will be achieved by directly juxtaposing German historical events against British historical events. Thus, different developments of both countries in respect of their relations to the European Union and its predecessors are outlined and explained.

It will be concluded that while the occurrence of Brexit was not inevitable, there were some indicators that Britain was never as well integrated into the framework of the European Union as Germany, and was - because of this ambiguity - more likely to break apart from the Union.

The differences between Germany and UK

Law and law making processes have always been shaped by historic and political events. History has always been a framework and wider context for law making and governance; in general and for European law making in particular. Surprisingly, legal developments are often seen in isolation and as removed from actual political and social developments. This rather narrow view is refuted by scholars such as Grimm, who argues that law is coagulated politics.[1] Grimm stresses that law can never be un- or a-political, but is rather a complex societal process.[2] Other scholars, such as Seckelmann, reinforce what German legal scholar Oskar von Bülow had already established, that law and law making is always a learning process.[3] This inherent connection of law and politics has been further explained and examined by other scholars such as Gschiegel.[4] Furthermore, it has been noted that "those who cannot remember the past are condemned to repeat it. "[5] It is, therefore, vital for lawyers to be aware of wider historical, political and societal currents. Being aware of history in general and of the history of law in particular, should thus contribute towards decision-

* M.A., International Relations Theory, The University of Warwick, 2006.

[1] Dieter Grimm, 'Recht und Politik' [1969] JuS 502-510.

[2] *Ibid*.

[3] Margit Seckelmann, 'Ist Rechtstransfer Möglich - Lernen vom Fremden Beispiel' [2012] 43(11) Rechtstheorie <https://heinonline.org/HOL/LandingPage?handle=hein.journals/rechtori43&div=23&id=&page=> accessed 23 April 2020.

[4] Stefan Gschiegl, 'Politik und Recht oder über den Mut zur Institutionalisierung' [2013] 42(2) Österreichische Zeitschrift für Politikwissenschaft 213.

[5] A quote often attributed to US philosopher George Santanya, however, as far as can be established first official citation cited by president of the University of Munich, Professor Ludwig Kotter, on 18 November 1965 during his opening speech of ring lecture: Ludwig Kotter, Chronik der Ludwig-Maximilians-Universität München (1965/1966) 67.

making and the further development of decision-making processes by the individual lawyer. Consequently, such an approach should contribute towards a widening and enriching of thought of the individual lawyer by aiding the understanding of complex societal and political issues.

Since the founding of the then European Economic Community (EEC), two contradictory schools of thought have been intensely discussed by scholars, public policy makers and the general public.[6] The first theory is one of a steady acceleration of a European super state as an end goal, with national states relinquishing their sovereignty to a supranational entity. In fact, one of the first to voice this idea of a 'United States of Europe' was Winston Churchill.[7] In order to simplify for the purposes of this paper, it can be said that followers of this theory are in favour of ever deeper – if not wider – European integration, and thus are consequently also in favour of relinquishing national power to a supranational entity. However, critics of this theory often point out, that the European Union has become an undemocratic entity and that yielding and relinquishing national powers to a supranational body should be viewed with suspicion.[8]

Thus, nationalist tendencies within European nation states have been present until today. Therefore, in reality the initial idea of a European super-state was rebuffed by two rather more flexible and pragmatic concepts of integration. First, the so-called 'two-speed Europe' – also called 'multi-speed Europe' – which has been applied and practised since the 1980s.[9] Here it is understood that often some countries act as pioneers in developments of treaties and laws and it is thus expected for other countries to join proposed measures at a later date.[10] The UK's preference has, however, almost always[11] been an approach of 'Europe à la carte', which resulted in a rather permanent manifestation of differences in degree of integration. This can be seen, for example, by the 'Opt-Out-Clauses' that were added under British pressure to the Treaty of Lisbon.[12] Critics of this model point out that a Union of ever greater depth would become impossible, if not unlikely. Thus, it is crucial to note that these conflicting positions –and at times fiercely debated struggles – have been with the EEC and its successors since its founding and are still, sometimes rather silent but at other times also voiced very prominently, present. Often, these discussions seem to become more muted and act rather as an undercurrent. However, scholarly and public debates remains ongoing.

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[6] A short search on Google Scholar for 'discussion European Integration' on 30 January 2020 has yielded about 4,400,000 results.

[7] Winston Churchill, Prime Minister UK 1940-1945/1951-1955, speech held on 19 September 1947 at the University of Zurich in Zurich, Switzerland. Sir Winston concluded his speech with the famous words: 'Therefore I say to you: may Europe rise!' Winston Churchill, 'United States of Europe September 19, 1946 University of Zurich' (*International Churchill Society*) <https://winstonchurchill.org/resources/speeches/1946-1963-elder-statesman/united-states-of-europe/> accessed 23 April 2020.

[8] Such as for example vehemently and elaborately voiced by UKIP party leader Nigel Farage on 29 January 2020 in his 'Leaving Speech' in the European Parliament. Nigel Farage, 'Nigel Farage silenced for breaking the rules during his final speech in the EU Parliament' (*YouTube*, 29 January 2019, minutes 1:30-2:48) <https://www.youtube.com/watch?v=Lfyal78d9EQ> accessed 24 April 2020.

[9] For instance, Schäuble-Lamers papers published in Schäuble and Lamers called for a '*Kerneuropa*'/'Core Europe.' Wolfgang Schäuble, 'Überlegungen zur europäischen Politik' (*Bundesfinanzministerium*, 1 September 1994) <https://www.bundesfinanzministerium.de/Content/DE/Downloads/schaeuble-lamers-papier-1994.pdf?__blob=publicationFile&v=1> accessed 24 April 2020.

[10] *Ibid*.

[11] Except for the Tony Blair years – see, for example Holger Mölder, 'British Approach to the European Union: From Tony Blair to David Cameron' (*Researchgate*, 2018) <DOI 10.1007/978-3-319-73414-9_9> accessed 24 April 2020.

[12] Treaty of Lisbon [2007] OJ 1 306/1-271.

Differences in approaches towards European integration can be found when examining the differing historic contexts of individual nation states. Thus, for Germans European Integration and subsequent implementation of European legislation into national law has been widely seen as inevitable, if not openly welcomed. For various reasons this has not been the case in Britain. Germany has always been located in a prime geopolitical position in the mainland of Europe, currently sharing land borders with nine neighbouring countries. Britain, however, has always been in a very different strategic position; as an island, it has clear external borders that are surrounded entirely by water – the North Sea in the east, the English Channel in the south, the Celtic Sea in the North West and the Atlantic Ocean in the south west. Thus, during the Napoleonic wars which, as has been argued by Lepsius, were seminal in the development of European Nation states[13] the whole of Europe was conquered except Britain. Britain, as a consequence of its unique geostrategic location enjoyed more protection from foreign land invasion than its neighbours on the European continent. The same natural geostrategic protection also led to a comparatively unscathed Britain in World War One. Again, Britain was not invaded by land.[14] Similarly, no land invasion took place in Britain in World War Two.[15]

Therefore, because of its unique geographic location as an island Britain has not been ruled or governed by other entities or foreign powers for centuries. Consequently, Britain was able to act independently and without direct restraints in their foreign policy. On the contrary, rather than being conquered Britain colonised other countries leading an Empire, which eventually evolved, into the 'Commonwealth of Nations' in 1931.

After the Second World War Britain, as one of the winning allies, did not see any need to join the EEC. Defeated Germany, however, struggled to become a fully accepted member of the international community again. Britain, as one of the winning allies did not experience the same struggle and also did not see an economic need to join the EEC at that particular time. Its ties from the Commonwealth era were still strong and apart from being a respected member of the international community, it also held important posts: such as a permanent seat on the UN Security Council which included a right of veto. Furthermore, Britain had at that time also become a respected member of NATO.

Meanwhile, West Germany proceeded to become one of the six founding members of the EEC in 1957 by signing the Treaty of Rome.[16] For Germany, aside from economic reasons, joining what would become a supranational entity was part of reconciliation with its neighbours after the war, and an attempt to assure permanent peace. In fact, it can be seen that this particular time in history was a decisive turning point in shaping the two very different approaches of Britain and Germany towards European integration, and is therefore vital for explaining subsequent different developments. After the end of the Second World War in 1949, defeated Germany experienced a momentous struggle to become a fully

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[13] MR Lepsius, Der europäische Nationalstaat: Erbe und Zukunft (VS Verlag für Sozialwissenschaften, Wiesbaden 1990) 256-269.

[14] A more detailed account can be seen in Timothy Egan, 'What if Hitler Had Invaded Britain?' (*New York Times*, July 28, 2017) <https://www.nytimes.com/2017/07/28/opinion/hitler-britain-invasion.html> accessed 24 April 2020. German zeppelins did indeed drop bombs over London, however the point is that there was no German land invasion.

[15] See Dan Cruickshank, 'BBC History, The German Threat to Britain in World War Two' (*BBC*, 21 June 2011) <http://www.bbc.co.uk/history/worldwars/wwtwo/invasion_ww2_01.shtml> accessed 24 April 2020.

[16] Treaty of Rome, '…ever closer union among the peoples of Europe', as the Treaty establishing the European Economic Community had put it. Treaty of Rome [1958].

accepted member of the international community again.[17] Part of this endeavour was to relinquish sovereignty to a newly created supranational body: the EEC. Not even German Chancellor Adenauer from the Christian Democrats trusted the German people. He feared that, left alone, the Germans would once more assert themselves with political, economic and most worryingly, military power.[18] Britain, on the other hand did not face such a struggle with recognition.

While Germany was steadily becoming more integrated, Britain was only interested in joining the EEC in 1963 because of its dire economic situation and relative economic decline.[19] Furthermore, as independence movements within the British Empire became stronger, the insecurity brought by a possible decline of the Empire within Britain grew.[20] However, French President De Gaulle then twice vetoed British membership.[21] This was because De Gaulle was suspicious of Britain's strong ties with the US and wanted to preserve French power. De Gaulle was afraid of an 'American Agent' inside the EEC and it was only after De Gaulle's resignation from the French Presidency that Britain was finally able to join the EEC in 1973. Curiously, even after joining, Britain was still uneasy about membership as can be seen by a subsequently held referendum in 1975 on the question: "[D]o you think the UK should stay in the European Community (European Market)?" The outcome of this referendum was that 67 per cent of constituents supported a 'Yes' vote.[22] The result ended with inner political turmoil and an inner party split – not, in fact, unlike today's turmoil.[23] However, even after the referendum discussions around membership remained. For example, Margaret Thatcher demanded reduced contributions from Britain towards the EEC budget in 1980.[24] This renegotiated rebate is in place even until today, with Britain only paying approximately 12 per cent of the contributions – down from 20 per cent of contributions in

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[17] Wayne C. Mcwilliams and Harry Piotrowski, The World since 1945 - A History of International Relations (5th edn, Lynne Rienner Publishers 2001) 78-79.
[18] *Ibid*.
[19] See, for example, Hugh Pemberton, 'Relative Decline and British Economic Policy in the 1960s' [December 2004] 47(4) The Historical Journal <DOI https://www.jstor.org/stable/4091665?seq=1> accessed 24 April 2020.
[20] See, for instance, the Mountbatten Plan for India in 1947 – further information on British Decolonization in David Pierce, 'Decolonization and the Collapse of the British Empire' [2009] 1(10) Inquiries Journal/Student Pulse <http://www.inquiriesjournal.com/articles/5/decolonization-and-the-collapse-of-the-british-empire> accessed 24 April 2020.
[21] Charles de Gaulle was elected French President from 1959-1969. Vetoes of British membership took place in 1963 and 1967. More information on how Britain tried to desperately and unsuccessfully join the EEC can be seen in The National Archives, 'The EEC and Britain's late entry' (*The Cabinet Papers*) <https://www.nationalarchives.gov.uk/cabinetpapers/themes/eec-britains-late-entry.htm> accessed 24 April 2020 and Kevin Connolly, 'How French 'Non' blocked UK in Europe' (*BBC News*, 2 December 2017) <https://www.bbc.com/news/world-europe-42165383> accessed 24 April 2020.
[22] ResearchDepartment Statista, 'Do you think the United Kingdom should stay in the European Community (the Common Market)?' (*Statista Research Department*, 12 July 2015) <https://www.statista.com/statistics/1043098/eec-referendum-result/> accessed 20 April 2020. See also Robert Skidelsky, 'The UK was never truly part of the European Union' (*Financial News*, 17 July 2018) <https://www.fnlondon.com/articles/britain-was-never-truly-part-of-the-eu-20180717> accessed 24 April 2020.
[23] See, for instance: OnThisDay BBC, '1975: Labour votes to leave the EEC' (*BBC On This Day - 1950-2005*) <http://news.bbc.co.uk/onthisday/hi/dates/stories/april/26/newsid_2503000/2503155.stm> accessed 20 April 2020 and Wordpress, 'The Parties and Europe 1: Labour and the 1975 Referendum' (*The History of Parliament*, 24 May 2016) <https://thehistoryofparliament.wordpress.com/2016/05/24/the-parties-and-europe-1-labour-and-the-1975-referendum/> accessed 20 April 2020.
[24] BBC, 'Thatcher and her tussles with Europe' (*BBC News*, 8 April 2013) <https://www.bbc.com/news/uk-politics-11598879> accessed 24 April 2020. Margaret Thatcher has been British Prime Minister from 1979-1990.

the 1980s.[25] In 1992, Britain also negotiated to opt out of European Monetary Union (EMU) and thus failed to introduce the Euro currency. Thus, Britain has traditionally been viewed as one of the dissenting voices in the Union.

Germany in the meantime was moving towards ever closer union. Helmut Schmidt and Gistard d'Estaign helped to establish the European Monetary System in 1979, including the European Currency Unit (ECU), a predecessor of the Euro currency.[26] One of the conditions of German re-unification in 1990 was that German Chancellor Kohl had to embrace the Euro currency as part of further political and economic integration. This was because French President Mitterrand was highly sceptical of German re-unification. For example, President Mitterrand even 'tried in vain to put a brake on reunification, and even to prevent it, by entering into an old-style "alliance de revers" with the Soviet Union, the GDR, and Poland: even travelling to Kiev and Leipzig and upholding Poland's position on the Oder-Neisse border.'[27] Indeed, Chancellor Kohl's initial silence on this sensitive issue in the spring of 1990 stirred the 'angst' of the re-emergence of a powerful, new super-Germany, which would return to its previous nationalist ambitions.[28]

This seemed to prove to sceptics of German unification that it would be better for Europe and the rest of the world that Germany remained divided.[29] It also should be noted that at the time there was no enthusiasm among the German population for the introduction of the Euro currency– in fact many Germans resented the replacement of the Deutsche Mark. However, it was Kohl's choice either to embrace the European Monetary Union (EMU), or to give up on German re-unification due to the lack of French support. On 9 November 1989 the Berlin Wall came down and this event brought about the end of a long era of Cold War confrontation. With the re-unification of Germany taking place, German allies began to worry about a re-emerging Germany that would return to its pre-World War Two strength and cause political trouble on the European mainland. Thus, in order for German re-unification to take place, German Chancellor Kohl returned to the Adenauer paradox policy of seeking consolidation and German autonomy through further European integration. As early as 1987, Kohl announced his commitment to a 'Federal Union of Europe' and his intention of building a 'European Germany' rather than a 'German Europe',[30] which might be perceived as a threat by its neighbours. At last, Kohl supported EMU thus and a further widening and deepening of the Union.

As outlined above, in the post-1949 period, Germany appeared to be desperately trying to avoid any unilateral and assertive policy initiatives, focusing instead on a low-key multilateral basis that was in concert with its international partners.[31] This restrained foreign policy multilateralism led to the much-repeated expression of Henry Kissinger, that the

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[25] Sarah Pruitt, 'The History Behind Brexit: The often-rocky relationship between Britain and the European Union stretches back nearly half a century' (*History*, 29 March 2017) <https://www.history.com/news/the-history-behind-brexit> accessed 24 April 2020.
[26] Helmut Schmidt: German Chancellor 1974-1982, Valèry Giscard d' Estaign: French President 1974-1981.
[27] Anna-Marie Le Gloannec, 'The Implifications of German Unification for Western Europe' in Paul B Stares (ed), The New Germany and the New Europe (The Brookings Institution 1992) 251.
[28] Ulrich Wickert, 'Weshalb noch Angst vor Deutschland?' in Ulrich Wickert (ed), Angst vor Deutschland (Hoffmann und Campe Verlag 1990) 12.
[29] *Ibid*.
[30] A famous expression by Thomas Mann, often repeated by Kohl. See, for instance Ulrich Beck, Das deutsche Europa - Neue Machtlandschaften im Zeichen der Krise (Edition suhrkamp digital 13.10.2012) accessed 24 April 2020 or Timothy Garton Ash, 'DEBATTE - Allein kriegen sie es nicht hin' (*Der Spiegel*, 13.02.2012) <https://www.spiegel.de/spiegel/print/d-83977208.html> accessed 24 April 2020.
[31] Charlie Jeffery, 'A Giant with Feet of Clay? United Germany in the European Union' (December 1995) Discussion Papers in German Studies No IGS95/6, 3.

Federal Republic was 'an economic giant but a political dwarf.'[32] This is also supported by other scholars, such as Jeffery, who have since argued that Germany is a 'giant with feet of clay'[33] – too weak to dominate the European continent, but too strong to not seek domination. Paterson speaks in this respect of a German Gulliver, which has been unbound in one sense, but which remains to be bound in another.[34] Glouannec also points out that

> the European Community (…) did much to assuage concerns about Germany and facilitate unification. The Federal Republic's membership in the EC helped reassure those countries that feared the new Germany would once again embark on an independent course with ominous consequences for the rest of Europe. In the process, the EC received an added boost with the decision to buttress further economic and monetary integration with political union.[35]

However, even prior to unification the Federal Republic of Germany was already the largest economic power within the European Community. At the time of German re-unification, Germany had the largest GDP of all European Community members besides being its biggest importer and exporter.[36] Because of this some writers assumed – and feared – that Germany would try to convert its economic power into political power, bluntly on the basis that as 'we do pay the majority of the bills therefore we can decide.'[37] While this had not been true at the time of re-unification where Germany – partly because of the costs of re-unification – plunged into depression, it is by now apparent that Germany has benefited greatly economically from European integration.[38] Some writers have thus polemically claimed that Germany lost the Second World War but still won through economic integration.[39]

Today it has become clear that Germany was profiting economically from ever further European integration. While one of the reasons and breeding ground for German aggression and subsequent wars were Germany's geographically exposed and central location on mainland Europe, this same location now led to ideal conditions for trade and economic prosperity during peace. Currently, Germany has nine geographic neighbouring countries and main travel routes in Europe, leading from north to south as well as from east to west through the country; thus taking advantage of its excellent strategic location in the heart of Europe.

In particular, with respect to law and policy-making, European Community Law and its superiority over national law have often been viewed suspiciously, by British citizens and British policy makers alike. One of the leading slogans during the leavers' campaign prior

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[32] *Ibid*.
[33] *Ibid*.
[34] William E. Paterson, 'Gulliver Unbound: The Changing Context of Foreign Policy' in Gordon Smith (ed), Developments of German Politics (Macmillan 1992).
[35] Anna-Marie Le Gloannec, 'The Implications of German Unification for Western Europe' in Paul B. Stares (ed), The New Germany and the New Europe (The Brookings Institution 1992) 251.
[36] See, for example, OECD, 'OECD Historical Statistics 2001' (*OECD Statistics*, 2002) <DOI https://doi.org/10.1787/hist_stats-2001-en-fr.> accessed 24 April 2020.
[37] See, for example, Simon J. Bulmer, 'Shaping the Rules?' in Peter J. Katzenstein (ed), Tamed Power – Germany in Europe (Cornell University Press 1997) 75.
[38] See, for example, Thieß Petersen, 'Policy Brief Future Social Market Economy #2013/01 ' (*Bertelsmann Stiftung*) <https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Presse/imported/downloads/xcms_bst_dms_37730_37731_2.pdf> accessed 24 April 2020.
[39] See, for instance, Leon Hadar, 'How Germany Won World War Two (in 2017)' (*The National Interest*, 26 March 2017) <https://nationalinterest.org/feature/how-germany-won-world-war-ii-2017-19910> accessed 24 April 2020.

to the 2016 referendum was ‘take back control!’ British policy makers and the British public have always been uneasy about subjugating national law to European Community Law. While law-making in Britain has been an ongoing historical process, Germany neither had nor was permitted to have the autonomy to shape its judicial system after World War Two. In fact, the German *Grundgesetz* (Basic Law) came, with the consent of the allies, into force in 1949, claiming to be only a ‘provisional law’ in order not to further deepen the divide between Eastern and Western Germany.

Conclusions

It can thus be concluded that Brexit was not a compelling foreseeable historic occurrence. However, as has been shown, Britain was never as well integrated in the European Union as other countries such as Germany. It has been shown that Germany has always needed EU membership more because of political, economic, and geographic reasons. As can be seen, this was not the case with Britain, which as a winning ally after the war was able to act much more independently and could afford to be much more suspicious of joining what would eventually become a supranational entity. Consequently, the risk for breaking apart from the Union was always higher for Britain than for Germany. As has been shown, Britain was not as vested and anchored in the EU as Germany. Despite this, because of the perceived chaos and dividing aspects surrounding Brexit in Britain all other European countries seem to currently stand together more than ever. Thus, a looming Brexit seems to be acting as a deterrent to break apart from the Union.[40] It is noted with regret that the European Union will lose in Britain one of their major powers. Britain, by leaving, will not be able to directly shape European policy making in the future. Therefore, the Union will be deprived of one of its major dissenting voices, so valuable for holistic, integral and healthy discussion.

Yet despite all issues, questions and discussions around European integration, it can be said that are at present common and shared values are continually upheld in both Germany and Britain. These values includes respect for human dignity, liberty, democracy, equality, solidarity, the rule of law and human rights.

[40] Chico Harlan, 'Frexit? Italeave? After watching Brexit, other European countries say: No, thanks' (*The Washington Post*, 29 March 2019) <https://www.washingtonpost.com/world/europe/frexit-italeave-after-watching-brexit-other-european-countries-say-no-thanks/2019/03/29/7b6e059a-4be0-11e9-8cfc-2c5d0999c21e_story.html> accessed 24 April 2020.

Trade in goods after Brexit

Dr Stuart MacLennan*

Introduction

On 31 January 2020, the United Kingdom officially left the European Union. The departure followed a tumultuous period following the 2016 referendum in which the United Kingdom had three different Prime Ministers, held two general elections, confidence votes in both the House of Commons and the Conservative Party, two Withdrawal Agreements, three 'meaningful votes' on the first Withdrawal Agreement, and six European Union (Withdrawal) Acts. The United Kingdom's formal departure from the European Union brings with it new challenges and decisions for both parties. Most pressing among these is the nature of the future trading relationship between the UK and the EU. Both the UK and the EU have a number of objectives for their future relationship. Inevitably, many of these objectives are in conflict, necessitating a degree of compromise on both sides. One shared objective of both parties, however, is the continued trade in goods between the UK and the EU.

This article commences with a consideration of the importance of continued trade in goods as well as the objectives of the UK and the EU for their future trading relationship. A number of potential options for a future trading relationship are then considered in light of the objectives of the parties and the legal requirements of the international trade law regime. Finally, this article concludes that a hybrid approach may provide a satisfactory long-term solution for both parties.

Process for withdrawal and negotiating a future relationship

The existence of a formal mechanism for withdrawal from the European Union is a relative novelty. Prior to the Treaty of Lisbon any withdrawal would likely have taken place under the auspices of the Vienna Convention on the Law of Treaties.[1] Following the coming into force of the Lisbon Treaty a new withdrawal mechanism is provided for by Article 50 TEU. Following the enactment of the European Union (Notification of Withdrawal) Act 2017 Theresa May, the then Prime Minister, notified the European Council of the UK's intention to withdraw from the European Union under Article 50(2) TEU.

Article 50(2) TEU mandates that the Union 'shall negotiate and conclude an agreement with [the withdrawing] State, setting out the arrangements for its withdrawal, and taking account of the framework for its future relationship with the Union.' Article 50(3) TEU provides that the Treaties shall cease to apply to the withdrawing State at the end of a period of two years following notification of withdrawal, unless the State agrees, unanimously with the European Council, to extend that period.[2] Article 50 TEU, therefore, provides for a clear order of negotiation. First, the State's withdrawal from the Union must be negotiated along with a framework for a future relationship. That future relationship, however, can only be formally negotiated after the State's withdrawal.

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[1] (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[2] Three such extensions were eventually agreed.

The process for concluding any agreement on a future relationship is provided for by the Treaty on the Functioning of the European Union and will, in part, depend upon the nature of the agreement. Under Article 218 TFEU a more straightforward trade agreement will be subject to a qualified majority vote in the Council, while Article 217 TEU provides for a unanimous vote in the case of a closer association agreement. The Withdrawal Agreement[3] provides for a transition period running until 31 December 2020, which is extendable until 31 December 2022. However, the European Union (Withdrawal Agreement) Act 2020 provides that the transition period 'completion day' means 31 December 2020 at 11.00pm. As the deadline for extending the transition period under the Withdrawal Agreement has now passed, the UK's future relationship with the EU will be known by the end of 2020.

The significance of trade in goods

The economy of the UK is dominated by services. In 2017, services accounted for 80 per cent of UK gross value added,[4] while production amounted to a mere 13 per cent.[5] On this basis, alone, it is tempting to conclude that trade in goods ought to be a secondary consideration with respect to the UK's trading relationships with any economy. There are three reasons, however, why trade in goods is a significant issue in the determination of the future UK-EU relationship.

The first such reason is sheer value. Although the value of the production of goods to the UK economy might seem comparatively small, the overall value of the UK's exports of goods remains significant. In 2019, the UK exported goods worth in excess of £170bn to the EU.[6] This amounts to 46 per cent of the UK's total goods exports. The UK's current account deficit in 2019 amounted to 4.3 per cent of nominal GDP – high by historical standards.[7] New barriers to UK exports of goods will likely only exacerbate the problem further.

The second reason is the level of integration. The European Union is, undoubtedly, the most integrated supra-national bloc for trade in goods in the world. In addition to the abolition of customs duties, quantitative restrictions, and measures having equivalent effect,[8] the EU's goods regime operates on the basis of full mutual recognition with only limited exceptions.[9] Most product standards across the EU are set on a harmonised basis by regulations, directives, and decisions with direct legal effects in the EU Member States. Furthermore, as a customs union the EU is wholly responsible for the Member States' trading relationships with respect to third countries. Leaving such an integrated regime for trade in goods creates the potential for severe disruption. Integration in trade in services, by contrast, has always been more sluggish.

Finally, issue of trade in goods is of pivotal significance with respect to Northern Ireland. The border on the island of Ireland is the UK's only land border and following the

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[3] Department for Exiting the European Union, 'Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community' (HMSO 2019) ('Withdrawal Agreement').
[4] ONS. 'UK National Accounts, The Blue Book: 2019' (2019) <https://www.ons.gov.uk/economy/grossdomesticproductgdp/compendium/unitedkingdomnationalaccountsthebluebook/2019> accessed 14 June 2020.
[5] *Ibid*.
[6] ONS. 'Trade in goods: all countries, seasonally adjusted ' (2020) <https://www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/datasets/uktradeallcountriesseasonallyadjusted> accessed 14 June 2020.
[7] *Supra* note 1.
[8] See Articles 30, 34, & 35 TFEU.
[9] Case 120/78, *Cassis de Dijon* [1979] ECR 649.

completion of the EU Customs Union in 1993 there have been no customs checks on goods travelling across this border. While the Good Friday Agreement (GFA)[10] does not explicitly require an open border on the island of Ireland it is broadly acknowledged that any physical checks on the border would violate the principles of the GFA and put in jeopardy the peace that it is designed to achieve.[11] Northern Ireland is, therefore, a key element of the negotiating objectives of both the UK and the EU.

Objectives of the UK and EU

In order to evaluate the options for the United Kingdom's future trading relationship with the European Union it is first necessary to appreciate what both parties want from a future deal. It is worth noting from the outset that the objectives of the parties, but in particular the United Kingdom, have varied over time. This can be explained, at least in part, by the shifting political dynamics in the United Kingdom. This can be summarised simply as Mrs May's government favouring a closer trading relationship with the EU than Mr Johnson's, who now, purportedly, favours a somewhat looser arrangement. On the EU side, objectives have shifted more subtly, and largely in response to the changing political dynamics with their interlocutors.

Objectives of the United Kingdom

The political force of the 'will of the people' is a strong one. Politicians usually wish to be seen carrying out that will, fearing that to do the opposite would result in accusations of 'betrayal'. Determining the will of the people, however, is usually a more difficult exercise than it appears, with political actors often seeing mandates where none exist. Nevertheless, it is important to consider the evidence that such political actors had before them in seeking to understand that 'will'.

[10] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (adopted 10 April 1998, entered into force 2 December 1999) 2114 UNTS 473.
[11] John Doyle and Eileen Connolly, 'The Effects of Brexit on the Good Friday Agreement and the Northern Ireland Peace Process' in Cornelia-Adriana Baciu and John Doyle (eds), *Peace, Security and Defence Cooperation in Post-Brexit Europe: Risks and Opportunities* (Springer International Publishing 2019) 79 <https://doi.org/10.1007/978-3-030-12418-2_4>

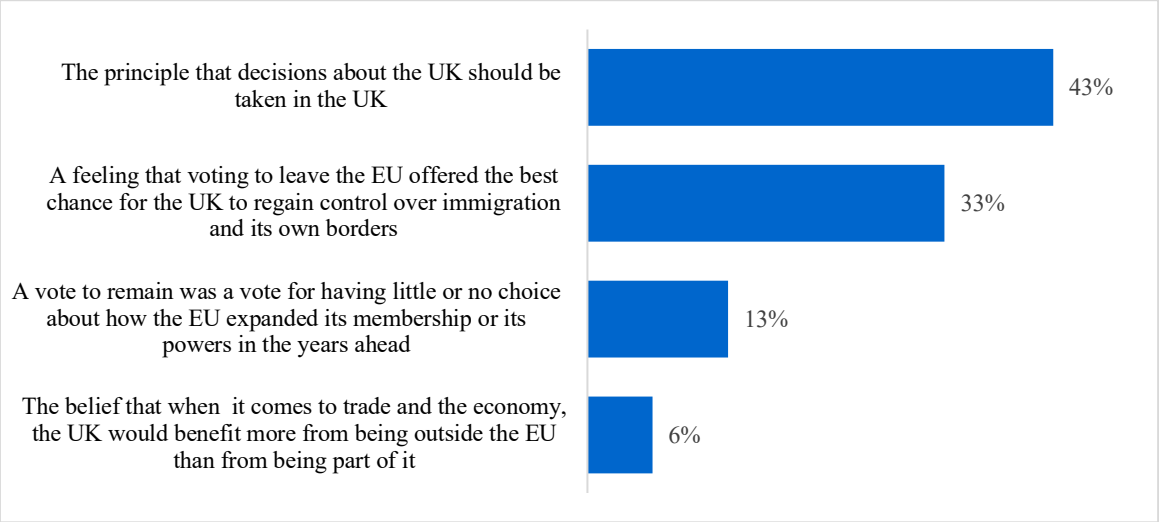

Figure 1: Motivations of 'leave' voters[12]

The key issues in the Brexit referendum campaign were described by Hobolt as 'economy versus immigration'.[13] No exit poll was conducted during the 2016 referendum. The most contemporaneous survey of voters' intentions in the Brexit referendum was a poll conducted by Lord Ashcroft in the weeks following the result.[14] Lord Ashcroft's poll of voters showed that among leave voters the top issues were sovereignty and immigration. Similarly, Hobolt and Writil's survey found that immigration, security, and the cost of EU membership were among the top issues for leave voters.[15]

	Mentioned mainly by	
Main referendum arguments:	**Leave voters**	**Remain voters**
Immigration control	X	-
No trust in Prime Minister/ Government	X	-
Cost of EU membership	X	-
Security implications	X	-
Lack of knowledge and trust	X	-
Lack of information	X	X
Economic risk of Brexit	-	X
Economic stability in the EU	-	X
Economic benefits from the EU	-	X

Figure 2: main referendum arguments

These priorities have been, at least in part, reflected in the stated negotiating objectives of both the May and Johnson governments. In 2017, prior to the triggering of Article 50 TEU

[12] Lord Ashcroft, 'How the United Kingdom voted on Thursday… and why' (*Lord Ashcroft Polls*, 24 June 2016) <https://lordashcroftpolls.com/2016/06/how-the-united-kingdom-voted-and-why/> accessed 10 July 2019.
[13] Sara B. Hobolt. 'The Brexit Vote: a divided nation, a divided continent' (2016) 23(9) Journal of European Public Policy 1259
[14] *Ibid.*
[15] Sara Hobolt and Christopher Wratil. 'Which argument will win the referendum–immigration, or the economy?' (2016) <https://blogs.lse.ac.uk/europpblog/2016/06/21/brexit-winning-argument-immigration-or-economy/> accessed 3 July 2020.

and the commencement of Brexit negotiation Mrs May outlined her twelve priorities for the forthcoming negotiation in her 'Lancaster House speech'. These objectives were:

1. Certainty
2. Control of our own laws
3. Strengthening the Union
4. Maintain the common travel area with Ireland
5. Control of immigration
6. Rights for EU nationals in Britain, and British nationals in the EU
7. Protect workers' rights
8. Free trade with European markets
9. New trade agreements with other countries
10. The best place for science and innovation
11. Co-operation in the fight against crime and terrorism
12. A smooth, orderly Brexit.[16]

This list certainly appears to have been non-exhaustive. Repeated subsequent references to the UK becoming an 'independent coastal state' appears to suggest that leaving the Common Fisheries Policy became a further priority.[17] These objectives largely cover both the process for the UK's withdrawal from the European Union as well as the future relationship between the parties. By contrast, the European Union's approach has generally been to view the issues of withdrawal and the future relationship separately, in accordance with Article 50 TEU.

With respect to withdrawal, the EU's primary objective was to avoid a sharp disruption at the end of the Article 50 TEU period.[18] In accordance with Article 50 TEU the European Council only sought a 'framework for a future relationship' in its negotiations. In February 2020, both parties published their negotiating objectives of the future relationship. These objectives considered all aspects of the future relationship, including services, foreign and security policy, policing, immigration, and governance. Of relevance to this article, however, are the negotiating objectives with respect to goods.

The United Kingdom's negotiating objectives can be summarised as follows:

1. Trade should be tariff-free and free from quantitative restrictions on imports.
2. The UK should maintain its own rules and regulations.
    a. There should be regulatory co-operation to address technical barriers to trade.
    b. Mutual recognition of conformity assessment, allowing UK authorities to assess for EU standards.
3. 'Equivalence' in some areas of agrifood (similar to CETA).
4. 'Modern rules of origin' (similar to the EU–Japan FTA).[19]

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[16] Theresa May, 'The government's negotiating objectives for exiting the EU', *Gov.uk* (17 January 2017) < https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> accessed 4 July 2020.
[17] See, for example, the Fisheries Bill 2019-21.
[18] European Council, 'European Council (Art. 50) guidelines for Brexit negotiations' (29 April 2017) <https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/> accessed 30 July 2020.
[19] Prime Minister's Office, 10 Downing Street, 'Our approach to the Future Relationship with the EU' (27 February 2020) <https://www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu?utm_source=bb41700f-fc08-4e99-8a7d-17c6ff46fd69&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate> accessed 30 July 2020.

The objectives set-out by the European Council, by contrast, are as follows:

1. Trade should be tariff-free and free from quantitative restrictions on imports.
2. A 'level playing field' between the UK and the EU using EU standards as a benchmark.
3. Regulatory coherence on technical barriers to trade and food safety rules.
4. Standard rules of origin.

Beyond these stated aims, however, it is clear that the EU has a number of additional objectives. Paramount among these is the desire to avoid a 'hard border' between the UK and Ireland. While the withdrawal agreement settles the UK's financial obligations towards the EU, it is clear that the EU does not wish to create incentives for other Member States to leave. Furthermore, the EU clearly wishes to avoid a financial and regulatory 'haven' jurisdiction located in close proximity to the Union's territory.

Both parties clearly agree that there should be no customs duties or quantitative restrictions on the free movement of goods between the UK and the EU. While this might, *prima facie*, appear to remove significant barriers to the free movement of goods, the reality is that regulatory barriers and discriminatory internal measures are among the most cumbersome obstacles to market access. It is unsurprising, perhaps, that these obstacles are invariably the most difficult to overcome in any trade negotiation.

Requirements under the GATT

While achieving agreement between the United Kingdom and European Union may seem difficult enough, the fact that any such agreement must comply with the requirements of the General Agreement on Tariffs and Trade (GATT)[20] adds a further layer of difficulty. If the UK and EU cannot reach a mutually satisfactory agreement it would, arguably, make sense for the UK not to apply tariffs on EU goods, and to afford full mutual recognition to EU product standards. Article I of the GATT, however, requires that states must apply 'most-favoured nation' treatment (MFN) to all other signatories. A state may only levy a single tariff to which all external trade must be subject.[21] Article XXVII of the GATT, however, recognises the advantages of negotiated reductions in tariff barriers and, therefore, permits such negotiated reductions 'on a reciprocal and mutually advantageous basis'.[22] Consequently, neither party can unilaterally favour the other.

Without a reciprocal agreement between the UK and the EU, imports and exports between the two parties will be subject to a number of additional burdens, the most significant of which is the imposition of tariffs. In March 2019, the United Kingdom published its envisaged temporary tariff schedule, updated in October 2019. The schedule includes extensive tariffs on agricultural goods and produce, with significant duties payable on meats and dairy products; as well as a 10 per cent customs duty payable on cars.

It is worth noting that tariffs are not payable on the basis of where goods are imported from but rather upon where goods originate. Consequently, in order to ensure the correct customs treatment when goods arrive from outside of a customs territory it is necessary to determine from which country those goods originate. 'Rules of origin' checks present a significant barrier to the free flow of goods across borders, and such rules are not easily dispensed with.

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[20] General Agreement on Tariffs and Trade (GATT) (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 187.
[21] With the exception of a Generalised System of Tariff Preferences.
[22] GATT, art. XXVII.

Many of the options for the future trading relationship will require such checks on goods moving between the UK and the EU.

Options for the future UK-EU trading relationship

In recent years both the UK and the EU have considerably narrowed, the range of potential options for their future trading relationship. In recent years, the options presented have ranged from a relatively close 'Norway plus' relationship, to a 'hard' or 'WTO' Brexit. The range of options currently being considered is somewhat narrower, with negotiations proceeding on the basis of a free trade agreement. Nevertheless, the possibility that a future UK government might pursue a different future relationship with the EU cannot be discounted. Consequently, it is worth considering the range of potential trading relationships.

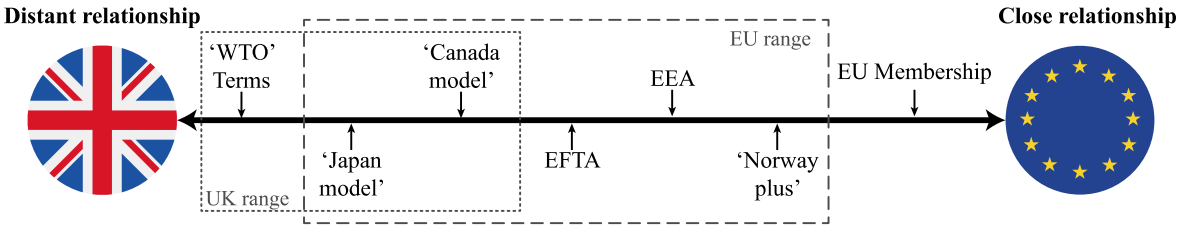

Figure 3: scale of options for a future trading relationship

Free Trade Agreement: the 'Canada model'

The revised UK-EU Political Declaration, attached to the Withdrawal Agreement, commits both parties to pursue 'an ambitious, broad, deep and flexible partnership across trade and economic cooperation with a comprehensive and balanced Free Trade Agreement at its core'.[23] When compared to other potential future relationships a free trade agreement (FTA) is among the most detached options, although within this term there exists a range of potential options. FTAs such as the EU's agreements with South Korea[24] and Japan[25] being somewhat looser arrangements as compared to the EU's Comprehensive Economic and Trade Agreement (CETA) with Canada.[26]

At its loosest an FTA involves the reduction or elimination on tariffs on goods originating in the contracting parties' territories. It is, however, increasingly common for such agreements to attempt to alleviate regulatory barriers to trade in goods too. This can take the form of agreed minimum product standards, mutual recognition of each other's standards, and harmonisation of certain standards.

Both the UK and EU appear to envisage a high degree of regulatory alignment. In the Political Declaration the UK and the EU affirmed that they

[23] 'New Political Declaration', *supra* n.3, p.2.
[24] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L 127/6.
[25] Agreement between the European Union and Japan for an Economic Partnership [2018] OJ L 330.
[26] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 11/23.

> 'envisage comprehensive arrangements that will create a free trade area, combining deep regulatory and customs cooperation, underpinned by provisions ensuring a level playing field for open and fair competition.'[27]

In this respect, the example of CETA – the 'Canada model' – provides an example of closer regulatory alignment. CETA introduces a new model for reducing regulatory barriers, called 'Regulatory Cooperation'. The Regulatory Cooperation approach identifies the root causes of regulatory divergences and, by developing a common approach to these regulatory foundations, provides the objective conditions for greater regulatory convergence in the future.

One major sticking point in the negotiation of a FTA is the issue of the 'level playing field'. Both CETA[28] and the South Korea FTA[29] provide for enhanced cooperation on competition law, building upon WTO rules on subsidies.[30] It is clear, however, that the European Union wishes to go far beyond these existing models, insisting that the UK continues to participate in the EU's state aid regime, as well as adhering to minimum standards of employment law and environmental protection. In January 2020 EU officials expressed the need for 'dynamic alignment'[31] with respect to the level playing field, which could best be interpreted as the UK agreeing not only to retain existing EU rules in these fields but adopting future regulation too.

A further difficulty with respect to an FTA is the need for rules of origin for goods moving between the UK and the EU. The political declaration commits the parties to 'appropriate and modern accompanying rules of origin'[32], however, both the UK and the EU appear to place differing interpretations on what this statement actually means. The CETA protocol on rules of origin, favoured by the EU, exceeds 200 pages, involving complex procedures for determination and certification of product origin. By contrast, the EU-Japan FTA deals with rules of origin considerably more succinctly and is the model favoured by the UK. One significant innovation in the EU-Japan agreement is the acceptance of 'importer's knowledge' with respect to origin of goods.[33] This significant liberalisation of rules of origin requirements would alleviate considerably the administrative burdens associated with importing and exporting goods.

Given the objectives of both the UK and the EU the attractions of the FTA approach are apparent. This approach ends the direct effect and supremacy of EU law. As the UK will be leaving the EU customs union the UK will have the legal capacity to enter into trade agreements with third countries, while leaving the single market will allow for regulatory divergence if the UK so wishes. This approach also ends the free movement of persons between the UK and the EU. From the EU's perspective, the fact that the EU already has a number of FTAs in place means lessens any perception that the UK might be receiving any special treatment.

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[27] *Supra*, n.23, p.6
[28] *Op. cit.*, Article 17.
[29] *Op. cit.*, Article 11.
[30] Agreement on Subsidies and Countervailing Measures (concluded 15 April 1994, entered into force 1 January 1995) 1869 UNTS 14.
[31] George Parker, Jim Brunsden and Sam Fleming. 'Brussels to fight tough on state aid in post-Brexit talks' (2020) <https://www.ft.com/content/24d3c604-3ed1-11ea-a01a-bae547046735> accessed Aug 1, 2020
[32] 'New Political Declaration', *supra* n.3, p.7.
[33] *Supra* n. 25, Article 3.16.

Nevertheless, the shortcomings of the 'Canada model' for both the UK and the EU are considerable. Having committed to the Northern Ireland 'backstop' in the Withdrawal Agreement[34] any rules of origin checks will place barriers on the movement of goods between Northern Ireland and Great Britain. The relatively loose regulatory alignment provided for by FTAs is clearly of concern to the EU. Furthermore, the more limited form of market access provided for by an FTA is sub-optimal for both the UK and the EU.

European Free Trade Association: the 'Swiss model'

The European Free Trade Association was founded in 1960 as a looser alternative to the European Economic Community (now the EU). EFTA's original seven members included the UK, however its numbers have dwindled from a peak of ten to just four – Norway, Switzerland, Iceland, and Liechtenstein – as its members joined the EU. In the late 1980s and early 1990s the rapid integration of the EEC contrasted sharply with the somewhat static EFTA. EFTA states increasingly sought to gain access to the growing European single market. Consequently, the EEC and EFTA agreed to form an economic area – the EEA – which would grant access to the single market for EFTA members. In 1992, however, Switzerland rejected the EEA Agreement (see below), leaving Switzerland as the only member to be operating on an EFTA-only basis.

As a free trade area, the EFTA Convention provides for the removal of customs duties and quantitative restrictions between its members. In this respect there are a number of similarities between the EFTA Convention and the EU Treaties. Article 7 EFTA is a composite of Articles 34 and 35 TFEU (quantitative restrictions); Article 3 EFTA duplicates the effects of Article 30 TFEU (customs duties); and Article 4 EFTA is almost identical to Article 110 TFEU (discriminatory internal taxation).

Despite their textual similarities, the legal effects of these provisions differ considerably. Without any direct applicability these provisions exist as commitments between the EFTA states only. They do not produce any direct legal effects within domestic courts. Furthermore, without the influence of the Court of Justice these provisions have not evolved into the powerful trade facilitators that their EU counterparts quickly became. While the EFTA states have collectively negotiated a number of FTAs with third countries, EFTA is not, in fact, a customs union. Consequently, it is possible for EFTA members to conclude independent trade agreements, and a number have.[35] This, however, also necessitates burdensome rules of origin checks.

Switzerland's failure to ratify the EEA Agreement in 1992 means access to the EU internal market is incomplete. Over the course of over two decades more than 120 bilateral agreements have been concluded. These cover a variety of market sectors removing or reducing practical barriers to cross-border trade. Only partial agreements have been reached on agricultural goods and, therefore, remain subject to certain restrictions and tariffs. Furthermore, in order to achieve this level of market access Switzerland has been forced to accept a broad range of EU obligations, including the free movement of persons.

From the UK's perspective EFTA may prove an attractive home in the future, however, Switzerland's experience demonstrates how difficult it is to 'cherry pick' parts of the EU

[34] 'Revised Protocol to the Withdrawal Agreement', *supra* n.3.
[35] See, for example, Free Trade Agreement between the Swiss Confederation and the People's Republic of China (concluded 6 July 2013, entry into force 1 July 2014) 3023 UNTS I-52504.

internal market. Furthermore, there appears to be little appetite in the EU to repeat their Swiss experience.[36]

The European Economic Area: the 'Norway model'

The origins of the EEA, discussed above, reflect the pursuit of a key objective among EFTA states which is shared by the UK in its Brexit negotiations: market access. The development of the EEA evidences the inadequacy of a focus on tariff barriers. The EEA exists precisely because the most challenging barriers to trade in goods are regulatory barriers to market access.

The EEA operates in what is known as a 'pillar structure'. Under this structure, counterparts to certain EU institutions have been established – the EFTA Surveillance Authority and the EFTA Court – to ensure that states' obligations under the EEA Agreement are adhered to.[37] The EEA Agreement also establishes a number of joint institutions – most notably the EEA Council – to agree on common approaches to regulation. While the EFTA Court has not recognised its direct effect, EEA law involves a curious form of quasi-direct effect provided for by Protocol 35 of the EEA Agreement. The protocol states that '[f]or cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases.'[38]The EFTA Court generally follows the jurisprudence of the Court of Justice, although the EFTA court has, on occasion, departed from its EU counterpart.[39] Indeed, as the EFTA Court deals with far fewer cases every year it often falls to it to decide questions of EEA law before the Court of Justice.[40] The existence of institutions to both harmonise regulation as well as to give legal effects to EEA law means that EEA members enjoy full access to the EU internal market. This is reflected in the jurisprudence of the EFTA Court.

The *Dassonville*[41] formula was recognised by the EFTA Court in *Ullensaker*.[42] Similarly, the EFTA Court affirmed the market access to products from other EEA states in *Tore Wilhelmsen*.[43] Of crucial significance with respect to regulatory barriers, however, is the adoption of mutual recognition as seen in *Phillip Morris Norway v Norway*:

> national measures adopted by an EEA State which have the object or effect of treating products coming from other EEA States less favourably than domestic products are to be regarded as measures having an effect equivalent to quantitative restrictions and thereby caught by Article 11 EEA. The same applies to rules that lay down requirements to be met by imported goods, even if those rules apply to all products alike. Any other measure which hinders access of products originating in one EEA State to the market of another also qualifies as having an equivalent effect for the purposes of Article 11 EEA.[44]

As an 'off the shelf' model that provides for near-total market access, the EEA option is particularly appealing to the EU. This approach would, however, require a number of

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[36] Alex Barker and Ralph Atkins. 'The Brexit effect: Brussels tries to blunt the Swiss model' (10 October 2018) <https://www.ft.com/content/574ce2e6-c49d-11e8-bc21-54264d1c4647> accessed 30 July 2020
[37] EFTA Surveillance Authority and Court Agreement [1994] OJ L 344, 31.1.1994, p. 3.
[38] Protocol 35, EEA Agreement.
[39] See, for example, Case E-19/11, *Vín Tríó ehf v the Icelandic State* [2013] EFTA Ct Rep. 25.
[40] See, for example, Case C-258/08, *Ladbrokes* [2010] ECR I-4757.
[41] Case 8/74, *Dassonville* [1974] ECR 837.
[42] Case E-5/96, *Ullensaker kommune and Others v. Nille AS* [1997] EFTA Ct Rep. 30, para. 22
[43] Case E-6/96, *Tore Wilhelmsen* [1997] EFTA Ct Rep. 53.
[44] Case E-16/10, *Phillip Morris Norway AS v Norway* [2011] EFTA Ct Rep. 330, para *.

significant concessions on the part of the UK. EEA membership would involve the UK continuing with the free movement of persons. The key piece of legislation providing free movement rights for EU and EEA citizens – directive 2004/38/EC – was incorporated into EEA law in 2007.[45]

One saving grace for the UK might be the joint declaration attached to that 2007 EEA decision - that it cannot be the basis for the creation of political rights, and that the directive does not impinge upon immigration policy. This reflects the fact that the primary focus of EEA law is on economically active migrants, rather than EU citizens.EEA law is closely harmonised with EU law. Although EEA Law does not enjoy direct effect in the same way as EU law EEA law is, effectively, supreme. Furthermore, while the UK would no longer be subject to the jurisdiction of the Court of Justice EEA membership would, effectively substitute the jurisdiction of a near-identical counterpart.

Finally, EEA membership, alone, does not solve the problem of rules of origin, as EEA members remain outside of the EU customs union. With so many concessions for an arrangement that does not solve one of the key problems of Brexit it is unlikely that any UK Government would opt for the 'Norway model'.

Common Market 2.0: 'Norway plus'

A final option worthy of mention gained traction during the fraught final months of parliamentary Brexit debates is 'Common Market 2.0'. The Common Market 2.0 idea is an attempt to reverse engineer the previous 25 years of EU integration, reverting the UK's participation in the EU to the position before the Maastricht Treaty was agreed in 1992.Under the plan, the UK would re-join the European Free Trade Association (EFTA). The UK would also accede to the European Economic Area (EEA) agreement with the EU. What moves the Common Market 2.0 proposal beyond simply replicating the Norway model, however, is that it also involves the UK entering a customs union directly with the EU, thereby removing the need for rules of origin checks between Northern Ireland and Great Britain. By entering into a customs union with the EU, such checks in the Irish Sea would never be necessary.

One major stumbling block with Common Market 2.0, however, is that under the EFTA agreement it's not currently possible for member states to enter into a customs union with other states – whether the EU or otherwise. Therefore, Norway cannot enter into a customs union directly with the EU, or the US, for example. If the UK were to seek this, it would require special treatment not only by the EU, but by EFTA as well – the political difficulties of which have been largely overlooked.

Although this arrangement solves the problem of rules of origin it also involves the UK capitulating on almost every single one of its Brexit objectives. On that basis Common Market 2.0 looks like an extremely unlikely prospect.

Analysis and conclusion

It is clear from the above that there is no option for a future trading relationship that achieves all of the objectives of both the UK and the EU. The favoured option of an FTA constitutes a relatively loose relationship which meets many of the objectives of the UK, in particular.

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[45] Decision of the EEA Joint Committee No 158/2007 of 7 December 2007 amending Annex V (Free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement [2007] OJ L 124, 8.5.2008, p. 20–23.

Such a relationship, however, will inevitably involve new barriers to the trade in goods – in particular regulatory barriers. Furthermore, any arrangement that does not involve a customs union will necessitate rules of origin checks on goods moving between the EU and the UK.

It may be, therefore, that a hybrid option provides the best long-term solution. The original Withdrawal Agreement and Political Declaration's proposed 'single customs territory […] which obviates the need for checks on rules of origin'[46] appeared to combine a CETA-style trade agreement with a customs union in all-but name. It is also worth noting that trade in goods is only one aspect of the future UK-EU relationship. In addition to trade in services, the parties are also seeking agreement on, *inter alia*, crime and law enforcement, foreign policy and defence, data protection, fisheries, participation in EU programmes, transport, energy, and social security. It is likely, therefore, that eventual agreement on a future relationship will require many more trade-offs than those discussed above.

[46] Department for Exiting the European Union, 'Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom' (25 November 2018) <https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration> accessed 30 July 2020.

Customs procedures after Brexit: an economic perspective on the impact of Brexit on customs procedures

Leonie Zappel*

Introduction

Trade relations between the United Kingdom (UK) and the other European Union (EU) Member States have developed over decades. Since Britain's accession to the EU on 1 January 1973,[1] the UK´s relations with other EU Member States, especially in the area of trade, have become increasingly strong. The UK in particular has been one of the driving forces behind the establishment of the EU Internal Market.[2] In 2018, nearly 50 per cent of the UK´s export volume of goods and services went to EU Member States (Germany 11 per cent, France, the Netherlands, and Ireland 6 per cent each). The main export partners outside the EU are the United States (15 per cent of exports) and Switzerland (5 per cent). Similarly, in 2018 almost 50 percent of UK imports came from EU Member States (Germany 14 per cent, the Netherlands 7 per cent and France 5 per cent). Only 9 per cent of the imported goods originate from the US and China.[3]

Since the British government invoked Article 50 TEU to withdraw from the EU after the referendum on 23 June 2016,[4] there has been uncertainty about the specific nature of trade relations between the EU and the UK. This situation bears unpredictable and incalculable risks for economic operators. In particular, possible future customs barriers and the associated customs procedures can place a heavy financial, legal, and logistical burden on economic operators, especially on transport and logistics companies. Thus, the withdrawal of the second largest economy from the EU cannot take place without an impact on the world economy.

Trade in goods between the EU and the UK: customs procedures

The UK has always been a driving force in strengthening the Internal Market and promoting the conclusion of free trade agreements between the EU and third countries.[5] In order to carry out trade within the EU and third countries as smoothly and efficiently as possible, the Union Customs Code (UCC) lays down, among other things, uniform customs procedures, which are defined in Art. 5 No. 16 UCC. Goods imported into the EU are therefore subject to uniform import regulations, customs tariffs and procedures.[6] The customs procedures under the UCC are subdivided into release for free circulation, special procedures (transit,

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[1] Treaty of Accession of Denmark, Ireland and the United Kingdom [1972] OJ L73/1; Treaty of Accession of Denmark, Ireland and the United Kingdom, Adaptation decision [1973] OJ L2/1.

[2] HM Government, Review of the Balance of Competences between the United Kingdom and the European Union: The Single Market (HM Government 2013), n 1.4 at page 13.

[3] Ward, Matthew, Statistics on UK-EU trade, (7851, House of Commons Library 2019) 4 ff.

[4] UK Government, *The UK leaves the EU on 31 January 2020* available at <https://www.gov.uk/transition> accessed 24 January 2020.

[5] HM Government, Review of the Balance of Competences between the United Kingdom and the European Union: The Single Market (HM Government 2013) n 1.4 at page 13.

[6] Commission, *Union Customs Code* available at <https://ec.europa.eu/taxation_customs/business/union-customs-code_en> accessed 24 January 2020.

temporary use, end-use, customs warehousing and free zone procedures) and export (see Art. 5 No. 16 UCC). They also include the submission of a customs declaration by the responsible economic operator, the acceptance of this declaration by the customs office, the inspection of the documents and goods, the production of a customs report by the customs office, the calculation and levying of import duties (see Art. 162 et seq UCC). Customs clearance also can comprise control of common trade policy measures (like anti-dumping measures) or prohibitions and restrictions (combating smuggling of weapons or counterfeit products).

Regarding the movement of goods within an Internal Market, there are no customs formalities or proof obligations to be fulfilled concerning the origin of the goods. Companies within the Internal Market benefit considerably from the free movement of goods (Article 28 *et seq* TFEU) within the (single) customs territory of the EU. In addition to saving time, the reduction of personnel costs and other general expenses, the Internal Market also ensures an easier access to a wide range of suppliers and lower product costs to a market with over 500 million consumers. Consumers within the Internal Market, in turn, benefit from lower prices, a wider choice of products as well as uniform and high safety and environmental standards.[7] These advantages of the EU Customs Union and the Internal Market will no longer be granted to the UK once it leaves the EU without an agreement that would regulate, especially, the remaining in the EU Internal Market and Customs Union.

In addition, the free trade agreements concluded by the EU with other states no longer apply to the UK. In principle, the future customs relationship between the EU and the UK will be based on WTO rules, if the UK leaves the EU without an appropriate agreement. The trade relations between the EU and the UK will more closely resemble those between the EU and third countries such as China or the US. Different treatment in comparison to these third countries can only be justified by means of a trade agreement between the EU and the UK.

In March 2018, the EU and the UK discussed a possible transitional period. As part of this transition, the UK remains within the Customs Union until the end of 2020 and the EU legislation would continue to apply until then. The legal basis for this agreed transition period is the withdrawal agreement, which has been concluded and entered into force on 31 January 2020.[8]Furthermore, the UK's core intention is, according to the 12-point-plan published on 17 January 2017, to conclude free trade agreements with third countries and withdraw from the EU Customs Union and Internal Market.[9] In case that the UK withdraws from the EU without a deal, the European Commission published guidelines on 11 March 2019 informing the cross-border intra-EU movement of excise goods between the UK and EU27, which started before the withdrawal date and will end thereafter. It also covers the related features e.g. registration and authorisations of economic operators, or administrative cooperation.[10]

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[7] Commission, *Single market for goods* available at <https://ec.europa.eu/growth/single-market/goods_en> accessed 25 January 2020.

[8] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/7; UK Government, *The UK leaves the EU on 31 January 2020* available at <https://www.gov.uk/transition> accessed 24 January 2020.

[9] UK Government, *The government's negotiating objectives for exiting the EU: PM speech,* available at <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> accessed 24 January 2020.

[10] Commission, ´Guidance Note: Withdrawal of the United Kingdom and aspects of Excise in relation to movement of goods ongoing on the withdrawal date` COM (2019) 11 March 2019 available at <https://industria.gob.es/es-es/brexit/DocumentosBrexit/Otros/guidance-excise-ongoing-movements.pdf> accessed 24 January 2020.

The Withdrawal Agreement

On 19 June 2017, negotiations on the UK's withdrawal from the EU commenced. The first 'Brexit Deal' was presented by the European Commission and the UK government on 14 November 2018[11], and was approved together with the political declaration on future cooperation by the European Council on 25 November 2018. The draft withdrawal agreement provides a transitional period until the end of 2020, during which the then non-EU Member State UK would still be treated as an EU Member State (see Article 126 *et seq* Agreement on the withdrawal of the UK).[12] This entails that EU law, including customs law, will continue to apply, but the UK will no longer participate in EU decision-making bodies. However, the UK Parliament has rejected this withdrawal treaty in numerous votes, in particular because it did not agree with the timetable. This situation forced the new Prime Minister, Boris Johnson, to develop a modified withdrawal agreement with the EU, which was endorsed by the European Council on 17 October 2019.[13] Following the signature of the withdrawal agreement on 24 January 2020 and the vote of consent by the European Parliament on 29 January 2020, the Council adopted by written procedure the decision on the conclusion of the withdrawal agreement on behalf of the EU.[14] At midnight CET on 31 January 2020, the Withdrawal Agreement entered into force, which provides for an orderly withdrawal of the UK from the EU.[15]

The most significant change to the first 'Brexit Deal' concerns the Northern Ireland Protocol.[16] This provides that Northern Ireland will be a permanent part of the British customs territory (see Article 4 of the Withdrawal Agreement).[17] However, all relevant EU regulations concerning the Internal Market and the UCC will continue to apply in Northern Ireland. Customs controls and the collection of duties will take place at the entry points to Northern Ireland in order to avoid the re-introduction of customs controls between Northern Ireland and the Republic of Ireland. In particular, the EU has a strong interest in maintaining the core elements of the Good Friday Agreement[18]. This is not only a matter of maintaining peace in Northern Ireland; it is also about the economic aspect of sustaining the open border between Northern Ireland and the Republic of Ireland. Other provisions of the withdrawal treaty remain substantially unaffected. This also applies to the transitional period until the end of 2020, which can be extended once, until the end of 2022 at the latest.[19]

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[11] Commission, ´Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community` COM (2018) 55 final.
[12] *Ibid*.
[13] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/7.
[14] European Council, *Brexit: Council adopts decision to conclude the withdrawal agreement* available at <https://www.consilium.europa.eu/en/press/press-releases/2020/01/30/brexit-council-adopts-decision-to-conclude-the-withdrawal-agreement/> accessed 24 January 2020.
[15] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/7.
[16] Commission, ´Revised Protocol on Ireland and Northern Ireland included in the Withdrawal Agreement` COM (2019) final 64.
[17] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/7.
[18] The Belfast Agreement 1998.
[19] German Customs, Questions and Answers on "Brexit and Customs": Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the EU available at <https://www.zoll.de/EN/Businesses/Movement-of-goods/Brexit/fragen_und_antworten.html?nn=332246&faqCalledDoc=332246> accessed 24 January 2020.

The exit from the Internal Market

With the emergence of the withdrawal of the UK from the Internal Market without an appropriate free trade agreement, WTO law will replace primary and secondary EU law in determining the UK's trade relations and policies with other countries. The provisions of EU trade policy, the EU Customs Code, the Combined Nomenclature, the freedoms and obligations concerning the EU Internal Market, will no longer apply to the UK.[20]

The EU External Action database shows that there are 1,261 international agreements involving the EU.[21] Of these, 977 are bilateral agreements and 284 are multilateral agreements. It is important to appreciate that many of these agreements are so important to UK trade policy that they need to be negotiated or renegotiated. It should also be noted that many of these agreements are not directly aimed at regulating trade relations but concern, for example, transport or regulatory cooperation and are therefore significant for post-Brexit trade but are not given the highest priority.[22]Currently, 34 free trade agreements with about 70 countries are on the UK Government's political agenda. Negotiations with these Trade Agreement Continuity (TAC) countries are expected to result in a replication of the existing EU Free Trade Agreements and the UK's preferential market access rules, and possibly lead to the conclusion of further trade agreements.[23]

Economically most relevant in this context is the most-favoured nation principle (MFN principle) under Article I:1 of the GATT 1994[24]. If the UK has not concluded a free trade agreement with the EU, it is not in a position to grant the EU, for example, tariff advantages without granting them to all the other WTO members.[25] For trade between the UK and the EU, this means that goods may be subject to higher customs duties and formalities. This in turn leads to price increases and possible delays in, or interruption of, supply chains.

Another important point to consider when dealing with the fact that the UK is leaving the EU Internal Market is the import of agricultural products from the UK into the EU. For the import of agricultural products from third countries, the EU demands, in addition to compliance with any veterinary control regulations that may apply, a number of different, very specific documents, some of which have to be processed by the customs offices of the remaining EU-27. In principle, several of these documents (for example, document VI1 for wine imports, declarations of conformity for fruit and vegetables, organic certificates) can also be provided by certain approved authorities in third countries. However, these third country documents can only be recognised if the issuing authority in the country concerned is approved under an agreement with the EU. Consequently, no release documents issued by the UK can be accepted before the relevant agreements have been concluded and the appropriate authorities notified by the UK and approved by the EU.[26]

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[20] Mielken, Arne, ´No-Deal-Brexit` (2019) 12 AW-Prax 483.
[21] EEAS – European External Action Service, 2019, *Treaties Office Database*, available at <http://ec.europa.eu/world/agreements/default.home.do> accessed 24 January 2020.
[22] German Economic Institute, *Brexit: Nachverhandlungen von EU-Freihandelsabkommen mit Drittländern* available at <https://www.iwkoeln.de/studien/iw-kurzberichte/beitrag/berthold-busch-nachverhandlungen-von-eu-freihandelsabkommen-mit-drittlaendern-435770.html> accessed 25 January 2020.
[23] *Ibid*.
[24] General Agreement on Tariffs and Trade 1994.
[25] *Supra* n20.
[26] German Customs, Questions and Answers on "Brexit and Customs": Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the EU available at

Moreover, companies must examine their supply chains in detail. Without an appropriate trade agreement, UK product parts in the manufacturing process of products in the EU could lead to a loss of the EU originating status.[27] This also leads to significantly higher customs duties on the one hand and higher personnel costs due to the control of these parts in the manufacturing processes on the other hand. Furthermore, third countries are not bound by the transitional provisions of the withdrawal agreement. They can therefore treat the UK as a non-EU state from 1 February 2020 and revoke the preferences from EU agreements.[28]Without an agreement after the transitional period, all movements of goods between the UK and the EU are subject to customs supervision and must therefore be placed under a specific customs procedure. Currently, this can be done by an electronic, written, or oral customs declaration.[29] The standard according to Art 6 UCC is the electronic form, meaning that other forms are only permitted in exceptional cases.

The EU customs procedure 'Release for free circulation' (Art. 201 UCC) must be applied if goods from the UK are intended to remain permanently in free circulation in the territory of the EU. However, if the goods are only imported from the UK into the EU customs territory for temporary admission and for a specific purpose, the temporary admission procedure (Art. 250 UCC) applies. In this case, customs duties can be levied on the goods, which are paid to customs administration. Customs controls are possible at any time.[30] Due to the fact that the UK has adopted almost identical EU customs procedures in the Taxation (Cross-border Trade) Act 2018 (TCBTA), the procedures for importing EU goods into the UK are similar.[31]

With effect from 30 March 2019, the UK has acceded to the Convention on a common transit procedure. This extension of the Convention was concluded exclusively for the case of a No-Deal-Brexit. This ensures that the duty-free movement of goods under customs control from EU-27 to the UK and vice versa will remain possible under the current NCTS-based common transit procedures.[32] In principle, it must be considered whether the goods are subject to import VAT or excise duty, and whether they are subject to prohibitions, restrictions, or further trade policy measures.[33]

Customs declarations

In the case of the absence of a free trade agreement after the transitional period, there will be a physical customs border at the British neighbouring countries with appropriate customs controls. To get goods through customs controls, they have to be registered online in the customs system. However, the mandatory EU customs registration (EORI number) is no longer valid for British companies, with the result that they need a UK EORI number. Regardless of the system that the UK will use, electronic customs clearance, imports and exports from the UK requires a separate customs declaration. The UK customs declaration C88 is almost identical to the customs declaration of the EU Single Administrative

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<https://www.zoll.de/EN/Businesses/Movement-of-goods/Brexit/fragen_und_antworten.html?nn=332246&faqCalledDoc=332246> accessed 24 January 2020.

[27] ibid.

[28] German Customs, *Status of Brexit in the area of the origin of goods and preferences* available at <https://www.zoll.de/DE/Fachthemen/Warenursprung-Praeferenzen/WuP_Meldungen/2020/up_brexit-_sachstand1.html> accessed 24 January 2020.

[29] *Supra* n19.

[30] *Ibid.*

[31] Taxation Cross-border Trade Act 2018.

[32] *Supra* n19.

[33] *Ibid*.

Document. The basis for the data and codes of the customs declaration is then no longer the EU tariff 'TARIC', but it will be replaced by the 'UK Trade Tariff'.[34]

From an economic point of view, customs clearance at British borders functions in the same way as trade between the EU and other third countries that do not have a corresponding free trade agreement. Due to customs controls and other customs formalities, the time required for importing and exporting goods will likely increase considerably.

Customs tariff

A temporary tariff regime will initially replace the EU customs tariff. The tariff structure in this UK tariff regime has barely changed significantly, but under the temporary customs tariff about 87 per cent of imported goods are free of customs duties. Only products such as meat, dairy products, fertilisers, finished vehicles and bioethanol are subject to customs duties or tariff quotas and import restrictions.[35]

This high rate of goods, which can be imported duty free, has a positive impact on exporters and consumers in the UK. By importing goods mainly free of customs duties, products can be offered on the market at lower prices. The lower prices benefit not only the buyers of the products, but also the exporters, who can export larger quantities and achieve higher profit margins.

Customs clearance and control at the inner-Irish border

Northern Ireland is part of the UK customs territory. Due to its geographical location and history, derogations for customs controls, tariffs and procedures were already decided in March 2019.[36]

The key point of this agreement is that even in the No-Deal-Brexit scenario, there will be – even after the end of the transitional period – no customs controls directly at the border between the Republic of Ireland and Northern Ireland, if goods are imported into Northern Ireland from the Republic of Ireland. Despite this ban on customs controls, certain movements of goods between the Republic of Ireland and Northern Ireland are subject to import VAT and excise duty.[37] The economic intention behind this scheme is to avoid potential congestion at the border as well as the maintenance of the Good Friday Agreement.

Customs surveillance is ensured when goods are brought into the Republic of Ireland from Northern Ireland under the transit procedure or by an electronic declaration procedure until they are released into a customs procedure. Goods leaving Northern Ireland to a final destination elsewhere in the UK are not subject to a transit procedure.[38] For Irish goods, moving between the Ireland and Northern Ireland, the UK Integrated Tariff is not applicable. For products originating in Ireland, the EU tariff rate applies. However, goods can be checked at the import/export companies or at special locations beyond the border.[39] Furthermore, for all third country goods, which after the No-Deal-Brexit also includes all

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[34] *Supra* n20.
[35] UK Government, *Trade Tariff* available at <https://www.gov.uk/trade-tariff> accessed 24 January 2020.
[36] Commission, ´Revised Protocol on Ireland and Northern Ireland included in the Withdrawal Agreement` COM (2019) 64 final.
[37] UK Government, *Guidance, Customs procedures for moving goods between Ireland and Northern Ireland in a no-deal Brexit* available at <https://www.gov.uk/guidance/customs-procedures-for-goods-moving-between-ireland-and-northern-ireland-if-the-uk-leaves-the-eu-without-a-deal> accessed 24 January 2020.
[38] *Ibid*.
[39] *Supra* n20.

goods from the other 26 EU member states, the previously agreed temporary British customs tariff and the various customs procedures apply.

Conclusion

Customs clearance and monitoring of the movement of goods to and from third countries is a task that customs administrations face on a daily basis. The number of such third country customs clearances will increase significantly, and likely pose a serious administrative challenge to the authorities. Therefore, the customs authorities are focusing on increasing their personnel in addition to the continuous optimisation of processes in the customs administrations. Furthermore, IT systems can ensure faster and better-structured customs clearance, especially at seaports and airports, which are possibly more congested.[40]

The most relevant impacts regarding customs law are the customs formalities that have to be observed for the movement of goods between the UK and continental EU Member States. In particular, a proof of origin may be required for goods crossing borders, since goods from the UK are no longer considered as EU goods in trade with third countries. In addition, customs duties may be levied on UK and EU goods. Other special regulations such as 'Trusted Trader Schemes' might be agreed to facilitate the movement of goods across borders.

Another issue that is widely discussed in the business community is the potential strong negative impact on small and medium sized enterprises, which may not be able to withstand the changes and conversions due to Brexit. Moreover, even large companies are affected negatively in this regard. The UK has not yet announced how simplifications for small and medium-sized enterprises might be structured. Depending on the result of the Brexit, the economic consequences are not predictable with sufficient certainty. A regulated Brexit with a free trade agreement is presumed to have less negative impact on the economy than a UK withdrawal from the EU without an agreement.[41] Similarly, it cannot be ruled out that the UK will re-join the EU after a withdrawal.

[40] *Supra* n19.
[41] United Nations, *UN study projects $32 billion loss for UK post no-deal Brexit* available at <https://news.un.org/en/story/2020/02/1058131> accessed 31 May 2020; Alasdair Sandford, *No-deal Brexit: what would 'WTO terms' mean for UK-EU trade?* available at <https://www.euronews.com/2018/12/19/how-would-uk-eu-trade-be-affected-by-a-no-deal-brexit> accessed 31 May 2020.

TRADE LAW

Electronic bills of lading in international trade transactions – critical remarks on digitalisation and the blockchain technology

Dr Karl Marxen*

In international trade transactions, bills of lading play a significant role. A bill of lading is a standardised transport document issued by a carrier after receiving goods to be shipped by sea, and will include information regarding the identity of the parties,[1] the goods and their particulars, the voyage details and the name of the vessel,[2] as well as miscellaneous standard terms and conditions.[3] Traditionally, the carrier will issue the bill of lading as a paper document, often with watermarks, perforations or other physical marks to discourage the production or circulation of carbon copies for fraudulent purposes.[4]

Once issued, the bill of lading serves several functions of which the following aspects are particularly important.: First, the bill of lading evidences the contract of carriage and its terms and stipulations,[5] and the responsibilities of each named party.[6] Moreover, the bill of lading will record the type/class of goods, quantity and their measurements (weight, volume, amount, and dimensions) and importantly, at the time of taking-over by the carrier the apparent condition (especially visible damage, leakage etc.) of the goods received and then shipped.[7] Should the goods arrive at the port of destination in a damaged condition, or not at all due to loss at sea, the bill of lading serves as evidence that the carrier received the goods, and in apparent good order.

Additionally, at the port of discharge the carrier will release the cargo to the person who presents it with the bill of lading, thereby extinguishing its obligation under the contract of

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[1] For example, the name and particulars of the carrier, the consignor/shipper, and the consignee (intended recipient of the goods).

[2] Vessel name, port of loading, port of destination, information relating to trans-shipment (if any), storage conditions etc.

[3] Applicable practice rules or conventions, jurisdiction and forum clause, limitation or exclusion of damages etc.

[4] Note, however, that the production and subsequent circulation of photocopies of bills of lading is not per se indicative of fraud. In many instances and in accordance with party agreements or applicable practice rules, the production and submission of photocopies of bills of lading is perfectly acceptable and a widespread commercial practice. The special marks and perforations – or the lack thereof – on a bill of lading, however, will typically reveal instantaneously whether the document is an original or a photocopy.

[5] Richard Schaffer, Filiberto Agusti, and Beverley Earle, *International Business Law and its Environment* (7th edn, South-Western 2009) 164; Roy Goode, Herbert Kronke, and Ewan McKendrick, *Transnational Commercial Law* (2nd edn, OUP 2015) 278 (par 9.44); Ewan McKendrick, *Goode on Commercial Law* (5th edn, Penguin 2016) 942 (par 32.59) and 1112 (par 36.22).

[6] For example, freight payment or notification requirements.

[7] Carole Murray, David Holloway, and Daren Timson-Hunt, *Schmitthoff's Export Trade* (11th edn, Sweet & Maxwell 2007) 320 ("This description is perhaps the most vital part of the whole bill…"); Ewan McKendrick, *Goode on Commercial Law* (5th edn, Penguin 2016) 924 (par 32.37) and 942 (par 32.57 – 32.58); JP van Niekerk and Wilhelm Georg Schulze, *The South African Law of International Trade* (4th edn, Saga Legal Publications 2016) 142-144; Roy Goode, Herbert Kronke, and Ewan McKendrick, *Transnational Commercial Law* (2nd edn, OUP 2015) 279-280 (par 9.51-9.52).

carriage.[8] Accordingly, the bill of lading fulfils a function similar to that of a key to a safe deposit box that is passed to a third party to enable it to gain effective access to the goods.[9]

Furthermore, the bill of lading is usually[10] a negotiable document of title in relation to the goods. That means that the holder of the document acquires constructive possession of the goods while they are in transit. Since the holder of the bill of lading may instruct the carrier regarding the cargo and its unloading, rerouting, disposal and the like, and therefore exercise effective control over the goods.[11] By transferring the bill of lading to the buyer, the seller effectively cedes control over the goods to the buyer. Subject to the intention[12] of the parties to the sales transaction, the legal transfer[13] of the negotiable bill of lading from the seller to the buyer may also trigger the transfer of ownership regarding the goods.[14] In this sense, the bill of lading represents the goods currently in transit, and the passing and indorsing of the bill allows, conveniently, passing of ownership of the goods.

In light of the above, it is obvious that a bill of lading is a document of considerable importance. Yet to appreciate fully the bill of lading's substantial role in international sales transactions, it is helpful to explore the notion of risk in international trade, traditional payment terms as well as sophisticated documentary payment options, and relate these issues to the utilisation of bills of lading in commercial practice. Subsequently, the relevance and impact of the particular medium of the bill of lading (paper or electronic/digital) can be examined.

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[8] Roy Goode, Herbert Kronke, and Ewan McKendrick, *Transnational Commercial Law* (2nd edn, OUP 2015) 287 (par 9.75); Ewan McKendrick, *Goode on Commercial Law* (5th edn, Penguin 2016) 1118 (par 36.34).

[9] See also the example presented by Marco Mosselman, *Introduction to International Commercial and European Law* (2nd edn, Paris Legal Publishers 2018) 350; as well as JP van Niekerk and Wilhelm Georg Schulze, *The South African Law of International Trade* (4th edn, Saga Legal Publications 2016) 148.

[10] Negotiability of the bill can be excluded, however, by stating that the bill of lading is "non-negotiable" (or something to that effect, such as a "straight bill of lading"), or by issuing what is called an "express bill of lading", "house bill of lading", a "sea waybill" or similar documents which applicable commercial law typically deprives of "negotiability". Marek Dubovec, 'The Problems and Possibilities for Using Electronic Bills of Lading as Collateral' (2006) *Arizona Journal of International & Comparative Law*, vol. 23 (2) 437, 443 *et seq*; Ewan McKendrick, *Goode on Commercial Law* (5th edn, Penguin 2016) 934-935 (par 32.53), 941 (par 32.54), and 954-955 (par 32.78-32.79); Marco Mosselman, *Introduction to International Commercial and European Law* (2nd edn, Paris Legal Publishers 2018) 350; Richard Schaffer, Filiberto Agusti and Beverley Earle, *International Business Law and its Environment* (7th edn, South-Western 2009) 164 and 174-175; Carole Murray, David Holloway, and Daren Timson-Hunt, *Schmitthoff's Export Trade* (11th edn, Sweet & Maxwell 2007) 309 *et seq*; Rolf Schütze and Klaus Vorpeil, *Das Dokumentenakkreditiv im internationalen Handelsverkehr* (7th edn, Deutscher Fachverlag 2016) 101 *et seq*.

[11] Roy Goode, Herbert Kronke, and Ewan McKendrick, *Transnational Commercial Law* (2nd edn, OUP 2015) 284-285; Ewan McKendrick, *Goode on Commercial Law* (5th edn, Penguin 2016) 934 (par 32.52); Stephen Tricks and Robert Parson, *The Legal Status of Electronic Bills of Lading* (Clyde&Co 2018) 8.

[12] In addition to delivery of the items, most legal systems also require party consensus as to the passing of ownership. Transferring/indorsing the bill of lading to the buyer, typically, expresses such an intention on the part of the seller. See also the remarks by Marek Dubovec, 'The Problems and Possibilities for Using Electronic Bills of Lading as Collateral' (2006) *Arizona Journal of International & Comparative Law*, vol. 23 (2) 437, 442; JP van Niekerk and Wilhelm Georg Schulze, *The South African Law of International Trade* (4th edn, Saga Legal Publications 2016) 148; Vincent O'Brien and Ashish Madan, 'Bills of Lading in Commodity Trade' (June 2019) *Documentary Credit World* (DCW) 17.

[13] Called indorsement.

[14] Ewan McKendrick, *Goode on Commercial Law* (5th edn, Penguin 2016) 934 (par 32.51); Rainer Gildeggen and Andreas Willburger, *Internationale Handelsgeschäfte* (5th edn, Vahlen 2018) 119; Marco Mosselman, *Introduction to International Commercial and European Law* (2nd edn, Paris Legal Publishers 2018) 350; Karsten Otte, '*Internationales Transportrecht*' in Christian Tietje (ed), *Internationales Wirtschaftsrecht* (2nd edn, De Gruyter 2015) 321, 380.

Risks in international trade transactions

Participants in international trade transactions face several risks and challenges,[15] ranging from:

- currency risks (for example, the agreed-upon currency strengthens or deteriorates significantly after contract formation),
- transport risks (goods are damaged or lost whilst in the custody of a carrier),
- political risks (exporting the goods in question is prohibited by governmental action, economic sanctions are imposed, sea routes impassable due to political tensions),
- insolvency risks (with either party encountering serious financial difficulties prior to fulfilling its contractual duties).

In order to address some of the aspects relating to the latter type of risk, namely unwillingness or incapability to perform the contractual duty due to financial difficulties – payment of the contract price or delivery of the goods, respectively – merchants have devised alternatives payment mechanisms.

Classic payment terms: payment in advance or delivery on open account

Traditionally, payment terms comprise of two contrarian options: "payment in advance", and "delivery on open account". The former option, payment in advance, means that the buyer must effect payment of the contract price before claiming delivery of the goods.[16] Fulfilling its part of the bargain first, it is the buyer who assumes fully the risk of defective delivery (damaged goods, short delivery, inferior quality etc.), or even non-delivery (no goods delivered at all). Should the seller be unwilling or unable to deliver the goods as promised, the onus is on the buyer to pursue legal remedies such as filing a lawsuit for specific performance, repayment of the contract price, or participating in insolvency proceedings against the seller or its estate.

The other traditional payment term, delivery on open account, allocates the default risk to the seller. Agreeing on delivery on open account, the seller is obligated to perform, that is dispatch and deliver the goods to the purchaser, before claiming payment. Naturally, this assigns the risk of non-performance (no payment at all) or insufficient performance (payment is late or less than agreed upon) firmly to the seller – and is indicative of the buyer's "strong bargaining position".[17] Thus, if delivery was made but payment is not, it is for the seller to take to the courts[18] or invoke other remedies/securities.[19]

These two traditional payment terms form part of many international sales agreements, because they are easy to implement into the contract, they leave little room for ambiguity or interpretational issues, and only require the involvement of banks or financial institutions in

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[15] Marco Mosselman, *Introduction to International Commercial and European Law* (2nd edn, Paris Legal Publishers 2018) 8 *et seq*; Christoph Graf von Bernstorff, *Forderungssicherheit im Außenhandel* (Bundesanzeiger Verlag 2016) 33 *et seq*; Ewan McKendrick, *Goode on Commercial Law* (5th edn, Penguin 2016) 910 (par 32.11).

[16] Christoph Graf von Bernstorff, *Forderungssicherheit im Außenhandel* (Bundesanzeiger Verlag 2016) 73-74 (par 6.3.1.).

[17] Charl Hugo, '*Payment in and Financing of International Sales Transactions*' in Robert Sharrock (ed), *The Law of Banking and Payment in South Africa* (Juta 2016) 394, 396 (par 9.3).

[18] That is, initiate an action for payment of the contract price ("action for price"), plus interest if applicable, or damages.

[19] For example, insist on the return of the goods if title to the goods has been retained, or make a call on a surety who secured payment of the contract price.

a very limited capacity (conventional international funds transfer). However, opting for either payment in advance or delivery on open account is indicative of a stark bargaining disparity between the parties.[20] While "payment in advance" expresses a significant bargaining power advantage on the part of the seller, the term "delivery on open account" suggests the opposite. Because these payment terms entail one-sided risk allocation,[21] merchants have devised alternative payment terms and methods that implement a more equal risk distribution.

Distributing default risk evenly with trade finance instruments

In order to distribute the default risk more evenly among the contracting parties in an international sales transaction, merchants and banks have devised complex trade finance solutions and instruments. Such trade finance solutions are especially useful when, and as long, no sufficient mutual trust has been established yet between potential buyer and seller. In such instances, the merchants may resort to documentary payment options such as "documentary collections" or "documentary letters of credit".

Documentary collection

Documentary collection is a trade facilitation service also known as "bank collection". If documentary collection is agreed upon, the seller hands over the goods to the carrier for transport to the buyer's country, receives a bill of lading, and sends all documents relating to the transaction to its bank. Among the documents are, regularly, the commercial invoice, packing list, insurance documents and – importantly – transport documents such as a bill of lading.[22] The instructions of the seller to the bank will be that the bank must present the transactional documents to the buyer for scrutiny, but release them only to the buyer against full payment of the contract price.[23] After payment, and the bill of lading now in its possession, the buyer can collect the goods at the port of destination.[24] The purchase price collected by the bank is passed on to the seller, and the trade transaction concluded.[25] The advantage of documentary collection arrangements is that the buyer will effect payment only after it has scrutinised documents (which represent the shipped and insured goods), while the seller retains control over the goods (through possession of the bill of lading) until the purchase price is paid in full. Thus, trading on a documentary collection basis clearly mitigates the one-sided risk allocations of the above introduced traditional payment terms.[26]

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[20] Christoph Graf von Bernstorff, *Forderungssicherheit im Außenhandel* (Bundesanzeiger Verlag 2016) 73-75.

[21] However, it is possible to combine the two payment terms if the parties so agree; for example, 20 per cent of the contract price may be due immediately after contract formation, and the outstanding balance upon delivery of the goods. Thus, the parties would effectively choose both payment in advance as well as payment on open account, each accorded to a certain portion of the contract price.

[22] Marek Dubovec, 'The Problems and Possibilities for Using Electronic Bills of Lading as Collateral' (2006) *Arizona Journal of International & Comparative Law*, vol. 23 (2) 437, 439; Charl Hugo, '*Payment in and Financing of International Sales Transactions*' in Robert Sharrock (ed), *The Law of Banking and Payment in South Africa* (Juta 2016) 394, 399 (par 9.4).

[23] In practice, there are further options regarding documentary collections that involve a draft (unaccepted bill of exchange) which the buyer (or its bank) has to accept in order to receive the transactional documents.

[24] Or claim damages from the carrier if the goods arrive damaged as well as seek compensation from the insurer.

[25] Note, that this describes the most basic scenario under a documentary collection agreement; in commercial practice, different banks as well as drafts/bills of exchange may be involved.

[26] Documentary collection, however, leaves the seller with the risk that the buyer is unable or unwilling to pay the purchase price (though, of course, the bank retains the documents in such an instance); see Charl Hugo, '*Payment in and Financing of International Sales Transactions*' in Robert Sharrock (ed), *The Law of Banking and Payment in South Africa* (Juta 2016) 394, 400. This risk is one of the reasons why documentary

The importance of trade documents, such as a bill of lading, is evident for the facilitation of a documentary collection service.

The documentary letter of credit

Another documentary payment term relates to documentary letters of credit. A letter of credit is an irrevocable promise by a bank to pay the contract price against submission of certain complying trade documents. One of the documents typically required under a letter of credit supporting an international trade transaction is a bill of lading. Once the seller presents the bill of lading, among other documents,[27] to the bank, the bank will pay the contract price in exchange for the bill of lading. The bank will then request reimbursement (the amount it paid to the seller plus the agreed-upon commission, fee or margin for its services) from the buyer and, once reimbursement was received, forward the bill of lading to the buyer.[28] With the bill of lading in its possession, the buyer will collect the cargo at the port of destination from the carrier. Again, the bill of lading constitutes an essential part of the trade transaction, especially when such a transaction is facilitated through a documentary letter of credit.

With the considerable importance of bills of lading in mind (see above), the article continues to investigate the significance and potential impact the medium of the bill of lading (paper or electronic/digital) can have in mercantile practice.

Bills of lading – printed on paper or issued in digital form

Bills of lading represent the goods that the seller had shipped through an ocean carrier, and play an important role in international trade. As was indicated above, ocean carriers still issue bills of lading mostly on paper. So what are the inconveniences and problems pertaining to the issuance of paper-based bills of lading? To emphasise the host of issues arising from paper-based bills of lading, some examples encountered in practice are presented below.

Sending paper documents around the world – costly, slow, and risky

The bill of lading has to reach the buyer before the goods themselves arrive at the port of destination,[29] so that the goods can be collected immediately upon unloading and without causing delays, demurrage charges or other costs. Depending on the length of the voyage that the goods take, this will usually necessitate that the bill is delivered by air to the buyer. This is costly and, like any mode of conveyance of paper documents, carries a certain risk. If the bill of lading is delayed, lost (due to theft, misdelivery or misplacement), damaged or otherwise not available,[30] it will be difficult for the buyer to collect the goods from the carrier. Because the carrier may be dealing with a person not authorised to take delivery, a

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letters of credit, which avoid this particular risk, are a popular alternative to documentary collections in international sales transactions.

[27] See Karl Marxen, '*Trade Finance Instruments a High Risk?*' in Charl Hugo (ed), *Annual Banking Law Update 2018* (Juta 2018) 161, 163; Rolf Schütze and Klaus Vorpeil, *Das Dokumentenakkreditiv im internationalen Handelsverkehr* (7th edn, Deutscher Fachverlag 2016) 126-130.

[28] Crucially, the banks will use the bill of lading as security/collateral in case the buyer refuses, or is unable, to reimburse the bank for the payment the bank previously has made to the seller. This is highly advantageous to the bank and constitutes an important aspect that this article will return to below.

[29] Ewan McKendrick, *Goode on Commercial Law* (5th edn, Penguin 2016) 908 (par 32.04), 955, and 969 (par 32.82); Marc van Maanen and Iris Regtien, 'Shipping E-Bills of Lading and the Blockchain Revolution' (June 2018) *Documentary Credit World* (DCW) 26, 27.

[30] For example, the document is locked away in a safe deposit box to which the key is (temporarily) unavailable.

fraudster even, it will not release the goods without surrender of the original bill of lading – otherwise the carrier runs the risk of incurring damages should the bearer of the bill of lading appear later and claim the cargo.

However, it happens regularly that the original bill of lading is not available (yet) for presentation to the carrier when the buyer intends to take delivery of the cargo at the port of destination. To resolve this issue in commercial practice, merchants and the shipping industry make use of other legal instruments such independent bank guarantees that are payable on demand.[31] Instead of the original bill of lading, the carrier will insist on such a guarantee (or similar instrument) to protect itself from a potential claim for damages arising from the unauthorised release of cargo without the original bill of lading.[32] While the guarantee eventually facilitates release of the cargo, it complicates matters further due to the time-consuming involvement of banks who issue the necessary guarantee (or other instrument require for the release) and, importantly, drives up the transaction costs.[33] This inconvenience could be avoided if electronic bills of lading were used that can be transferred and forwarded in seconds without the need for sending physical documents.[34] Replacing paper-based bills of lading with digital bills of lading, therefore, would certainly mitigate this problematic aspect.

Another problem lies in the fact that, despite perforations, watermarks, or similar precautions, one cannot rule out entirely the occurrence of fraudulent copies or falsifications of paper-based bills of lading. With the rapid improvement and ubiquitous availability of high-resolution scanners and printers, computer programmes and other devices used for the production and replication of letter heads, original signatures, printed documents, and other materials, physical forgeries are easier to produce and often difficult to detect. Electronically issued bills of lading, on the other, can be more secure against forgeries or fraudulent alterations provided sophisticated technology for authentication, electronic signatures, and similar procedures are used.

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[31] Depending on practice, customs, the region or particular jurisdiction, such a guarantee may also be referred to, or conceptually known, as a letter of indemnity, bank bond, bill of lading guarantee, or standby letter of credit. While the exact mechanics and agreements may differ depending on the jurisdiction and its construction of such security instruments, the aim is always to protect and indemnify the carrier who releases the cargo despite the absence of the original bill of lading.

[32] Carole Murray, David Holloway, and Daren Timson-Hunt, *Schmitthoff's Export Trade* (11th edn, Sweet & Maxwell 2007) 330 (par 15-040); Christoph Graf von Bernstorff, *Forderungssicherheit im Außenhandel* (Bundesanzeiger Verlag 2016) 111-112; Roy Goode, Herbert Kronke, and Ewan McKendrick, *Transnational Commercial Law* (2nd edn, OUP 2015) 287 (par 9.76); Marek Dubovec, 'The Problems and Possibilities for Using Electronic Bills of Lading as Collateral' (2006) *Arizona Journal of International & Comparative Law*, vol. 23 (2) 437, 442 and 445.

[33] In commercial practice, the issuance of an independent bank guarantee inevitably requires the payment of an application fee and other charges based on, *inter alia*, the monetary amount the instrument covers, the duration/expiry period of the guarantee, the relevant circumstances of the transaction, and the credit standing of the applicant (in the present scenario, the buyer who applies for issuance of the guarantee). See also Stephen Tricks, *Practitioner's Guide to Demand Guarantees* (London Institute of Banking & Finance 2017) 8. Furthermore, banks usually require that the applicant of the guarantee (the person wishing to collect the cargo without the original bill of lading) pays a deposit to secure the claim for reimbursement should the guarantee be called-up.

[34] Stephen Tricks and Robert Parson, *The Legal Status of Electronic Bills of Lading* (Clyde&Co 2018) 9; Thandiwe Legwaila, '*Trade Digitization: Developments and Legal Aspects*' in Charl Hugo and Sarel du Toit (eds), *Annual Banking Law Update 2017* (Juta 2017) 133, 144; David Saive, 'Das Blockchain-Traditionspapier' (6/2018) *Transportrecht* 234, 236-237; Richard Schaffer, Filiberto Agusti, and Beverley Earle, *International Business Law and its Environment* (7th edn, South-Western 2009) 175; Carole Murray, David Holloway, and Daren Timson-Hunt, *Schmitthoff's Export Trade* (11th edn, Sweet & Maxwell 2007) 318 (par 15-035).

Compliance aimed at transnational financial crime

Moreover, when documentary payment terms and services, such as documentary collections and letters of credits, are integrated into the trade transaction, the involvement of banks and financial services providers becomes inevitable. Nowadays, banks are under increasing pressure to detect and prevent transnational financial crime,[35] such as money laundering, violations of international economic sanctions and other abuses of the international financial system.[36] These compliance expectations translate into an expansive (and expensive) obligation on banks to identify their customers and scrutinise their customers' activities,[37] including international sales transactions and the financing thereof. In order to satisfy lawmakers' and regulators' compliance requirements, banks runs comprehensive checks on all natural persons and commercial entities relating to commercial and financial transactions which the banks facilitate, for example documentary collections, document forwarding, granting of credit lines, or opening and advising of letters of credit.

These checks largely rely on data extracted from documents, among them bills of lading. To gather and analyse such data and information, however, routinely necessitates the digitalisation of the information[38] – if a document such as a bill of lading is presented in paper form, the bank must scan and apply OCR procedures[39] to the document first. Naturally, this requires the use of technology, and occasionally human intervention and discretion[40] – all of which is time-consuming, and incurs additional delays and costs. As was suggested above, replacing paper-based bills of lading with digitally-issued transport documents, therefore, can make data acquisition and processing easier and thus unburden banks in carrying out their financial crime compliance tasks. That will reduce fees and charges levied by banks for trade facilitation services and decrease overall transaction costs.

These are just some of the problems and complications that stem from the continuous use of bills of lading as paper-issued documents. Switching to digital bills of lading would therefore avoid or at least mitigate said problems; but would taking such a step of digital development be conducive to international trade facilitation in general?

Going digital – electronic bills of lading

Electronic bills of lading have the potential to aid facilitation of international trade and the financing thereof, and rectify some of the aforementioned problems which stem from the widespread use of bills of lading issued as paper documents. However, the use of digital bills of lading is not entirely without difficulties and may even create further problems. To

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[35] James Edward Byrne and Justin Benjamin Berger, *Trade Based Financial Crime Compliance* (IIBLP 2017) 72.
[36] Regarding some of the unintended but negative consequences arising from heightened financial crime compliance expectations for the trade finance industry and international trade, see Karl Marxen, '*Trade Finance Instruments a High Risk?*' in Charl Hugo (ed), *Annual Banking Law Update 2018* (Juta 2018) 161, 175 *et seq*.
[37] James Edward Byrne and Justin Benjamin Berger, *Trade Based Financial Crime Compliance* (IIBLP 2017) 103 *et seq*.
[38] Compare remarks by Thandiwe Legwaila, '*Trade Digitization: Developments and Legal Aspects*' in Charl Hugo and Sarel du Toit (eds), *Annual Banking Law Update 2017* (Juta 2017) 133, 142-143.
[39] Short for optical character recognition, a process whereby physical documents containing script, logos, symbols and printed characters will be scanned, identified, and converted in computer-readable data.
[40] To rectify the faulty conversion of annotations, marks, printed characters or script that the OCR programme captured incorrectly.

appreciate the potential impact on law and commercial practice, some important aspects – with special references to blockchain technology – will be explored below in more detail.

Different providers, different systems

So far, this article has multiple times referred to bills of lading issued in electronic form yet not specified what particular digital format, electronic protocol, standard or precise technology would be used to achieve this. The commercial world has seen several providers offering systems under which bills of lading can be issued electronically, subsequently circulated and utilised among the systems' participants, for example SeaDocs,[41] BOLERO,[42] CargoDocs,[43] or the "e-title" system,[44] to name but a few. Despite abundant claims of successful market entries, no particular system or system provider has truly reached sufficient market penetration at present to replace paper bills of lading on a satisfactory scale.[45] If digital bills of lading were to replace bills of lading printed on paper, one of the conditions will arguably be universal, or at least near universal, acceptance of a certain common system, or failing that, the ability to create, transfer and process such digital transport documents across different electronic systems (interoperability) with sufficient reliability based on common standards.[46] For the past few years, blockchain technology has been advocated continuously as a solution.

Blockchain technology and electronic bills of lading

After digital currencies using cryptography, most notably Bitcoin, received international attention the underlying blockchain technology was explored for other purposes that necessitate tamper-proof storage of digital information. Soon, blockchain was used to develop systems capable of the issuance and management of trade finance documents, among them electronic bills of lading. Blockchain is a database technology that stores digital information in a distributed, de-centralised manner and uses sophisticated cryptographic calculations to ensure that once information is entered into the database, it cannot subsequently be altered or deleted without detection (immutability).[47] Using this technology, it is possible to issue electronic bills of lading recorded on the blockchain database in a reliable fashion and ensure, that once issued (that is, entered into the blockchain database and assigned to a user) no fraudulent alterations, suppression or otherwise manipulative

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[41] Short for Seaborne Trade Documents Scheme.
[42] Short for Bill of Lading Electronic Registry Organization.
[43] Administrated by essDOCS.
[44] Devised by the E-Title Authority Pte Ltd.
[45] Marc van Maanen and Iris Regtien, 'Shipping E-Bills of Lading and the Blockchain Revolution' (June 2018) *Documentary Credit World* (DCW) 26.
[46] Compare Richard Schaffer, Filiberto Agusti, and Beverley Earle, *International Business Law and its Environment* (7th edn, South-Western 2009) 175, who write "Another obstacle to the global paperless system of trade is the lack of standardization. A particular trade document, such as a bill of lading, may have several different formats depending on the country and practices used. In order for a global system to work, the format of trade documents must be standardized."; see also Colleen Baker and Kevin Werbach, '*Blockchain in Financial Services*' in Jelena Madir (ed), *Fintech Law and Regulation* (Edward Elgar 2019) 123, 124 (par 6.02), and 147 (par 6.69); Stephen Tricks and Robert Parson, *The Legal Status of Electronic Bills of Lading* (Clyde&Co 2018) 10; and the earlier remarks by Georgios Zekos, 'Electronic Bills of Lading and Negotiability' (Nov. 2001) *Journal of World Intellectual Property* 977, 989.
[47] Jelena Madir, '*What is Fintech?* ' in Jelena Madir (ed), *Fintech Law and Regulation* (Edward Elgar 2019) 1, 10; Colleen Baker and Kevin Werbach, '*Blockchain in Financial Services*' in Jelena Madir (ed), *Fintech Law and Regulation* (Edward Elgar 2019) 123, 127 (par 6.14); David Saive, 'Das Blockchain-Traditionspapier' (6/2018) *Transportrecht* 234, 235; Marc van Maanen and Iris Regtien, 'Shipping E-Bills of Lading and the Blockchain Revolution' (June 2018) *Documentary Credit World* (DCW) 26, 28; Niels Vandezande, *Virtual Currencies: A Legal Framework* (Intersentia 2018) 58.

actions can be undertaken unnoticed. Blockchain is capable, therefore, to ensure with a reasonably high degree the authenticity of electronic bills of lading and guard these digital documents against fraudulent subsequent interventions. Nevertheless, simply replying "blockchain" to answer the above question of what "particular digital format, electronic protocol, standard or precise technology" the industry should use in the future for electronic bills of lading is insufficient,[48] as blockchain itself – while offering an interesting database approach – can only represent one component or part of a comprehensive electronic bill of lading system. Therefore, "standards development will be a key topic in the years ahead",[49] especially for the area of digital systems for electronic bills of lading.

For any successful digital bill of lading system, it would be paramount to ensure the unique character of the electronic bill of lading, meaning the bill of lading may only be under the control of one party at a time. Known as the problem of "double spending",[50] all electronic databases must address the risk that a party uses a unique digital value, token, point, dataset or privilege, reserved to be used only once (spent, converted, exchanged, assigned to someone else etc.), illegitimately in two or more instances – for example, transfer the same electronic bill of lading to numerous different parties contemporaneously.

Blockchain technology can certainly prevent "double spending",[51] but there are several other considerations that militate against using blockchain databases for digital bills of lading. Setting up and running a database for electronically-issued bills of lading with blockchain technology requires disproportionate high computing power and, consequently, resources for the necessarily powerful hardware as well as vast quantities of electricity. Blockchain technology as a database technology is also comparatively slow due to the cryptographic calculations and authentication procedures tied to entering new transaction records to the database, allowing only a limited number of new entries (and thus transactions) to the database within a certain period of time.[52] Additionally, while a blockchain database offers a high degree of protection against subsequent alterations of the data, in this case electronic bills of lading, it is theoretically possible to penetrate the layer of security and tamper with the blockchain database.[53] Moreover, even though perhaps a matter of course, it is important to remember that blockchain technology – just like every other available database technology – will in no case certify or ensure the actual correctness, veracity or truthfulness of any information entered and stored. Expressed colloquially, "a lie on a blockchain is still

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[48] Compare the important remarks by Brant Carson, Giulio Romanelli, Patricia Walsh, and Askhat Zhumaev, '*Blockchain Beyond the Hype: What is the Strategic Business Value?* ' (McKinsey 2018) <www.mckinsey.com/business-functions/mckinsey-digital/our-insights/blockchain-beyond-the-hype-what-is-the-strategic-business-value> accessed 31 January 2020, who state that "Blockchain's value comes from its network effects and interoperability, and all parties need to agree on a common standard to realize this value—multiple siloed blockchains provide little advantage over multiple siloed databases.".

[49] Colleen Baker and Kevin Werbach, '*Blockchain in Financial Services*' in Jelena Madir (ed), *Fintech Law and Regulation* (Edward Elgar 2019) 123, 147 (par 6.69).

[50] Niels Vandezande, *Virtual Currencies: A Legal Framework* (Intersentia 2018) 56-57 (par 3.4.2.3); Florian Möslein and Sebastian Omlor, *FinTech-Handbuch* (C.H.Beck 2019) 77 (par 18). Note also Georgios Zekos, 'Electronic Bills of Lading and Negotiability' (Nov. 2001) *Journal of World Intellectual Property* 977, 990-991 and his elaborations.

[51] Niels Vandezande, *Virtual Currencies: A Legal Framework* (Intersentia 2018) 57; Florian Möslein and Sebastian Omlor, *FinTech-Handbuch* (C.H.Beck 2019) 78 (par 22); David Saive, 'Das Blockchain-Traditionspapier' (6/2018) *Transportrecht* 234, 235.

[52] Florian Möslein and Sebastian Omlor, *FinTech-Handbuch* (C.H.Beck 2019) 130 (par 27).

[53] One of the vulnerabilities is a so-called "51 per cent attack", see Patricia de Miranda, '*Cybersecurity and Blockchain*', in Jelena Madir (ed), *Fintech Law and Regulation* (Edward Elgar 2019) 208, 216-217; Colleen Baker and Kevin Werbach, '*Blockchain in Financial Services*' in Jelena Madir (ed), *Fintech Law and Regulation* (Edward Elgar 2019) 123, 126 (par 6.09); Enée Bussac, *Bitcoin, Ethereum & Co* (ESV 2019) 47-48. For purposes of this article, a detailed elaboration of this aspect is unnecessary and therefore omitted.

a lie" which in turn means that certain opportunities for fraud will not be eliminated. Among all the excitement towards blockchain as a database technology, it may be helpful to point this out. Therefore, if a carrier makes an untruthful statement by entering incorrect information while creating the electronic bill of lading,[54] this untruthful statement will be stored on the blockchain just like any other (true) statement or set of data.[55]

Sophisticated technology – but resource hungry, comparatively slow, and often just not necessary

Lastly, blockchain technology is designed, and in fact most appropriate, for databases in which no central authority, single trusted party nor principal institution administrates, supervises or enters data and transaction entries.[56] Instead, blockchain developed a different and complex method[57] to ensure, without a central trusted administrative entity,[58] the fraud-free entry of new data to the blockchain which, while very intriguing technologically, leads to the above mentioned problems of high requirements for computing power and thus waste of electricity and other resources, and comparatively slow transaction speed of the database technology. All proposed or operative electronic bills of lading systems, however, are conceptualised, typically, with one central authority in control – the operator of the particular system. If this operator is reliable, trustworthy and free of bias – and this will be the very promise highlighted by any entity/provider advertising a system for electronic bills of lading – there is no compelling reason, let alone essential requirement, that the database system be run on blockchain. Instead, numerous electronic database systems are already established and market-tested, providing higher transaction speed and considerably lower energy or resource consumption.[59] Due to the fact that blockchain is not particularly efficient for any electronic bills of lading system as long as these systems rest upon a central and trusted administrative operator – which they currently mostly do – the inclusion of blockchain in such circumstances could arguably be perceived as an attempt to leverage the current interest

[54] This concerns the problem of "back-dating" loading or shipment dates, meaning a carrier issues knowingly a bill of lading which indicates an incorrect (often an earlier date, mostly for reasons of "last day for shipment" provisions in letters of credit, but in mercantile practice also the opposite case may occur) date on which loading of goods or shipment thereof (allegedly) commenced.

[55] In a way, the situation is comparable to one in which a notary public who, unknowingly, records, notarises or otherwise officiates a statement that is incorrect or untrue.

[56] For example, compare the remarks by Colleen Baker and Kevin Werbach, '*Blockchain in Financial Services*' in Jelena Madir (ed), *Fintech Law and Regulation* (Edward Elgar 2019) 123, 126 (par 6.10) with their references to the (centrally administered) SWIFT communications system; Florian Möslein and Sebastian Omlor, *FinTech-Handbuch* (C.H.Beck 2019) 95 (par 98); Brant Carson, Giulio Romanelli, Patricia Walsh, and Askhat Zhumaev, '*Blockchain Beyond the Hype: What is the Strategic Business Value?* ' (McKinsey 2018) <www.mckinsey.com/business-functions/mckinsey-digital/our-insights/blockchain-beyond-the-hype-what-is-the-strategic-business-value> accessed 31 January 2020, who state that: "It [blockchain technology] allows information to be verified and value to be exchanged without having to rely on a third-party authority.". Note also the interesting considerations by Chris Berg, Sinclair Davidson, and Jason Potts, *Understanding the Blockchain Economy* (Edward Elgar 2019) 35-36.

[57] Which relies on consensus expressed by a significant number of network participants (so-called nodes). See Jelena Madir, '*What is Fintech?* ' in Jelena Madir (ed), *Fintech Law and Regulation* (Edward Elgar 2019) 1, 10 (par 1.25); David Saive, 'Das Blockchain-Traditionspapier' (6/2018) *Transportrecht* 234, 235.

[58] David Saive, 'Das Blockchain-Traditionspapier' (6/2018) *Transportrecht* 234.

[59] One may also consider the fact that numerous electronic bill of lading systems are, or have been, operative long before blockchain technology was devised; failure of such systems to prevail was mostly caused by lack of market interest and insufficient uptake by merchants, finance providers, and shipping companies.

or "hype"[60] in "all things blockchain", and thus represent primarily a (questionable) marketing tool.

Blockchain as a catalyst for debates and developments

Accordingly, blockchain as a concept and technology will probably not constitute the ideal solution for the issuance and management of electronic bills of lading. It is argued, however, that the (unrestrained and therefore problematic) enthusiasm for the use of blockchain technology within the trade finance sector will lead to, and has already generated, refreshing and innovative discussions on how to modernise and improve international mercantile transactions and the flow of respective documents. Blockchain should be appreciated as a mere catalyst for debates on establishing an international consensus regarding the particular digital format, electronic protocol, standard or precise technology, if any, for electronic bills of lading in the future. A perfect or efficient solution it is probably not, but it will inevitably lead to further developments.

Overall, it is reasonable to assume that utilisation of electronic bills of lading will proliferate,[61] even though there is still reluctance among some of the potential users and stakeholders – often simply based on tradition and familiarity with the concept of paper-issued bills of lading, and unwillingness to embrace new technology.[62]

Freedom of contract and its limits in property transactions

Irrespective of the precise digital technology that is used for electronic bills of lading, a remaining key question is, however, whether applicable law fully accepts, and gives effect to, electronic bills of lading – including negotiability. To appreciate the importance of negotiability of bills of lading, it is helpful to explore the concept of party autonomy and freedom of contract. Party autonomy and freedom of contract flow from the notion that it is up to the parties involved, which in this case are seller, buyer, and the bank as trade finance provider, to agree on applicable terms, rules, and practices to govern their transaction.[63] Taking party autonomy and freedom of contract seriously means that electronic bills of lading should be fully equated to such transport documents issued on paper – if and as far as the parties wish. However, the principles of freedom of contract and party autonomy are not

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[60] Florian Möslein and Sebastian Omlor, *FinTech-Handbuch* (C.H.Beck 2019) 72. See also Niels Vandezande, *Virtual Currencies: A Legal Framework* (Intersentia 2018) 62, who state that "[i]n recent years, blockchain technology has become one of the biggest buzzwords in the technology sector".

[61] For example, Marc van Maanen and Iris Regtien, 'Shipping E-Bills of Lading and the Blockchain Revolution' (June 2018) *Documentary Credit World* (DCW) 26, 29 write "[…] it is no longer a question whether [electronic] bills of lading will become a staple in the international shipping trade, but a question of when".

[62] See Shiyong Wang, 'The Outlook for Electronic Presentations' (July/Aug. 2019) *Documentary Credit World* (DCW) 33, 36 who writes, with reference to, *inter alia*, bill of lading and other documents for trade finance purposes: "…paper form has played such a dominant role traditionally. […] Paper in hand provides comfort to all involved parties […]". Other experts state that the adoption and widespread use of electronic bills of lading suffers from, among other, "conservative attitudes among long-established participants", Stephen Tricks and Robert Parson, *The Legal Status of Electronic Bills of Lading* (Clyde&Co 2018) 5. Note also the remarks of a more general nature by Thandiwe Legwaila, '*Trade Digitization: Developments and Legal Aspects*' in Charl Hugo and Sarel du Toit (eds), *Annual Banking Law Update 2017* (Juta 2017) 133 who realised that "[…] paper's grip on trade finance seems more tenacious than anyone would have thought […]"; as well as the findings by Colleen Baker and Kevin Werbach, '*Blockchain in Financial Services*' in Jelena Madir (ed), *Fintech Law and Regulation* (Edward Elgar 2019) 123, 138 (par 6.43) who state that: "Trade finance is an ancient industry that remains largely paper-based to this day.".

[63] Compare Roy Goode, Herbert Kronke, and Ewan McKendrick, *Transnational Commercial Law* (2nd edn, OUP 2015) 22 (par 1.36).

limitless, and boundaries and exceptions are recognised in most jurisdictions, for instances based on public policy[64] or regarding the areas of taxation and insolvency.[65]

Therefore, the parties cannot decide by virtue of mutual agreement certain circumstances or questions; most issues concerning taxation or insolvency proceedings are primarily subject to applicable law in order to protect fundamental principles for the benefit of third parties and the wider public. A further example is the field of property law, since any legally effective agreement or action on property has a potential impact far beyond the parties directly involved in the transaction. While agreements, actions, and clauses relating to contracts typically have merely an effect "*inter partes*" (between or among the parties – privity of contract), actions affecting property typically extend their effect beyond the actual parties directly involved (that is an effect "in rem", and therefore "*erga omnes*"). To explain this particular aspect's relevance to electronic bills of lading and whether they can be established in commercial law and mercantile practice, the above-mentioned issue of trade finance solutions, especially relating to letters of credit, needs more exploring.

The importance of collateral for banks opening letters of credit

A substantial amount of international sales transactions relies on documentary letters of credit to facilitate payment and the exchange of performance. The bank that agrees to support the transaction with its trade finance services will open a letter of credit, thereby irrevocably binding itself to pay money against submission of stipulated documents. The documents required under said letter of credit will, almost inevitably, include a bill of lading. As indicated above, once the bill of lading is presented by the seller to the bank, the bank will honour its letter of credit obligation and pay the purchase price. The bill of lading is now in possession[66] of the bank, so that the bank can exercise control over the goods currently in transit. Immediately after payment to seller, the bank will demand reimbursement from the buyer. The bank will only release the bill of lading to the buyer once reimbursement is successful – thus, the bill of lading secures the bank's reimbursement claim. Mentioned briefly already above, this aspect requires further elaboration so that the significant difference between a paper-based bill of lading and an electronic one can be appreciated in this particular context.

When a bank facilitates an international sales transaction by opening a letter of credit, the bank incurs a risk – specifically, that it pays the purchase price to the seller but, subsequently, fails to enforce its reimbursement claim against the buyer. Banks, however, need to hold adequate capital reserves under applicable laws and regulations when incurring financial risks, for example when making a loan to a customer.[67] Opening a letter of credit constitutes such a risk, meaning the bank will have to note its potential exposure (the purchase price irrevocably promised under the letter of credit) in its books and hold a certain amount of funds in reserve to back its obligation. Interestingly, obligations arising from letters of credit

[64] For example, a contract for the sale of illegal recreational drugs will in most jurisdictions be considered void, unenforceable, and without legal validity.

[65] Otherwise, parties could inappropriately lower the effective taxation of their transactions, or undermine insolvency rules that ensure collective, equitable, proportionate and orderly distribution of remaining assets from the insolvent estate, and rules of priority.

[66] In most cases, in addition to mere possession of bill of lading, the bank will likely demand to have it indorsed to it (the bank) by the seller, so as to complete the legal transfer of the document in favour of the bank.

[67] The laws and regulations governing capital adequacy and financial reserves to cover risk exposure are a highly complex and technical area, the in-depth treatment of which is clearly beyond the scope of this article. For purposes of this paper the following concise introduction, highlighting only some key aspects and considerations, is deemed sufficient.

are considered less risky compared to, for example, an unsecured loan to a customer. As a result, the bank will only have to retain a comparatively low amount of capital reserves to cover its letter of credit obligation. This rather lenient treatment of letter of credit obligations, in terms of capital adequacy rules, is justified because the bank's obligation to pay is conditioned on the presentation of a bill of lading. The bill of lading represents goods in transit, which means the bank's payment and subsequent reimbursement claim is counter-balanced, secured and thus collateralised by the value of the goods represented by the bill of lading.[68] This means, that even if the buyer fails to reimburse the bank, the bank can retain the bill of lading and satisfy, at least partially, its reimbursement claim by selling the bill of lading (and thus the goods this document represents) on the commercial markets to a third party. The favourable treatment of letters of credit, however, is only possible if the bill of lading truly establishes real security and collateral for the bank.[69]

While reliable security can be established undoubtedly through paper-based bills of lading because of their negotiability, this is probably not so regarding electronic bills of lading. At the moment, many jurisdictions do not fully equate electronic bills of lading with bills of lading issued on paper in the sense that they could be negotiable documents of title.[70] Consequently, security *in rem* is not reliably and firmly established under the transfer of an electronic bill of lading. As a result, the risk-weighing exercise and capital adequacy rules will apply less favourably to a bank that opened a letter of credit pursuant to which it will hold only an electronic bill of lading, and thus only insufficient collateral. Therefore, scholars[71] have described this issue as "one of the most difficult obstacles for the electronic bill of lading to overcome".

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[68] Marek Dubovec, 'The Problems and Possibilities for Using Electronic Bills of Lading as Collateral' (2006) *Arizona Journal of International & Comparative Law*, vol. 23 (2) 437, 442-443, 459, and 466; Marc van Maanen and Iris Regtien, 'Shipping E-Bills of Lading and the Blockchain Revolution' (June 2018) *Documentary Credit World* (DCW) 26, 27; Peter Ellinger, Eva Lomnicka, and Christopher Hare, *Ellinger's Modern Banking Law* (5th edn, OUP 2011) 860; Rainer Gildeggen and Andreas Willburger, *Internationale Handelsgeschäfte* (5th edn, Vahlen 2018) 119 who emphasise negotiability in bills of lading and thus security, so that trade finance instruments, such as letters of credit, can be obtained and utilised (the original German reads: "Weil das Konnossement damit mit größter Sicherheit das Verfügungsrecht über die Ware auf dem Transport gewährt, ist es auch als Finanzierungsinstrument geeignet."). See also Vasileios Ziakas, 'Challenges Regarding the Electronic Bill of Lading (EBOL) ' (2018) *International Journal of Commerce and Finance*, vol. 4 (2) 40, 43-44; as well as Ross Cranston, Emilios Avgouleas, Kristin van Zwieten, Christopher Hare, and Theodor van Sante, *Principles of Banking Law* (3rd edn, OUP 2017) 546.

[69] Stephen Tricks and Robert Parson, *The Legal Status of Electronic Bills of Lading* (Clyde&Co 2018) 8; Ross Cranston, Emilios Avgouleas, Kristin van Zwieten, Christopher Hare, and Theodor van Sante, *Principles of Banking Law* (3rd edn, OUP 2017) 546.

[70] Stephen Tricks and Robert Parson, *The Legal Status of Electronic Bills of Lading* (Clyde&Co 2018) 7 and 17 (specifically regarding the position in English law); Roy Goode, Herbert Kronke, and Ewan McKendrick, *Transnational Commercial Law* (2nd edn, OUP 2015) 290 (par 9.88). Even recent international initiatives, such as the UNCITRAL Model Law on Electronic Transferable Records, seems to avoid the issue, see *UNCITRAL Model Law on Electronic Transferable Records – Explanatory Note* (UNCITRAL 2017) 23 (par 20) <www.uncitral.org/pdf/english/texts/electcom/MLETR_ebook.pdf> accessed 31 January 2020. Interestingly, German commercial law is prepared to recognise fully electronic bills of lading, including granting negotiability to such digital documents, see Sec. 516 *German Commercial Code*. See also the remarks in Christoph Graf von Bernstorff, *Incoterms 2020 Kommentierung für die Praxis* (Reguvis 2020) 85-86. However, according to Sec. 516 par 3 *German Commercial Code*, the prescribed standards, procedures and legal requirements need to be determined through administrative regulation ("*Rechtsverordnung*") by the *German Federal Ministry of Justice and Consumer Protection*, which so far has failed to do so.

[71] Marek Dubovec, 'The Problems and Possibilities for Using Electronic Bills of Lading as Collateral' (2006) *Arizona Journal of International & Comparative Law*, vol. 23 (2) 437, 449; note also his persuasive remarks at 459 and 466.

Conclusions: negotiability and common standards – the missing main components

The bill of lading plays an important role in international trade transaction, and issuance on paper, while causing delays and other problems, is paramount to utilise fully its potential in international trade and trade finance. Issuing the bill of lading in electronic form, unfortunately, still presents serious challenges. One of the crucial obstacles to universal use of electronic bills of lading is the above-mentioned reluctance of most legal systems to recognise negotiability in them so that the electronic bills may serve as documents of title in relation to the goods in transit. This has serious implications regarding collateralising such bills for purposes of trade finance. Another major hurdle is the lack of common standards or mutual understanding on a truly international scale regarding what computerised system(s) to use for electronic bills of lading – or at least how to ensure interoperability of bills of lading issued on different digital systems.

Despite the critical approach that this article has taken, it should be noted that the development of electronic bills of lading is embraced and appreciated by the author. What was attempted (and hopefully achieved), however, was to provide a word of caution to calm the (sometimes) unrestrained enthusiasm and excitement prevalent in some circles of the international trade (finance) industry.

The impact of Brexit on the United Kingdom's start-up ecosystem: implications for entrepreneurs and decision-makers

Professor Dr Reza Asghari and Mathis Vetter *

Introduction

The approaching withdrawal of the United Kingdom from the European Union, Brexit, could mean a considerable economic cut. Numerous studies have already looked at the possibilities for future economic development of the United Kingdom and the European Union. The economic impacts of different scenarios are likely to have an effect on trade, foreign direct investment, migration, and the gross domestic product of the United Kingdom.

Start-ups are important economic drivers that create wealth by adding new products or services to the market and creating a significant number of jobs. Start-ups feature highly innovative technologies and/or business models. Start-ups have to strive for significant employee and sales growth.[1] Based on these characteristics, it becomes apparent that start-up founders are in need of framework conditions for their success with regard to raising capital or the demand for high-skilled talents in order to be able to develop and finance innovative ideas and technologies. As in nature, start-ups and other companies are part of an ecosystem, and the conditions of an ecosystem change over time. Brexit could be seen as a similar change of ecosystem conditions. Considering that changing ecosystem, this paper analyzes the impact of Brexit on start-ups in United Kingdom. The central hypothesis is that removing the advantages of the start-up ecosystem enabled by the European Union, Brexit obstructs the founding and growth of start-ups in the United Kingdom. Besides, start-ups in the United Kingdom will face various disadvantages according to different Brexit-scenarios.

The research is based on a theoretical exploration of start-up ecosystems. First, it describes how start-up ecosystems are characterized and how they affect the performance of start-ups. The analysis includes a consideration of how the European Union takes part in the United Kingdom's start-up ecosystem. Then, the impacts of different Brexit-scenarios are considered in two different perspectives: On the one hand, the macroeconomic effects on start-ups, on the other hand, the microeconomic effects on start-ups are described. It will be extracted how changes in a complex, modern, open economy might impact start-ups concerning the loss of important framework conditions.

Start-up ecosystems

Companies operate in environments characterized by different fundamental conditions. Even like biological ecosystems, there are interconnections between companies and other elements.[2] Especially start-ups need a context having a significant effect on the

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[1] Tobias Kollmann, Christoph Stoeckmann, Simon Hensellek, Julia Kensbock, *European Startup Monitor 2016* (2016).

[2] James Moore, *Predators and Prey: A New Ecology of Competition* (Harvard Business Review 1993).

entrepreneurship process.[3] This context is described as an entrepreneurial or start-up ecosystem with a set of individual elements. The ecosystem is divided into framework conditions like formal institutions, culture, physical infrastructure, such as demand and systemic conditions like networks, leadership, finance, talent, knowledge and intermediaries.[4] All these elements interact in complex ways[5] and in a specific geographic area.[6] In particular, with a focus on the entrepreneurial framework conditions, interconnected entrepreneurial actors, entrepreneurial organizations (e.g., venture capitalists, business angels, banks), and institutions (e.g., universities, public sector agencies) are needed to enable the entrepreneurship process.[7] The entrepreneurial output of an ecosystem is measured by the entrepreneurial activity like businesses birth rate, number of high growth firms and start-up-investments.[8]

In addition, the World Economic Forum[9] mentioned eight distinct domains a start-up ecosystem can be divided into:

1) accessible markets: consumers, companies and governments as customers in the domestic and foreign market
2) human capital workforce: management talent, technical talent, entrepreneurial company experience, outsourcing availability, access to immigrant workforce
3) funding and finance: friends and family, angel investors, private equity, venture capital, access to debt
4) support system: mentors, advisors, professional services, incubators, accelerators, network of entrepreneurial peers
5) regulatory framework and infrastructure: ease of starting a business, tax incentives, business-friendly legislation and policies, access to basic infrastructure, telecommunication, transport
6) education and training: available workforce with (pre-)university education, entrepreneur-specific training
7) major universities as catalysts: promoting a culture of respect for entrepreneurship, idea-transformation for new companies, providing graduates for new companies
8) cultural support: tolerance of risk and failure, preference for self-employment, success stories, research culture, positive image of entrepreneurship, celebration of innovation

Describing the attributes of start-up ecosystems like this combination of social, political, economic and cultural elements within a region, start-up ecosystems can support the development and growth of innovative start-ups and encourage nascent entrepreneurs to launch high-risk ventures.[10]

According to the research of Mind the Bridge conducted in several studies on the scaleup environment in the United Kingdom and Europe, the United Kingdom is the "epicenter of Scaleup Europe".[11] The scaleups in the United Kingdom registered by the latest report

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[3] Allan O'Connor, Erik Stam, Fiona Sussan, David Audretsch, *Entrepreneurial Ecosystems Place-Based Transformations and Transitions* (2018).
[4] Erik Stam, Ben Spigel, *Entrepreneurial Ecosystems* (Discussion Paper Series 2016).
[5] Daniel Isenberg, *How to start an Entrepreneurial Revolution* (Harvard Business Review 2010).
[6] Boyd Cohen, *Sustainable valley entrepreneurial ecosystems* (Business Strategy and the Environment 2006).
[7] Collin Manson, Ross Brown, *Entrepreneurial Ecosystems and Growth Oriented Entrepreneurship* (2013).
[8] Erik Stam, Ben Spigel, *Entrepreneurial Ecosystems* (Discussion Paper Series 2016).
[9] World Economic Forum, *Entrepreneurial Ecosystems Around the Globe and Company Growth Dynamics: Report Summary for the Annual Meeting of the New Champions* (2013).
[10] Ben Spigel, *The Relational Organization of Entrepreneurial Ecosystems* (2017).
[11] Alberto Onetti, Marco Marinucci, *SEP Monitor - Scaleup UK 2017* (Mind the Bridge 2018).

amount to a total of 2,217 in 2018, which equals a share of 32% of all scaleups in Europe.[12] This supremacy in Europe is also confirmed by the number of start-up Unicorns founded out of the United Kingdom. According to the latest CB Insights data, 17 out of 37 European start-up unicorns in 2019 come from United Kingdom, followed by Germany with eight unicorns.[13]

The European Union as start-up ecosystem

It is questionable how the European Union constitutes a start-up ecosystem. On the one hand, the European Union represents an own start-up ecosystem institutionalizing fundamental conditions by creating the Common Market with free movement of goods, capital, services and labor. Thus, the European Union offers far-reaching opportunities in terms of financing, sales, and talent acquisition to companies. On the other hand, the European Union takes part in the United Kingdom's start-up ecosystem as a participating actor fostering entrepreneurship. The following table shows the involvement of the European Union as a fundamental element of the United Kingdom's start-up ecosystem.

Pillars	**European Union framework conditions**
Accessible markets	- Free movement of goods[14] - Free movement of services[15] - No customs duties or other non-tariff barriers to trade are imposed - A large number of Free or Preferential Trade Agreements with third countries - Single Market with more than 500m consumers with 3x higher GDP than the worldwide average[16] ▪ Start-ups from the United Kingdom generated more than 53 per cent of their revenues outside their home market, 27.8 per cent to other European countries, 25.9 per cent worldwide[17]
Human capital workforce	- Free movement of persons[18] ▪ 69,6 per cent share of founders in the United Kingdom with citizenship of another European Union-country[19] [20] ▪ Additionally, 22% of start-up employees in the United Kingdom are from other European Union countries, and a further 22% come from third countries.[21]

[12] Alberto Onetti, Marco Marinucci, *SEP Monitor - Scaleup UK 2017* (Mind the Bridge 2018).
[13] CB Insights, *14 European Companies That Became Unicorns in 2018* (CB Insights 2019).
[14] Art. 28, 34 AEUV.
[15] Art. 26, 49-55, 56-62 AEUV.
[16] World Bank Group, *GDP per capita* (2019).
[17] Tobias Kollmann, Christoph Stoeckmann, Simon Hensellek, Julia Kensbock, *European Startup Monitor 2016* (2016).
[18] Art. 21, 45 AEUV.
[19] Tobias Kollmann, Christoph Stoeckmann, Simon Hensellek, Julia Kensbock, *European Startup Monitor 2016* (2016).
[20] European Startup Initiative, *The Rise of The Interconnected Startup: Startup Heatmap Europe* (European Startup Initiative 2018).
[21] Tobias Kollmann, Christoph Stoeckmann, Simon Hensellek, Julia Kensbock, *European Startup Monitor 2016* (2016).

Funding and finance	- Free movement of capital[22] - Venture capital by e.g., InnoFin – European Union Finance for innovators or VentureEU[23] ▪ EIF is the European Union's public investment program with the biggest impact on United Kingdom market, as it "invested €2.3 billion into the United Kingdom venture capital, growth and mid-market funds, which in turn supported total investment of €13.8 billion into Small and Medium-sized Enterprises"[24]
Mentors, advisors, support system, Regulatory framework, Education and training, Major universities as catalysts, Cultural support	- Europe 2020 strategy with the Innovation-Union and Horizon 2020: direct and indirect funding support for especially start-ups - Entrepreneurship action plan: entrepreneurial education and creating an entrepreneurial environment - Startup Europe: strengthen connections between founders, investors, accelerators, and universities by events like Startup Europe Week, Startup Europe Award and European Maker Week[25] - Create a pan-European network of start-up hubs with StartupCity Europe Partnership - Scale-Up initiative

Membership in the European Union has reduced trade costs between the United Kingdom and the rest of Europe. The Customs Union removed tariff barriers allowing free trade in goods and services within the European Union. Trade costs are also reduced by non-tariff barriers resulting from the European Union´s continuing efforts to create a Single Market that lowers costs of trade such as border controls, rules-of-origin checks, cross-country differences in regulation like product standards and safety. These reductions in trade barriers have increased trade between the United Kingdom and the other members of the European Union, so the United Kingdom's consumers benefit through access to better goods and services and lower prices. Businesses profit from new export opportunities that lead to higher sales. Unrestricted access to the Single Market is also an important reason for inward FDI.[26] In summary, it can be determined that start-ups in the United Kingdom are extremely privileged and have substantial market access at their disposal, which they are using intensively. In addition, migration is significantly important for access to talent in the United

[22] Art. 63 AEUV.
[23] European Commission, *State of the innovation union 2015* (European Commission 2015).
[24] British Private Equity & Venture Capital Association, *BVCA Response to the Inquiry: Brexit: the European Investment Bank* (British Private Equity & Venture Capital Association 2018).
[25] European Commission, Startup Europe (European Commission 2019)
[26] Holger Breinlich, Elsa Leromain, Dennis Novy, Thomas Sampson, *Voting with their Money: Brexit and Outward Investment by UK Firms* (Centre for Economic Performance 2019)

Kingdom's start-up ecosystem. It still has the second-largest talent pool in the European Union and attracts most tech talents from both inside and outside the European Union. That position is necessary given the fact that migrants are hugely significant in the United Kingdom, both as employees and as founders. Therefore, it can be concluded that the United Kingdom offers extremely favorable financing opportunities; it is the only European country where more respondents said that it has become harder to raise venture capital in Europe compared to 12 months before.[27]

The summary of these different ecosystem elements and initiatives enabled by the European Union shows that the European Union is an important provider of start-up-friendly conditions. Through the possible exit from the European Union would United Kingdom as leave this entrepreneurial-friendly ecosystem is. Different Brexit scenarios cause various consequences with significant effects on European start-ups and regional start-up ecosystems in the United Kingdom. Until now, it is indeterminate how Brexit will affect start-ups in the United Kingdom.

Brexit

Facing the possible withdrawal of the United Kingdom from the European Union, which is called Brexit, this very entrepreneurial-friendly ecosystem is possibly threatened. The exact quality of Brexit and thus the future economic connection of the European Union and the United Kingdom is still unclear. The main reasons for the United Kingdom's desire to leave the European Union are the urge to regain absolute control over migration to the United Kingdom, to put an end to the high contributions that have to be paid to the European Union and to generally escape Brussels domination.[28]

The future economic relationship between the United Kingdom and the European Union after Brexit has a significant influence on the performance of the United Kingdom's start-up ecosystem. Different Brexit scenarios cause various consequences with effects on start-ups in the United Kingdom. Depending on scenarios, most studies predict a significant deterioration of the framework conditions. Looking into different studies conducted by private companies (PwC, Rabobank, Cambridge Econometrics), by official sources (HM Treasury, Netherlands Central Planning Bureau (CPB)), and by independent academic institutions (Bertelsmann, Open Europe, London School of Economics (LSE), National Institute of Economic and Social Research (NIESR)), there are some factors making the United Kingdom become less attractive for creating start-ups:

1. *Decreasing GDP*:

   The potential change in United Kingdom's GDP can be used to predict the impact of the various Brexit scenarios.[29] All studies agree that no matter which Brexit will occur – it will have a negative impact on the United Kingdom's economy.
2. *Decline in Trade*:

   All studies predict higher tariffs and higher non-tariff barriers such as costs due to border controls, different regulations and the application of rules of origin. Thus, a significant

[27] Atomico, *State of European Tech 2018* (Atomico 2018).
[28] Alexander Niedermeier, Wolfram Ridder, *Das Brexit-Referendum: Hintergründe, Streitthemen, Perspektiven* (2017).
[29] UNESCO, *UNESCO Science Report: towards 2030* (UNESCO Publishing Paris 2015).

decline in trade volumes is expected.[30] Depending on "soft" scenarios like the "Norway-Option" as a member of the European Economic Area, there are no higher tariffs expected and the United Kingdom has to adopt policies and regulations designed to reduce non-tariff barriers within the Single Market. "Hard" scenarios are leading to World Trade Organization rules. This implies increases in trade costs, and there is less progress on reducing non-tariff barriers compared to the European Union.[31]

In summary, the increases in trade costs can be divided into three categories:[32]

- Higher tariffs on imports
- Higher non-tariff barriers to trade (regulations, border controls, …)
- Lower likelihood of the United Kingdom's participation in future European Union integration

3. *Decreasing foreign direct investments (FDI)*

   European Union membership is important for inward FDI, as the free movement of capital allows easy investing for other European Union members. In addition, the attractiveness of each member country as a business location is significantly increased by the feature of free access to the Single Market.[33] Especially the United Kingdom's Department for International Trade recognized a sharp decline in the number of FDI projects from the 2017/2018 to the 2018/2019 period of around 14. Compared to the 2016/2017 period, this means a decrease of 21%. The number of new jobs established by those FDI projects declined even sharper with a 24% loss in the 2018/2019 period compared to the year before.[34]

4. *Immigration*

   Free movement is a founding principle and a central freedom in the European Union and it also applies to European Economic Area membership. There are no exceptions in the Brexit negotiation expected. If the United Kingdom was no longer part of the European Union, an immigration policy would look quite different to the currently policy.[35] Completely free access to the United Kingdom´s labor market is, concerning to the Brexit referendum, not a valid option. A possible alternative consists of a points-system to regulate migration in human capital workforce.

No matter which Brexit will occur it will have a negative impact on the United Kingdom's economy. Therefore, the question arises of what impacts the Brexit will have on the United Kingdom's start-up ecosystem and start-ups in particular.

Impacts of Brexit on the Unites Kingdom´s start-up ecosystem

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[30] Patrick Bisciari, *A survey of the long-term impact of Brexit on the UK and the EU27 economies* (National Bank of Belgium 2019).
[31] Berthold Busch, Jürgen Matthes, *Brexit - The Economic Impact: A meta-analysis* (IW-Report 2016).
[32] John van Reen, *Brexit´s Long-Run Effects on the U.K. Economy* (Brookings Papers on Economic Activity 2016).
[33] Holger Breinlich, Elsa Leromain, Dennis Novy, Thomas Sampson, *Voting with their Money: Brexit and Outward Investment by UK Firms* (Centre for Economic Performance 2019).
[34] Department for International Trade, *Inward Investment Results 2018-2019, Invest in Great Britain & Northern Ireland* (2019).
[35] Jonathan Portes, *Immigration, Free Movement and The EU Referendum* (National Institute of Economic Review 2016).

After analyzing potentially harmful developments caused by Brexit, it is expedient to point out the impacts on framework and trends leveraged by start-ups in the United Kingdom.

a) Impacts on market environment:

84 per cent of United Kingdom's start-ups indicated that they would continue to expand internationally in the future.[36] Due to the Brexit, the overall exports of the United Kingdom are predicted to fall significantly.[37] It seems unlikely that this impact will be less severe for start-ups. In addition, the number of consumers, start-ups in the United Kingdom will have nearly unhindered access to; will reduce from more than 500m (EU28 inhabitants) to around 66m (United Kingdom's inhabitants). In combination with the predicted decreasing of GDP in the United Kingdom, falling sales opportunities are to be expected. Because of the economic mechanism that a loss of GDP comes along with a reduction in employment, Brexit may affect the United Kingdom´s employment levels twice:

- first, by the general reduction in economic growth
- second, by an expected lower trade volume with the EU[38]

Demand from other EU countries constitutes of the overall demand for United Kingdom´s goods and services and approximately 3 million jobs. However, these jobs will not necessarily be lost. They depend on the general openness of United Kingdom and the trading activity with the EU after Brexit and with other countries.[39]

b) Impacts on funding and access to finance:

Problematic is the expected decrease of GDP. Indeed, there is no direct connection between a decrease in FDI and a possible decrease in available venture capital, but a descend FDI indicates a less attractive environment for investors.[40] In summary, the emphasized negative effects on the United Kingdom's financial market, the additional regulatory burden to do Venture Capital business with continental Europe, and the loss of economic welfare and employment will decrease the attractiveness of the United Kingdom for institutional Venture Capital investors.[41] Access to the EIF and participation in the Horizon 2020 program is a prerequisite for obtaining venture capital within the framework of the Venture EU funds.

The United Kingdom is also a participant in the European Research Area. Due to the importance of research, it is probable that the United Kingdom would continue involvement in European Union framework programs within the European Research Area as an associate member.[42] The United Kingdom might be able to obtain access like

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[36] Tobias Kollmann, Christoph Stoeckmann, Simon Hensellek, Julia Kensbock, *European Startup Monitor 2016* (2016).
[37] Patrick Bisciari, *A survey of the long-term impact of Brexit on the UK and the EU27 economies* (National Bank of Belgium 2019).
[38] Monique Ebell, James Warren, *The Long-term Economic Impact of Leaving the EU* (2016).
[39] Alexander Groh, Heinrich Liechtenstein, Karsten Lieser, Markus Biesinger, *The Venture Capital and Private Equity Country Attractiveness Index 2018* (2018).
[40] Holger Breinlich, Elsa Leromain, Dennis Novy, Thomas Sampson, *Voting with their Money: Brexit and Outward Investment by UK Firms* (Centre for Economic Performance 2019).
[41] Alexander Groh, Heinrich Liechtenstein, Karsten Lieser, Markus Biesinger, *The Venture Capital and Private Equity Country Attractiveness Index 2018* (2018).
[42] UNESCO, *UNESCO Science Report: towards 2030* (UNESCO Publishing Paris 2015).

16 further associated countries. All member states contribute to a 7-year budget for innovation and research. In the future, the allocation and availability of these funds would have to be renegotiated between the European Union and the United Kingdom and any shortfall of funds would have to be managed by the United Kingdom.[43] When the United Kingdom exits from the European Union, there is no longer access to European Union structural funds, which are widely used in the financing of research-related infrastructure. During the last framework program, the United Kingdom was the recipient of €8.8bn from the European Union and contributed €5.4 bn.[44]

c) *Impacts on access to workforce*:

Currently, there are approx. 3 million European Union citizens based in the United Kingdom and around 1.2 million Britishers residing in various European Union countries and there is an uncertainty surrounding the future of both these groups.[45] Regarding the ranking of which country has the fastest-growing tech worker populations, the United Kingdom also lost four ranks (from 3rd to 7th placed) from 2016 to 2017.[46] The share of start-ups founded by migrants is immense, and the total entrepreneurship activity of them is considerably higher than that of the United Kingdom born lifelong residents.[47] Depending on the regulation of migration, the easy access to talents and tech-workforce could be restricted intensely. It is obvious that the free movement had drastically increased the influx of European Union citizens into the United Kingdom.

Summarising, it can be determined that the macroeconomic changes due to Brexit have a significant impact on start-up ecosystem of the United Kingdom. This causes a direct inhibitory impact on already existing and possibly launching start-ups in the United Kingdom. Moreover, the start-up ecosystem is threatened because the circumstances change in an entrepreneurship-unfriendly direction. Many advantages of the European Union given conditions as a start-up ecosystem are in danger.

Implications for entrepreneurs

After reviewing developments and impacts from a macroeconomic perspective, the microeconomic implications by these changing conditions from a start-up perspective are discussed now. Changes in a complex, modern and open economy impact start-ups concerning the loss of trading advantages, foreign direct investments, number and type of employees, regulations, productivity, and currency value.[48]

Losing unhindered access to the European Union Single Market and thus sales opportunities is a key disadvantage for the United Kingdom's start-ups with focus on sales of goods or services. Possible restrictions through non-tariff barriers risk supply chains and fast delivery of goods. An international expansion from the United Kingdom to other EU27-countries seems difficult. Therefore, looking at the decline in trade, existing start-ups in the United Kingdom should leave the United Kingdom if they are selling their products and services to EU27 or countries with existing EU27 agreements. If the government enhances the United Kingdom's market quickly concluding bilateral agreements for example with the United

[43] UNESCO, *UNESCO Science Report: towards 2030* (UNESCO Publishing Paris 2015).
[44] Carlos Frenk, Tim Hunt, Linda Partridge, Janet Thronton, Terry Wyatt, *UK research and the European Union: the role of the EU in funding UK research* (The Royal Society 2016)
[45] Full Fact, 2016.
[46] Atomico, *State of European Tech 2018* (Atomico 2018).
[47] Mark Hart, Jonathan Levie, *Global Entrepreneurship Monitor: United Kingdom 2017 Monitoring Report* (2017).
[48] Gemma Tetlow, Alex Stojanovic, *Understanding the economic impact of Brexit* (2018).

States, this could be a compensation for losing the EU27 market and so start-ups could stay in the United Kingdom.

The expected decreasing FDI and possibly fewer investments in the United Kingdom´s start-ups are the second reason for start-ups to leave the United Kingdom or raise up in another European Union country. In particular, if start-ups in the United Kingdom are dealing with border-crossing finances or protective data, they should relocate the head office to continental Europe to avoid conflicts with changing or contradictory policies. At least, there would be many legal issues for international-oriented start-ups in the United Kingdom. Because of attendant uncertainty to Brexit negotiations and future status of migration regulation, it could be expected that the United Kingdom's attractivity as a valuable location for founders and tech workers decrease. The total entrepreneurship activity would also subside similarly. This affects the whole start-up ecosystem and results in a less dynamic development of all domains the start-up ecosystem is divided into.

According to Charles Darwin's theory of biological evolution by natural selection, Brexit could be seen in analogy as a fundamental change in the ecosystem. Following Darwin, the survival of the fittest could mean that most adaptive companies could survive changes like this. In that perspective, the Brexit could suppress established companies and releases markets to new businesses. Highly flexible start-ups are more capable of anticipating changes and reacting quickly to new conditions. So, the Brexit also could be understood as a chance for entrepreneurs to be flexible and agile, getting new opportunities and using the new order to create a new business. To reduce the negative effects on daily business and to develop new business models, start-ups should further know the legal issues regarding trade, finance, and migration.

Conclusions: implications for decision-makers

The United Kingdom, as a member of the European Union, has very advantageous market access, which is mostly unregulated and provides an enormous and very high-income customer market. The United Kingdom has the second-largest pool of talent in the European Union and a steady influx of new migrants, who make up a significant proportion of employees in start-ups as well as start-up founders. In addition, the United Kingdom still provides by far the best finance and funding conditions among the European Union countries. The strength of these basic prerequisites is also reflected in the outcomes of the ecosystem, as the United Kingdom is able to create the most scaleups and unicorns in the European Union and provides a particularly strong exit environment.

Brexit has to be designed to induce fewer devastating consequences than those of a hard Brexit. This includes early clarity about Brexit conditions and the future relationship with the European Union, considering the required framework conditions of the start-up ecosystem. There is also the necessity to obtain access to the EIF and the European Research Area to enable research and funding. The government of the United Kingdom should be aware of the drastic consequences that especially a hard Brexit entails for young innovative start-ups and the whole start-up ecosystem in the United Kingdom.

Enhancing student knowledge and skills with publishing opportunities: a case study at Coventry University

Dr Ben Stanford and Dr Steve Foster*

Introduction

When students embark upon an undergraduate law programme they soon realise that they will be tested not only on their knowledge of the law and its application, but also their ability to articulate their answers using clear and professional legal language and grammatical skills. Students will be told at the outset of their course that these skills are part and parcel of being a professional lawyer and that without such skills the client or general reader will not benefit from a lawyer's research and knowledge. In other words, law and legal rules are complex, and an inability to explain them clearly and expertly will render that knowledge redundant.

In order to encourage students to acquire these skills we point them towards professional writers as an exemplar for good writing and communication skills. For example, a good legal textbook writer not only covers the essential rules and sources in a legal area, they also present that information in a structured and coherent way, displaying expert skills in terms of research, referencing and grammar and legal style. So too, authors of academic articles and case commentaries are recommended to allow the student to learn and copy necessary discursive and analytical skills when examining specific legal dilemmas or recent case and other developments.

In short, we expect students to read these sources in order to emulate the necessary writing and other skills in their own assessments. Yet, how often do we allow those students to employ those skills for the purpose of contributing their work as part of legal literature? Student assessments inevitably ask the student to write and present legal information as students, albeit very good ones. The assessment is to be read and marked as a student essay, and although the student will try to emulate a professional writer's skills, they will not benefit from the true feeling of being a legal writer. In other words, can we expect students to acquire these writing skills fully, or most effectively, if we do not put them in a position where they can imagine their work being published and read as is the work of professional writers? This is not to denigrate the benefit of traditional student assessments, but this paper explores the benefits of making the student a legal writer and having their work published, and examines how Coventry Law School has facilitated such skills and opportunities on behalf of students.

The rationale for encouraging writing and publication for students

As noted in the introduction, a significant criterion in marking student assessment is their ability to articulate rules and principles in a clear and professional fashion and to employ sound and sophisticated grammatical and writing skills. There are, of course, other skills that are expected from the students, yet in practice law staff find that weak academic writing skills are a large contributor to student failure and low grades. Every effort, therefore, needs to be made to ensure that student work meets the expected standards of appropriate and effective legal writing.

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At Coventry Law School, in addition to teaching general legal skills on Legal System and Method courses, a specific module – Law Study – is delivered on year one of the LLB programme, dedicated to teaching assessment skills, including effective writing in essays and other assessments.[1] The idea of encouraging student writing and publishing, therefore, builds on this module and the School's general desire to enhance student writing. Although the School has achieved some success in this area, it was felt that more needed to be done to encourage more professional and effective academic writing simply than pointing students to appropriate guides and 'warning' them of the consequences of poor grammar and academic writing. Students needed positive encouragement to improve their writing skills, and visible rewards for displaying these skills.

Accordingly, a number of projects and ideas have been formulated and executed in order to encourage the development of student writing skills, most noticeably through the opportunity to emulate the professional writer and to get their work published. Additionally, the School has devised a number of assessments which encourage the student to appreciate the academic importance of good writing for the benefit of all readers beyond the person marking their work, whether that be a future employer or client, fellow students or the general reader of legal literature.

In summary, the rationale for these projects and methods was as follows:

- To encourage the improvement of student writing, academic and analytical skills, including enhanced referencing skills.

First, it is expected that when students know that their work may be published, and being aware that their work is intended to be read and understood by a wider audience, this would result in greater care being taken over matters such as spelling, grammar, structure and coherence. Specifically, by asking the students to emulate professional academic writers, they would be more willing to read academic writing and note the structure, style and in particular the referencing adopted by such writers. This might prove more successful than simply referring the students to academic reading and referencing guides. This can often be unsuccessful as students choose not to carry out such research in the belief that style and referencing does not matter.

- To encourage student engagement in their assessments and in particular to enable them to appreciate the importance of these skills.

Second, setting innovative and authentic assessments that require the students to emulate professional academic writing encourages students to buy into the assessment and to see the rewards of good academic practice. In particular, the presence of a reward for good work – in the form of publication of what is regarded as the best student work – makes the student appreciate the benefits of attention to detail, sound writing and referencing skills and the ability to explain legal data and case law in a competent, effective and clear manner. This also encourages student ownership of their assessment. The work is not simply being submitted by a student to lecturers (along with hundreds of other pieces of work), but

[1] Students at Coventry are referred to guides on academic writing and assessment skills: Steve Foster, *Legal Writing Skills*, 5th end. Pearson 2019.

represents the student's attempt to contribute to the legal area and produce work that others may read.

- To encourage student pride and satisfaction in their assessments, through higher marks and publishing opportunities.

Third, being the owner of that piece of work and knowing that it may be considered for publication offers a double incentive to the student. Following the coursework brief and the style of professional writers incentivises the student with respect to the aspiration and expectation for higher marks, but it also provides them with the opportunity to display their skills to others, whether that be friends and family, fellow students or future employers or publishers.

- To 'bridge the 'gap' between staff expectation of student work and the skills traditionally delivered by students in their work.

Fourth, there is often a discernible gap between what staff expect from student work and what students think is an acceptable source of information and a good piece of work. By setting students academic writing tasks in assessments, and referring students to professional academic writing to guide them, students are made aware more directly of the type of academic literature staff read and regard as good writing, and, accordingly of the writing and academic skills expected of students in their assessments.

- To prepare students more effectively for the world of work and the expectations of employers, clients and others who will digest their work; and, more specifically, to enhance student CVs and job applications

Lastly, modern universities regard employability as high on their agenda and it is their role to prepare their students for the world of work and to inculcate strong academic and other communication skills in their students. In particular, students will be expected to display expert English and communication skills when explaining and applying the law, and these skills can be practised and honed during the course and in assessments. Encouraging professional writing, particularly through publication opportunities, will assist the students in the future; from constructing effective CVs and application letters, to providing professional advice to clients, or to attracting professional publishers to accept their work. Moreover, as students approach the end of their studies and increasingly focus their efforts on securing work opportunities or further study, many feel more confident and appreciative of their ability to join the legal community as established writers.

The methods employed to encourage publication in particular modules

The opportunities for students to produce work for possible publication were provided both via formal assessments and by students deciding to contribute their previous work, or their independent research, to the *Coventry Law Journal* – the Law School's in house law journal. In the former case students were informed that the best work might appear in the journal, but all students were tested on their ability to replicate the skills of a professional author and

imagine their work to be read by an audience beyond that of the marker. In that way, it was hoped that the students would appreciate the benefits of good, professional writing skills, whilst at the same time being encouraged to submit their best work (with the reward of selection for publication). In addition, students are encouraged by tutors to submit their previous or independent work for publication. It is also promising that some students take the initiative, without being prompted by their tutors, and submit their work for consideration. This can benefit the student by increasing their confidence as an academic writer, preparing themselves for a future career in academic writing or simply enhancing their CV.

Academic and Career Development: writing case notes for potential employers

The purpose of the Academic and Career Development module is primarily to enhance students' existing legal and professional skills with respect to research, writing, and legal and business awareness, and therefore to better prepare students for the working world. Owing to its more practical, skills-based and somewhat unconventional nature of delivery and assessment, this module has traditionally been difficult to engage students with. As such, the co-authors were tasked with redesigning the module for the 2017-18 academic year to enhance student satisfaction, engagement and appreciation. This was achieved by designing a forward thinking, innovative and authentic assessment, with the opportunity for students to publish aspects of it after submission and feedback.

The authentic assessment took the form of a job application to a fictitious law firm, 'Beaverbrook & Sons Ltd'.[2] The job specification outlined certain functions that the positions would entail, such as researching, drafting educational documents for outreach work, and assisting legal practitioners. To demonstrate suitability for this 'role', the assessment required the students to submit a cover letter, answer basic competency questions that focussed upon key academic skills, and lastly, of most relevance to this article, to write a short, critical case note on a recent case decided in the UK domestic courts. The students are told that the best case notes will be included in a special issue of the *Coventry Law Journal*.

The case note task was intended to promote student engagement, employability and key skills, as students were instructed to focus on a recent case which would be of interest to the public or which was important for students to learn about. Crucially, this encouraged the students to consider the role that the law plays when responding to current legal problems that affect wider society, but also to consider their audience and tailor their writing accordingly. Moreover, embedding some level of public engagement into assessments helps students to consider their social responsibility and roles as future leaders.

Human Rights and Civil Liberties: writing case notes

As with the exercise carried out in the Academic and Career Development module, above, students on this module were required to construct a case note or case commentary as part of the coursework assessment. This would take the form of one or a series of case notes based on recent human rights disputes heard in either the domestic courts in the United Kingdom or before the European Court of Human Rights, which adjudicates disputes concerning the application of the European Convention on Human Rights. Students were

[2] See further Ben Stanford and Steve Foster, 'Enhancing Key Legal Skills and Student Engagement through an Innovative, Authentic Assessment' in Claire Simmons (ed) *Teaching and Learning Excellence: The Coventry Way* (Coventry University Group, 2019) at <https://acdev.orgdev.coventry.domains/application/files/2715/6293/3552/J282-19_The-Coventry-Way-eBook_V7.pdf> accessed 5 August 2020.

required to construct the case note in between 500 or 1000 words by providing the facts and decision of the court together with an academic analysis of the decision and its importance in the area of human rights.

Students were encouraged to present the case note in a style similar to that used in established legal journals, including a brief introduction to the case and its context, the facts and decision and an academic commentary, where the student can stress the reasoning of the court and the impact of the case in the general and specific area of human rights. Following the prior success of the Academic and Career Development module, the students are told that the best case notes will be included in a special issue of the *Coventry Law Journal*, and that they can expand the case note for inclusion in the general journal.

The benefits of submitting such a task are varied. Not only does the student learn and demonstrate general case law skills that can be utilised in other modules, but also they can better appreciate the importance of the dispute and its significance to the study of human rights adjudication. The student also learns how to articulate these matters to an intended audience, whether that be professional lawyers, academics or other students. This enhances their understanding and appreciation of the case as well as practising professional writing skills. The possibility of getting the work published also increases their desire to get things right and take extra pride in their work.

Human Rights and Civil Liberties: writing critical essays

Although law students are given ample opportunity to write essays and practice their essay skills in all modules, in the Human Rights module we set the students the task of writing a critical essay or journal article on human rights which was different from the traditional essay in a number of respects.

First, the student had to devise their own title for the essay; they were however given a number of areas from which to choose, including the mechanism for protecting rights and various substantive rights. This encouraged the students to focus their research and writing on a topic of their choosing, in accordance with a title set by themselves, thus encouraging individual thinking and research. Second, the coursework brief often required students to write the essay as an article in their own imaginary journal. This meant that they would emulate professional writers in established journals, and would need to be mindful of what the reader would want to receive and in what style. It also encouraged adherence to established referencing styles as well as encouraging a sense of professionalism on behalf of the student. Third, the students were informed that their work could be chosen for publication in a special issue of the *Coventry Law Journal*, thus promoting healthy competition and added pride in their work.

Students are given the choice to write an essay and/or a case note, or a series of case notes, or a short story and case note; thus, they are allowed to choose in accordance with their preferred, or presumed, strengths and experience. Students choosing this option found that they had to adopt a slightly different approach to essay writing than in previous assessments, and some struggled to write as an author as opposed to a student. However, in general students benefitted from the brief in that it encouraged ownership and an added sense of pride, as well as making them more familiar with good academic writing. The best essays were published in a special issue of the journal and some students reworked their essays and submitted them to the official journal.

Human Rights and Civil Liberties: the short story

The idea of getting late students to write short stories was presented to us in 2010 by Alison Morris from the Department of Creative Writing. The idea was that it would allow students outside the department to convey their knowledge and appreciation of their chosen study via works of fiction; thus encouraging both creative writing and a different and wider understanding of their area. It was then decided to introduce the short story task as an option to students studying human rights, and the option was extended to first year modules for a number of years. It has been used on the Human Rights module for ten years and it is felt that this module lends itself most effectively to this method as human rights cases inevitably involve exceptional human stories, controversies and predicaments.

Providing the student with the opportunity to write a short, fictional story as part of their human rights assessment obviously tests and rewards different skills than those tested in the case note and the critical essay above. However, although the student is not being assessed directly on their legal knowledge and appreciation, it is clear that the student needs to employ a number of generic legal and other skills to complete the task, discussed further below.

Here the student must choose a human rights case that has been decided in the domestic or European courts in the previous six months. They are then encouraged to read the case for the purpose of discovering why the case was brought and who was involved in the case. Although the student will be required to provide a brief introduction to the case and why it was chosen to base their story on, the task now is to construct a short and fictional story including characters, plot and any underlying message. The piece, therefore, must be a story and although based on the case facts, it is fictional and the student is being tested on their ability to construct a piece of fiction, to engage and interest the reader, and to convey a central theme or number of emotions through the central characters. It can be in any genre – e.g. science fiction, drama, romance, political thriller – and the student will be assessed on their ability to present a well-structured, well-written and engaging story.

Writing the story tests a number of transferable academic and even legal skills. Structure, clarity of writing, employing appropriate phrases and building a convincing story are skills that are similar to those expected in essay writing and answers to problem questions. The student also has to read and appreciate the case to build an understanding of the legal dispute and the effect it has on the parties. In that sense, the student gains a fuller appreciation of case law, which can be transferred to other assessments and modules; it thus hopefully encourages students to read and make sense of cases.

However, the main benefits from undertaking this task are that it encourages those who have a skill and passion for creative writing and thinking, and that it offers the possibility that their story may be published. The best stories are published in a special issue of the journal and this provides the student with an opportunity to present their unique work to an audience who are not simply reading the piece to enhance their legal knowledge, but to be entertained and to read a story that will make them think about the law and human predicaments. Of course, this exposes the student's thoughts and feelings to that audience, but the short story assessment is an option and all students need to consent to publication of their story (as do all student contributors).

Over the years, student stories have covered a variety of issues and legal claims, but claims related to assisted suicide, celebrity privacy, prisoners' rights, police powers, national

security, demonstrations and deportation and extradition have been especially popular vehicles to portray the experiences of those involved in those disputes. All students are warned against damaging language, but are otherwise given a free hand to write their story, stressing that the work is one of fiction.

In our experience, not only do students enjoy this exercise, they perform at a high level – often slightly higher than those who choose the more traditional assessment, although some struggle with the task and might in hindsight have performed better had they chosen another assessment. Those choosing the story option must also present at least one case note or legal piece, so they must show more general legal skills in the whole assessment. Experience shows that these students are in general capable of displaying both skills, although some display better skills in one or other of the assessment tasks. In particular, students who write a story take greater care with presentation and grammar and thus benefit from the task, both in terms of gaining high marks and establishing their own sound writing skills.

Encouraging students to publish their dissertations, essays or independent research

In addition to encouraging enhanced writing skills and publication opportunities in specific assessments, students at Coventry – both undergraduates and postgraduates – are given the opportunity to forward their academic work and research to staff in order to be considered for publication in the *Coventry Law Journal*. The journal is published twice a year in house and is also available on Westlaw UK. It is now celebrating its twenty-fifth anniversary and publishes articles, recent developments, case notes and book reviews written by academics at Coventry and from other national and international universities. The journal encourages early researchers and in particular allows students to publish their work and research. Postgraduate students are also encouraged to submit their dissertations and extended courseworks and this can lead to further publications and the beginning of their academic careers. Additionally, undergraduate students can submit work previously submitted in other modules, apart from those referred to above, or they can submit independent research for publication. In some instances, the student is paired with a member of staff to write a joint piece on a legal issue or recent case.[3]

These opportunities are provided in order to augment the School's desire to enhance students' academic writing, but they also provide a number of more specific benefits. First, publication in an official journal can enhance students' employment opportunities, and more specifically can kick start a student's academic and publishing career. Second, publication is a source of student pride and satisfaction, encouraging them to produce their best work and in a style that is consistent with professional authors. Third, joint pieces with staff allows collaboration between staff and students so that both sides benefit from each other's contribution and expertise. Fourth, publication is a mark of student success and excellence, illustrating to the student that they have produced publishable work, and showing other students what is possible.

Feedback, outcomes, strengths and weaknesses

[3] For example, in 2019 two students wrote joint case notes with Dr Steve Foster for the journal on recent cases in vicarious liability: see Steve Foster and Marie Clarke, 'Expanding the law or unruly justice? The development of vicarious liability and the decision in Barclays Bank' (2019) 24(1) *Coventry Law Journal* 93-102, and Steve Foster and Samuel Dixon, 'Vicarious liability for employee assaults: is there any limit to liability after Mohamud?' (2019) 24(1) *Coventry Law Journal* 102-111.

The above assessments methods and projects were met generally with strong student approval and positive feedback. Comments on the respective module evaluation questionnaires (MEQs) were very positive overall, although a small number of students suggested that we revert to more traditional methods, and that they found the assessment briefs a little confusing and quite demanding. The students on the Human Rights module were particularly positive regarding the choice and innovation of the assessment methods available to them and in particular the opportunity to write a short story – something very different from other methods of law assessments.

The Academic and Career Development module witnessed a sharp increase in student satisfaction in particular. As noted earlier, this has traditionally been a difficult module to engage students, but with the innovative changes to the module structure, assessment and teaching materials, student satisfaction, engagement and appreciation for the module's purpose increased significantly. Following the module redesign and the introduction of the opportunity to publish student work, overall student satisfaction increased from 71 per cent to 89 per cent in 2017-18, which was replicated in 2018-19 again at 89%. Similarly, the student satisfaction for the Human Rights module has been consistently high since the introduction of the opportunity to publish, with an overall student satisfaction of over 90 per cent for three consecutive years.

Other indicators of success can be found in the respective MEQs for these modules. For example, feedback has been very positive with respect to questions such as 'this module has challenged me to achieve my best work' and 'this module has provided me with opportunities to apply what I have learned'. The positive responses to both questions reflects to some extent how students perceive and appreciate the opportunities to publish.

With respect to other tangible outcomes, we witnessed a growing increase in the quality of student work and the marks attained in the relevant modules, particularly at the higher end. However, this was somewhat offset by the lower marks achieved by students at the lower end, who may have struggled to come to terms with the nature and demands of this form of assessment. There was also an improvement in students' referencing skills in these modules, although this was not always evident in other modules. There was also a positive response by the students whose work was published, together with pleasing engagement from the other students who enjoyed reading their fellow students' work.

The strengths identified in these projects included an increased engagement by many students in the assessment process and in the modules as a whole, and a marked increase in the quality and clarity of many students' work. There was also a satisfying response from the general student body, who enjoyed reading the special issues of the journal and other work published by students. Ultimately, all of the objectives underpinning the rationale discussed earlier were achieved in part, and in some cases beyond expectation, particularly greater student engagement with modules, assessment and academic literature.

There were, however, some weaknesses identified in the projects. Some students failed to engage and buy into the assessments and their desired outcomes, and as a result performed below their skills and expectations. Thus, despite being offered different tasks with varied choices, some students did not favour assessments that tested these professional writing skills and who accordingly fared worse. More specifically, in hindsight some students chose the wrong option – for example a number of students chose the short story option believing that this was an easy option, then discovering that they lacked the necessary creative juices.

Conclusions

Coventry Law School remains committed to teaching students sound academic writing skills and offering assessments that will test and improve those skills. In that sense, Coventry is consistent with the aims of all other law schools that view these skills as essential at both undergraduate and postgraduate level.

However, where Coventry might lead the way is in providing students with the opportunity to have their work published, or at least to emulate the skills of the professional academic writer. The School has provided such opportunities by encouraging students to publish their work in the School's journal as well as in devising assessments that allow the students to imagine themselves as legal writers and not just law students. These options not only encourage students to read more, and qualitatively better, legal literature, but incentivise them to write more professionally and improve their writing and analytical skills, not only on their course, but for the future.

The authors are mindful of the demands of these initiatives, and their possible negative outcomes on some students; although staff remain committed to ensuring such students learn those skills and are allowed to take part in assessments that are more traditional. However, they are delighted with the positive outcomes derived from the projects and feel that they have enhanced the student experience and the skills of our law students.

STUDENT CASE NOTES

Hri Agnihotri

Director of Public Prosecution v Ramsey Barreto [2019] EWHC 2044

Introduction

It is evident that 'using a mobile-phone undoubtedly distracts drivers.'[1] However, in *Director of Public Prosecution v Ramsey Barreto*,[2] the High Court held that s.41D of the Road Traffic Act 1988 and Regulation 110 of the Road Vehicles (Construction and Use) Regulations 1986 does not prohibit all use of a mobile phone whilst driving. This case highlights how the legislation might need to be revisited, to ensure it can meet the challenges of modern society.

Facts and decision

The respondent had been observed by a police officer using his mobile phone device to film a car crash scene as he was driving past the accident. The police officer found the device on the respondent's lap still in video mode, but the respondent denied he was using it; arguing that it was his son who was recording. Both the Magistrates Court and Crown Court rejected his argument and found that he was the one recording the accident. He was initially convicted in the Magistrates Court, but this was overturned by the Crown Court, which held, adopting the same reasoning in the case of *R v Nader Eldarf,*[3] that filming with a mobile phone did not amount to 'using' it for the purposes of Regulation 110.[4] The DPP appealed against this finding and the High Court concluded that the decision to quash the conviction was correct on the basis that 'the legislation does not prohibit all use of a mobile phone while driving.'[5]

Analysis

The decision should not be seen as 'a green light for people to make films as they 'drive', as Lady Justice Thirlwill indicated that it was still feasible that the respondent's conduct could amount to either careless or dangerous driving.[6] This emphasises that criminal law is not a straightforward area for the courts and there are various issues to be considered by the court in interpreting specific legislation. The decision in *Barreto* could affect previous decisions where defendants believed they were wrongly convicted in similar circumstances, and will set a precedent for future cases. This could create problems in deciding what function the device is performing at the time of the alleged unlawful act. It is likely that unless reform is proposed 'as a matter of urgency,'[7] there will be more cases in the future that will struggle to come to a definitive judgment

[1] David L. Strayer and Joel M Cooper, 'Driven to Distraction' (2015) 57 Human Factors 1343.
[2] [2019] EWHC 2044.
[3] *R v Nader Eldarf*, unreported, Crown Court, 21 and 23 September 2018.
[4] Road Vehicles (Construction and Use) Regulations 1986, SI 1986/1078.
[5] *Director of Public Prosecution v Ramsey Barreto* [2019] EWHC 2044, 8.
[6] *Director of Public Prosecution v Ramsey Barreto* [2019] EWHC 2044, 9.
[7] Adam Snow, '"Interactive communication" and driving - does it matter whether it is a mobile or camera?' (2019) 83 J. Crim. L. 425, 429.

This case illustrates that mobile phone legislation has become outdated in response to how quickly technology has evolved. When the legislation was created, very few mobile phones had a camera/video function. Therefore, the interactive communication function was directed at mobile phones that functioned at a basic level, rather than the present modernized smartphone. Consequently, the respondent would have fallen within Regulation 110[8] if he had been livestreaming the recording of the accident. Regulation 110 prohibits the use of a hand-held telephone or device that perform an interactive communication function by transmitting and receiving data. This includes sending and receiving texts and phone calls, and providing access to the internet. Lord Justice Thirlwill adopted a narrow approach to the interpretation of Regulation 110 (6) (a),[9] in comparison to the approach adopted in *Smith v Procurator Fiscal*.[10] Knowing that the scope of the interactive communication function has been narrowly interpreted could lead to further problems, as drivers would feel confident in relying on *Baretto* as a defence.

As suggested by LJ Thirlwill, the legislation should be reviewed, which 'is a matter for Parliament, not the courts.'[11] The case is important to law students because it is reflects the complexity of criminal law and its modern application. Moreover, *Baretto* illustrates the process of statutory interpretation, where the High Court adopted the literal rule to interpret this legislation. Although it recognises Parliament as the supreme lawmaker, and upholds the separation of powers, this can create injustice, providing the opportunity to law students to recognise that judges have little discretion to adapt the law to accommodate changes in society. It thus demonstrates to law students that legislation needs to be reformed and updated to match and support ongoing and evolving technological changes. Legislation needs to ban the use of modern features that can be used in the latest hand-held electronic devices because of the dangers it can create. This should include devices used for changing songs or checking weather apps.

[8] Road Vehicles (Construction and Use) Regulations 1986, SI 1986/1078, reg. 110.
[9] *Ibid,* s 6(a).
[10] [2017] SAC (Crim) 16.
[11] *Director of Public Prosecutions v Ramsey Barreto* [2019] EWHC 2044, 12

Poniso Dinah Lipimile

R v Foy [2019] EWCA Crim 1156

Introduction

Substantive criminal law is continually impacted by criminal procedure and the rules of evidence. In the present case the court granted leave to appeal because it was arguable that there was a mental condition which could have allowed the defence of diminished responsibility using 'fresh evidence'.

Facts and decision

The victim, Mr Volpe, was on his way back from the supermarket when the appellant stabbed him in the stomach. The appellant, who says he spent the previous 2 days continuously consuming alcohol and cocaine, claimed to be having auditory and visual hallucinations, which put him in a paranoid state that made him unaware of his actions. The appellant claimed he did not remember seeing the victim and was unaware that he had seriously injured someone. He did however state that he understood that he had a knife in his hand and had used a deliberate stabbing motion. The appellant was convicted of murder and sentenced to life imprisonment (with a minimum term of 17 years).

The Court decided that diminished responsibility stood as a possible defence for the appellant. A psychiatric report produced by Dr Joseph after the appellant's conviction suggested that there was a severe abnormality of mental function that substantially impaired his responsibility, concluding that the appellant experienced an acute transient psychotic episode independent from his alcohol and drug use. In the Court's view, the evidence provided by Dr Joseph met the requirements for the defence of diminished responsibility outlined in s.52 of the Coroners and Justice Act 2009,[1] specifically subsection 1(b) requiring the abnormality of mental function to have 'substantially impaired' the defendant's ability.[2]

Section 23 of the Criminal Appeal Act 1968 allows the court to receive new evidence and order the production of any document required for the proceedings. Section 23(2) of the Act outlines the criteria to receive fresh evidence and this was applied in *Erskine*,[3] where it was held that if the defendant is allowed to advance on appeal a defence and/or evidence which could and should have been but was not put before the jury, the trial process will be subverted. Using the criteria in the statute and case law, the Court decided to allow the leave to appeal against the conviction using the 'fresh' evidence.

Analysis

It is suggested that the Court should have clarified that the appeal was allowed because it was arguable that the defence of diminished responsibility was available at the first trial, and not because the new psychiatric evidence enabled the appellant to meet the criteria for diminished responsibility. Possible misinterpretations could lead to appeals with new psychiatric evidence for previously failed attempts to use diminished responsibility as a defence.

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[1] Coroners and Justice Act 2009 s.52 (1) (b).

[2] At first instance, it was decided that the impairment was not substantial because of Dr Isaac's report, and consequently, the defence not pursued on this new evidence.

[3] [2009] 2 Cr App R 29, [39].

The word "substantial" was defined in *R* v *Golds,*[4] as "important or weighty, and this was a relevant determining factor in the case as Dr Isaac believed that had the appellant not been voluntarily intoxicated, the abnormality of mental function would not have substantially impaired his ability. The ruling allows a possible argument for the defence of diminished responsibility where there is voluntary intoxication, on the basis that, the abnormality of mental function was more substantial than the intoxication. For students, this case highlights the nature of diminished responsibility as a defence and the interpretation of legislation to allow the use of the defence. The case demonstrated the subjective approach adopted by the courts when considering new evidence, specifically for the defence of diminished responsibility that refers to the state of mind of the appellant.

Conclusion

As shown by the different doctors' reports, determining the state of mind of the appellant can produce different outcomes. Defences such as diminished responsibility that involve the mental state of the appellant, needs to be applied carefully, ensuring sufficient explanation of the application of the legislation to avoid misinterpretation. The aim of s.23 is to ensure that the court makes the decision in the interest of justice. By allowing the appeal based on the fresh evidence, the courts made a just decision using statute and case law, but could have provided some further explanation to avoid any misunderstanding of how the decision was made.

[4] [2016] UKSC 61, [2016] 1 WLR 5231.

Cecily Wijenje

R. (on the application of TT) v The Registrar General for England and Wales and others [2019] EWHC 2384

Introduction

With transgender identity increasingly being recognised by the law, the Gender Recognition Act (GRA) 2004 allows people to gain full recognition of their acquired gender. However, in *R (on the application of TT) v Registrar General for England and Wales*[1] the court had to deal with the rejection of the parental status of a transgender man who requested to be listed as the father of his child on the birth certificate.

Facts and decision

In 2013, the claimant (TT) began medically transitioning into a male. In 2016 at a Human Fertilisation and Embryology (HFEA) certified clinic,[2] TT stopped the testosterone treatment in order to get pregnant. Whilst obtaining the treatment at the clinic, TT was registered as a male patient. In January 2017, TT applied for a Gender Recognition Certificate confirming his male status and on 11th April 2017, the Gender Recognition (GR) certificate was issued, confirming his status as male. The certificate's legal effect is outlined in s.9 (1) of the GRA, which states that "where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender."[3] In April, TT became pregnant, which recognises him as a legally registered pregnant male. However, in January 2018, following the birth of the child, the Registry Office informed TT that he would have to be registered as the child's 'mother' as opposed to the 'father' or 'parent' on the birth certificate. TT claimed judicial review in April 2018 to quash the decision of the Registrar General, but the claim was dismissed. It was held that "the status of a person as the father or mother of a child is not affected by the acquisition of gender under the Act, even where the relevant birth has taken place after the issue of a GR certificate".[4]

Analysis

This case is important to students as a case involving Article 14 of the European Convention on Human Rights, governing protection from discrimination in the enjoyment of Convention rights. It is also important because it recognises a new and developing area of law that demonstrates the impact of gender transitioning on parenthood and the willingness of Parliament to create laws that adapt to the changes in society. However, consistency is needed in order to provide legal clarity and justice with the existing law. This is evident in the HFEA that defines the 'treatment of services' as "the purpose of assisting women to carry children."[5] However, as a transgender male TT and others like him are offered a service under this definition as a male, which lacks clarity as to where TT and other transgender males legally stand.[6] This lack of clarity is evident in the case and may have played a role in the dismissal of the claim.

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[1] *R (on the application of TT) v The Registrar General for England and Wales* [2019] EWHC 2384, [2019] WL 04648983.
[2] Human Fertilisation and Embryology Act 1990.
[3] *ibid*, s 9 (1).
[4] *R (on the application of TT)* (n 1) para 280.
[5] i*bid* (n 2), s 2.
[6] *R (on the application of TT)*, para 21.

Consequently, reform is required and needs to be considered by the government to fully integrate transgender rights in society and to avoid inconsistencies in legislation such as the GRA 2004, which seeks to protect transgender rights, yet limits the rights provided by the legislation. This is evident in s.12 of the Act, which provides that, "although a person is regarded as being of the acquired gender, the person will retain their original status as either father or mother of a child."[7] This section thus risks gender dysphoria among the individuals that the Act seeks to protect. Reform should aim to widen the scope of gender, considering gender-neutral options to ensure the full recognition of acquired identities across legal documents that could lead to better future decisions.

[7] *Ibid*, s 12.

Stephanie Bananzi

R (on the Application of LXD) v Chief of Merseyside Police [2019] EWHC 1685 (Admin)

Introduction

The case of *R (on the Application of LXD) v The Chief of Merseyside Police*[1] is a rolled-up permission and substantive hearing for judicial review into the rationality of a police decision to close an investigation into a threat to kill. In this case, the High Court examined whether the police violated rights under the European Convention on Human Rights (ECHR), which have been incorporated into domestic law under the Human Rights Act 1998 (HRA).

Facts and decision

On 17 January 2019, a threat to kill the claimants was made to the effect that AB, the ex-partner of the first claimant and the father of the other claimants paid monies that was owed to his associates, EM and SM. It was made clear that failure to repay the money on the night of the 17th would result in the death of the claimants. The claimants asserted that the threat to their lives was still imminent as further incidents, such as two or three men visiting the house in mid-February, highlighted the prominence of the threat. The claimants sought judicial review into the police investigative decisions and claimed a breach of the right to life under Article 2 ECHR.

In his judgement, J Dingemans J stated that the right to life under Article 2 ECHR establishes a positive obligation on the authorities to take preventive operational measure in order to protect an individual's life who is at real and immediate risk from the criminal acts of another.[2] This was supported by Lord Bridge in *Bugdaycay v Secretary of State for Home Department*,[3] because the right to life is "the most fundamental of all human rights"

On the facts, the Court decided that there was no breach of Article 2 as the police placed a 'treat as urgent' (TAU) marker placed on the claimants' house under which the police had to respond to a 999 call within a certain period. This, in the Court's view, demonstrated that the police took the threat seriously. Further, the prompt arrest of SM and EM with bail conditions, including not contacting the claimants represented the best means to protect the claimants. This was because those who had made the threats would know the police were dealing with the matter, reducing the risk of the threats being acted on" [4]

Applying the principle of irrationality, the Court noted that in *Associate Provincial Pictures Houses Limited v Wednesbury Corporation*,[5] Lord Greene had highlighted that for a decision to be irrational it must be so unreasonable that no reasonable authority could ever come to it. In the present case, the police had taken the correct steps in investigating the incident by reviewing CCTV, obtaining mobile phone of the claimants to track down EM and SM, and obtaining search warrants to arrest the suspects.[6] In terms of closing the case, the claimants were able to return home on occasion to live there, facts of which is disputed, and there were no further incidents. This demonstrated that the threat was no longer imminent, and thus no evidence of irrationality on behalf of the defendants.

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[1] [2019] EWHC 1685 (Admin)
[2] *Osman v United Kingdom* (1998) 2 EHRR 245.
[3] [1987] 1 AC 514
[4] [2019] EWHC 1685 (Admin), 92
[5] [1948] 1 KB 223
[6] [2019] EWHC 1685 (Admin), 89

Analysis

This case is important because it demonstrates that public bodies can be held accountable for their actions, especially where human rights are engaged. Under s.6 HRA, it is unlawful for a public authority to act in a way that is incompatible with the Convention rights and the courts can scrutinise and thus ensure that public bodies do not violate individual's human rights. This is important for students, as citizens themselves, as they can gain awareness of remedial and procedural options available to them where their own human rights have been violated by a public body.

More specifically, the claim under irrationality has been criticised by academics as they assert that the courts examine the decision itself rather than the decision making process.[7] This is to ensure that the judiciary does not infringe the separation of powers, as Parliament has conferred power to make the decision on the public body not the courts.[8] However, this case, in following the *Wednesbury* principle, demonstrates that there is a high threshold for a claim of irrationality to succeed. Any decision made by the courts is after "careful and anxious scrutiny" of the claim and any breach of human rights.[9] For the police decision to be irrational and in breach of human right there must be an "egregious and substantial" [10] failure to investigate the case. Thus, the high threshold limits the possibility of the courts overstepping their judicial powers whilst still holding the government to account.

[7] Mark Ryan and Steve Foster '*Unlocking the Constitutional and Administrative Law* (Routledge 2018, 4th edition), 808
[8] Mark Ryan and Steve Foster, *Unlocking the Constitutional and Administrative Law* (Routledge 2018, 4th edition), 808
[9] [2019] EWHC 1685 (Admin), 14
[10] [2019] EWHC 1685 (Admin), 10

Ebonie Brew

R (on the application of Ngole) v The University of Sheffield (2019) EWCA Civ 1127

Introduction

This case concerned how a university deals with controversial public opinions expressed on the topic of sexual orientation by one of its students, a Christian student studying on a social work course. It thus raises issues of free speech in universities with equality and diversity.

Facts and decision

The appellant was a devout Christian and was enrolled at the University of Sheffield for his MA in Social Work. Upon entry, he signed an agreement that stated he had accessed to and had read the Health and Care Professions Council (HCPC) code of conduct, which insisted that his personal beliefs would not result in prejudice to service users. The appellant made statements on his personal Facebook expressing his views on and against homosexuality and an investigation was carried out by the university. The university decided to exclude Mr. Ngole from studying social work, maintaining that it did not want N to change his beliefs, but had concerns regarding whether he would refrain from expressing his views in the future. The university stressed that a person's behaviour should not cause a loss of public confidence in the profession. He maintained that he was intending to discriminate and used his placement reports as evidence. The student appealed to the universities appeals committee, who rejected his appeal and subsequently he sought judicial review of the decision.

Before the High Court, he argued that the university had violated Articles 9 and Article 10 of the European Convention of Human Rights. The High Court determined that there was no violation of Article 9, although it was accepted that there was a *prima facie* interference with Article 10, and proceeded to consider the lawfulness of that interference. In the court's view, three major elements needed to be considered: whether the interference of Article 10 was prescribed by law; pursuant to a legitimate aim; and necessary in a democratic society. The court decided that the university had struck a fair balance struck by and thus decided not to interfere with the decision.

The Court of Appeal allowed the appeal and the initial ruling was overruled on the basis that it gave an incorrect understanding that the university rules imposed a blanket ban on expressing religious views on public platforms. The Court of Appeal acknowledged that the guidance provided in this case was accessible to the appellant and precise enough to allow the appellant to foresee the consequence of his actions. However, it also determined that the sanction imposed by the university was not proportionate to the actions of the student, and that the least intrusive approach should have been considered before the removal of the student. In addition, the disciplinary proceedings were "flawed and unfair"[11] to the appellant and there should have been an attempt by the university to provide guidance for the student on what views were acceptable.

Analysis

Although the student's freedom of expression was upheld, it could be argued that the judgment overlooked the rights of sexual minorities and of principles of equality and diversity. A report by the European Union Agency for Fundamental Rights established that sexual minorities can

[11] *R (on the application of Ngole) v The University of Sheffield* (2019) EWCA Civ 1127.

point to the inequalities they face using Article 10.[12] It could be argued therefore that this ruling is controversial as it permits discriminatory comments about other people's sexual orientation and suggest that consequences can be avoided as they can claim that such comments are simply freedom of speech.

The precedent set by this case is very significant for future cases as it suggests that professional regulators have to be meticulous with how they solve issues concerning personal views expressed on social platforms, as a blanket ban on expressing your opinions on controversial topics would actually be interfering with Article 10.

The case is important for students as it interlinks with human rights taught in both Constitutional law and English Legal System. This case provides the students with a relevant example of how the courts would rule in cases where human rights collide.

[12] European Union Agency for Fundamental Rights, Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Summary of Findings, Trends, Challenges and Promising Practices, Vienna: FRA, 2010, 17.

Odinchezo Obingene

R (on the application of Miller) v Prime Minister [2019] UKSC 41[1]

Introduction

Once again, the BREXIT process called upon the courts to clarify certain principles of the British constitution, the question this time being whether the Prime Minister's advice to the Queen to prorogue parliament for five weeks was within his powers under the royal prerogative.

Facts and decision

The claimants sought judicial review of the Prime Minister's advice to the Queen to prorogue Parliament for five weeks. Counsel for the Prime Minister argued that the issue was not justiciable, i.e. was too political to fall within the jurisdiction of the courts. In *Cherry,* it was also argued that prorogations fall under 'procedures of parliament' protected from judicial intervention by Article 9 of the Bill of Rights (BOR) 1689, and therefore, any resulting prorogation cannot be declared null by the courts. The Divisional court in *Miller* had agreed that the issue was not justiciable whilst the Court of Session in *Cherry* held that it was justiciable; and that the advice was unlawful and the resulting prorogation was null and void.

On appeal, the Supreme Court held, firstly, that the issue was justiciable as it simply dealt with the determination of the extent of prerogative powers. This has always been within the courts' jurisdiction, and political context has never deterred the courts doing their job.[2] Secondly, the extent of the power was held to be "...that which the law of the land allows..."[3] i.e., within the bounds of the rule of law.[4] For this case, the advice had to be compatible with parliamentary sovereignty and accountability. Next, the court noted that proroguing Parliament for five weeks[5] would impair its ability to legislate and hold government accountable on "BREXIT related business."[6] With no justification found for this exceptional delay,[7] the advice was held to be in excess of its legal limits.[8] Lastly, the resulting prorogation was held to be "...as if the commissioners had walked into Parliament with a blank piece of paper."[9] This meant that, as the advice was unlawful, the resulting prorogation was groundless and thus null.[10] Additionally, prorogation is not an issue of high policy[11] excluded from judicial review

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[1] Decided jointly with *Cherry v Advocate General of Scotland*.
[2] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, and *Case of Proclamations* (1611) 12 Co Rep 74, and *Entick v Carrington* (1765) EWHC KB J98.
[3] Excerpt in paragraph 49 of the judgement was taken from *Case of Proclamations ibid,* see note 4.
[4] *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508, *R(Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 and *R v Secretary of State for the Environment, Ex p Nottinghamshire County Council* [1986] AC 240.
[5] The court paid particular attention to the period, as five weeks was longer than normal for Parliament to be inactive.
[6] At paragraph 60 of the judgment.
[7] The court examined a variety of evidence in an attempt to find any justifications.
[8] The court did also state that it was not concerned with the motive of the Prime Minister in the declaration of unlawfulness. This is important, as the Court of Session of Scotland, in its judgement, had heavily considered Prime Minister's possibly ulterior motive of keeping Parliament off his tail during BREXIT negotiations.
[9] Paragraph 69 of the judgement.
[10] *R (UNISON) v Lord Chancellor* [2017] 3 WLR 409.
[11] As identified under the above case and *R v Foreign Secretary for Foreign and Commonwealth Affairs, ex parte Everett* [1989] 2 WLR 224.

and it does not fall under 'proceedings in parliament' under Article 9 BOR as it is not a decision of Parliament or its committees, but merely one imposed upon it.[12]

Analysis

This case raises questions chiefly concerning the doctrine of separation of powers, particularly the extent of these powers and the extent of the separation. It is a clear example of the modern day implications of these principles, although the decision has been regarded by some as constituting "unconvincing legal creativity."[13]

The first noteworthy issue is justiciability. Academics such as Dobson[14] opine that the Divisional Court's decision was the right one following a long established convention that the courts do not interfere in the political sphere.[15] Students should note, however, that the court specified that its decision was not one of policy and that "the fact that a legal dispute concerns politicians, or arises from political controversy, has never been sufficient reason for the courts to refuse to consider it."[16] Caird agrees,[17] as he argues that this case shatters the illusion that the courts completely avoid the political sphere. This is because he sees any attempts to interpret the constitution or evaluate government action are political to some degree.[18] Students will also note the impact of this decision on the doctrine of separation of powers. Academic writers such as Arnheim[19] argue that it offends the doctrine as the court stepped into the political sphere of the executive and parliament. However, since scholars such as Wade have identified checks and balances as a core principle of the doctrine,[20] emphasis must be laid on the fact that the courts only stepped in to carry out its role of checking executive powers.

The Supreme Court also upheld parliamentary sovereignty and accountability, the dominant characteristic of the UK's constitution.[21] This gives a practical example to students of its importance even against the prerogative power of the executive. It is no surprise that the court is willing to uphold it at whatever cost; including utilising 'legal creativity', that Wade argues is necessary for the development of satisfactory administrative law.[22] Lastly, students will note the treatment of Article 9 BOR. The court clarified that it could not have been Parliament's intention for 'proceedings in parliament' to apply to executive actions, especially where this contravenes its sovereignty. This again upholds the core of the UK constitution.[23]

Conclusion

The principles examined in this case are core to the study of Constitutional law. The interpretation and analysis offered by the Supreme Court will help students better understand their practical implications in the light of the UK's elusive Constitution.

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[12] *R v Chaytor* [2011] 1 AC 684.
[13] Nicholas Dobson, 'The prorogation judgement…a step too far?' [2019] 169 NLJ 7860, 10.
[14] *ibid.*
[15] See particularly Lord Bingham in *R v Foreign Secretary for Foreign and Commonwealth Affairs, ex parte Everett,* note 11.
[16] At paragraph 31 of the judgment.
[17] Jack Caird, 'Miller 2, the Supreme Court and the politics of constitutional interpretation' [2019] (Nov) Counsel, 28.
[18] See William Wade, *Constitutional Fundamentals* (Revised edition, Stevens & Sons 1989), 97.
[19] Michael Arnheim, 'Monarchs, judges & controversial prime ministers' [2019] 169 NLJ 7858, 9.
[20] *Ibid,* see note 20 at page 97 and 100.
[21] A.V Dicey, *Introduction to the Study of the Law of the Constitution* (10th edition, Indianapolis 1982) at 39.
[22] *Ibid,* see note 18, at 98.
[23] See Anne Twomey, 'Article 9 of the Bill of Rights 1688 and its application to prorogation' (2019) U.K. Constitutional law Blog 4th Oct. at https://ukconstitutionallaw.org/blog/.

Weronika Kotlicka

R (on the application of Bridges) v *South Wales Police* [2019] EWHC 2341 (Admin)

Introduction

Reportedly, the world's first case on police use of Automated Facial Recognition (AFR),[24] this case raises the question of whether the current legal regime in the UK is adequate to ensure the appropriate use of the automated facial recognition technology.

Facts and decision

The claimant, Edward Bridges, challenged the legality of South Wales Police's use of automated facial recognition (AFR). The technology is an automated biometric system capable of identifying or verifying a member of the public captured on the surveillance camera. Facial features and contours are analysed and compared with facial biometric information of people on police watch lists. If no match is found, then the image or biometrics are automatically deleted. Bridges claimed to have been present and caught on the camera without warning on two occasions, and challenged the South West Police ('SWP') on the grounds that the usage of such technology was contrary to his rights under the Human Rights Act 1998 and data protection legislation.[25] Furthermore, he believed that decision to use it had failed to comply with the public sector equality duty contained in the s.149 Equality Act 2010, regarding discrimination on grounds of sex and/or race.

The Divisional Court refused the application on all grounds. It was concluded that the use of AFR did not breach the requirements of the Human Rights Act 1998. In particular, the court found that although the use of AFR did entail an infringement of Article 8 of the ECHR (right to private life),[26] following the decision in *Catt* v *Association of Chief Police Officers,*[27] the police's actions were legally justified and amply sufficient,[28] being subject to a legal framework governing, whether how, and when, AFR can be used. This framework composed three legally enforceable elements: primary legislation,[29] statutory codes of practice,[30] and the SWP's own local policies. In reaching its conclusion, the Court noted that AFR was deployed in an open and transparent way, was used for a limited time and specific purpose only, and in the case of a 'no match', all collected data was deleted immediately. It did not cause any disproportionate interference with the individual's rights.

In respect of the data protection legislation, the main point of dispute was whether use of the technology entails the processing of personal data of people that are not on the watch list, and whether it contravene the data principle under the DPA 1998. On this issue, the Court held that the processing was lawful and satisfied legal requirements. The second issue concerned the problem of 'sensitive processing' within the DPA 2018,[31] and whether it was justified. The Court held that the use of AFR was strictly necessary for law enforcement purposes and

[24] Telegraph Reporters, 'First Legal Challenge To Police Use Of Facial Recognition Technology Is Defeated In The Courts' (*The Daily Telegraph,* 4 September 2019)
[25] Data Protection Act 1998, Data Protection Act 2018
[26] *R (on the application of Bridges)* v *South Wales Police* [2019] EWHC 2341 (Admin) [45]-[62]
[27] [2015] AC 1065
[28] *R (on the application of Bridges)* v *South Wales Police* [2019] EWHC 2341 (Admin) [71]
[29] Data Protection Act 2018.
[30] Surveillance Camera Code of Practice, pursuant to s.30 of the Protection of Freedoms Act 2012
[31] Data Protection Act 2018, s.35(8)

therefore satisfied the requirements of legality and fairness. Finally, in the Court's opinion, the SWP had also complied with the requirements of the public sector equality duty.[32]

Analysis

The case is thought to be the first case in the world challenging the legality of automated facial recognition technology.[33] Despite the fact that it considers merely the use of the AFR by SWP in these specific circumstances, it gives rise to a larger problem. The judgment did not consider that the present legal framework was insufficient, however, it recommended that further steps could, and should be taken to codify the relevant legal standards, and that the future development of AFR technology is likely to require periodic re-evaluation of the sufficiency of the legal regime.

The decision provoked number of debates and concerns regarding the need to create a specific legal framework governing the use of biometric data, not only in the UK, but also the rest of the Europe.[34] This issue has been raised by British campaign groups, such as Liberty and Big Brother Watch. The latter group have challenged the legality of such technology and called for its banning, and its views were discussed in the reports of both the Biometrics Commissioner,[35] and the Information Commissioner's Office.[36] The use of automated facial recognition technology is becoming a technological necessity of modern society. Such systems can be beneficial to the protection of the public, however, if not responsibly and ethically operated; these technologies can affect public confidence and may be regarded as an intrusion into privacy and liberty. The Court of Appeal has granted permission to hear the case and the outcome is likely to have a significant impact on the use of AFR by public and private authorities.

[32] Equality Act 2010, s.149
[33] Nicholas Dobson, 'Use of automatic facial recognition software', (The Law Gazette, 14 October 2019)
[34] Clare Sellars, 'High Court considers the lawfulness of use of automated facial recognition technology', (2020) 26(1) C.T.L.R., 3-7
[35] Biometrics Commissioner, *Automated facial recognition*, (2019)
[36] Information Commissioner's Office, *ICO investigation into how the police use facial recognition technology in public places*, (2019)

Fatmata Tarawalley

Dulgheriu v London Borough Ealing [2019] EWCA Civ 1490

Introduction

The debate on abortion has polarised our nation for centuries and both the morality and legality of ending a potential human life continues to be questioned. Inescapably, the clinics that provide abortions and the individuals that use them have attracted the scrutiny of pro-life protesters, and the "Marie Stopes West London Centre"[1] has encountered this problem directly.

Facts and Decision

For an extended period, the pro-life Christian group called the Good Counsel (GCN)[2] assembled outside the Marie Stopes UK West London[3] abortion clinic to promote their movement. They used various methods to engage with pregnant women using the clinic. Tension and distress heightened in the community when pro-choice movements became involved, promoting their opposing beliefs. These circumstances prompted the local authority to implement a Public Spaces Protection Order (PSPO)[4], which states that the protesters have to be "about 100 metres away from the entrance to the centre" and the "numbers of participants", "the size of placards on display" are subject to restriction. Since the protestors had a detrimental and long-lived impact, their "persistent" conduct was expected to continue as it had done for years. As a result, the provision is authorised by s.59 (2) of the Anti-Social and Crime Prevention Act of 2014. However, the anti-abortion protesters contested this ban in the High Court,[5] claiming that the restriction imposed on them violated their rights under article 9-11 of the ECHR. Nevertheless, the court stated that some of the occasional users of the clinic had suffered substantial emotional and psychological distress due to protesters' behaviour.[6]

At the Court of Appeal, the protesters challenged the decision of the High Court[7] concerning the PSPO on the basis that the court misinterpreted the meaning of "those in the locality" to include occasional visitors, and that the court failed to proportionately balance the rights of the users and the rights of the protestors. However, the Court of Appeal rejected this first argument, stating that the Act is clear in including occasional visitors as part of the local community as this Act serves the purpose of restricting anti-social behaviour in public places.[8] Moreover, all three judges of the Court of Appeal rejected the claim that the local authority ban infringed on the human rights of the protestors. The Court held that the rights of the users of the clinic were engaged, as the women who visit the clinic are in their early pregnancy "some, rape victims and some are carrying foetus of abnormalities."[9] These women are facing a difficult decision, it is profoundly "personal and intimate,"[10] and they deserve privacy and respect. However, the protesters' conduct was not simply a case of protest "causing annoyance or disturbance"[11] which is still permissible and fall with their rights; they went beyond that by "taking or

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[1] *Dulgheriu v London Borough Ealing* [2019] EWCA Civ 1490.
[2] *Ibid.*
[3] *Ibid.*
[4] *Ibid.*
[5] *Dulgeriu & Anor v The London Borough of Ealing* [2018] EWHC 1667.
[6] *Ibid*.
[7] *Dulgheriu v London Borough Ealing* [2019] EWCA Civ 1490.
[8] *Ibid*. [57]
[9] *Ibid* [58].
[10] *Ibid.* [62]
[11] *Ibid* [89]

pretending to take photographs of the service users"[12], this left an ever-lasting "emotional damage"[13] to the women.

Analysis

The Court of Appeal's dismissal of the appellant's claims highlights the controversial debate between religious expression and the safeguarding of the private lives of pregnant women. The argument was whether the impediment of the right to protest was necessary in a democratic society, and whether the judgment fairly balanced the rights of the respective parties. On the one hand, one might argue that the decision displayed a narrow approach towards the protester's rights. Although some may disagree with the protesters' radical conduct, the protesters were effectively expressing their religious beliefs, which is considered as "one of the most vital elements that go to make up the identity of believers and their conception of life."[14] However, it is clear that the Court did not object to the expression of their prayers or beliefs; they do, however, but objected to their measures, such as "the distribution of anti-abortion material which interfered unduly with the private life of the users of the clinic. The unanimous decision of the Court in favour of protecting the private lives of the pregnant women is pivotal for female students, as it shows that the courts acknowledge the importance of "the right to personal autonomy and personal development of such women. The Court has looked beyond the central moral and political debate of women ending their pregnancy, and instead, focussed on the emotional pain, suffering and psychological impact the protests had on these women. Finally, although the PSPO was successful upheld in this case, this however does not give the local authority the right to infringe the rights of the protesters in every situation; they should only enforce it in extreme cases.

[12] *Ibid* [60]
[13] *Ibid* [58].
[14] Bulak Begun and Alain Zysset, "Personal autonomy" and "democratic society" at the European Court of Human Rights: friends or foes?" (2013) 2(1) UCL Journal of Law and Jurisprudence 230.

Sonia Gee

Richard Lloyd v Google LLC [2019] EWCA Civ 1599

Introduction

Where browser-generated information is illegally obtained and used for commercial purposes, there may be a potential breach of data protection law together with the award of compensation. The recent case of *Richard Lloyd v Google LLC,*[1] explores whether an individual can be awarded damages despite the lack of evidence surrounding financial loss and distress.

Facts and Decision

Mr Lloyd sought damages under s.13 (1) of the Data Protection Act 1998 against Google LLC on behalf of a represented class of 4 million Apple iPhone users. Google had obtained browser-generated information (BGI) using cookies placed on devices running safari. The information obtained included personal data and private information that Google had used for commercial purposes.[2] In the High Court Warby J refused to serve judgment on Google outside jurisdiction as it could not be proven that the represented class had suffered damages under the Data Protection Act or had similar interests within the CPR 19.6(1).[3] His Lordship also exercised his discretion under CPR Part 19.6(2),[4] and agreed that Mr Lloyd could not act as a representative on behalf of other people. On appeal, the Court of Appeal clarified that a claimant could recover damages under the Data Protection Act without proof of pecuniary loss or distress. The Court compared the present case to that of *Gulati,*[5] where it was held that damages are recoverable for misuse of private information without proof of loss or distress.[6] The Court of Appeal explained that the represented class suffered from the same loss: loss of control over their browser-generated information, and suffering from the same loss showed that they all had similar interests within CPR 19.6(1). Therefore, Mr Lloyd could act as a representative under CPR Part 19.6(2). The Court of Appeal upheld the appeal and granted Mr Lloyd permission to serve Google outside jurisdiction.

Analysis

Disputes have arisen as to whether the Court of Appeal's judgement in *Lloyd* would open the floodgates for representative actions in the UK. When associating representative actions with a data breach, the risk for organisations would be significantly higher, and organisations will face a severe impact on their financial position. It could be also be noted that when there is a proliferation of claimants, the recovery for damages would significantly increase. This shows the importance for organisations to comply with data protection laws and limit their litigation exposure.

As seen in *Lloyd*, the illegal possession of personal data is often used for commercial purchases, but it can also be used to benefit political parties during elections.[7] The fact that political parties, working alongside organisations that are capable of applying data analytics

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[1] [2019] EWCA Civ 1599.
[2] Paula Barrett, 'Not everything that happens to a person without their prior consent causes significant damage or any distress: Lloyd v Google LLC' (2019) 25 C.T.L.R, 31.
[3] Civil Procedure Rules 1998, SI 1998/3132, 19.6(1).
[4] Civil Procedure Rules 1998, SI 1998/3132, 19.6 (2).
[5] *Gulati v. MGN Limited* [2015] EWHC 1482.
[6] For a commentary, see Paula Barrett, 'Not everything that happens to a person without their prior consent causes significant damage or any distress: Lloyd v Google LLC' (2019) 25 C.T.L.R, 31.
[7] Malcolm Dowden, Moga Moodley, 'Protecting the election 'Persuadables'' (2019) 7862 NLJ, 1.

to personal data, shows an evident breach in general data protection regulations (GDPR).[8] GDPR is a relatively new framework for data protection laws and replaces the Data Protection Act 1998. It is designed to give individuals more control over their personal data and limits organisation's powers in relation to personal data, as they can only acquire and use data if they have a genuine reason. The GDPR regime has an impact on students' legal study and personal lives as certain rights are implied during certain circumstances that allows them to exert control over their personal data. Where a student consents to sharing personal information when participating in an internship and wishes to withdraw their consent upon completion of the internship, they can apply for the right to be forgotten, [9] which would make it illegal for the organisations to continue holding that data.

[8] Regulation 2016/679 General Data Protection Regulation [2016] OJ L 119.
[9] Malcolm Dowden, Moga Moodley, 'Protecting the election 'Persuadables'' (2019) 7862 NLJ, 1.

Jonathan Ogundiya

Goknur v Organic Village Ltd [2019] EWHC 2201

Introduction

When a person has been induced to enter into a contract by a misrepresentation, they may sue for damages either in the tort of deceit or under the Misrepresentation Act 1967. Further, if the statement has become a term of the contract they may sue for damages in breach of contract. However, the measure of damages will be different, and not all loss will be recoverable under either heading. Further, the innocent party will have to mitigate their loss and account for any profits gained despite the breach.

Facts and decision

Mr Aytacli and Mrs Bilgin ran a limited company together known as Organic Village (OV), an organic food and drink business. The company formed a contract with the claimant's business, Goknur. OV had agreed with Goknur to pay EUR 1000 per month and purchase Goknur's 'not from concentrate' (NFC) juices for a minimum of 3 years. An issue arose concerning the term involving the juices OV agreed to purchase from Goknur. OV's competitor Colibri SARL, who tested the juices supplied by Goknur, discovered it held added water, meaning OV's juices did not fulfil their NFC claim. OV carried out the same test on their Goknur supplied juice, concluding that every juice had added water apart from Cherry. This resulted in OV claiming for breach of contract and making a claim for £325,015.04 in terms of the losses flowing from the fact that Goknur did not conform to OV's contractual description, including the cherry juice. There were also claims against Goknur under the Misrepresentation Act 1967 for providing a false statement that OV had relied on in entering a contract. G counter claimed for breach of contract when OV refused to pay.

The High Court upheld OV's claim for misrepresentation under the 1967 Act, and for breach of contract. Martin Chamberlain QC based this judgement on the fact that Goknur had indeed breached their contract with OV by supplying added water to their juices, and had made a false statement about the juice. The expert evidence showed that the supply to OV had been tampered with before it arrived, and thus the judge believed that the claimant was an honest witness who took pride in their company's reputation, suggesting it would be very unlikely that a man of his calibre would make a representation knowing it to be false.[10] This meant that the claim for damages in deceit for fraudulent misrepresentation would fail. Further, the judge held that OV could not make a claim for loss in regards to the Cherry juice, because that juice was not defective and matched the contractual description.

In terms of recovering the loss of profits as a head of damages under the 1967 Act, it was concluded that OV could not succeed in this claim, because damages under the Act for non-fraudulent misrepresentation did not include loss of profits resulting from breach of contract, but rather actual loss caused by the person entering into it. Further, the measure of damages for breach of contract in this case was the loss suffered by the goods being less valuable than described, and not for loss of full profits on resale. In this respect, the judge was influenced by Devlin J's view on when damages could cover lost profits. The judge also reduced OV's damages for failure to mitigate their loss and for the profit they had obtained from selling the defective goods.

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[10] *Goknur v Organic Village Ltd* [2019] EWHC 2201 (QB), [2019] 8 WLUK 37.

Analysis

The judge's incorporation of Devlin J's view on the recoverability of lost profits under the 1967 Act and in breach of contract meant that OV could not sue for full loss of profits, but rather only the market value loss that they had suffered for the goods being defective. In this case the juices supplied by Goknur, 'were not goods of special manufacture in the sense in which Devlin J used that phrase in *Kewi Tek Chao*.[11] As a result, OV could not claim that if the goods were defective they would not be able to get similar goods in the market: the market values were the appropriate measure of damages.

It is suggested that a more appropriate approach would have been for the judge to incorporate a more up to date view, similar to that of Baroness Hale in *Corporation v York*.[12] Where she outlined two questions that must considered in this type of loss: did the parties contemplate this *type* of loss when the contact was made, and did the parties contemplate *liability* for the type of loss?[13] OV requested NFC juices in the contract with Goknur so their 'contents would conform to what was on labels'.[14] This clearly indicated that both parties had contemplated the potential loss of profits if the term was not fulfilled, satisfying one of Hale's approaches. Regarding Hale's second approach, the judge believed that liability falls upon OV to secure alternative suppliers; hence, no claim for lost profits can succeed. Yet, it is suggested that the contract should be interpreted against its commercial background. This would mean recognising that Goknur was a business that thrives of its integrity; thus making it more than likely they would consider liability for not fulfilling their terms, providing OV with a claim for loss of profits.

As stated above, the case focusses on issues regarding breach of contract and misrepresentation under the 1967 Act. These are vital and complex areas covered in contract law. By understanding the key issues of the OV case, first year students can gain a better understanding of the module's application in the real world. It may be of value if pursuing a career as a commercial solicitor and advising your client. In cases involving a breach of contract and/or misrepresentation.

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[11] G*oknur* (n 1) 45, 47.
[12] [1997] A.C. 191 (HL).
[13] Janet O' Sullivan, 'Damages for lost profits for late redelivery: How remote is too remote?' (2009) 68 CLJ 34.
[14] *Goknur* (n 1) 3.