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The Uninsured Drivers' Agreement 2015 as a Legitimate Source of Authority

James Marson* and Katy Ferris†

ABSTRACT

In the United Kingdom, motor vehicle insurance is governed by national and EU law. In respect of the EU requirement that member states establish a guarantee fund from which the victims of negligent uninsured or untraced drivers may obtain compensation, the United Kingdom entered into a series of agreements with the Motor Insurers' Bureau (MIB). In 2015, the MIB established the Uninsured Drivers' Agreement (UDA). This agreement implements (with the Road Traffic Act 1988 and the Untraced Drivers' Agreement 2003) aspects of the Motor Vehicle Insurance Directives (MVID). The UDA 2015 establishes clauses and procedural arrangements which, we argue, have largely removed legal certainty for policyholders and for the victims of negligent uninsured drivers. As such, the fundamental goals of the MVID and the free movement principles upon which they are based are undermined in the United Kingdom. This article offers a critique of the substantive breaches of the MVID through the UDA 2015's exclusions and procedural arrangements and identifies the current state of unpredictability and uncertainty when the two sources of law are compared.

1. MOTOR VEHICLE INSURANCE AND CERTAINTY

The regulation of insurance for motor vehicles used on a road or other public place derives from national and EU law. Nationally, such insurance is governed through statutory and extra-statutory provisions. The statute [the Road Traffic Act 1988 (RTA88)] at section 143 necessitates a minimum of third-party (liability) insurance is held by the owner of the vehicle to protect the innocent victim of a negligent insured and traced driver. The RTA88 also provides protection for the victims of uninsured drivers through, for example, enabling their claims directly against the policyholder's insurers. However, in the event of the driver being uninsured, extra-statutory provisions[1] take

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[1] In 1937, the Cassel Committee (Cmnd 5528), 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 victims of uninsured drivers would be able to recover damages. This led to the government entering into an agreement in 1945 with the insurance industry, through the created Motor Insurers' Bureau (MIB), to undertake the central guarantee fund role. Thus, the MIB assumes the position of insurer for victims of accidents caused by uninsured and untraced drivers [protection for victims of untraced drivers (e.g. victims of a hit-and-run accident) did not become effective until 1969].

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over. It is through the extra-statutory arrangements where a victim may recover compensation in the event that either the at-fault driver's insurer is not contractually nor statutorily liable to compensate the victim or that the individual causing the accident cannot be traced.

The Motor Vehicle Insurance Directives (MVID) is a collective term for a series of six EU directives[2] relating to compulsory motor vehicle insurance. The aim, initially to facilitate the free movement principles of goods and people,[3] extended latterly to reducing the negative effects on victims of accidents caused by uninsured[4] and untraced[5] motor vehicle drivers. The directives continued, incorporating revisions and extensions facilitating protection to a wider remit of vehicles and places where accidents involving such vehicles took place (e.g. public and private land). A requirement of the MVID was for member states to establish a guarantee fund, a compensation fund, an information centre, and a central body to provide enhanced protection for injured victims of negligent uninsured, untraced, or foreign motorists.[6] Member states were entitled to designate these tasks to a central body and in the United Kingdom, through an agreement between the Secretary of State for Transport and the Motor Insurers' Bureau (MIB), the MIB satisfied this aspect of the MVID and in so doing acts as an insurer of last resort.[7] The MIB's agreements with the State consist of the Uninsured Drivers' Agreement (UDA), most recently of 2015, and an Untraced Drivers' Agreement (UtDA), established in 2003 but subsequently amended.[8]

Given the relationship between the EU parent MVID and the national transposing provisions (incorporating the UDA 2015), the UDA 2015 is required to be in conformity with the MVID and the jurisprudence of the Court of Justice of the European Union (CJEU). This provides the certainty necessary for citizens to understand the rights and obligations created through both sources. Hence both legal certainty and the principle

[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] Abolishing frontier checks on insurance certificates.

[4] A driver who caused or contributed to the accident and who, at the time, held no valid policy of insurance.

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

[6] This 'green card scheme' applies to accidents caused through the negligent driving of foreign motorists. The MIB may resolve the victim's claim for damages and he/she is not then required to communicate with the foreign insurer.

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

[8] Whilst the MIB and the government develop a new UtDA to replace the 2003 agreement, it was amended at the same time as the UDA 2015. Similar provisions, as per the UDA 2015, in respect of exclusions for passengers with constructive knowledge, and what constitutes a subrogated claim have been applied. This provides a consistent approach to both matters between the two agreements.

of justice (a fellow pillar of the rule of law) are required to be present in the legal issuance of the UDA 2015 and in its application.

The CJEU[9] has confirmed that legal certainty[10] is a fundamental principle of EU law (even though it does not appear explicitly in the Treaties).[11] Whilst a very broad concept, in essence it imposes upon member states a requirement for transparency, precision, stability, and predictability in law-making.[12] Legal certainty enables citizens to understand, in advance, the consequences that follow their conduct.[13] It provides governance, identifies limitations, and imposes order on permissible actions including rule-making and law-applying activities.[14] This lends itself to the long and often complex negotiation, and the planning and administration, of the agreements concluded between the Secretary of State and the MIB. However, it is in both the drafting and in the judicial interpretation of the agreement with the parent MVID (at least until the United Kingdom determines if and on what basis it leaves the EU) where problems of certainty, and justice, exist.

2. THE UDA 1999 AND 2015: HISTORY REPEATING ITSELF?

In the intervening 16 years between the previous UDA (concluded in 1999) and the current agreement, jurisprudence from national and EU law, along with three further directives,[15] had evolved and clarified much of the law relating to motor vehicle insurance. Hence, a textual reading of the UDA 1999 contained erroneous and/or misleading information, despite the publication of Supplemental Guidance Notes from 15 April 2002 which were designed to alleviate the most severe criticisms.[16]

The UDA 2015 aimed to simplify many of the previous rules surrounding claims to the MIB. The UDA 1999 was widely disliked and broadly criticized due to the procedural rules applied[17] (often placing an unfair burden on claimants) and which, if not

[9] See Case C-236/95 *Commission* v. *Hellenic Republic* [1996] ECLI:EU:C:1996:341 where the European Court of Justice (now the CJEU) remarked: '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 (see to this effect Case 29/84 *Commission v Germany* [1985] ECR 1661, paragraph 23, Case 363/85 *Commission v Italy* [1987] ECR 1733, paragraph 7, and C-59/89 *Commission v Germany* [1991] ECR I-2607, paragraph 18).' at [13].

[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] It is a principle common to the legal systems of the member states—see J Temple Lang 'Legal Certainty and Legitimate Expectation as General Principles of Community Law' in U Bernitz and J Nergelius (eds) *General Principles of European Community Law* (Kluwer The Hague 2000), 163. Legal certainty is enshrined in Art. 49 of the Charter of Fundamental Rights of the European Union, 2000/C 364/01.

[12] See cases including Case 70/83 *Kloppenburg* 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].

[13] T Tridimas *The General Principles of EU Law* (2nd edn Oxford University Press Oxford 2006), 242.

[14] See, for instance, Bertelsmann Stiftung '2014 Rule of Law Report Legal Certainty, Judicial Review, Appointment of Justices, Corruption Prevention' Sustainable Governance Indicators.

[15] The fourth, fifth and sixth MVID.

[16] See, e.g., commentary published in The Law Society Gazette <http://www.lawgazette.co.uk/news/motor-insurers-bureau-trouble-ahead/38186.fullarticle> (accessed 28 August 2016).

[17] Evidenced in cll. 7 (failure to use the MIB's own application form), 9 (failure to provide the MIB with 'proper notice' of proceedings), 10 and 11 (failure to inform the MIB within seven days with details of various developments/additional information as the MIB may reasonably require), and 13 (failure to request insurance information from the defendant driver/failing to use all reasonable endeavours to obtain the information/report the failure to provide that information to the police).

complied with, permitted the MIB to escape liability. The 2015 UDA removed many of these problems by enabling the MIB to be joined as a party to the action for the recovery of losses from the outset [clause 13(1)].[18] This provided the MIB with adequate notice of proceedings,[19] whilst also including a requirement for the claimant to issue the MIB with such information as it may *reasonably* require.

The UDA 1999 (in)famously included a 'crime exception' where the MIB was allowed to exclude its liability to compensate claimants in the event that they knowingly allowed themselves to be carried in vehicles which: have been stolen or unlawfully taken,[20] are uninsured, are used in the furtherance of a crime, or are used to avoid lawful apprehension. The latter two exclusions were not permitted in EU law although it took proceedings in state liability in *Delaney* v. *Secretary of State for Transport* [2015][21] for the exclusion to be disapplied and removed in the 2015 UDA.

The UDA 1999 included evidential 'presumptions' regarding the knowledge held by the claimant which, following the Lords' ruling in *White* v. *White* [2001],[22] brought the definition in line with that used in RTA88 sections 143(3) and 151(4). Unfortunately, this interpretation and that used in RTA88 section 151(4) continues to amount to a breach of EU law. The presumption relates to imputed knowledge which, to comply with the MVID, requires proof of the knowledge held by the claimant/third party rather than perceived or subsequent knowledge or that the claimant 'turned a blind eye' to such evidence.[23] The UDA 2015 replaces the phraseology 'ought to have known' with 'had reason to believe' which in practical application will have little impact on the problems which such constructive knowledge creates between national and EU law. The UDA 2015 does at least remove the previous drafting error contained in UDA 1999 where it was the knowledge of the claimant that was applied, rather than the knowledge held of a passenger who died in the incident.[24]

Clause 9 of the UDA 2015 excludes the MIB from liability for terrorist acts involving motor vehicles. This is a new inclusion compared with the UDA 1999, although it does appear in the UtDA 2003. It has been questioned whether the clause now clarifies matters related to the use of vehicle for terrorism-related purposes, whether it follows an interpretation restricting the liability of the MIB consistently with the RTA88,[25] or where the inclusion of the word 'use' of a vehicle restricts even the direct application of a vehicle for terrorist purposes (e.g. as a car bomb). However, we argue later that this inclusion is illegal in the blanket use of the clause and will likely be removed by the courts/a revised UDA from the MIB.

Ultimately, the UDA 2015 has simplified several aspects of the agreement and its use. It is approximately half the length of the 1999 agreement, and this is reflected also in the shortened guidance notes accompanying the UDA 2015 compared with the UDA 1999. Many of the most unjust exclusions included in the UDA 1999 have also been

[18] The MIB had already possessed this right following *Gurtner* v. *Circuit and the MIB* [1968] 2 QB 587.

[19] And hence the necessary procedural documents and court notices at the same time as the defendant receives these.

[20] A similar exclusion applies in RTA88 151(4).

[21] *Delaney* v. *Secretary of State for Transport* [2015] 3 All ER 329.

[22] *White* v. *White* [2001] UKHL 9.

[23] See *White* v. *White* [2001] UKHL 9, per Lord Scott at [53].

[24] *Phillips* v. *Rafiq and the MIB* [2007] 3 All ER 382.

[25] *AXN and others* v. *Worboys and Inceptum Insurance Co Ltd* [2013] Lloyd's Rep IR 207.

removed in the UDA 2015. There are areas of motor vehicle insurance law where the United Kingdom exceeds the minimum standards required at EU law. However, this is not to say that the statutory law or the UDA 2015 complies with EU law in its entirety. This article presents some of the current problems which exist in the exclusions and procedural arrangements of the UDA 2015 (and which either were not rectified from the UDA 1999 or have introduced new infringements).

3. UDA EXCLUSIONS

Clearly, and specifically relevant to EU laws and their national transposing measures, legislative action and procedural rules which distort either a subject within the legislative instrument or the provisions between laws should be forestalled.[26] The UDA 2015, in clauses 4–10, outlines a series of exceptions to the MIB's liability. In this latest agreement, and despite the implications of *Vnuk*[27] and historic (and in places continued) inconsistencies between EU and national law,[28] the Department for Transport seems to be ignoring[29] the lessons issued following successful enforcement actions[30] and to heed advice regarding compliance between the sources of law.[31]

(A) Vehicles Requiring No Insurance

Article 3 of the Sixth MVID requires the compulsory insurance of vehicles in member states. They are, subject to Article 5, to take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in their territory is covered by insurance. In relation to accidents occurring in the United Kingdom, the MIB's potential liability only extends to losses arising from accidents where there ought to have been insurance in place.[32] In UDA 2015 clause 5,[33] the MIB is not liable for any claim 'arising out of the use of a vehicle which is not required to be covered by a contract of insurance[34] unless the use is in fact covered by a contract of insurance.' In its supplementary guidance notes, local authorities, the National Health Service, and the police are examples of public bodies that will meet claims arising from the use of vehicles in their ownership or possession and as such do

[26] Thus legal certainty being framed as an epistemic problem.

[27] Case C-162/13 *Damijan Vnuk* v. *Zavarovalnica Triglav* [2014] ECLI:EU:C:2014:2146. Note that, as detailed on the MIB's website on 9 June 2016, the EC Commission is undertaking a review of Directive 2009/103/EC in light of the *Vnuk* ruling.

[28] Leading to amendment, replacement or the agreements being supplemented, predominantly with the intention to bring the framework in to line with EU law [the UDA 1999 was amended on 7 November 2008, essentially replaced (in respect of future incidents) on 3 July 2015, and the UtDA 2008 has been amended five times, on 30 December 2008, 15 April 2011, 30 April 2013, 8 June 2015, and 3 July 2015].

[29] See the correspondence received from the Department for Transport by Nicholas Bevan: <http://nicholasbevan.blogspot.co.uk/search?updated-min=2015-01-01T00:00:00Z&updated-max=2016-01-01T00:00:00Z&max-results=31> (accessed 23 June 2016).

[30] *Delaney* v. *Secretary of State for Transport* [2014] EWHC 1785 (QB) and *Delaney* v. *Secretary of State for Transport* [2015] EWCA Civ 172.

[31] Nicholas Bevan has provided information and detailed accounts to both the UK Government and the EU Commission regarding the infractions of the law contained in the RTA88 and the UDA 2015 and UtDA 2003 (and their previous incarnations).

[32] See Pt VI RTA88.

[33] Similar provisions were included in the UDA 1999 cll. 6.1(a) and (b).

[34] per RTA88 section 144.

not require insurance cover. Therefore, the MIB is not liable for any judgment arising out of the use of such vehicles unless the vehicle in question is in fact covered by insurance. In such circumstances, the MIB's obligation arises where the 'insurer' does not satisfy the judgment. The result of clause 5 is that a victim of an unauthorized driver will be unable to recover compensation. This is in contrast to the requirements established in the Sixth MVID (the derogation from the obligation in respect of compulsory insurance of vehicles).[35] Clause 5 breaches the MVID by allowing the guarantee fund body to avoid liability to victims in the event of injury caused by uninsured vehicles.

(B) Deducting Compensation Payments

Clause 6 of the UDA 2015 is broader in scope than the previous clause contained in the 1999 Agreement (clause 17).[36] In clause 6, the MIB is provided with authority to avoid liability or to deduct the payments a victim of an uninsured driver would be entitled to receive through accident insurance payments/compensation (subject to certain exclusions). These exclusions, relating to payments from the Criminal Injuries Compensation Authority and an employer's non-insured refundable advance, and paragraph 3 which continues by penalizing a victim for a failure to use (or to claim within time) from his own insurance, each act contrary to the rights a victim has at common law.[37] It has been held[38] that such a distinction between the MIB agreements and the common law in the protection of victims is unlawful. In *McCall* v. *Poulton*,[39] the Court of Appeal was faced with a taxi driver who, having been the victim of the negligent driving of Poulton, required a replacement vehicle and entered into an agreement with a company, Helphire. It transpired that Poulton was an uninsured driver and McCall, recovering compensation from the MIB for his personal injury and the damage to his property, was refused compensation for his hire charges. The UDA 1999 (applicable at the time) did not extend to covering subrogation claims[40] and the issue was not resolved due to the case being settled prior to a reference to the CJEU. Subrogation is a mechanism where motor vehicle insurers may recover monies paid in claims to their policyholders. It provides to the insurer a legal right to make a payment that is owed by another party (here the other driver or his insurance company). This process is important as often fault is an issue in motor vehicle accidents yet responsibility may not be determined until some time after the event. The policyholder may not be able to wait until this process is concluded before payments are made. His insurer will make payments to the policyholder and will seek recovery of these through the at-fault driver (or insurer where available). The policyholder claimant will be required to cooperate with the insurer in its pursuit of recovery of these costs and will be prevented in waiving the

[35] Art. 5.

[36] UDA 1999 cl. 17 allowed the MIB to deduct from a claimant's compensatory entitlement sums received from the Policyholders Protection Board (no longer applicable); an insurer under an agreement or other arrangement; and from any other source where the sums were paid in respect of injury loss or damage claimed in the proceedings. These exceed the permissible deductions outlined in MVID Art. 10(1).

[37] Under the general rules of quantum.

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

[39] [2008] EWCA Civ 1263.

[40] Cl. 6(1)(c).

other driver's responsibility for the accident. The UDA 1999 incorporated exclusions to the MIB's liability regarding subrogated claims. Issues relating to what constitutes a subrogated claim, and hence which claims the MIB was obliged to meet, were particularly problematic and subject to litigation. The UDA 2015 clause 6(1) provides that subrogated claims are excluded, as are the claims of individuals who have other sources of redress available (e.g. those with comprehensive insurance cover).

The sixth MVID does allow for member states (via their guarantee fund body) to make deductions from a victim's compensation award. In Article 10, the obligation on the MIB is construed without prejudice for the member state 'to regard compensation by… other insurers or social security bodies required to compensate the victim in respect of the same accident.' This paragraph is included to ensure that member states would not be placed in a position to offer double-compensation for a victim who has, for example, received payment through a state-run benefits system or who may have recovered funds through a compensation scheme. The MVID continues to require member states to provide full compensation for victims and does not permit subrogation against victims of motor vehicle accidents. At paragraph 2, Article 10 permits the MIB to 'exclude the payment of compensation … 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.' Clause 6 UDA 2015 exceeds this limitation and fails to adhere to both the MVID and the EU's equivalence principle.

(C) Constructive Knowledge of an Uninsured Vehicle

Clause 7 allows the MIB to avoid liability for damage to vehicles where, at the time of the damage being caused, there was no contract of insurance in force for the use of the vehicle and the claimant knew or ought to have reason to believe this was the case. The MVID specifically outlaw such an exclusion.

Clause 8 applies to situations where the victim is a passenger in a vehicle, the driver is responsible for the accident, and the victim attempts to claim against the driver/anyone else who might be responsible for the driver's use of the vehicle. Here, the MIB is not liable for any claim, or any part of a claim, in respect of a relevant liability by a claimant who, at the time of the use giving rise to that liability, was voluntarily allowing himself to be a passenger in the vehicle. Further, this applies where: *either before the start of the claimant's journey in the vehicle or after its start* if the victim could reasonably be expected to have alighted from it, [he] *knew or had reason to believe* that (i) the vehicle had been stolen or unlawfully taken or (ii) the vehicle was being used without there being in force a contract of insurance complying with the RTA88. The areas of contention are identified in italics.

Here, the legal decision making of the United Kingdom in relation to the MVID (the procedural component) and the attainment of a consistent and correct transposition of the directives and the obligation on member states to follow EU law (the rational component) are absent and certainty is put at risk. Both clauses 7 and 8 maintain a phraseology used in previous incarnations of the UDA[41] regarding the victim's knowledge (or where he had reason to believe) that no (effective) insurance was in place covering the vehicle's use at the time of the accident. Changes have been made to the wording from

[41] Cl. 6 UDA 1999.

'ought to have known'[42] to 'had reason to believe'. Further, an acknowledgment of the ruling and construction of the UDA and the RTA88 sections 143(3) and 151(4) in *White* v. *White*[43] has also been incorporated. Finally, the UDA 2015 removed the EU-offending 'crime exemption'[44] of the MIB to victims who had knowingly allowed themselves to be carried in vehicles which were used in the furtherance of a crime. Despite these changes, it remains that the UDA 2015 is in breach of the MVID. MVID Article 10(2) permits the exclusion of liability in relation to persons who the member state (or the MIB in the United Kingdom) *can prove*/knew the vehicle in which they were travelling was uninsured. In *White* v. *White*,[45] the House of Lords construed actual knowledge to include purposefully not enquiring about the status of the insurance when the victim suspected insurance cover was not in place/effective, and where the victim 'turned a blind eye'[46] to the fact of no insurance cover, but even this extension does not fulfil the requirements of the MVID as there is no equivalent provision in the directives. Clause 8 continues to impose constructive knowledge where the victim had no knowledge having entered the vehicle and subsequently discovers it is stolen or without the required insurance cover.

(D) The Terrorism Exclusion

Clause 9 of the UDA 2015 is a relatively succinct inclusion which provides:

> [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 (TA) 2000.[47]

This 'terrorism exclusion' clause operates to void the MIB of liability in those specific circumstances and is a clause which began life in UtDA 2003 clause 5.1(g). The UDA 2015 clause refers to the definition as provided by the TA 2000 which is where potential problems exist.[48] It is possible that the drafters of the agreement made reference to the TA 2000 section 1 merely because it contains a broadly used definition of terrorism[49] or due to its previous use in another of the MIB's agreements. The opening paragraph of section 1 reads:

> (1) In this Act "terrorism" means the use or threat of action where—
> (a) the action falls within subsection (2),[50]

42 UDA 1999.

43 *White* v. *White* [2001] UKHL 9.

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

45 *White* v. *White* [2001] UKHL 9.

46 At [34].

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

48 For a critical assessment of the Terrorism Act (TA) 2000 and broader aspects of human rights, see C Gearty 'Terrorism and Human Rights: A Case Study in Impending Legal Realities' [1999] Legal Studies 19, 367.

49 The member states of the United Nations, as identified in a report published in 1988 ('Political Terrorism' Schmidt and Youngman) collectively had 109 different definitions.

50 Subsection 2 refers to actions including serious violence; serious damage to property; serious danger to health or public safety; endangering another person's life [which, according to the Court of Appeal in *David Miranda* v. *Secretary of State for the Home Department* [2016] EWCA Civ 6 involves intent or recklessness on the part of the individual (para. 55)] or action which is designed seriously to interfere/disrupt an electronic system.

(b) the use or threat is designed to influence[51] the government [or an international governmental organisation] or to intimidate the public or a section of the public, and
(c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.

Beyond the debate regarding whether the term terrorism should be defined broadly or tightly,[52] it is probable that this clause of the agreement was created with the view of a vehicle being used as a weapon[53] and/or car bomb[54] and would consequently, in accordance with EU law, not constitute a normal use of a vehicle and therefore result in no insurance being held.[55] However, the agreement does not provide this limitation. By using the TA 2000 section 1, the case law establishing the scope and effect of the Act is applicable. It is possible that a consequence of clause 9 using the TA 2000 is that in a situation where, for example, an individual who is a victim of a road traffic accident caused by an uninsured driver fleeing the scene following the use or threat of action, made for the purpose of advancing a political, religious, racial, or ideological cause, would not be able to rely on the MIB as insurer of last resort. Evidently, terrorism may constitute racism, nationalism, separatism, extremist ideology, religious fundamentalism (and so on). It may also constitute single-issue campaigns.[56] Whilst mercifully rare in the United Kingdom, the United States has been subject to interested groups joining and utilizing terrorist methods. Challenges in this way regarding animal rights, environmental movements, and anti-abortionist movements (as forms of single-issue extremism) have led to laboratories and clinics being bombed and the individuals working in these industries being attacked and in some instances killed.[57] Therefore, a third-party victim of a road traffic accident caused by an uninsured driver of a car fleeing the scene following his murder of a nurse employed at an abortion clinic/an arsonist having killed victims employed at an anti-genetically modified crop facility, for example, may find, under its current reading, that clause 9 UDA 2015 excludes the MIB from liability. Victims of other non-terrorism offences committed in similar ways would, however, be protected. Hence the third-party victim of a road traffic accident caused by an uninsured driver of a car fleeing the scene following his murder of a clerk during his bank

[51] Despite Lord Carlile's efforts to have the term changed to 'intimidate'—The Definition of Terrorism (Cm 7052, 2007), para. 86(11).

[52] Substantial debate, prior to the enactment of the TA 2000 and following its commencement, has demonstrated concerns over the nature of its definition of terrorism and what may constitute an act of terrorism. It is, however, not the purpose of this article to critique the wider implications of the use of this definition in the fight against terrorism.

[53] See *Seddon v. Binions* [1978] RTR 163 for the use of a vehicle to intentionally injure a person rather than being indicative of an act of terror for the purposes of TA 2000 section 1.

[54] As has been used in mainland Britain on several occasions by organizations including (allegedly) the Real IRA: <http://news.bbc.co.uk/1/hi/uk/1201273.stm> (accessed 4 March 2001).

[55] 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 Oxford 2011).

[56] Indeed, in its consultation paper, the Government had identified three different forms of terrorism—Irish terrorism; international terrorism; and domestic terrorism (which includes Irish terrorism but also animal rights, environmentalist and anti-abortion activists). See Cm 4178, Legislation against Terrorism, paras 2.2 and 2.6.

[57] See Home Office and Northern Ireland Office *Legislation Against Terrorism. A Consultation Paper*, Cm 4178 (Stationery Office London 1998) para. 3.12.

robbery would be able to claim from the MIB according to the UDA 2015.[58] Public policy would be remiss to allow such a distinction to exist as, if protection here is to be afforded to the third-party victim, it surely makes no difference to him what purpose (lawful, unlawful, terrorism-related or otherwise) the driver was involved with when the victim was injured.

It remains possible, as this clause has yet to be tested in court, that the interpretation of '… in the course of…' may follow that used in maritime insurance law. Similarities exist between this rule and the loss or damage to insured property due to the perils of piracy. Where this area of law may be useful in respect of the UDA's terrorism exclusion clause is in the interpretation of the use of violence when making good an escape following the actual insurable loss having occurred. Therefore, in the case of piracy, damage or loss is not deemed a *consequence* of piracy when it occurs during an escape.[59] Hence, the judiciary could follow a similar line of reasoning to restrict the attribution of loss caused by a driver *following* his act of terror (and hence the terrorist act has been completed and any accident caused during his motor vehicle-based escape would not be considered to have occurred '… in the course of…' such action). However, irrespective of whether the application of clause 9 follows the hypothetical example as provided above or that available in another strand of insurance law, a plausible, and indeed unfortunately more likely scenario, is where motor vehicles are used as weapons in terrorist attacks. As way of examples, France has been subject to vehicular terrorist attacks on four occasions between 2014 and 2016; such attacks have been relatively common in Israel (seven attacks between 2008 and 2014) and even in the United Kingdom, in 2013 a car was used in the (terrorist-based) murder of Fusilier Lee Rigby. It is a breach of the MVID to continue the terrorism exclusion.

Had the MIB wished to protect itself against liability for genuine acts of terrorism, it could have used, for instance, the definition provided in the Reinsurance (Acts of Terrorism) Act 1993 section 2(2) which avoids the negative consequences of the TA 2000 section 1 with regards public intimidation (if not directed to the specified ends identified) and the highly problematic element of acts/threats of acts which advance a political, religious, racial, or ideological cause. It would also have been better served to have not used a definition of terrorism which has been the subject of dispute and controversy prior to its enactment. In relation to EU jurisprudence, the CJEU in *Vnuk*[60] ruled, prior to the establishment of the UDA 2015 (and incredulously in relation to the public commentary on the case and its implications, the MIB did not take its effects into consideration) that vehicles must be used for their intended purpose. Beyond the scope of this would constitute some form of misuse and the MVID would not have effect or impose compulsory third-party insurance invoking national bodies such as the MIB. There was thus no requirement or useful function played by the inclusion of clause 9, yet despite its redundancy, it is present and is a breach of EU law. The measure has not been tested and is likely to be rejected in judicial review or through further legislative action, yet the MIB is, at the time of writing, silent on the issue, and the UDA 2015 and

[58] Similar arguments, when considering the implications of removing the motive element of the definition of terrorism have been raised in D Anderson 'Shielding the Compass: How to Fight Terrorism Without Defeating the Law' [2013] European Human Rights Law Review 3, 233, 243.

[59] *Athens Maritime Enterprises Corp* v. *Hellenic Mutual War Risks Assn (Bermuda) Ltd (The Andreas Lemos)* [1983] QB 647.

[60] Case C-162/13 *Damijan Vnuk* v. *Zavarovalnica Triglav* [2014] ECLI:EU:C:2014:2146.

the supplementary information provided on the MIB's website remains unaltered. Legal certainty is lacking with this provision despite knowledge by the government that clause 9, in its current form, is illegal. Subjects to this rule are entitled to have ascertained facts to enable their compliance with the law, and in the event of silence on the matter, the principles of temporal law will be applied. Hence, in the absence of clear instruction to the contrary, a legal rule has immediate application. Neither the MIB or the government has informed subjects to the law of the potential illegality of clause 9 or whether it will be applied, be modified when tested in court, or be removed via a new agreement.

4. PROCEDURAL ANOMALIES

The victim of an uninsured driver is required to follow the procedural rules established in the MIB Agreements if he is to be successful in recovering compensation from this body. Road users and pedestrians in the United Kingdom 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 these rights. The imposition of procedural rules which are deployed, for instance, in arbitrary forms, negatively impact on the attainment of legal certainty, justice, and reasonableness. Examples exist of irrationality in the application of the procedural rules underlying the UDA 2015, and here we identify some of the more serious (although it is beyond the scope of this article to provide an exhaustive examination of all the failures of transposition within the UDA 2015). The inclusion of such procedural rules, like the exclusion clauses outlined above, are not only incorrect in their scope but also unsustainable in relation to the level of the infraction committed to the victim and when compared with the Civil Procedure Rules 1998 which contain no similar application of such harsh tests or strike-out policies.

(A) Compulsory Arbitration and Limited Appeals

Under the UDA 1999, the MIB was to cause any application for a payment under the agreement to be investigated and decide whether to make an award.[61] Following the decision and the reasoned reply regarding the application, the applicant could decide to accept and be paid the award[62] or he could appeal to an arbitrator.[63] A significant factor relating to the previous arbitration process was that, under the general rules on arbitration laid down by the Arbitration Act 1996, the victim may, in certain cases, appeal against the award to the High Court of Justice. The right of appeal is, of course, subject to procedural and substantive rules; however, it is automatically available to a victim alleging serious irregularity[64] which affects the arbitration. Further, the right of appeal is also available to the victim (subject to the granting of leave of the High Court) in the event of the victim's allegation of an infringement of a rule of law or the conclusion of a decision which no arbitrator could have reasonably reached based on the evidence considered.[65] Having obtained leave from the competent court, subsequent appeals could

[61] Cl. 7. This is made in spite of the fact that clearly the MIB is not a court—see Case C-63/01 *Evans* v. *Secretary of State for Transport and the MIB* [2003] ECR I-14492 at [48].

[62] Cll. 9 and 10.

[63] Cl. 11.

[64] Arbitration Act 1996 section 68.

[65] See Case C-63/01 *Evans* v. *Secretary of State for Transport and the MIB* [2003] ECR I-14492 at [51].

be made to the Court of Appeal and then to the House of Lords (now Supreme Court). On the basis of this process, and the balance it afforded between costs and speed of decision making, the result was that this system did not render it practically impossible or excessively difficult to exercise the right to compensation conferred on victims of damage or injury caused by unidentified or insufficiently insured vehicles. Hence, in accordance with the Second MVID, the arbitration process and decision making of awards complied (held the CJEU in *Evans*) with the principle of effectiveness and provided the protection to victims as required by that directive.[66]

The CJEU's ruling in *Evans* is unfortunate in this regard and suggests that scrutiny of the effects and consequences of these procedural rules was not undertaken or was at least accepted on face value. The UDA 1999 enabled the MIB to determine whether to deny to a victim any compensation payment where he failed to issue to the MIB '… such information about the relevant proceedings and… such documents as MIB may reasonably require.'[67] Similar provisions are not included in the MVID or the RTA88, and a disparity exists between these rules and those available in the civil law (and the protections present therein through rules of evidence and even extending to the rule of law and the determination of legal rules to be determined by law, not discretion).

One of the more insidious inclusions in the 2015 UDA is in clause 17. Any dispute as to the reasonableness of MIB's requirements under clauses 12 or 14, and which cannot be resolved by agreement, *must be referred* to an arbitrator appointed by the Secretary of State following a request from either MIB or the claimant. The clause establishes the procedure to be adopted which involves the MIB sending to the appointed arbitrator and to the claimant, in writing, the reasons for the referral together with its views on the dispute. The claimant may thereafter (within 28 days) provide to MIB and to the arbitrator in writing any further specific observations he wishes to make in relation to the dispute. The arbitrator will then decide the dispute based solely upon the written submissions before him and his written decision will be final.

On face value, this may not appear particularly noteworthy, until sub-clause 3 is considered. Here, the arbitrator determines disputes on the basis of written submissions and his decision is final. There is no scope for appeal to higher courts, or a review of decisions other than in those written forms. Opportunity for cross- or direct examination of witnesses is lost. It also appears that due to the restrictions imposed on the arbitrator, it may preclude the consideration of EU law, and details are lacking as to the procedure of the appeal and on what bases it must be made and by whom. The claimant, who by including the MIB in proceedings is doing so because of the lack of available damages from the tortfeasor and is seeking redress from the insurer of last resort, has legal protections available in the national legal system denied to him.

The inclusion of a compulsory arbitration element to the resolution of disputes between the victim and the MIB is sufficient to breach the legal certainty of EU law. Even given the latitude issued to member states as to their procedural measures and the application of these, such an imposition renders it impossible for an effective review of the decision of the arbitrator. That the arbitrator is appointed by the MIB further compounds this error, despite their fee being paid by the MIB. A further significant problem

[66] Ibid at [54] and [58].

[67] Cll. 7(1)(b) and (c).

with the present system of MIB appeals is the lack of appeals from an arbitrator on points of fact or in the exercise of his discretion. Given the nature of motor vehicle insurance claims, these are the very issues likely to be at stake in an UDA arbitration. It is questionable whether transferring these matters to a person appointed by the MIB rather than the State is acceptable.

Victims of a negligent uninsured driver are entitled to seek compensation from the MIB, they have not transferred rights to another body, they have not waived their rights to due legal process by their need to seek compensation from the state's guaranteed fund, and the agreements concluded between the state and their preferred provider of insurance protection do not entitle either party to disregard the fundamental requirements of effectiveness and equivalence of EU law.[68]

Certainty and non-arbitrariness may be achieved where the law's procedural and rational components are secured. The forms of decision making in the application of the arbitration process are not consistent with the rights of claimants outside of this narrow field (i.e. those available to claimants under the common law). The propensity for procedural irrationality in the absence of review mechanisms and in the (in)ability to examine and challenge evidence and the underlying rationale for awards is prevalent. The result of the imposition of a system of compulsory arbitration must be unreasonable at common law and under the MVID.

5. EQUIVALENCE AND EFFECTIVENESS

The UDA 2015 and UtDA 2003 (as amended) each consist of deficiencies which breach EU law and would enable enforcement mechanisms to be pursued. This is a matter of subsidiarity and consequently how the law is actually enforced is a matter for the state to determine in relation to the principles of effectiveness and equivalence.[69] This has caused problems in the application of the MIB agreements (particularly so the UtDA 2003) as there exists no obvious comparable civil procedure by which to test the equivalence criterion.[70] Conversely, the EU parent MVID and its imposition of obligations on the state is a matter of EU law and the underlying principle applicable here is its ability to be invoked in domestic courts. Hence, every citizen in the member state has the guaranteed protection of his rights, and this applies regardless of the choice of body/procedural route the state wishes to adopt. The result is that where the claimant applies to the MIB for redress, seeking to obtain an enforcement against it through use of the MVID, and this fails (either due to the absolute refusal of the MIB to entertain such an argument or because an appeal court holds the MIB as not satisfying the criteria as an 'emanation of the state'),[71] the fact that the claimant has sought to invoke EU rights obliges that court to give effect to the MVID due to the primacy of EU norms.

[68] As articulated in Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG* v. *Landwirtschaftskammer für das Saarland* [1976] ECR 1989 at [5].

[69] Case C-144/04 *Werner Mangold* v. *Rüdiger Helm* [2005] ECR I-9981.

[70] See, for instance, the (unsuccessful) arguments presented and challenges made to the national procedural arrangements in relation to the UtDA 2003 in *Carswell* v. *Secretary of State for Transport and MIB* [2010] EWHC 3230 (QB) on the basis of the impossibility of excessive difficulty for the claimant to present a claim.

[71] See J Marson, K Ferris, and A Nicholson 'Irreconcilable Differences? The Road Traffic Act and the European Motor Vehicle Insurance Directives' [2017] Journal of Business Law 1, 51.

This will manifest itself in a change in either the obligations between the MIB and the Secretary of State or a direct changing of the agreement itself.[72]

Engaging with public policy on the matter is necessary to raise awareness[73] and to compel a review of the UDA 2015. Further, pending these required changes, it is necessary to inform educators and lawyers[74] in exercising the range of tools available through domestic enforcement mechanisms.

6. CONCLUSIONS

The legitimacy of the MIB UDA 2015 as a source of authority is questionable. There exist several substantive and procedural anomalies within the agreement which lead to uncertainty in its content and application and provide inconsistencies between the national law and the EU parent directives. Both the substantive and procedural requirements articulated in the UDA 2015 do not operate in the abstract, nor are their criteria trivial or without consequence. They impact on individuals and the lack of an effective system of review (beyond the actions individuals may take in state liability against the United Kingdom) constitutes an abrogation of individuals' rights guaranteed at EU law.

It is a necessary truth that some element of uncertainty has to be found in legal systems[75] and their application, but that which is found in the current version of the MIB agreement is almost inexcusable. It provides the uninitiated (and even lawyers and the judiciary) with few guarantees as to the correct application of national and EU law, whether the available governance structures are appropriate for their functions, and any semblance of the limitations of the actors involved in the rule-making or what currently establishes 'permissible actions' in national law.

The UDA 2015 requires a purification—the disposal of ineffective, contradictory, obsolete, and unenforceable rules, replaced with a clear and compliant structure which adheres to domestic and EU laws and principles. These rules should be properly published; clear as to their content; consistent with other sources of law (including the MVID); identify the application of the rules and their commencement dates; adhere to the doctrine of legitimate expectations; and be enforceable.[76]

[72] See *Cour d'Arbitrage*, Judgment No. 41/2005 of 16 February 2005, a case heard by the Belgian constitutional court.

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

[74] See J Marson and K Ferris '*Delaney* and the Motor Vehicle Insurance Directives: Lessons for the Teaching of EU Law' [2016] The Law Teacher 50 [in press]. Available online 25 August 2016. <http://dx.doi.org/10.1080/03069400.2016.1201742>.

[75] Legal rules in particular often incorporate an element of unpredictability with the common use of the words including 'reasonable' and 'ordinary'. Typically, the greater the complexity of the code, the increased likelihood there is to be inconsistencies in its content and, thereby, its application.

[76] See P Popelier 'Legal Certainty and the Principles of Proper Law Making' [2000] European Journal of Law Reform 2, 321, 339.