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MOTOR VEHICLE INSURANCE LAW: IGNORING THE LESSONS FROM KING REX

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ABSTRACT

Following a review in 2013, the Motor Insurers' Bureau (MIB) established the Uninsured Drivers Agreement (UDA) 2015. The aim was to implement aspects of the Motor Vehicle Insurance Directives (MVID). The UDA 2015 contained numerous errors in its drafting and led to widespread criticism due to its incompatibility with EU law and common law principles. In January 2017 the MIB provided its Supplementary Uninsured Drivers Agreement. If its aim was to remedy these problems we argue that it has substantially failed. Further, the updated Agreement continues the uncertainty of the law in this area and, with reference to Fuller's 'Eight Ways to Fail to Make Law', we present an argument that the Secretary of State for Transport should again redraft the UDA 2015 and the 2017 Supplement to provide legal certainty, remove the inconsistencies between national and EU law, and provide the protection to which third-party victims of uninsured drivers are entitled under EU law.

MOTOR VEHICLE INSURANCE

Motor vehicle insurance in the UK is governed through statutory and extra-statutory provisions. The statute (the Road Traffic Act 1988 (RTA88)) imposes duties to insure vehicles on a road or other public place, including requirements on insurance protection in the event that an individual is a victim of a negligent uninsured or untraced driver. The RTA88 provides protection for the third-party victims of uninsured drivers through (for example) enabling their claims directly against the policyholder's insurers, but, in the event of the driver being uninsured, extra-statutory provisions¹ take over. Through the extra-statutory arrangements a third-party victim may recover compensation in the event that either the insurer is not contractually nor statutorily liable to compensate the victim, or that the individual causing the accident cannot be traced.

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¹ The Cassel Committee (Cmnd 5528) in 1937, having reviewed the motor insurance legislation, recommended that a deficiency in the Acts be remedied through the creation of a central fund through which the third-party victims of uninsured drivers would be able to recover damages. Thereafter the government established an Agreement, in 1945, with the insurance industry, through a Motor Insurers' Bureau (MIB), to undertake this central guarantee fund role. Presently, the MIB assumes the position of insurer for third-party victims of accidents caused by uninsured and untraced drivers.

The national law governing motor vehicle insurance is also subject to EU law in the form of a series of six directives,² collectively referred to as the motor vehicle insurance directives (MVID). The sixth MVID is a consolidating directive and therefore unless otherwise specified, this directive contains the provisions governing the law since its enactment in 2009. Through the MVID member states are obligated to establish a fund from which victims of uninsured³ and untraced⁴ motor vehicles and/or their drivers can obtain compensation. These responsibilities were to be designated to a central body and in the UK, the Government (through the Secretary of State for Transport) and the Motor Insurers' Bureau (a private company which has entered into a series of agreements with the UK – (MIB)) satisfy this requirement. In this regard, the MIB acts as an insurer of last resort⁵ through the Uninsured Drivers' Agreement (UDA), most recently of 2015 with a supplementary UDA in 2017, and an Untraced Drivers' Agreement (UtDA), most recently updated and given effect from March 2017.

Due to the relationship between the MVID and the UK's transposing legislation and the MIB Agreements, these national laws are subject to the jurisprudence of the Court of Justice of the European Union (CJEU). Further, they must be interpreted, as far as is possible,⁶ in accordance with the MVID. Given these parameters for transposition, interpretation and application of the law, the certainty necessary for citizens to understand the rights and obligations created through both sources is provided. In relation to the CJEU, legal certainty may be argued from a black-letter law perspective, aligned with predictability.⁷ Predictability is joined with rationally acceptable adjudications (in terms of solutions or outcomes) in ensuring the content of the law is

² (The First Directive) Council Directive 72/166/EEC on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability [1972] OJ L103/1; (the) Second Council Directive 84/5/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1984] OJ LL8/17; (the) Third Council Directive 90/232/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1990] OJ L129/33; Directive 2000/26/EC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (the Fourth Motor Insurance Directive) [2000] OJ L181/65; (the Fifth Directive) Directive 2005/14/EC amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles [2005] OJ L149/14; and (the Sixth Directive) Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11.

³ A driver who caused or contributed to the accident and who, at the time held no valid policy of insurance, but who is identified.

⁴ A driver deemed responsible for the accident and who leaves the scene without identifying him/herself and cannot be traced.

⁵ Every insurer operating a business incorporating the underwriting of compulsory motor insurance is required to be a member of the MIB (RTA88, ss 95, 143 and 145(2)).

⁶ As per Case C-397/01 to C-403/01 *Bernhard Pfeiffer et al v Deutsches Rotes Kreuz, Kreisverband Walshut eV* [2004] ECR I-8835; Cases C-10-22/97 *Ministero delle Finanze v IN.CO. '90 Srl* [1998] ECR I-6307 at [21]; and Case C-314/08 *Krzysztof Filipiak*, 19 November 2009 at [18].

⁷ Although this approach may lead to a less than complete answer to certainty.

determined and expressed as either a directly applicable measure or that it is used consistently in the CJEU's interpretation and decisions. As such, both legal certainty and the principle of justice must be present in legal issuance and its application.

LEGAL CERTAINTY: THE MIB, ITS AGREEMENTS AND INTERPRETATION

The CJEU,⁸ adopting a Cartesian philosophy,⁹ has confirmed that legal certainty¹⁰ is a fundamental principle of EU law and imposes upon member states a requirement for transparency, precision, stability and predictability in law-making.¹¹ It assists in avoiding injustice¹² and imposes order on permissible actions, including rule-making and law-applying activities.¹³ In the dealings between the Secretary of State and the MIB in the creation of the UDA and UtDA, these principles almost seem to have been ignored. Further, the Government's recent White Paper¹⁴ on the Great Repeal Bill and the legal transition in exiting the EU, has raised further issues of certainty – particularly present in the decision-making of the Court of Appeal and its adherence (or not) with the jurisprudence of the CJEU.

The focus of this article is the critique of the main problems which exist in the Supplementary UDA 2017 (continuing and leaving unaltered several problems still present in the UDA 2015), and specifically a continuation of the MIB's self-exclusion of liability and in the administrative arrangements incorporated into the Agreement (imposed on those who use it). In the allegory of King Rex, Fuller¹⁵ outlines the eight principles of internal morality which are inherent qualities of a legal system. Problems exist in Rex's well-intentioned (but

⁸ From Case C-236/95 *Commission v Hellenic Republic* [1996] ECLI:EU:C:1996:341 'the Court has consistently held that it is particularly important, in order to satisfy the requirement for legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts.' at [13].

⁹ Although recently van Meerbeeck has argued that this form of legal certainty could be replaced with a fiduciary logic based on trust. See J van Meerbeeck 'The Principle of Legal Certainty in the Case-Law of the European Court of Justice: From Certainty to Trust' (2016) 41(2) *European Law Review* 275.

¹⁰ A term first used by the CJEU in Cases 42, 49/59 *Société nouvelle des usines de Pontlieue - Aciéries du Temple (S.N.U.P.A.T.) v High Authority of the European Coal and Steel Community* [1961] ECR 53.

¹¹ See Case 70/83 *Kloppenborg v Finanzamt Leer* [1984] ECR 1075 at 1086; Case 169/80 *Administration des Douanes v Société Anonyme Gondrand Freres and Societe anonyme Garancini* [1981] ECR 1931; Case C-182/03 and C-217/03, *Belgium and Forum 187 v Commission* [2006] ECR I-5479 at 69; and Case C-67/09 *P Nuova Agricast and Cofra v Commission* [2010] ECR I-09811 at [77].

¹² See J Rawls, *A Theory of Justice* (Cambridge, Massachusetts: Belknap Press of Harvard University Press, 1999) for discussion of how injustice is avoided through a clarity of content, effectiveness and enforcement.

¹³ Bertelsmann Stiftung '2014 Rule of Law Report Legal Certainty, Judicial Review, Appointment of Justices, Corruption Prevention' Sustainable Governance Indicators.

¹⁴ Department for Exiting the European Union (2017) 'Legislating for the United Kingdom's withdrawal from the European Union' Cm 9446 (available at www.gov.uk/government/publications).

¹⁵ L L Fuller 'Eight Ways to Fail to Make Law' (2000) reprinted in J Feinberg & J Coleman eds, *Philosophy of Law*, sixth edition 91.

doomed) attempts to establish a fair system of legal rules based on codes and precedent (as legislator and judge). Establishing and maintaining 'a system of legal rules may miscarry [fail] in at least eight ways; there are... eight distinct routes to disaster.'¹⁶ The eight ways are 1) A failure to achieve rules (every decision is made on an ad hoc basis with no generality); 2) a failure to make available the rules which parties are expected to observe; 3) the abuse of retroactive legislation; 4) a failure to make clear rules; 5) the enactment of contradictory rules; 6) rules that require conduct beyond the powers of the affected party (they are impossible to perform); 7) introducing such frequent changes in the rules that the subject cannot orient his action to them; and 8) a failure of congruence between the rules as announced and their actual administration. Fuller concludes on this point that 'total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all...'¹⁷ For Fuller, the 'eights ways to fail to make law' were self-evident, applying as they did to a legal system – they are obvious in respect of the context of the frame of reference to which they are applied.¹⁸ Whilst the MVID and the UDA 2015 do not constitute a legal system as applied in the King Rex allegory, they form a significant aspect of motor insurance law relating to the protection of innocent victims of negligent uninsured drivers. Further in the article, we identify the examples in which the MIB and Secretary of State have 'failed to make law' in at least three aspects of Fuller's 'eight ways.'

Giving effect to the legal and procedural rights provided through the jurisprudence of the CJEU and the contents of the MVID, via the transposing national UDA, and their interpretation by the courts and dispute-resolving arbitrators, has proved to be contentious and fraught with errors.¹⁹ This has led to a system of uncertainty, far exceeding lexical ambiguity, guarantees from EU law not being met, and, we argue, a situation where a cancelling and re-writing of the most recent Supplementary UDA 2017 and the UDA 2015 is necessary to meet the legitimate expectations²⁰ of all involved in motor vehicle insurance. It is also in the application of the procedural requirements embedded in the UDA where questions may be raised of its adherence to principles of justice.²¹

For Dicey, certainty of law (as part of the rule of law) is guaranteed not only by the law-makers, but also the courts in the definition, application and enforcement of the law. At the EU level, certainty is based on the German

¹⁶ L L Fuller 'Eight Ways to Fail to Make Law' (2000) reprinted in J Feinberg & J Coleman eds, *Philosophy of Law*, sixth edition 91, 93.

¹⁷ L L Fuller 'Eight Ways to Fail to Make Law' (2000) reprinted in J Feinberg & J Coleman eds, *Philosophy of Law*, sixth edition 91, 93.

¹⁸ For further discussion of this point see P Popelier 'Legal Certainty and the Principles of Proper Law Making' (2000) *European Journal of Law Reform* 321.

¹⁹ See J Marson, K Ferris, and A Nicholson 'Irreconcilable differences? The Road Traffic Act and the European Motor Vehicle Insurance Directives' (2017) *The Journal of Business Law* 1, 51.

²⁰ K D Logue 'Optimal Tax Compliance and Penalties When the Law is Uncertain' (2007) 27 *Virginia Tax Review* 241, 248.

²¹ This is particularly so with regards the finality of civil proceedings with the compulsory use of a paper-based system of arbitration when appealing a decision of the MIB.

doctrine and jurisprudence 'Dispositionssicherheit' - the 'personal freedom to decide and develop oneself, made possible... by the predictability of the whole legal framework.'²² However, conflicts exist between, on the one hand, certainty, and on the other justice. Insurers, policyholders and the innocent third-party victims of negligent drivers require that the law is certain, but also that justice is available through the EU and transposing national instruments. Legal certainty aligns with tenets such as uniformity, predictability and non-arbitrariness, while justice may involve exceptions to these principles as it necessitates adaptability. Both are features of a just legal system, and hence require a balanced, nuanced approach to their adoption and promotion. The interpretation necessary of the UDA 2015 and Supplementary UDA 2017 in the spirit of the MVID on which it is based, and to whose provisions it must adhere, is an issue which is likely to affect the certainty of law.

Legal certainty, in isolation, of course consists of inherent weakness. The openness of law, its open sphere, empowers the judiciary with authority to create new laws in similar fashion to a legislator (adopting what Kelsen refers to as a 'free discretion').²³ Even where correctness exists within the framework of the legal system, this does not necessarily result in predictability for citizens. For example, the House of Lords was in *White v White*²⁴ faced with interpreting cl 6 of the UDA 1999 (the exclusions to liability permissible to the MIB). Whilst the Lords interpreted these consistently and correctly²⁵ with reference to the MVID and the judgments of the CJEU, these sources did not constitute a dictionary definition nor a literal interpretation of the content of the legislative or judicial issuance. As such, the uncertainty present in that Agreement would have led to an average person to have been mistaken as to the extent and meaning of cl 6 without access to legal advice or a strong sense of their own ability to purposively interpret national law / rules with the EU parent. The lessons from the UDA 1999 regarding the need for clarity, and that here the rule as announced and its actual administration was incongruent, could lead to Fuller's eighth way to fail to make law.

The Secretary of State and the MIB have updated the Agreement on the issue of uninsured drivers in 1999, 2015 and most recently in 2017. The 1999 Agreement has effect between the 13 August 1999 to 2 July 2015 and the 2015 Agreement applies from 3 July 2015 (albeit subject to deletions of cll 7 and 9 as from the 1 March 2017). The legacy of these Agreements has the consequence that individuals affected during these dates are subject to the Agreement in place at the time. They do not repeal the previous Agreement and therefore, for example, anyone so affected by a clause in the UDA 2015 occurring before 1 March 2017 would still be affected by the breaches in that Agreement, despite the removal of two of the EU-offending clauses through the Supplementary UDA 2017. As such, legacy breaches may still continue to

²² P Popelier 'Legal Certainty and the Principles of Proper Law Making' (2000) European Journal of Law Reform 321, 327.

²³ H Kelsen, Pure Theory of Law. Translation from the Second German Edition by Max Knight (Berkeley: University of California Press, 1967), 349.

²⁴ [2001] UKHL 9.

²⁵ Other aspects of the judgment were incorrect as to the requirements of the MVID.

adversely affect a third-party victim, despite any update in a subsequent Agreement.

THE EU AND CERTAINTY

The MIB acts as the insurer of last resort for the innocent victims of identified uninsured drivers. Here the victim claims compensation for his/her injuries from the MIB as if the uninsured driver was insured,²⁶ via the UDA 2015 (as amended by the Supplementary UDA 2017). The certainty of the Agreements relate to what it means and is understood by the average person (or indeed lawyer and judge) and hence how this affects the person's behaviour and ability to orientate their behaviour.

According to Dworkin, certainty is increased in advanced legal systems that are 'thick with constitutional rules and practices, and dense with precedents and statutes...'²⁷ It cannot be justifiably argued that motor vehicle insurance is not replete with rules, practices, precedents and statutes to guide citizens, organisations and the legislators in adhering to the underlying requirements to facilitate the free movement principles upon which they are founded. However, this has not increased certainty nor prevented the subjectivity in the transposition of EU rules by the UK. It was in *SIAT*²⁸ where the CJEU, when addressing the compatibility between a Treaty Article and national law, commented with reference to the lack of objectivity in the application of the national rules. It remarked that, in failing to satisfy the requirements of legal certainty, the lack of precision '... does not make it possible, at the outset, to determine its scope with sufficient precision and its applicability remains a matter of uncertainty.'²⁹ The national provision in question was not '... clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences *for individuals and undertakings*'³⁰ (authors' emphasis). Further, the CJEU held that with regards to the free movement principles, '... a rule which does not meet the requirements of the principle of legal certainty cannot be considered to be proportionate to the objectives pursued.'³¹

The inconsistency between national and EU law spans both judicial interpretations and the statutory and extra-statutory provisions. Hence, specifically in relation to the UDA 2015 and the Supplementary UDA 2017, the MIB and Secretary of State had the opportunity to redress the previous incompatibilities and uncertainty of the law,³² and at the very least, to remove

²⁶ The MIB will attempt to recover any disbursement from the uninsured driver.

²⁷ R Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977), 286.

²⁸ Case C-318/10 *Societe d'investissement pour l'agriculture tropicale SA (SIAT) v Etat belge* EU:C:2012:415.

²⁹ Case C-318/10 *Societe d'investissement pour l'agriculture tropicale SA (SIAT) v Etat belge* EU:C:2012:415 at [57].

³⁰ Case C-318/10 *Societe d'investissement pour l'agriculture tropicale SA (SIAT) v Etat belge* EU:C:2012:415 at [58].

³¹ Case C-318/10 *Societe d'investissement pour l'agriculture tropicale SA (SIAT) v Etat belge* EU:C:2012:415 at [59].

³² See N Bevan 'Part II: Why the Uninsured Drivers Agreement 1999 Needs to be Scrapped' (2011) 2 *Journal of Personal Injury Law*, 123.

the misleading and conflicting content of the Agreement remaining following the supplementary update. There are many aspects of the Agreements which are seemingly contrary to EU law requirements. The focus of this article, however, is the content of the UDA 2015 which outlines permissible exclusions of liability of the MIB in relation to uninsured drivers and aspects of the application of certain procedural rules, and the failure to remedy these in the Supplementary UDA 2017.

UDA EXCLUSIONS

To reiterate, the MVID is designed with the intention of protecting the third-party victims of uninsured drivers or of untraced vehicles through providing compensation at the level they could expect to receive in a claim against an identified and insured driver. To ensure harmonization of the law, member states are required to give effect to the directives and are restricted from actions which would undermine the objectives of the directives or to make access to their provisions more difficult than under comparable national law.

There are many examples where the courts have failed to give effect to the MVID through the national laws and have thus failed to provide certainty to this aspect of motor vehicle insurance.³³ Here, the judiciary's interpretation of the UDA 2015 inherently lacks the second-order correctness³⁴ of content required under the MVID and transgresses the norms of free movement, underpinning the Treaties. The UDA 2015 and UDA 2017 both distort the meaning of the MVID in significant ways and this is exacerbated when the MIB and Secretary of State prepare an updated/supplementary Agreement which seemingly addresses problems contained in the previous document. If we concentrate on the exclusions of liability to which the MIB is responsible, as contained in the UDA 2015, it is quite evident how confusion is present and individuals may not have certainty in determining the national provisions when compared with the EU parent directives. The areas where the MIB exempts itself from responsibility to act as insurer of last resort are identified in cl 4-10 UDA 2015. The most egregious transgressions are identified below and are compared with the MVID and the requirements established at EU law.

The UDA 2015 cl 5 exempts the MIB from being liable for a claim arising out of the use of a vehicle which is not, itself, required to be covered by a contract of insurance (unless its use is (actually) covered by such an insurance policy). Whilst it is widely understood that cars lawfully used on a road or other public place must be subject to minimum insurance cover, certain vehicles, in accordance with the RTA88 s 144, are exempt. For example, vehicles owned

³³ See cases including *Delaney v Pickett* [2012] PIQR P10, [2011] EWCA Civ 1532 and *EUI v Bristol Alliance Partnership* [2012] EWCA Civ 1267.

³⁴ In Alexy's thesis, correctness of content is concerned with practical questions, such as what is instructed, prevented and permitted apart from norms issued in the positive law. Here Alexy establishes two levels/stages of correctness of content – first-order and second-order. First-order correctness refers to an ideal dimension of justice. Second-order correctness adopts a more all-encompassing role incorporating legal certainty and justice. The second-order correctness introduces a balancing between legal certainty as a formal principle and justice as a material/substantive principle. (R Alexy 'On the Concept and the Nature of Law' (2008) 21 *Ratio Juris* 281.

or in the possession of organizations such as the National Health Service, the police force and local authorities would not require insurance cover as any claim should be met through them directly rather than through the MIB. This is problematic insofar as compatibility with the Sixth MVID is concerned. Article 3 of the MVID provides for the compulsory insurance of vehicles in member states and at Article 5, there exists a derogation from the obligation in respect of compulsory insurance of vehicles. However, member states are still tasked with taking all appropriate measures to ensure civil liability in respect of the use of vehicles is covered by insurance. Clause 5 of the UDA 2015 is in breach of the MVID by enabling the insurer of last resort/guarantee fund body to avoid its liability to third-party victims in the event of injury caused by an uninsured driver.

UDA 2015, at cl 6, permits the MIB to avoid liability or to deduct payments to a third-party victim of an uninsured driver. Such payments include those the victim would be entitled to receive through accident insurance payments or via compensation, and are subject to given exclusions. The exclusions³⁵ are contrary to rights held at common law and the distinction between the rights available through a claim via the MIB Agreements and those at common law have been held unlawful.³⁶ Whilst the sixth MVID does enable member states to make deductions from the compensation payment made to a third-party victim, this is included to prevent the situation of the double payment of compensation (for example where the claimant has been in receipt of a payment through a state-run benefits system or who may have recovered funds through a compensation scheme and who then seeks an award through the MIB Agreement). The only permissible exclusion against the payment of compensation allowed through the sixth MVID is 'in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured.'³⁷ Clause 6 UDA 2015 exceeds this limitation and breaches the MVID.

Clause 7 allows the MIB to avoid liability for damage to vehicles on the basis that, at the material time when the damage was caused, there was no contract of insurance for the use of the vehicle and, the claimant knew this or ought to have reason to believe no valid insurance was in place. The issue of the claimant's (perceived) knowledge is referred to as 'constructive knowledge' and is also a feature of cl 8. Clause 8 applies to situations where a victim, as a passenger in a vehicle in which the driver was responsible for the accident, attempts to claim against the driver or anyone else who may be responsible for the driver's use of the vehicle. The MIB avoids liability for the claim where the claimant voluntarily allowed themselves to be a passenger in the vehicle and either before the start of the journey, or after it starts,³⁸ the passenger (as victim) knew or had reason to believe that it had been stolen, unlawfully taken, or was being used without a contract of insurance being in

³⁵ From the Criminal Injuries Compensation Authority and an employer's non-insured refundable advance.

³⁶ *White v White* [2001] UKHL 9 at [34].

³⁷ Art. 10(2).

³⁸ For instance, if the victim could reasonably be expected to have alighted from it.

place. This phraseology was used in previous incarnations of the UDA³⁹ and even despite minor changes between the wording used in the 1999⁴⁰ and 2015⁴¹ UDAs, along with the removal of the EU-offending ‘crime exemption’⁴² of the MIB to victims who had knowingly allowed themselves to be carried in vehicles which were used in the furtherance of a crime, the clauses breach Art. 10(2) of the sixth MVID.⁴³ The MVID requires ‘proof’ of knowledge by the victim. Even the House of Lords extending actual knowledge to purposefully not enquiring⁴⁴ about the existence of insurance breached the MVID as no similar provision is contained in the directive.

Clause 9 of the UDA 2015, despite its brevity, has potentially profound implications for third-party victims of uninsured drivers. The clause reads: ‘[The] MIB is not liable for any claim, or any part of a claim, where the death, bodily injury or damage to property was caused by, or in the course of, an act of terrorism within the meaning of s 1 of the Terrorism Act 2000.’⁴⁵ The result was an exemption for the MIB to have to settle claims in those specific circumstances.⁴⁶ Problems were caused with the definition of ‘terrorism’ being based on that included in the Terrorism Act (TA) 2000.⁴⁷ It was unusual and indeed unnecessary for the inclusion of this clause given that the CJEU’s jurisprudence exempted the MIB from being required to satisfy a claim against an uninsured vehicle which use did not constitute a normal use of a vehicle.⁴⁸ In another article⁴⁹ we outlined the hypothetical situations which use of TA 2000 s 1 could lead to (for example a third party victim of a road traffic accident caused by an uninsured driver of a car fleeing the scene of his arsonist attack having killed victims employed at an anti-GM crop facility). Another third-party victim of an accident caused by an uninsured driver not involved in a terrorist act would, by contrast, be protected and have the claim dealt with by the MIB.

³⁹ Clause 6 UDA 1999.

⁴⁰ ‘... ought to have known.’

⁴¹ ‘... had reason to believe.’

⁴² *Delaney v Secretary of State* [2015] EWCA Civ 172.

⁴³ Similar breaches when using ‘constructive knowledge’ apply to RTA88 151(4).

⁴⁴ *White v White* [2001] UKHL 9 at [34].

⁴⁵ Although the use of this definition is not limited to the UDA 2015 – see for instance the Anti-Terrorism, Crime and Security Act 2001 s 74; the Prevention of Terrorism Act 2005 s 15; and the Immigration, Asylum and Nationality Act 2006 s 54.

⁴⁶ The ‘terrorism exclusion’ clause operates to void the MIB of liability in those specific circumstances and is a clause which began life in UtDA 2003 cl 5.1(g).

⁴⁷ For an of the Terrorism Act 2000 see C Gearty ‘Terrorism and Human Rights: A Case Study in Impending Legal Realities’ (1999) 19 *Legal Studies*, 367.

⁴⁸ The TA 2000 definition of terrorism is itself questionable as to its appropriateness for the various purposes to which it is applied – see C Walker, *Terrorism and the Law* (OUP, 2011). Further, in Case C-162/13 *Damijan Vnuk v Zavarovalnica Triglav* [2014] ECLI:EU:C:2014:2146, a case decided prior to the creation of the UDA 2015, the CJEU held that vehicles must be used for their intended purpose. Where this is not adhered to, use would be construed as ‘misuse’ and the MVID would not have effect. Therefore, no compulsory third-party insurance would be required and the MIB would have no role in any subsequent claim for damages.

⁴⁹ J Marson, and K Ferris ‘The Uninsured Drivers’ Agreement 2015 as a Legitimate Source of Authority’ (2016) *Statute Law Review*, DOI: <https://doi.org/10.1093/slr/hmw043> where we outline the deficiencies in the Agreement with regards its compatibility with EU law.

Law should be accurate. In relation to the MVID, the jurisprudence of the CJEU clarifies many areas of contention with regards the RTA88 and the UDA. This is not to say that, of itself, the EU's teleological approach to statutory interpretation creates certainty. The EU's addition to the domestic interpretation of national law within the spirit of the EU parent can lead to '... a regime in which reliance and predictability are wholly subsumed to constant change and, correspondingly, an unstable legal framework.'⁵⁰ However, uncertainty here does not refer to a lack of legislative provision in its implementation or judicial direction in its application. The uncertainty lies in the differing rules between the EU source and the UK national implementing measure, and in the definitive status provided to the MIB and its Agreement with the Secretary of State. For example, the interpretation provided by the judiciary in the UK holds the MIB not to have emanation of the State status. In light of authority from the CJEU, this position is questionable and not in conformity with EU jurisprudence.⁵¹

THE SUPPLEMENTARY UNINSURED DRIVERS AGREEMENT 2017

Following the establishing of the recent UDAs and UtDAs, public calls for a comprehensive review and subsequent changes to their content and scope were made.⁵² The MIB disagreed, considering that the provisions of the UDA were compatible with its legal requirements. Yet in 2017, it provided as a rationale for the Supplementary UDA 'We understand that the government felt its hands were tied and they must comply with the [sixth MVID]; so both the [UDA and UtDA] have to change.'⁵³

The extent of the exclusions contained in the UDA 2015 were significant and articulated in clear terms breaches of the MVID. Beyond the judicial review⁵⁴ currently progressing in court brought by the charity RoadPeace which seeks rectification of the breaches in the UDA 2015 and the 2003 UtDA (this latter Agreement was more substantially updated in March 2017), the MIB and the Secretary of State sought to use this opportunity to update the UDA 2015. In

⁵⁰ A L Tyler, 'Continuity, Coherence, and the Canons' (2005) 99 *Northwestern University Law Review* 1389, 1418.

⁵¹ See a case involving the status of the MIB of Ireland; Case C-356/05 *Farrell* [2007] ECR I-3067.

⁵² On the issue of the compatibility between national law and EU requirements in motor insurance law see the comprehensive work of Nicholas Bevan including: 'Motor Insurance Law Change' (2016) 166 *NLJ* 7703, 5; 'Putting Wrongs to Rights (Pt 2)' (2016) 166 *NLJ* 7701, 13; 'Putting Wrongs to Rights (Pt 1)' (2016) 166 *NLJ* 7700, 17; 'Redress Road' (2016) 166 *NLJ* 7700, 5; 'Still Driving Dangerously' (2016) 166 *NLJ* 7693, 18; 'A Call for (More) Reform' (2015) 165 *NLJ* 7661, 9; 'No Through Road' (2015) 165 *NLJ* 7648, 7; 'Delaney Sets a New Insurance Route' (2015) 165 *NLJ* 7644, 4; 'High Impact' (2014) 164 *NLJ* 7628, 5; 'Ignore at Your Peril' (2014) 164 *NLJ* 7628, 7; 'Bad Law' (2014) 164 *NLJ* 7624, 7; 'UK in Breach Over Uninsured Drivers' (2014) 164 *NLJ* 7610, 4; 'Untraced Drivers' Scheme is Car Crash' (2014) 164 *NLJ* 7598, 4; 'On the Right Road (Pt IV)' (2013) 163 *NLJ* 193; 'On the Right Road? (Pt III)' (2013) 163 *NLJ* 160; 'On the Right Road? (Pt II)' (2013) 163 *NLJ* 130; 'On the Right Road?' (2013) 163 *NLJ* 94; 'Asleep at the Wheel?' (2013) 163 *NLJ* 7556, 10.

⁵³ <https://www.mib.org.uk/media-centre/news/2017/january/new-untraced-drivers-agreement-and-supplementary-uninsured-drivers-agreement/> (accessed 30 March 2017).

⁵⁴ *R (on the application of RoadPeace) v Secretary of State for Transport and the MIB*, Claim no. CO/4681/2015.

so doing it has changed some of the wording to achieve parity with those used in the UtDA 2017, albeit this was a relatively minor series of changes.

The Supplementary Agreement provides:

‘2. This Agreement shall come into force on the 01 day of March 2017 and applies to accidents occurring on or after that date. From that time onwards, the 2015 Agreement shall continue to apply in all respects save as provided for by the amendments set out below.

3. The whole of clauses 7 (vehicle damage) and 9 (terrorism) are omitted but, notwithstanding this, the numbering of the subsequent clauses remains unchanged.’

Hence, cll 7 and 9 were both repealed from the UDA 2015 in the Supplementary UDA 2017. Both the UDA 1999 and 2015 excluded the MIB⁵⁵ from having to settle claims against an uninsured driver where the claimant’s vehicle was also uninsured. Deleting this clause in the UDA 2017 prevents insurers dealing with claims on behalf of the MIB against an uninsured driver from refusing to meet a claim where the claimant’s vehicle was uninsured. Secondly, the terrorism exclusion which was misconceived from the outset has also been removed without recourse to further legal action (although it remains an aspect of the judicial review proceedings brought by RoadPeace).

However, each of the existing clauses which operated in the UDA 2015 and have not been expressly deleted (cll 5,6 and 8) continue to breach the MVID and have not been addressed. Despite the Court of Appeal’s position in the recent case of *Sahin v Havard*⁵⁶ that the RTA88 and MIB Agreements collectively achieve the requirements of the MVID,⁵⁷ these inconsistencies do nothing to improve legal certainty or give drivers, insurers and third-party victims adequate instruction as to their legal rights and obligations. Indeed, the application of the law in the courts does nothing to assist with remedying the current uncertainty.⁵⁸

Actions contrary to the legal certainty principle include provisions which are meaningless or irreconcilable with the content of other (EU) laws (including cll 5,6 and 8 UDA 2015 and s 148(2) RTA88),⁵⁹ where provisions are repealed or

⁵⁵ And also any Art. 79 insurer acting as the agent of the MIB. Article 79 refers to that part of the MIB’s Articles of Association which provides: ‘Article 79 - Domestic Regulations. The purpose of the Domestic Regulations is to distribute amongst MIB Members, in an equitable fashion, the liabilities falling on the Central Fund, by imposing an obligation to meet a claim upon any Member that has a relationship with the risk. The obligations imposed by the Domestic Regulations may require a Member to meet claims even where no contractual relationship exists with the parties to the accident. Details of decisions taken by the Technical Committee upon cases falling within the Domestic Regulations are regularly circulated to Members.’ (available at <https://www.mib.org.uk/media/311594/mib-member-application-form-supporting-document-version-60.pdf>).

⁵⁶ *Sahin v Havard and Riverstone Insurance (UK) Ltd* [2016] EWCA Civ 1202.

⁵⁷ See paras [8], [13], [16–28], [32], [33], and [34] of the judgment.

⁵⁸ J Marson, and K Ferris ‘Misunderstanding and Misapplication of Motor Insurance Law. Will the Supreme Court come to the Rescue?’ (2017) *European Journal of Current Legal Issues* (forthcoming).

⁵⁹ Establishing Fuller’s fifth failure to make law.

substantially altered (including cl 7 and 9 UDA after 1 March 2017 but whose application continues for incidents covered by the previous applicable UDA),⁶⁰ and where the issue is so complex that citizens would be unable to know the extent of the law (for example the current application of s 148(2) RTA88).⁶¹ Each of these elements may be found in the exclusion clauses within the UDA 2015. The Agreement frequently fails to provide authoritative issuance on significant matters clearly defined in the parent MVID and/or the deductive reasoning provided by the CJEU. Judgments made in accordance with the UDA 2015 would fail the test of rational argumentation, and, as will be observed below, the application of the Agreement in accordance with procedural rules would lack the required adaptability (particularly in relation to the current status of the MIB as not constituting an emanation of the state) to provide justice. The Supplementary UDA 2017 and the UDA 2015 fail the dual nature of law.⁶²

THE GREAT REPEAL BILL

Despite the assertion by the Government that the UK's exit from the European Union (commonly referred to as Brexit) will establish greater certainty for, amongst others, the legal system, the White Paper⁶³ introduced on 30 March 2017 included details regarding the mechanism of the transition from EU law to national law. The Government proposes to convert the 'acquis' of EU law into national law on the coming into force of the Great Repeal Bill (read Act) following the repeal of the European Communities Act. Such an approach will see national law as supreme,⁶⁴ that existing directly applicable EU laws (Treaty Articles and Regulations) will be subsumed into national law⁶⁵ (via secondary legislation) and existing EU laws already transposed into national law will be preserved.⁶⁶ Provisions from Treaties which may be relied on directly in national courts (and hence have direct effect) will continue to be available⁶⁷ and, perhaps much more significantly in terms of motor vehicle insurance law, whilst the jurisdiction of the CJEU will be brought to an end, its historic jurisprudence will have the same binding precedence as decisions of the UK Supreme Court.⁶⁸

The Government, whilst acknowledging the potential problem of leaving the EU, its laws and the jurisprudence of the CJEU, sought to reassure readers of the White Paper. It provides examples of EU-based laws which will continue and interpretations of laws provided by the CJEU which will also continue to be used in the post-Brexit era in an attempt to provide certainty and clarity of

⁶⁰ Establishing Fuller's seventh failure to make law.

⁶¹ Establishing Fuller's fourth failure to make law.

⁶² For discussion of this theoretical position see R Alexy 'The Dual Nature of Law' (2010) 23 *Ratio Juris* 167, 167.

⁶³ Department for Exiting the European Union (2017) 'Legislating for the United Kingdom's withdrawal from the European Union' Cm 9446 (available at www.gov.uk/government/publications).

⁶⁴ Para. 2.3.

⁶⁵ Para. 2.4.

⁶⁶ Para. 2.5.

⁶⁷ Para. 2.11.

⁶⁸ Paras 2.12-2.17.

the law.⁶⁹ At paragraphs 2.16 and 2.17 the White Paper continues its assessment of the implications of previous CJEU decisions. It identifies that adherence to, and the continuation of, the jurisprudence established by the CJEU is important as it maximizes legal certainty, but it does not want this intention to ‘fossilise the past decisions of the CJEU forever.’⁷⁰ The Supreme Court will have the ability, derived from a practice statement made by the House of Lords in 1966 and adopted by the Supreme Court in 2010, to treat previous decisions as binding but with the ability to depart from these when it appears right to do so. At paragraph 2.17 the White Paper continues that the Government expects the Supreme Court to take a

‘similar, sparing approach to departing from CJEU case law. We are also examining whether it might be desirable for any additional steps to be taken to give further clarity about the circumstances in which such a departure might occur. Parliament will be free to change the law, and therefore overturn case law, where it decides it is right to do so.’

This poses an interesting conundrum for the application of motor vehicle insurance law in post-Brexit Britain.⁷¹ Whilst the UK government will have the right to change EU-based laws following a review and submission to Parliament, on Brexit day the jurisprudence of the CJEU will take effect akin to a precedent established by the Supreme Court. By way of just one example, the problem for the UK’s compliance with the MVID will come starkly into focus. Section 148 RTA88 governs where insurers may and may not seek to avoid a contract of insurance. Following the supply of a certificate of insurance, there are eight ‘matters’ which, if attempted to be used by an insurer to avoid their liabilities, would be held void. The matters are contained in s 148(2) and relate to:

- (a) the age or physical or mental condition of persons driving the vehicle;
- (b) the condition of the vehicle;
- (c) the number of persons that the vehicle carries;
- (d) the weight or physical characteristics of the goods that the vehicle carries;
- (e) the time at which or the areas within which the vehicle is used;
- (f) the horsepower or cylinder capacity or value of the vehicle;
- (g) the carrying on the vehicle of any particular apparatus; or

⁶⁹ The EU Council clearly does not agree with the UK’s positive perception of the impending legal certainty following the Brexit notification: ‘The United Kingdom’s decision to leave the Union creates significant uncertainties that have the potential to cause disruption, in particular in the UK but also in other Member States. Citizens who have built their lives on the basis of rights flowing from the British membership of the EU face the prospect of losing those rights. Businesses and other stakeholders will lose the predictability and certainty that come with EU law.’ European Council ‘(Art. 50) (29 April 2017) - Draft Guidelines following the United Kingdom’s Notification under Article 50 TEU’ Brussels, 31 March 2017 (OR. en), XT 21001/17, 2.

⁷⁰ Para. 2.16.

⁷¹ For our interpretation of the possibilities see J Marson, K Ferris, and A Nicholson ‘Brexit means Brexit: What does it mean for the Protection of Third Party Victims and the Road Traffic Act 1988?’ (2017) *Statute Law Review*, DOI: <https://doi.org/10.1093/slr/hmx006>.

(h) the carrying on the vehicle of any particular means of identification other than any means of identification required to be carried by or under [the Vehicle Excise and Registration Act 1994].

The extent of the application of s 148(2) RTA88 was considered in *EUI v Bristol Alliance Partnership*.⁷² The case involved an individual who, using his motor vehicle, attempted to commit suicide by driving into a building. In the course of this activity the driver damaged the property of another motorist. Under the terms of the contractual policy, the motor insurer had sought to exclude liability for 'deliberate acts' and therefore sought to avoid the claim of the third-party motorist who had suffered damage by the deliberate actions of the insured driver. The question to be considered by the Court of Appeal was whether such an attempted exclusion was permitted under s 148(2). This issue of national laws which seek to permit the exclusion of contractual liability in motor vehicle policies had been previously determined by the CJEU in *Ruiz Bernaldez*.⁷³ The CJEU had confirmed that the only permissible grounds for excluding a third party's right to claim against the policyholder's insurers was where the third party knew that the vehicle was stolen⁷⁴ (this being the only permissible derogation from such insurance cover as outlined in the MVID). The *Bernaldez*⁷⁵ reasoning was also confirmed in the later cases of *Correia Ferreira v Companhia de Seguros Mundial Confiança SA*,⁷⁶ *Candolin v Vahinkovakuutusosakeyhtio Pohjola*,⁷⁷ *Farrell v Whitty*,⁷⁸ and *Churchill v Wilkinson and Tracey Evans*.⁷⁹ However, in *EUI v Bristol Alliance Partnership*⁸⁰ the Court of Appeal refused to follow the principles established in *Bernaldez* and held they were not of general application. In a unanimous judgment delivered by Ward LJ, the Court of Appeal concluded that as s 148(2) provided a finite list of matters, this should be interpreted as exhaustive rather than illustrative (as CJEU jurisprudence would require).

Given the obligation that the jurisprudence of the CJEU will become the equivalent to precedent established by the Supreme Court, decisions such as that delivered in *EUI v Bristol Alliance Partnership* will no longer be able to disregard EU-compliant authority. It will, in essence, be overruled by the

⁷² [2012] EWCA Civ 1267.

⁷³ Case C-129/94 *Rafael Ruiz Bernáldez* [1996] ECR I-1829.

⁷⁴ The CJEU achieved this through purposively interpreting the list of void exclusions provided in Art.2(1) of the Second MVID (now contained in Art.13(1) of the Sixth MVID) as being illustrative and thereby extending the scope of the civil liability insurance requirement contained in Art.3(1) of the First MVID.

⁷⁵ Case C-129/94 *Rafael Ruiz Bernáldez* [1996] ECR I-1829.

⁷⁶ Case C-348/98 *Vitor Manuel Mendes Ferreira and Maria Clara Delgado Correia Ferreira v Companhia de Seguros Mundial Confiança SA* [2000] ECR I-6711.

⁷⁷ Case C-537/03 *Katja Candolin, Jari-Antero Viljaniemi and Veli-Matti Paananen v Vahinkovakuutusosakeyhtio Pohjola and Jarno Ruokoranta* [2005] ECR I-5745. Here the court, when referring to *Bernaldez* (at [20]), commented that it had previously '... held that Art 3(1) [of the MVID]... precludes an insurer from relying on statutory provisions or contractual clauses in order to refuse to compensate third-party victims of an accident caused by the insured vehicle.' at [18].

⁷⁸ *Elaine Farrell v Alan Whitty* (C-356/05) [2007] ECR I-3067.

⁷⁹ Case C-442/10 *Churchill Insurance Company Limited v Benjamin Wilkinson and Tracy Evans v Equity Claims Limited* [2011] ECR I-00000.

⁸⁰ [2012] EWCA Civ 1267.

CJEU (now Supreme Court) authority in *Bernaldez*.⁸¹ The Court of Appeal, which has historically and more recently⁸² transgressed precedent established by the CJEU, will now be forced to comply with EU law. Evidently the Government may change the legislation, and it is not impossible to consider that the Government will have a new RTA prepared prior to Brexit or indeed one ready to be enacted in the immediate aftermath, but pending such an eventuality, the landscape of motor vehicle insurance law is likely to change and whether this will establish legal certainty is at this stage still questionable.

THE APPLICATION PROCESS UNDER THE MIB AGREEMENTS

Road users and pedestrians in the UK are entitled to clear guidance regarding not only their rights in relation to compulsory insurance provisions but also the circumstances and extent to which public authorities may interfere with their rights. All claims are subject to procedural rules, but it is arguable that those applied to the MIB Agreements breach comparable measures through the Civil Procedure Rules (CPR) 1998.

When making a claim to the MIB, an application form of eight pages must be completed. The depth of questions required to be answered of the claimant are quite different from those required under the RTA 1 claim notification form under the CPR.⁸³ This requires the claimant's personal details – name, address, occupation, national insurance number, vehicle details and accident details (including injury and medical information, any rehabilitation required and vehicle damage). Even in RTA 1 Section H, claims under the MIB scheme for uninsured cases merely requires details of the defendant (a brief description, their approximate age and sex) and their vehicle. RTA 1 Section L, detailing the funding of the claim, is limited to details of any conditional fee arrangement entered into, the existence of an insurance policy, or an agreement with a membership organization which will meet the claimant's costs.

The MIB claim form is considerably more detailed but it is in Section 12 where stark differences are evident. Here the claimant consents to the MIB and their representatives using his personal and sensitive information (including medical information and criminal convictions relevant to the claim);⁸⁴ the release of all information to the MIB or its representatives from any source which the MIB believes may possess relevant information to the claim for compensation. This may include, but is not limited to, information requested

⁸¹ Case C-129/94 *Rafael Ruiz Bernáldez* [1996] ECR I-1829.

⁸² In *Sahin v Havard and Riverstone Insurance (UK) Ltd* [2016] EWCA Civ 1202 the Court of Appeal disregarded EU jurisprudence (and a decision held weeks before the judgment (*Allen v Mohammed and Allianz Insurance* (2016), Lawtel, LTL 25/10/2016) when interpreting ss. 145, 143(1)(a) and 143(1)(b) RTA88. The Court of Appeal restrictively (and we argue incorrectly) interpreted RTA88 despite the second MVID providing the protection sought by the claimant. See J Marson, and K Ferris 'Misunderstanding and Misapplication of Motor Insurance Law. Will the Supreme Court come to the Rescue?' (2017) *European Journal of Current Legal Issues* (*forthcoming*).

⁸³ For low value personal injury claims in road traffic accidents (the value of which is between £1,000-£25,000).

⁸⁴ Clause 3.

from: the claimant's employers (such as wage and other benefit/pension details, absence/attendance records, the full personnel file, and precise contract details); any government department (such as all applications for benefits, tax records, payments made, driving licence details including relevant endorsements); and insurance companies (including full details of any policies held, claims made, monies received).⁸⁵ Further, in Section 12 the claimant explicitly authorizes any health professional with whom they have consulted *at any time* to provide the MIB or its representatives with any relevant information (this is all the claimant's health records and notes) concerning their past, present, or anticipated future, physical or mental health.⁸⁶ Finally, in the event that the claimant has provided personal data about a third party (other than any uninsured driver) as part of the claim, they purport to have obtained the freely given agreement of the individual(s) concerned to enable the MIB to use their personal data, including any sensitive personal data, where practicable.⁸⁷

The extent of the information required to be provided, and to which access must be given, is significant. It is open to question whether such information is necessary to enable the MIB to fulfil its duties under the Supplementary UDA 2017, UDA 2015 and the MVID. The personal data to be surrendered greatly exceeds that which is needed to pursue a claim under the auspices of the CPR and even may be questionable with regards the individual's right to privacy under Article 8 of the European Convention on Human Rights. The respect for an individual's private and family life requires no interference by a public authority except in accordance with the law. This includes, where it is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country; for the prevention of disorder or crime; for the protection of health or morals; or for the protection of the rights and freedoms of others. Clearly, Art. 8 is by its nature open-ended, but its interpretation covers both negative, as well as positive⁸⁸ obligations on the state. Key issues in question regarding the invoking of Art. 8 is the 'necessity' of the requirements of the MIB disclosures in Section 12 of the claim form. This is satisfied where any interference of the individual's privacy corresponds to a pressing social need,⁸⁹ and that the need is proportionate to the legitimate aim being pursued. Given the extent of the information provided, and when compared under equivalence to the CPR, it does not appear *ex facie* that such information is required to satisfy the pressing need of enabling a victim of an uninsured or untraced driver to claim from a central fund. When coupled with the compulsory requirement of arbitration with no right of appeal to higher courts, the presence of safeguards at national law which have generally prevented a breach of the proportionality principle of the measure being necessary in a democratic society, are uncertain.⁹⁰ It could be argued to

⁸⁵ Clause 4.

⁸⁶ Clause 5.

⁸⁷ Clause 6.

⁸⁸ *X and Y v The Netherlands* (1985) 8 EHRR 235.

⁸⁹ *The Sunday Times v United Kingdom* (1979) 2 EHRR 245.

⁹⁰ *MS v Sweden* (1997) 3 BHRC 248.

the contrary that the limitations on public finances⁹¹ requires the full and complete disclosure of the claimant's private information to prevent unworthy claims; however, the RTA88 s 154 was designed to facilitate, rather than to reduce, the effectiveness of an individual recovering compensation to which they were entitled. The MVID also requires the individual to be provided compensation from the state fund and it is quite possible to mount an argument that the administration of the claim form required by the MIB could dissuade a genuine claimant from pursuing their action for recovery.

CONCLUSIONS

Returning to King Rex and his attempts to revise his legal code:

'The resulting code was a model of clarity, but as it was studied it became apparent that its new clarity had merely brought to light that it was honeycombed with contradictions. It was reliably reported that there was not a single provision in the code that was not nullified by another provision inconsistent with it.'⁹²

The legitimacy of the UDA 2015 and the Supplementary UDA 2017 as being compliant with the MVID has been an area of contention since their inception. The MVID and the jurisprudence of the CJEU have developed the law relating to third-party victims of uninsured drivers and untraced vehicles. This has, however, often been stunted through the Agreements between the Secretary of State and the MIB and national courts (notably the Court of Appeal). Law is a regulatory concept but, whilst unable to offer definitive solutions to each potentially unanswerable question, it at least has the ability to provide a method of determinacy. However, the Court of Appeal has on several occasions, refused to follow the reasoning of the CJEU on the interpretation and application of the MVID through its myopic view of national laws. Brexit has furthered the uncertainty of the law in two key aspects. First, the Government has announced that it will use Parliamentary powers to review existing EU laws and selectively remove those from national application which do not adhere to the Government's strategy. Secondly, historic CJEU decisions will be incorporated in UK law and be considered of the same standing as judgments of the Supreme Court. As such, case law from the *Bernaldez*⁹³ line of reasoning will, following Brexit-day, be binding on the Court of Appeal and decisions such as in *EUI v Bristol Alliance Partnership*⁹⁴ will be unavailable to that national court. Either the Government will pre-empt such an eventuality and change the RTA in advance of Brexit or it will lead to

⁹¹ *R v Director of Public Prosecutions, ex parte Sofiane Kebeline* [2002] 2 AC 366, 381: 'In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.'

⁹² L L Fuller 'Eight Ways to Fail to Make Law' (2000) reprinted in J Feinberg & J Coleman eds, *Philosophy of Law*, sixth edition 91, 92.

⁹³ Case C-129/94 *Rafael Ruiz Bernáldez* [1996] ECR I-1829.

⁹⁴ *EUI v Bristol Alliance Partnership* [2012] EWCA Civ 1267.

many appeals to the Supreme Court to clarify national provisions from their historic EU lineage.

The motor vehicle insurance laws in the UK are in a state of flux. This does not help any user or participant in this area. Of course, a level of uncertainty has to be found in all legal systems⁹⁵ and in their application, but legal and administrative inconsistencies affecting the UDA 2015 (and subsequently) its Supplementary UDA 2017 have been identified and discussed, and yet the Government and the courts are often failing to apply the law in conformity with superior EU law.⁹⁶ A reading of the UDA 2015 reveals a succinct and clear outline of the breadth of the MIB's liability and responsibility to third-party victims of an uninsured driver. However, it is a contradictory document when considered in the light of its EU-law parent. Similarly, the RTA88 fails to correspond with the MVID in a number of areas.⁹⁷

The Secretary of State for Transport, the MIB and the UK executive (along with elements of the judiciary) have collectively failed to make the law of motor vehicle insurance clear and certain. Whether, as with *King Rex*, they were misguided but ultimately well intentioned when creating the national law is ambiguous. What is definite, however, is that, like *King Rex*, their actions were ultimately doomed.

⁹⁵ Legal rules often incorporate an element of unpredictability with the common use of the words such as 'reasonable' and 'ordinary'. Typically, the greater the complexity of the code, the increased likelihood there is to be inconsistencies in its content and its application.

⁹⁶ See P Popelier 'Legal Certainty and the Principles of Proper Law Making' (2000) *European Journal of Law Reform* 321, 339.

⁹⁷ For example, s 143 (the duty to insure breaches Arts. 1 and 3 of the sixth MVID.), s 145 (the requirement of third-party insurance cover breaches Arts. 1 and 3 of the sixth MVID.), s 148 (the limitations on certain exclusions within the holder's insurance policy breaches Art. 3 of the sixth MVID), s 150 (the private use of a vehicle breaches Arts. 3 and 12(1) of the sixth MVID), s 151(4) (the (constructive) knowledge of theft or unlawful taking of a vehicle breaches Art. 13.1 of the sixth MVID), s 152 (the exceptions to indemnity under s. 151 breaches recital 15 of the sixth MVID), s 185 (the definition of a motor vehicle breaches Arts. 1 and 3 of the sixth MVID), and s 192 (the definition of road or other public place breaches Arts. 1 and 3 of the sixth MVID).