

Journal of Business Law

2010

Legislative Comment

The EC REACH Regulation and contractual supply obligations

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Subject: European Union. **Other related subjects:** Sale of goods

Keywords: Chemicals; Direct effect; EU law; Hazardous substances; National legislation; Purchase and supply agreements

Legislation: Regulation 1907/2006 on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) and establishing a European Chemicals Agency

****J.B.L. 394** This article addresses the possible effects of the REACH Regulation (R1907/2006) on the autonomous contractual relationships of sellers, buyers, insurers and financiers of goods throughout the EEA and the consequent uncertainties arising (not least by contractual illegality) for such parties.*

Introduction

REACH,¹ as an EC legislative instrument in the form of a community regulation, is directly applicable² in the national domestic laws of each of the 30 states³ in the European Economic Area (EEA). REACH now takes effect within the context of the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU), both of which entered into force under the Treaty of Lisbon on December 1, 2009 and replace, as from that date, the prior governing Treaties of the European Union (EU). REACH prohibits the placing of registrable substances, on their own, or in preparations or articles, on the market in the EEA unless they have been registered and, when required, their use authorised in accordance with REACH. It also places obligations on sellers and buyers of such substances (or of preparations--and in certain circumstances even articles containing them) to pass product, risk and use information both up and down the supply chain and also to the European Chemicals Agency (ECHA), which is effectively responsible for managing the registration, authorisation and restriction process across the EEA and for co-ordinating the implementation of REACH by the EEA states. REACH has the capacity⁴ to have direct effects on the rights and duties of parties buying and selling within, and into, the EEA. While subject to **J.B.L. 395* certain transitional provisions until June 1, 2018, REACH entered into force on June 1, 2007. The REACH art.3 definitions of "substance", "preparation" and "article" are so broad as to bring within their scope all goods.⁵ Clearly then, save as expressly excepted from REACH,⁶ the provisions of REACH must be considered in the context of any contract for the sale and purchase of goods. While manufacturers, exporters, importers and downstream users⁷ must struggle to ensure compliance in their own and their trading partners' business practices, lawyers must address how the statutory prohibitions and duties imposed by REACH will operate in the context of sale and purchase arrangements. This article explores, in the absence of any clear direction in the REACH legislation,⁸ the contrasting effects on autonomous contractual relationships of statutory duties under EU and UK legislation, and how non-compliance with REACH might, under English law (or alternative applicable EEA domestic laws), undermine the legal certainty parties endeavour to achieve in such relationships.

Purpose of REACH

It is important to take the underlying purposes of any EU legislation as the starting point for any inquiry as to its effect and, only once those purposes are understood, to then go on to consider the operative legislative provisions against those intended purposes. The reason for this lies in the adoption by the Court of Justice of the European Union (ECJ) of a teleological approach to the interpretation of EU legislation, an approach which the ECJ has described in the following terms:

"... [I]t is not sufficient for the court to adopt the literal interpretation and the court considers it necessary to examine the question whether this interpretation is confirmed by other criteria concerning in particular the common intention of the high contracting parties and the *ratio legis* ..."⁹

Accordingly, it is necessary to first identify the fundamental aims of the REACH legislation. Unfortunately, this is not a straightforward exercise, since it is evident from the 131-paragraph Preamble to the legislation that the aims of REACH are broad, several and conflicting. Significantly, in industrial supply chains, aims include the following: the protection, variously, of human health, the environment and the free movement of goods in the single market; the systematic conveying of information as to substance composition, use and hazards through industrial supply chains; and the placing of risk management responsibility on those who ***J.B.L. 396** manufacture, import, place on the market or use substances.¹⁰ Paragraph 77 of the Preamble expressly acknowledges that flexibility is required over compliance deadlines, particularly in relation to the authorisation procedure. This is significant as the legislation only provides an outline registration and authorisation framework for substance registration and use authorisation. It is the importers, manufacturers, downstream users and suppliers affected by the legislation that are primarily responsible for identifying registration categories, product risk and use information throughout and beyond the 10-year transitional period.

Implementation of REACH

The extended transitional period arises because art.23 provides that substances satisfying certain specified criteria,¹¹ being directed at identifying substances already lawfully on the EEA market,¹² benefit from extended registration deadlines provided they were pre-registered with ECHA, pursuant to REACH art.28,¹³ between June 1 and December 1, 2008. The extended deadlines are to December 1, 2010, June 1, 2013, or June 1, 2018 depending upon the substance risk category and the tonnage manufactured in, or imported into, the EEA. Every manufacturer or importer who wished to take advantage of the extended transitional period in respect of their prior and continuing substance manufacture within, or substance supply into, the EEA market had the obligation to pre-register those substances before December 1, 2008. Article 29 provides that every potential registrant, downstream user and third party submitting information to ECHA pursuant to the pre-registration procedure will have become participants in the substance information exchange forum (SIEF) for that particular substance, or group of substances, which was the subject of such pre-registration procedures. The purpose of the SIEFs, as set out in REACH art.29(2), is to facilitate the exchange of information for the purposes of both the compilation of the essential registration documents (i.e. the technical dossier including guidance as to the safe use of the substance and any required chemical safety report required for registration under REACH art. 10) and the elimination of any differences between potential registrants as to classification and labelling requirements. Only following registration does the onus move on to ECHA to verify compliance with registration requirements and to evaluate whether there is any need for any use of the substance to be subject to the authorisation procedure or for the substance itself to be made subject to any restriction.

In the meantime, as from December 1, 2008, substances that are registrable but have not been pre-registered (whether by them not being phase-in substances as defined by REACH art. 3 or by simple omission) become subject to the various prohibitions and information obligations arising pursuant to REACH. Prior to considering the extent and effect of those prohibitions and obligations it is ***J.B.L. 397** appropriate to consider what substances are excluded from the broad scope of the REACH art.3 definitions of “substances”, “preparations” or “articles”. Some goods are entirely exempted by art. 2 from falling within the ambit of REACH owing to a variety of reasons, such as: they are regulated under other EU regulatory regimes (e.g. “waste”)¹⁴; they are destined for uses that are regulated under other EU regulatory regimes¹⁵; or they are simply part of the production process (e.g. non-isolated intermediates).¹⁶ Other goods have partial exemption from the requirements of substance registration, evaluation or authorisation on the basis that they are included in Annex IV as substances considered to cause minimum risk,¹⁷ or from registration on the basis that they are included in Annex V as substances for which registration is deemed inappropriate or unnecessary and their exemption does not prejudice the objectives of REACH¹⁸ or are on-site isolated intermediates, transported isolated intermediates or polymers.¹⁹

The legislation is rendered complex not only by the difficulty in applying these defined terms to particular substances (requiring analysis both of chemical composition and, in some cases, the process of production) but also by reason of the interaction of the definitions with each other when considering whether such particular substances are included, excluded or only partially excluded from REACH. An obvious instance of interaction between inclusion and exclusion is that of waste collected for recycling, which clearly falls within the scope of the exclusion for “waste” as defined by reference to Directive 2006/12,²⁰ but which once recycled and supplied for reprocessing or packaging emerges back out of the exclusion to be caught by the overarching definitions of “substances” and “preparations”. The exclusion of “polymers” is a good illustration of the complexity arising from partial

exclusion, since, while polymers are themselves excluded from registration, the monomers and additives incorporated in the polymer must themselves be registered by the manufacturer or importer of the polymer.

While the definition of “articles” is as broad and encompassing as those of “substances” and “preparations”, the prohibitions and obligations arising in connection with articles are significantly reduced. Substances in articles only require registration when the substance is “intended to be released under normal or reasonably foreseeable conditions of use” and exceeds one tonne per producer or importer per year as so provided by art.7(1). Of course, the questions of what an “article”, “intended” release and “normal or reasonably foreseeable” use are, await definitive interpretation by the EU Courts. In the meantime ECHA has **J.B.L. 398* produced guidance addressing these issues.²¹ The guidance seeks to differentiate an “article” from any container which simply contains substances (e.g. printer cartridges or ink pens) and to differentiate “intentional release” from any release in normal use which is not functional. ECHA clearly wishes to restrict the requirements of substance registration in relation to “articles”, to those objects releasing substances for some ancillary function intended by the supplier and/or required by the recipient, not being the primary function of the object (e.g. perfumed towels releasing scent when used for their primary drying function²² ; by analogy, perhaps also plastic bags sold with the promise of bio-degradability or oxo-degradability depending upon the chemistry of their bio- or oxo-degradation). This construction of the word “article” appears to be rather strained, as even ECHA appears to acknowledge.²³ To what extent the EU Courts will adopt this strained interpretation remains to be seen. Assuming they do, goods comprising “articles” are most unlikely to be subject to the registration process. However, where the article comprises a container containing a “substance” on its own or in a “preparation” (e.g. a brake cylinder containing brake fluid, another hydraulic system containing fluid, or a printer cartridge containing ink), then the substance will need to be registered, and the use of such substances may require authorisation under REACH. In any event (as discussed below under the heading “REACH information obligations”) the supply of certain articles will, by reason of their chemical composition, attract statutory notification obligations.

Consequently the performance of contractual supply obligations arising in contracts for the sale and purchase of goods within or into the EEA will need to take account of statutory duties imposed by REACH--unless, of course, the goods to which the contract relates are specifically excluded by REACH. Many of these statutory duties appear to be capable of having a profound effect on the rights and duties of contracting parties within the various national domestic law systems of the EEA.

Prohibitions and obligations imposed by REACH

EU legislation operates within those EEA national legal systems as overarching legislative instruments capable of having primacy²⁴ over national law, with the result that a national court within the EEA is obliged to give full effect to such EU legislation in all proceedings before it (including in proceedings for the enforcement of arbitral awards),²⁵ even to the extent of suspending, or setting aside, its own **J.B.L. 399* national law rules.²⁶ The difficulty is that not all EU legislative provisions have direct effect within national legal systems and only in the event that such legislation has direct effect will it be considered supreme to national law. In the absence of direction by the Community legislature the direct effect of any EU legislation is left to be determined by the EU Courts on a case-by-case basis under the ad hoc referral system operating under TFEU art.267 (ex EC art.234). By this system, particular issues of EU law (as and when they require determination in connection with litigation before national courts) may be referred to the EU Courts for a definitive ruling; however, the EU Courts decline to accept references unless their legal and factual context is clear²⁷ and the question arises out of an actual, and not a hypothetical, dispute.²⁸

Over the last 40 years since the principle of “direct effects” was first established by the EU Courts,²⁹ they have established certain recognisable criteria for such direct effects (i.e. that the legislation satisfies the following requirements: it is of a type that is capable of giving rise to direct effects; it confers rights on individuals--including businesses--and corresponding duties; and that such duties imposed by it both satisfy the justiciability requirements of being clear, precise and unconditional and are capable of being enforceable before national courts in the manner contended for by the claimant).³⁰ In order to assess the approach likely to be taken by the EU Courts as to the direct effect of the various legislative provisions of REACH within the EEA national legal systems, it is necessary to address those statutory provisions as against the above criteria. Although, of course, the EU Courts will only have the opportunity of determining such issues in the context of EU law questions referred to them by national courts.³¹

An EU Regulation, such as REACH, is a one-size-fits-all legislative measure applying throughout the EU which is certainly capable of giving rise to direct effects.³² It has neither need of transposition into national law nor any conditionality as to its effect, other than insofar as the EU Regulation itself provides for such conditionality.³³ As A.G. Geelhoed made clear in the Opinion delivered in the *Muñoz* case, not all provisions in EU Regulations have direct effect. Rather it needs to be inquired, in respect of each particular provision and in the context of a particular dispute, whether or not: the provision protects a class having a particular interest³⁴ (e.g. traders in competition with each other); the claimant falls within that class; and protection is sought in respect of the particular interest the EU **J.B.L. 400* legislation seeks to protect (e.g. exchange of product, risk and use information along supply chains). The case of *Muñoz* concerned art.3(1) of Regulation 1035/72, which prohibited the marketing of horticultural products under certain trade names that had been attached to products fulfilling certain sale quality standards (in this case “superior seedless grapes”). The ECJ held that this prohibition gave rise to an enforceable right at the suit of a competitor to obtain a civil court order to stop any infringement. In its judgment the ECJ justified its decision that the prohibition did give rise to such an enforceable duty at the suit of a competitor on the basis that the “regulations operate to confer rights on individuals which the national courts have a duty to protect” and that

“... the full effectiveness of the rules on quality standards and, in particular, the practical effect of the obligation laid down by Article 3(1) ... imply that it must be possible to enforce that obligation by means of civil proceedings instituted by a trader against a competitor.”³⁵

It should be noted that in this case the relevant UK authority, the Horticultural Marketing Inspectorate, had failed to take action to enforce the regulation, and the case might yet be seen as a high-water mark for the direct effect of EU law in civil disputes between non-contracting parties.³⁶

The outcome of the teleological interpretative inquiry to be undertaken by the EU Courts when they come to address the effect of REACH is difficult to predict. The Preamble to REACH does make it abundantly clear that the purpose of the legislation is to protect a diverse range of economic and environmental interests operating between the state and industry, within industrial supply chains and between industry and consumers.³⁷ The achievement of many of the aims of REACH can be seen to be fundamental to the central purposes of the European Union as described in the TFEU, particularly those purposes directed to the protection of the environment, the competitiveness of EU industry, health and consumer protection.³⁸ Accordingly, there is a clear linkage between the achievement of the aims and purposes of the TFEU, the REACH legislation and the operation of industrial supply chains. Given that linkage, there seems little reason to doubt that the EU Courts will conclude (as and when opportunity for definitive interpretation arises) that REACH--or rather some of the statutory duties imposed by REACH--may have direct effect, at least in some circumstances. Assuming continued incremental development of EU law in this area by TFEU art.267 (ex EC art.234) procedure, rather than by further legislation; such direct effect will **J.B.L. 401* only ever be considered by the EU Courts in the context of those particular issues, related disputes, contractual relationships and industrial supply chains that are the subject of national court references to them.

However, even in the absence of those particular contexts, it is possible to address certain duties imposed by REACH in entirely abstract terms and consider to what extent they satisfy the justiciability requirements arising under EU law: namely those of sufficient clarity in the legislative provision, sufficient precision in the imposed obligation and the absence of any conditionality in its imposition. In addressing REACH on this abstract basis, it would appear that the provisions most likely to have a significant impact within a contractual context involving the buying and selling of goods are those provisions prohibiting the sale of certain goods (the REACH prohibitions) and those provisions requiring the provision of information up and down the supply chain (the REACH information obligations).

Reach prohibitions

The REACH prohibitions are capable of arising in three distinct situations.

First, substances requiring registration are prohibited by REACH art. 5 from being placed on the EEA market in the absence of registration. The prohibition at art. 5 against registrable substances on their own, in preparations or in articles being “placed on the market” unless registered pursuant to REACH can be seen to clearly affect supply contracts when account is taken of the definitions. The phrase “placing on the market” is defined by art. 3 as being the activities either of “supplying or making available ... [to a] ... third party” inside the EEA or of importation into the EEA. While perhaps susceptible to a literal interpretation that only supply and not purchase is prohibited, it does appear to

be a general prohibition imposed on everyone. Notwithstanding the general nature of the prohibition, the obligation to register is only placed on those certain parties established within the EEA who manufacture the relevant substance, or produce the relevant article, in the EEA or are responsible for their importation into the EEA. The registration obligations on those parties are set out at arts 6-24 of REACH and require manufacturers, producers and importers to provide, for substance registration, certain information to ECHA within a technical dossier and, where required by art. 14 of REACH, a chemical safety report.³⁹ As the general prohibition at art.5 requires registration to be “in accordance with the relevant provisions” of REACH the possibility arises that some want of compliance in the provision of information to ECHA (e.g. by the omission of required information or the submission of incorrect information by those manufacturers, producers and importers having the statutory obligation of registration) could give rise to the general prohibition notwithstanding an apparent, though flawed, registration. REACH is silent as to this apparent possibility, but the nature and range of the information to be covered by the technical dossier (and particularly any required chemical safety report) is such that the risk of inaccuracy in submissions to ECHA is high. Consequently, the effect ***J.B.L. 402** of such inaccuracies on the validity of the registration is another issue awaiting some definitive interpretation by the EU Courts, although it may be that the EU jurisprudence requiring EU institutions (such as ECHA) to fulfil the legitimate expectations of persons relying on their decisions will give some level of protection where registration should have been declined.⁴⁰

Second, substances of very high concern (SVHC) are prohibited by REACH art.56 from being placed on the EEA market for any use which has not been authorised “in accordance” with REACH. The art.56 prohibition is only imposed on any “manufacturer, importer or downstream user” in the EEA,⁴¹ but again, by requiring authorisation in accordance with the authorisation procedures within REACH, similar issues arise in relation to the art.56 prohibition to those arising above (i.e. as to whether authorisation is “in accordance” with REACH where inaccurate or misleading information is provided by the applicant--being a manufacturer, importer or downstream user--to ECHA for authorisation for a particular use).

Third, substances which are made the subject of restrictions are prohibited by REACH art.67 from being manufactured, placed on the market or used unless there is compliance with the restriction conditions. Any prohibitions arising under art.67 by reason of restrictions being placed by ECHA on certain substances, would, alike with the art. 5 prohibition, be generally applicable. The art.67 prohibition expressly prohibits substances from being “manufactured ... placed on the market or used” by anyone unless there is compliance “with the conditions of” the applicable restriction, apparently irrespective of intent or knowledge of the conditions or of the chemical composition of the goods being sold.

The REACH prohibitions would appear on their face to satisfy the requirement of clarity for direct effects, but it is difficult not to be drawn to the conclusion that, even in the absence of conditionality, the obligations will appear in particular circumstances to be imprecise. Absence of precision flows from the conceptual structure of the regulation itself in that REACH purports to require all substances (i.e. everything corporeal) to be registered and then excludes from registration substances which fall within so many competing categories (i.e. as to general and particular composition, stage of manufacturing process, use, tonnage, etc). Particular difficulties can certainly be anticipated in respect of the following substances: substances constituting “waste” within Directive 2006/12 are excluded from the ambit of REACH until such point as they cease to constitute such waste and become recovered through recycling⁴² ; polymers (defined by reference to molecular composition, rather than any polymeric production process) are excluded from registration or authorisation while the monomer and other substances used to produce them are not⁴³ ; substances used in medicinal products for human or veterinary use⁴⁴ or in food- or feeding-stuffs⁴⁵ are excluded from registration or ***J.B.L. 403** authorisation, but only as to the extent of such use; no obligation to register arises at all where substances are imported into, or manufactured in, the EEA in annual quantities below the threshold of one tonne or more per year per manufacturer or per importer.⁴⁶ As to this tonnage issue it should be noted that higher thresholds initially apply to phase-in substances, but these higher thresholds decrease over the transitional period.⁴⁷ This prompts the immediate inquiry as to how a downstream user or distributor purchasing small quantities (whose sale and purchase contracts would ostensibly be subject to the art.5 prohibition) could possibly be expected to know whether or not there has been compliance upstream. However, subject to such want of precision obstructing direct effects in particular cases, the justiciability criteria would appear to be fulfilled by the REACH prohibitions, which are clearly and unambiguously expressed and unconditional in nature.

Reach information obligations

The REACH information obligations for the supply of information back and forth along the supply chain (as distinct from the submission of information by manufacturers, importers and/or downstream users to ECHA in connection with the processes of registration, authorisation and restriction)⁴⁸ arise in various distinct situations which can be generally dealt with in four categories. First, sellers and other suppliers of substances (on their own or in preparations) are obliged to provide down the supply chain limited technical information under art.32⁴⁹ or (where the substances comprise substances which are classified as dangerous, PBT, vPvB or SVHC)⁵⁰ safety data sheets under art.31.⁵¹ Second, sellers and other suppliers of articles containing SVHC above a certain concentration threshold⁵² have particular obligations under art. 33 to give automatically to all recipients (other than consumers)⁵³ sufficient information for safe use of the article “including, as a minimum,” the name of the SVHC. Third, buyers and other recipients in supply chains who are manufacturers, importers or downstream users⁵⁴ are obliged under art.34 to pass up the supply chain information both as to “new” hazardous properties and as to deficiencies in the risk management information (i.e. the information *J.B.L. 404 already passed downstream in safety data sheets). Fourth, buyers of such dangerous, PBT, vPvB, or SVHC substances who are downstream users are obliged to provide use information up the supply chain to their own suppliers, albeit only where those buyers elect to advise particular uses to their supplier.⁵⁵

This fourth category raises particular issues. Downstream users advising particular uses to their supplier have obligations under art.37 to provide “sufficient information” for the supplier to prepare an exposure scenario for that use. The supplier, if it is itself a downstream user, importer or manufacturer, can either provide the requested exposure scenario or else pass on, further up along the supply chain, the use information received. Article 37(3) gives the ultimate EEA manufacturer or importer of the substance responsible for its registration a choice. It can either include that use, and the relevant exposure scenario, as part of the chemical safety report information to be provided by it to ECHA for the purposes of substance registration and use authorisation, or else it can decline to do so “for reasons of protection of human health or the environment” and proceed to advise ECHA and the downstream user accordingly. If it takes the latter option it must give written reasons without delay to that downstream user. It cannot make any further supply to that downstream user unless it gives its reasons for refusing to incorporate the proposed use in its existing substance registration and use authorisation. The downstream user always has the option of proceeding itself to provide a chemical safety report to ECHA in relation to any uses not appearing in its supplier's safety data sheet.

Again, while in concept these obligations appear to satisfy the justiciability requirement for direct effect in terms of their clarity, there is a manifest want of precision as to what the detail of the obligations will be in particular contexts. For instance, in the case of a sale of an “article” comprising an old oil painting (e.g. the archetypal Rembrandt masterpiece), it could be contended that notice, under REACH art.33, should be given of the existence of SVHCs--but to determine whether such notice should be given, and what the contents of such notice should be, destructive testing would be necessary. In the face of such an absurd interpretation the EU Courts are surely likely to conclude that the obligation on the supplier is insufficiently precise to be capable of giving rise to direct effects in that context. Similar issues arise in other contexts as to the extent of the duty on the person required to provide information. For instance, REACH art.34 specifies in general terms the information that needs to be supplied by any “actor in the supply chain” to “the next actor or distributor up the supply chain”, but does not place any obligation on that party to discover, collate or verify the veracity of such information or specify the means by which such information is to be communicated. Will the negligent or reckless actor be able to escape the obligation by making no such inquiry? When a supplier prepares and supplies an exposure scenario down the supply chain, following the receipt of use information under REACH art. 37, how is liability to be apportioned for any consequent inaccuracy in the exposure scenario attributable to underlying inaccuracy in the use information? These issues suggest that in many particular circumstances the REACH information obligations *J.B.L. 405 will be considered insufficiently precise to have direct effects within the context of the national domestic law applicable to the contractual obligations agreed between the parties, irrespective of their general capacity for direct effects in more straightforward circumstances (e.g. where a supplier fails to provide safety data sheets despite a statutory obligation to do so).

Reach prohibitions and information obligations

To the extent that the REACH prohibitions and the REACH information obligations are accorded direct effect by the EU Courts, such effects will be experienced within the various autonomous sale and purchase contracts concluded along the particular supply chain for the substances and articles in question. Non-compliance with REACH will mean breach by one or other of the relevant contracting

parties (manufacturers-importers-downstream users-distributors) of an EU statutory duty that might either prohibit transactions, or create liabilities within transactions, right along the entire length of the particular supply chain. The effect of such statutory breach would need to be evaluated under each particular contract subject to its own governing law, albeit, in the event that any dispute was determined or enforced⁵⁶ by jurisdictions within the EEA, only to the extent that such effect is consistent with EU law.

The requirements of EU law as to the enforcement of EU legislation such as REACH are that there be:

- equivalence⁵⁷ in sanctions for breach of EU legislation--requiring procedural and substantive equivalence to national law sanctions (whether public, private, criminal or civil) imposed for “comparable infringements of like seriousness”⁵⁸ of national law; and
- effectiveness⁵⁹ in sanctions for breach of EU legislation--requiring that sanctions be effective, have deterrent effect, and be proportionate.

Accordingly, the first inquiry is to analyse the effect of domestic statutory prohibitions and statutory duties (such as those arising under REACH) under the governing laws of any contract,⁶⁰ which, in the context of this article, requires analysis under English law as to the effect that the REACH prohibitions and the REACH information obligations would be likely to have had under English law had they been imposed by domestic UK, rather than EU, legislation. In contrast to the teleological interpretative approach required in relation to EU legislation, national English law would require a more literal approach in the context of national **J.B.L. 406* UK legislation not deriving from EU law,⁶¹ and, given the EU principle of equivalence already referred to, it is perhaps appropriate at first to address the effects on autonomous contractual relationships of legislative interventions, such as REACH, under this more literal approach.⁶² Traditionally English courts have interpreted statutory interventions as having the following potential effects: the effect of rendering some contracts and/or the performance of some contractual obligations illegal; the effect of informing the content of contractual and/or tortious duties; and/or the effect of creating entirely new rights. It is appropriate to address the possible impact of REACH under English law in each of these respects.

REACH potential for contractual illegality under English law

The first and overriding question posed by English law when addressing the effect of legislative prohibitions in the context of contractual duties is whether the contract, as well as the act, is prohibited.⁶³ An affirmative answer can only be given in two categories of case. The first is where the contract is illegal, because it is prohibited and could never be lawfully performed.⁶⁴ The second is where the contract could have been lawfully performed, but it was performed, or was to be performed, in a manner which was prohibited.⁶⁵ This second category sub-divides into circumstances where the illegality only operates against the party performing, or intending to perform, the contract in a prohibited manner,⁶⁶ and circumstances where the illegality operates against all contracting parties because there is an illegal conspiracy among them to perform the contract in a illegal manner (all of them having, or having had, a common and fixed intention towards such illegal performance).⁶⁷ An inquiry as to the fact of illegality demands investigation both as to the scope of the statutory prohibition and the nature of the contractual obligation to be performed. Such investigation involves careful textual analysis of the legislative provision at issue,⁶⁸ and factual inquiry of the contractual context **J.B.L. 407* in which the allegation of illegality has arisen.⁶⁹ English law does not generally require criminal intent. It is the fact of the contravention of a statutory prohibition, irrespective of the knowledge of that statutory prohibition and of its contravention, which will render contractual performance illegal. Only in the case of intended future performance by illegal means of an otherwise lawful contract would actual knowledge that the performance was prohibited be required for the contract to be considered illegal.⁷⁰

Against this framework, the REACH prohibitions at arts 5, 56 and 67 (arising, variously, in relation to: unregistered registrable substances; unauthorised use of those substances subject to use authorisation; and restricted substances) may be expected to give rise to the same issues of contractual illegality in sale and purchase contracts as would arise in English law in the context of domestic and foreign national prohibitions.⁷¹ English law has generated a clear principle that if goods are prohibited from sale or purchase then any contract concluded for their sale and purchase will be illegal.⁷² Would English law consider the Reach prohibitions to prohibit such contracts? Each of the Reach prohibitions embraces “placing on the [EEA] market”. As previously explained, this is defined as including “supplying or making available ... [to a] ... third party” or importing into the EEA. As any

such supply or import is prohibited, then any agreement for such supply or importation will surely also be illegal.⁷³ Such illegality has the potential to cause considerable uncertainty in intentional supply chains relating to goods subject to REACH.⁷⁴

The issues are less obvious in connection with the REACH information obligations arising under arts 31-34 and 37-38, but illegality can arise under English law where goods, though not themselves prohibited from sale, are sold without required accompanying information. One example of such a case is *Anderson v Daniel*, where the sale of imported or processed fertiliser, unaccompanied by information as to chemical composition, contrary to the Fertilisers and Feeding Stuffs Act 1906, resulted in the contract being held illegal and the vendor being unable to sue the purchaser for the price of the supplied fertiliser.⁷⁵ Another example is *Marles v Philip Trant & Sons Ltd*, where a merchant ***J.B.L. 408** supplying seed to a farmer as "spring wheat" did not, in breach of the Seeds Act 1920, give written particulars of the seed variety of the seed sold and the Court of Appeal (in the course of considering the effect of such illegality) accepted that the merchant would have been unable to sue the farmer for the price as the contract was unenforceable by reason of illegality.⁷⁶ To the extent that any REACH information obligations were accorded direct effect by the EU Courts, would English law consider breach of any of them sufficient to render illegal the contracts of sale and purchase to which any non-compliance related? This question can only be answered by addressing whether, expressly or by implication, non-compliance with the obligation in question makes the supply unlawful and prohibited. One possible example of such a provision under REACH is the obligation imposed on a supplier by art.37(3). Pursuant to this provision, where a supplier has received notification from a downstream user of a downstream use which the supplier refuses to include as an identified use in the supplier's chemical safety report, the supplier must refrain from further supply to that downstream user without providing reasons for such refusal. An example in a different context would arise where substances are subject to restrictions requiring the exchange of further particular information between contracting parties. Non-compliance with the conditions of such restrictions could give rise to the art.67 prohibition. Apart from such particular provisions, it seems unlikely that failure to provide information up and down the supply chain will result in contractual illegality, as no general prohibition attaches to non-compliance with the REACH information obligations at arts 31-34 or 37-38, and the REACH prohibitions at arts 5, 56 and 67 are not obviously dependant on the supply of such information.

Illegality operates under English law as a barrier to a private civil law claim. The barrier can be raised by the court itself, but is generally raised by a litigant by way of defence. The barrier generally operates to the prejudice of all contracting parties irrespective of fault and its effect is to render any prohibited contract, or tainted contract (as discussed at 2. below), void and unenforceable to the prejudice of all parties irrespective of responsibility for the non-compliance with the statutory prohibition.⁷⁷ It is only in the event of illegality in the performance by only one of the parties (the other parties not intending or participating in such illegal conduct and the contract not itself being prohibited) that the barrier might operate only to the prejudice of the party responsible for the illegal performance. Once illegality is proven, the barrier operates in response to the following principles.

1. If a litigant is forced to rely on an illegal contract in asserting their case, then their case must fail by reason of illegality whether their claim is in contract (for the price of the contractual supply, any breach of warranty, or for analogous contractual claims such as for damages ***J.B.L. 409** for wrongful repudiation)⁷⁸ or in restitution for reasonable remuneration for the value of goods (*quantum valebat* claims) or services (*quantum meruit* claims) supplied at another person's request.⁷⁹
2. A court may consider other contracts (such as financing or insurance contracts) which are ostensibly lawful to be so connected with the illegal contract as to be tainted with illegality, in which case claims under such tainted contracts must fail too.⁸⁰ Furthermore, claims which might otherwise be framed in tort (e.g. for breach of duty in negligence), or in restitution (e.g. for unjust enrichment) in relation to the fulfilment of the prohibited contract, will also fail on the basis that no court will give effect to such a contract however the cause of action is actually framed.⁸¹
3. A court will not allow litigants to benefit from their own illegal conduct, however a claim is framed and even though the contract might not itself be illegal. It is this principle which essentially underpins the illegality of unlawful conspiracies to perform ostensibly lawful contracts by illegal means.⁸²
4. Even though a litigant's cause of action would otherwise be defeated by illegality, executed property dispositions will remain effective notwithstanding any illegality in the contract pursuant to which they were made.⁸³ The principle has become known as the *Bowmakers* rule, after the case of that name (in which machine tools transferred under prohibited hire purchase agreements were

recovered by the lender from the borrower),⁸⁴ and is the one general exception to the draconian effect of contractual illegality under English law. Consequently, in the context of contracts for the sale of goods, whilst contractual rights, duties and liabilities become void and unenforceable as a result of illegality, property rights in the goods sold might, nevertheless, pass under English law from seller to buyer. However, in the context of the REACH prohibitions, note should be taken of Du Parcq L.J.'s observation that this general exception is itself subject to "one obvious exception ... namely, that class of cases in which the goods claimed are of such a kind that it is unlawful to ***J.B.L. 410** deal in them at all, as for example, obscene books ...",⁸⁵ or perhaps, by analogy, any goods subject to one or other of the REACH prohibitions.

5. There is an intricate web of certain defined situations in which litigants can succeed in their claims, notwithstanding contractual illegality, by arguing that they were *non in pari delicto* (i.e. not equally at fault). This has a highly structured meaning under English law. It includes litigants' rights to relief where they can "make out ... [their] ... case otherwise than through the medium and by the aid of the illegal transaction ...",⁸⁶ as well as permitting restitutionary claims to prevent unjust enrichment in certain particular circumstances. These circumstances include those where the party seeking relief is within the class of persons whose interests the statute in question was seeking to protect.⁸⁷ Alternatively, those who would have been entitled to have had the contract rescinded in any event by circumstances such as fraudulent misrepresentation, duress, undue influence, etc. may claim restitutionary relief.⁸⁸ Such restitutionary claims are subject to the court being satisfied of the following various circumstances: that the equitable grounds for the relief sought are satisfied⁸⁹; that such relief, if granted, would not have the same effect as enforcement of the illegal contract⁹⁰; and that the party obtaining relief would not thereby benefit from their own criminal conduct⁹¹ (excepting where such benefit is sought under doctrine of *locus poenitentiae* by which a party repenting of, and seeking to withdraw from, an illegal contract before it is performed is entitled to recover their own property).⁹² There is some suggestion in more recent authorities that parties not "equally culpable" should also be entitled to pursue claims for restitution, and in tort for damages, in respect ***J.B.L. 411** of losses suffered by reason of contractual remuneration being irrecoverable under illegal contracts,⁹³ but there is, as yet, no certainty of entitlement for such persons.⁹⁴

Lawyers may refer routinely to the doctrine of severance (by which judges are able to sever from contracts provisions which are void as being against public policy when the offending provision or obligation is not the entire consideration moving from one party to another),⁹⁵ but courts have resisted the application of this principle to contracts rendered illegal by reason of statutory contraventions where "the illegality is criminal, or *contra bonos mores*".⁹⁶

Since, with REACH, we are concerned with EU and not UK legislation, this complex common law structure can only take effect insofar as such structure is itself compliant with EU law. This will be dependent not only on the extent to which the EU Courts accord direct effect to the statutory duties arising pursuant to REACH, but also on what the EU Courts will require of national domestic law to ensure the effectiveness of REACH. Leaving such issues on one side for the moment, REACH appears to raise the prospect of the illegality barrier being raised under English law in respect of any sale and purchase contract in a supply chain for goods involving unregistered substances which are required to be registered, or registered substances requiring use authorisation where the use is not unauthorised, or restricted substances where the conditions of the restriction are not complied with.

If the sale and purchase contract is rendered illegal then the risk is that English law would regard an ancillary contract for the financing, insurance or even carriage of the prohibited goods as being tainted with illegality and unenforceable as a result. Obviously this would be the case where all parties to the ancillary contracts are aware of the illegality in the underlying supply contract and conspire to achieve that illegal purpose.⁹⁷ It could also be the case where there is no such conspiracy, but the ancillary finance, insurance and/or carriage contracts are considered to have the effect of facilitating the illegal purpose. In the latter case contractual illegality might arise even though all of the parties to such contracts are wholly unaware of the illegality. As Staughton L.J. put it, when addressing the issue in ***J.B.L. 412** connection with letters of credit, "that would not be because the letters of credit were themselves illegal, but because they were being used to carry out an illegal transaction".⁹⁸

All the REACH prohibitions are directed towards the supply of goods. This is clear from the prohibition being expressed as including "supplying or making available ... [to a] ... third party" the prohibited goods. Accordingly, claims for payment under letters of credit issued to secure payment for such prohibited supply, or even under credit insurance obtained for a similar purpose, might be refused under English law by reason of the payment guarantee being considered unenforceable through being tainted with illegality. Contracts of carriage, or for goods in transit insurance, appear far less

susceptible to allegations of taint in the absence of an illegal conspiracy, as REACH does not prohibit the physical carriage of the goods from A to B, only the supply of the goods into, or to others within, the EEA market.⁹⁹ While any transfer of title effected under such illegal contracts might remain effective notwithstanding such illegality, such title transfer might be defeated by the possible application of the “exception to the exception” proposed by Du Parcq L.J. in relation to the rule in the *Bowmakers* case.¹⁰⁰

REACH potential to inform content of contractual and tortious duties

In contracts for the sale and purchase of goods sellers will undertake certain express obligations to be fulfilled by them in relation to the goods and may also have to satisfy certain obligations implied under the applicable law. In the case of EU legislation such as REACH, these express and/or implied contractual terms are required to operate not merely against a background of national domestic law, but also the provisions of EU law requiring legislative interventions by the EU to be applied by national courts in compliance with the EU law requirement of effectiveness.

Under English law, subject to goods being sold in the course of a business and to the operation of contractual exclusions, English law implies obligations that goods supplied should be fit for their purpose. These obligations require that the goods are fit both for all purposes for which those goods are commonly supplied (so as to fulfil the requirement of “satisfactory quality”),¹⁰¹ and for any particular purpose for which they were expressly purchased.¹⁰² If the seller is aware that goods are being purchased for a particular market (e.g. the EEA) and has agreed to sell goods which are appropriate for that market then, clearly, the seller would be in breach of these generally implied obligations were it to either provide goods not compliant with the known requirements of that market or provide compliant goods with non-compliant information (since, under English law, goods can be rendered unfit for their intended purpose, or of unsatisfactory quality for any common ***J.B.L. 413** purpose, by reason of the information which accompanies them).¹⁰³ Conversely, there would be no breach if the goods were sold generally and not for a particular market as the standard of performance is relative to the contractually required performance.¹⁰⁴ Similarly, general obligations to exercise reasonable care may be imposed by the contract either expressly or by implication,¹⁰⁵ importing the possibility that breach of the statutory obligations by a seller might be considered evidence of breach by the seller of any such implied contractual duty.¹⁰⁶ However, it is most unlikely that any breach on the part of a buyer of those statutory obligations imposed on buyers by arts 34-37 of REACH could be considered as evidence of breach of any implied contractual term, unless extraordinarily an appropriate contractual term was to be implied by the common law in the context of the exercise of judicial discretion in all the circumstances of any particular case. Further, or alternatively, express terms requiring compliance with all applicable REACH obligations could be imposed by the contract on one, other or both of the seller (as to the goods and the required risk information), or the buyer (as to the use of the goods and the required use information). Such express obligations could be expressed generally, or refer to the REACH obligations specifically.

Any such implied or express terms have the potential to give contractual effect to some or all of the REACH information obligations imposed on sellers by REACH arts 31-33 and any such express terms have potential to give contractual effect to those REACH information obligations imposed on buyers by arts 34-37. However, any such contractual provision (whether imposed on the seller or the buyer) would ordinarily be defeated in the event of any illegality arising under English law pursuant to the REACH prohibitions at arts 5, 56 and 67.

REACH potential to create tortious rights

Breach of UK legislation does not inevitably lead to any private civil law liability in tort, although where such liability arises it may be co-extensive with liabilities arising in contract.¹⁰⁷ The tort of breach of statutory duty only lies, according to English common law, when the legislature not only imposes a statutory duty on some person or persons, but can be proved to have intended that private law rights of action be afforded to those claiming against any such person acting in breach of the statutory duty imposed on them.¹⁰⁸ It must also be clear that the legislature actually intended to confer a cause of action for breach of statutory duty on the claimant particularly, or as a member of a particular class, either for general relief ***J.B.L. 414** or for certain particularly specified relief.¹⁰⁹ UK statutes contain many examples of such rights being expressly provided for by UK statutory draughtspersons using one or other of the following techniques:

- providing for breach to be actionable by way of claims for breach of statutory duty; or

- making specific provision for particular remedies for particular classes of persons; or
- creating general rights for *damages* or *compensation* or in *tort*.¹¹⁰

Difficult issues of statutory construction arise, however, where the UK statute makes no such express provision and the court needs to ascertain the intention of the UK legislature as to the capacity of the statute to create a civil right of action. This is the position under REACH. Neither the EC REACH legislation itself, nor the REACH Enforcement Regulations 2008¹¹¹ (made by the UK Government pursuant to art. 126 of REACH), address what, if any, civil rights of redress might lie as between contracting parties. However, English law now has a well-developed set of principles pursuant to which the extent of such rights, if any, must be determined. The overriding principle, as described by Lord Simonds in *Cutler v Wandsworth Stadium Ltd*, is that “the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted” and the English common law provides clear indications “which point with more or less force to the one answer or the other”.¹¹²

These indications are to the effect that “if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damaged by the breach”, since otherwise the legislation would merely be just a “pious aspiration”.¹¹³ Since individuals commonly now have rights to seek judicial review of the actions of public authorities, this indication is, perhaps, of little relevance--except where the failure in statutory compliance is attributable to someone other than the state. Clearly no such inference could be made regarding REACH following the imposition of public criminal and public civil sanctions by the REACH Enforcement Regulations 2008 for non-compliance with REACH.

Pointing the other way is the “general rule”¹¹⁴ that, “where an Act creates an obligation, and enforces the performance in a specified manner ... that performance cannot be enforced in any other manner”.¹¹⁵ This general rule has two recognised exceptions: first, where the statutory duty was imposed to benefit or protect a ***J.B.L. 415** particular class of individuals,¹¹⁶ and, second, where the statute creates a public right (i.e. a right to be enjoyed by all UK citizens) and one or more of those citizens suffers “particular, direct and substantial” damage “other and different from that which was common to all the rest of the public”.¹¹⁷ It is clear, as Lord Jauncy noted in *Hague*,¹¹⁸ that such exceptions only apply when it appears “upon the true construction of the legislation in question that the intention was to confer on members of the protected class a cause of action sounding in damages occasioned by the breach”.¹¹⁹ It is that principle which should be described as the overriding rule.

Accordingly, except where a UK statute makes express provision for civil claims, non-contractual civil liability is a most unlikely consequence of regulatory breach. There is no presumption that the legislature intends to give a private right of action in tort simply because the legislation protects some particular class of individuals, and civil law claims for breach of statutory duty cannot be created from a statutory duty not intended by the legislature to be owed to individuals.¹²⁰ Where civil claims for breach of statutory duty do lie, it is the statute rather than the common law that will control the standard of care and the extent of the losses that can be recovered by reason of breach.¹²¹ These principles of English law, were they to be applied unconstrained by the EU law principle of effectiveness, could be expected to operate so as to prevent any breach of the statutory obligations imposed by REACH on contracting parties being actionable per se by way of private civil action (otherwise than pursuant to contractual obligation) whether by way of claim or defence. However, any certainty provided by the common law in this respect can only be preserved subject to the application of the EU law principle of effectiveness.

Impact of EU law as to the effect of reach under English law

If the REACH prohibitions and REACH information obligations are interpreted as giving rise to “direct effects” within the various national laws of EEA states, the normal principles of English law would take effect subject to the EU law principles of equivalence and effectiveness. Judicial application of equivalence requires little more than the non-discriminatory application of EU legislation to ensure it is as effective as a similar right arising under domestic national law. The difficulty for national courts in applying this principle lies not in determining the extent of the sanctions to be applied, but in determining when to apply which sanction, as the doctrine of equivalence only has application when the rights created by EU law and national domestic law are similar.¹²² Judicial application of effectiveness requires English courts to ensure that the EU legislation is effectively ***J.B.L. 416** applied in the achievement of its essential purposes and a twofold inquiry by the EU Courts has been noted in this respect: first, that of ensuring that Member States effectively enforce compliance with EU

law and, second, that of ensuring effective judicial protection for those disadvantaged by breach of EU law.¹²³ It has been suggested¹²⁴ that, while the principle of effectiveness was originally developed by the ECJ in such cases as *Van Gend en Loos* to ensure effective compliance by Member States,¹²⁵ the need for effective judicial protection has underpinned the effectiveness principle in the more recent cases where the principle has been applied in the context of competition law.¹²⁶ Coupled with the EU law requirements for the primacy (or supremacy) of EU law over national law,¹²⁷ and for conformity of national law with EU law (placing an interpretative duty on all organs of the Member States, and in particular on national courts, to interpret the entirety of national law so that it conforms with the requirements of EU law),¹²⁸ the requirement of effectiveness creates a potent brew capable of undermining the contractual certainty that has been the hallmark of English common law for contracting parties.¹²⁹

The EU Courts have, by judgments applying effectiveness in a series of cases, effectively reserved to themselves the discretion to consider any national law provision, or omission, an obstacle either to the effective fulfilment of the aims of EU legislation or to the effective protection of those disadvantaged by non-compliance with EU legislation.¹³⁰ The development of the effectiveness principle has been in response to ad hoc referrals under TFEU art.267 (ex EC art.234) with the result that little certainty attends its potential scope and impact. The principle of effectiveness has been applied by the EU Courts, strictly in the context of the particular issues then before them, to require national law to afford certain private civil remedies in particular circumstances for breach of EU legislation. Some of the rights arising in consequence can be seen to be distinct from those rights which would have arisen under English law for breach of UK legislation. In this context particular reference can be made to the following rights: ***J.B.L. 417** the right to injunctive relief and damages by private civil action notwithstanding the existence of public law sanctions¹³¹; the right of persons disadvantaged by breach of EU law to be able to seek compensation for their loss of profit plus interest in the absence of express statutory provision irrespective of the provisions of national domestic law¹³²; the recognition of contractual invalidity arising from breach of EU law resulting in affected contracts being of no effect whatever, and being incapable of any effect (as between contracting parties, or with third parties) whether in the past or the future¹³³; and the right of any person without significant responsibility for the breach of statutory obligations arising under EU law to claim compensation for their losses notwithstanding the invalidity of the contract pursuant to which those losses have been incurred.¹³⁴

In the case of REACH the application of the effectiveness principle might result in a variety of outcomes that from an English common law perspective might be considered unlikely, such as: rights to claim in tort for breach of statutory duty for failure to comply with the REACH information obligations (or, indeed, the registration or authorisation obligations); rights to further pecuniary and/or non-pecuniary relief additional to the relief otherwise available under national law for such claims¹³⁵; and rights for parties to illegal contracts, without “significant responsibility” for the breach of EU law giving rise to such illegality, to seek contractual relief unencumbered by the illegality.¹³⁶ Perhaps it is even possible that the rule in *Bowmakers*¹³⁷ case that the passing of legal title under a contract invalid by reason of illegality might be considered to obstruct the effectiveness of EU legislation.¹³⁸ Certainly the principle of effectiveness has already resulted in breach of EU legislation giving rise, in claims made before the English courts, to the availability of English law remedies where they would not have been available had the breach been in respect of national UK legislation.¹³⁹

***J.B.L. 418** Where does this analysis leave contracting parties? Obligations under REACH are clearly placed on manufacturers, producers, importers and/or downstream users within the EEA.¹⁴⁰ There seems little reason to assume that a statutory obligation imposed by REACH on one party will be considered capable of delegation to someone else,¹⁴¹ and this, and the risk of illegality, may undermine reliance upon express or implied terms to transfer risks of non-compliance, and may even undermine express generic provisions purporting to exclude or limit liability for regulatory non-compliance. This appears to leave sellers and buyers to manage, as best they can, the risk of non-compliance with REACH in their own contractual relationships by: the exercise of careful management and supervision, not only over their own compliance practices but also over the compliance practices of others within their supply and distribution chains; the careful drafting of sale and purchase contracts, so that statutory duties arising under REACH are reinforced by express contractual warranties; and the negotiation of appropriate suspensive conditions facilitating the suspension of any contractual supply obligation otherwise contravening REACH irrespective of fault.

Should they fail to do so, then the certainty they might look for in those contracts will be exposed to the vagaries surrounding the interpretation and application of REACH pursuant to EU law and the reverberations of any direct effect of REACH within the applicable national law, as reinterpreted by

the elastic EU law concept of effectiveness. Even though English law may strive towards achieving certain predictable outcomes for honest contracting parties,¹⁴² EU law has no such direction of travel and the doctrine of legal certainty in EU jurisprudence is confined to that of securing the legitimate expectations of those exposed to public sanctions by retroactive, or inconsistent, decisions of Member States and EU institutions.¹⁴³ Being thus so confined to the field of public administrative law, it can provide little comfort to contracting parties in the management of their own autonomous relationships.

Conclusion

The extent of the regulatory control exercised by REACH over the sale and purchase of substances, preparations and articles is broad and far ranging. REACH imposes many duties on contracting parties involved in the sale and purchase of goods. These concern the following diverse matters: the assessment of the chemical composition, functional characteristics and hazards of the goods to be supplied; *J.B.L. 419 the uses to which those goods are to be put; and the information to be exchanged (not only as between the parties themselves; but also by them with others involved in the supply chain, and with the regulatory authority ECHA). Most significantly, REACH also prohibits the supply of certain goods.

Commercial certainty surrounding the consequences of non-compliance with REACH must await elucidation by the EU Courts. This elucidation can only emerge over time in the course of the successive references to be anticipated from national courts under the TFEU art.267 (ex EC art.234) procedure. Many such references will be needed to determine not only which of the highly complex provisions of REACH have direct effects, but also what the EU law principle of effectiveness will actually require of contractual and tortious sanctions under national domestic legal systems, in the enforcement of those REACH provisions apparently capable of direct effects. While the impact of any breach of UK legislation on autonomous contractual relationships is confined by the English common law and, generally, is predictable (following thorough textual and contextual evaluation of the relevant statutory and contractual obligations), the impact of regulatory breach of EU legislation on such autonomous contractual relationships is unconfined and unpredictable. Furthermore, while English law strives for contractual certainty; the EU doctrine of legal certainty is so limited as to afford contracting parties little assistance in this private autonomous realm. As a result, English law (alike with the national law of the other EEA legal systems), may be prevented from fulfilling contracting parties' legitimate commercial expectations within the context of those industrial supply arrangements that include goods attracting statutory regulation under REACH.

This article expands and develops themes first explored by the author in a paper entitled "The Effect of REACH in Commercial Contracts", presented to the REACH Europe 2008 conference held on September 16-18, 2008 at Park Plaza, Antwerp, Belgium and published on September 16, 2008 in Conference Proceedings by Smithers Rapra Ltd, Shawbury, Shrewsbury, Shropshire, SY4 4NR, UK (ISBN: 978-1-84735-073-2; Paper 14; pp.1-10).

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1. Regulation 1907/2006 concerning the registration, evaluation, authorisation and restriction of chemical substances. In consequence of the REACH regulatory environment for such substances, the EU requirements as to their classification, labelling and packaging have been replaced by the CLP Regulation (Regulation 1272/2008). It should be noted that the CLP Regulation (e.g. see CLP art.4) imposes additional statutory obligations and prohibitions on contracting parties in relation to substances regulated by REACH.
 2. TFEU art.288 (ex art.249 EC).
 3. The 27 Member States of the European Union; plus Norway, Iceland and Liechtenstein by virtue of European Economic Area Agreement of March 17, 1993, which entered into force on January 1, 1994.
 4. Being "binding in its entirety and directly applicable in all Member States" under TFEU art.288 (ex art.249 EC) as a generally applicable EU Regulation.
 5. *Substances* are defined as "any chemical element and its compounds in the natural state or obtained by any manufacturing process ..."; *preparations* as any "mixture or solution composed of two or more substances ..." and an *article* as any "object which during production is given a special shape, surface or design which determines its function to a greater degree than does its chemical composition ...".

6. The exceptions are detailed in REACH art.2 and annexes IV and V to the legislation. As A.G. Kokott commented, at [40] of his Opinion in *SPCMSA v DEFRA (C-558/07)*, July 7, 2009, exceptions to EU law requirements must, as a matter of general principle, be subjected to a strict interpretation.
7. The "downstream user" is defined by REACH art.3 as any EU established person, other than the manufacturer or importer of the substance (unless the substance is already registered by a non-EU manufacturer through an only representative, when the importer should apparently be considered a downstream user--see the *SPCM* case, July 7, 2009, at [66] of the ECJ judgment), using a substance in industrial or professional activities (or being a re-importer of such substances) excluding distributors and consumers.
8. REACH art. 126 simply provides for "effective, proportionate and dissuasive" penalties to be laid down by Member States by December 1, 2008. The UK Government has enacted the REACH Enforcement Regulations 2008 (SI 2008/2852) pursuant to this obligation.
9. *Humblet v Belgian State (6/60)* [1960] E.C.R. 559 at 575.
10. This being apparent from paras 1, 2, 17, 18, 56 and 58 of the Preamble.
11. Defined as "phase-in substances" by REACH art.3.
12. The criteria being that the substance should be already listed in the European Inventory of Existing Commercial Chemical Substances (EINECS); or else manufactured in the EU some time after June 1, 1992 and before June 1, 2007, but not placed on the market; or not a polymer as defined by REACH and previously placed on the EEA market before June 1, 2007 and considered to have been notified in accordance with art.8(1) Directive 67/548.
13. REACH art.28 providing for pre-registration by substance name and requisite identity code, registrant name, envisaged registration deadline and tonnage band.
14. Defined by reference to Council Directive 2006/12.
15. Such exemptions are limited to medicinal products for human or veterinary use and food or feedingstuffs for human or animal consumption.
16. Defined by REACH art.3(15a) as an intermediate not intentionally removed during synthesis, an intermediate being defined as a substance manufactured for the purposes of transformation, by synthesis in chemical reactions, into another substance.
17. Substances as diverse as limestone and corn oil are, by reason of inclusion in Annex IV, excluded from REACH.
18. Substances as diverse as crude oil and helium are exempted (unless chemically modified) by being referenced in Annex V to REACH. In addition, Annex V identifies other substances not by name but by reference to a general description of the chemical reactions by which they were created, i.e. reactions that can be loosely described as occurring naturally during manufacturing or other processes.
19. An intermediate is an on-site isolated intermediate, when the process of manufacturing and synthesis takes place on the same site, while a transported isolated intermediate is where such substances are transported between sites. The definition of polymers at REACH art.3(5) raises issues of particular complexity discussed in fn.43 below.
20. Defined by art. 1(1a) of Directive 2006/12 as "any substance or object ... which the holder discards or intends or is required to discard" also falling within one of the categories appearing in Annex 1 to that Directive.
21. ECHA Guidance on requirements for substances in articles released in May 2008 and available from the ECHA website at: http://echa.europa.eu/reach/fact_sheet_en.asp [Accessed April 30, 2010].
22. ECHA Guidance, 2008, p.27, available from the ECHA website at: http://echa.europa.eu/reach/fact_sheet_en.asp [Accessed April 30, 2010].
23. ECHA Guidance, 2008, p.29, available from the ECHA website at: http://echa.europa.eu/reach/fact_sheet_en.asp [Accessed April 30, 2010].
24. As established by the EU Courts in numerous cases, including *Van Gend en Loos (26/62)* [1963] E.C.R. 13; *Costa v ENEL (6/64)* [1964] E.C.R. 585; and *Simmenthal SpA (106/77)* [1978] E.C.R. 629, in respect of EU legislation having direct effects.
25. At least where the EU legislation should be regarded as being "a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market" as the ECJ described the restraint of anti-competitive practices under EC Treaty art. 81 (now TFEU art. 101) at [36] of its judgment in *Eco Swiss China Time Ltd v Benetton*

Internationa NV (C-126/97) [1999] E.C.R. I-3055 in deciding that art.81 EC Treaty constituted a rule of public policy that a national court was obliged to respect by refusing to enforce an arbitral award that would offend the prohibition arising under EU law.

26. See the judgment in *Simmenthal* [1978] E.C.R. 629 at [24] and, as far as the laws of the UK are concerned, the judgment of Lord Bridge in *Factortame Ltd v Secretary of State for Transport (No.2)* [1991] 1 A.C. 603 HL at 658.
27. *Telemarsicabruzzo SpA v Circostel, Ministero delle Poste e Telecomunicazioni and Ministero della Difesa* (C-320-322/90) [1993] E.C.R. I-393.
28. *Gasparini* (C-467/04) [2006] E.C.R. I-9199; although such dispute may arise in the context of judicial review proceedings challenging national implementation of community law; see below fn. 31.
29. In the seminal judgment in *Van Gend en Loos* [1963] E.C.R. 13.
30. *Muñoz v Frumar Ltd* (C-253/00) [2002] E.C.R. I-7289.
31. One such reference already made is *SPCM SA v DEFRA* (C-558/07), where the ECJ gave judgment on July 7, 2009. The reference arose out of an application for judicial review of actions to be taken by the UK Government to punish non-compliance with REACH. In the course of such proceedings, the claimants sought to: challenge before the English High Court the legality of REACH; and to obtain definitive interpretations of REACH art. 6.3 as to the duties on manufacturers and importers to register reacted monomers given that the registration of the derivative polymer is exempted. The ECJ proceeded to uphold the legality of REACH and to give authoritative interpretation of those duties, as discussed in fn.39 and 43 below.
32. See *Muñoz* [2002] E.C.R. I-7289.
33. As art. 126 of REACH does as regards the penalties to be introduced by Member States for breach.
34. Advocate-General's opinion in *Muñoz* [2002] E.C.R. I-7289 at [46]-[47].
35. [2002] E.C.R. I-7289 at [27]-[32] of the judgment.
36. In this regard the following should be particularly noted: A.G. Geelhoed indicated, at [76] of his Opinion in *Muñoz* [2002] E.C.R. I-7289, that, where national law preferred public enforcement of EU law, private civil enforcement might only be required by EU law when public enforcement had been shown to be ineffective; A.G. Sharpson, in *Unibet (London) Ltd v Justitiekanslern* (C-432/05) [2007] E.C.R. I-2271, subsequently characterised *Munoz* as a case where direct effect was necessary to avoid an EU law right being rendered nugatory by national law; and the ECJ, in *Leffler v Berlin Chemie AG* (C-443/03) [2005] E.C.R. I-9611 at [51], characterised *M#noz* as a case where a national rule "drawn up with only a purely domestic situation in mind" had to be disapplied in order for EU law to be applied "to the cross-border situation at issue".
37. See, in particular, paras 1, 8, 17, 18, and 58 of the Preamble.
38. EC Treaty art.3.1 (1), (m), (p) and (t), now re-enacted by the TFEU: either in respect of the competitiveness of Community industry, as exclusive competences under TFEU art.3.1; or in respect of environmental, consumer or health protection, as shared competences under TFEU art.4.2 (e), (t) or (k).
39. REACH specifies the type of information which must be included in the technical dossier at art. 10 (as regards the technical dossier) and at art. 14 (as regards the chemical safety report). The ECJ has now confirmed in *SPCM SA v DEFRA*, July 7, 2009 that the registration duties on manufacturers and importers are the same but suggests (at [66] of its judgment) that the appointment by a non-EEA manufacturer of an EEA sole representative under art. 8(1) relieves the importer of such obligations.
40. Below text to fn. 143.
41. REACH art.56(1).
42. See REACH art.2(2).
43. Pursuant to REACH art.3(5): "A polymer comprises the following: (a) a simple weight majority of molecules containing at least three monomer units which are covalently bound to at least one other monomer unit or other reactant; (b) less than a simple weight majority of molecules of the same molecular weight." In *SPCM SA v DEFRA*, July 7, 2009, the ECJ rendered this provision more precise by determining that, while polymers are currently excluded, the reacted monomer and other chemical substances contained within the polymer are not.
44. Such use is defined by reference to Regulation 726/2004, Directive 2001/82 and Directive 2001/83.

45. Such use is defined by reference to Regulation 178/2002.
46. As provided by REACH art.6(1).
47. As provided by REACH art. 23--pursuant to which, by June 1, 2018, all substances manufactured in, or imported into, the EEA in quantities greater than one tonne or more per year per manufacturer or per importer will require registration.
48. REACH addresses, by various articles, the registration process in Title II, the authorisation process in Title VII and the restriction process in Title VIII.
49. REACH art.32 requires available and relevant information about the substance "necessary to enable appropriate risk management measures to be identified and applied" including in relation to substance related exposure testing under s.3 of Annex XI.
50. Such substances are those classified as dangerous under Directives 67/548 or 1999/45 or classified as persistent, bioaccumulative and toxic (PBT) or very persistent and very bioaccumulative (vPvB) in accordance with the criteria set out in Annex XIII to REACH or included in the candidate list under art.59(1) of substances of very high concern (SVHC) for inclusion in Annex XIV as substances the use of which requires authorisation.
51. The required contents for safety data sheets at REACH art.31 (6) is the same as that required by CHIP--Chemicals (Hazard Information and Packaging for Supply) Regulations 2002 (SI 2002/1689)--giving detailed hazard information on the basis of which risk exposure assessments can be prepared under the COSHH--Control of Substances Hazardous to Health Regulations 2002 (SI 2002/2677).
52. The concentration threshold is set by REACH art. 33(1) at in excess of 0.1% weight by weight of the article; "the article" for these purposes is interpreted by ECHA in their May 2008 Guidance, pp. 16 and 17 as being the article as supplied.
53. Consumers may, however, under REACH art.33(2), trigger such an obligation to themselves by request to their supplier who then would have 45 days to provide the information free of charge.
54. REACH art.3 and 34(1) collectively refer to these parties as an "actor in the supply chain".
55. REACH art.37 limits this to suppliers who are a "manufacturer, importer, downstream user or distributor", but since distributor is defined at art.3 as including retailers who "only stores and places on the market" this would seem to embrace all suppliers to downstream users
56. *Eco Swiss China Time v Benetton* [1999] E.C.R. I-3055.
57. See the ECJ's judgment in *Manfredi v Lloyd Adriatico Assicurazioni* [2006] E.C.R. I-6619 at [93].
58. *Muñoz* [2002] E.C.R. I-7289, A.G. Geelhoed's Opinion at [54].
59. *Courage v Crehan* (C-453/99) [2001] E.C.R. I-6297 in which the ECJ relied upon the "effectiveness" principle in deciding that damages should be recoverable for breach of competition regulation arising under art. 81 EC Treaty (now TFEU art. 101) notwithstanding the illegality of the contract. However, it should be noted that the principle of effectiveness should only disapply national law rules that "render practically impossible or excessively difficult the exercise of rights conferred by Community law": see *City Motors Groep NV v Citroën Belux NV* (C-421/05) [2007] E.C.R. I-653 at [34].
60. There are 30 EEA states. Some of these, such as the UK, have complex federal systems, so there are many national law regimes within the EEA and very many more outside of the EEA. Any one of these national law regimes might be an applicable governing law to all or any part of a contract--under the 1980 Rome Convention (incorporated into the laws of the UK by the Contracts (Applicable Law) Act 1990), or the Rome 1 Regulation (R593/2008) that determines governing laws within the EEA for contracts made after December 17, 2009.
61. See the House of Lords decision in *R. v Environment Secretary* [2001] 2 A.C. 349 HL, in which Lord Bingham stated that the overriding aim of an English court is "to give effect to the intention of Parliament as expressed in the words used" in the statute.
62. Particularly since the House of Lords decided in *White v White and the MIB* [2001] 1 Lloyd's Rep. 679 HL that the clear and accepted obligation on English courts (given the principles of art. 10 EC Treaty (now substantively re-enacted within TEU art.4(3)) and EU jurisprudence such as *Marleasing SA v La Comercial Internacional de Alimentacion* (C-106/89) [1990] ECR I-4135) to interpret English law in conformity with EU law, cannot be applied to the interpretation of contractual agreements.
63. This question, subsequently posed by many English judges in respect of very many statutory provisions, was formulated and expressed by Baron Parke in *Cope v Rowlands* (1836) 2 M. & W. 149 in the following terms: "It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only,

because such a penalty implies a prohibition... The sole question is, whether the statute means to prohibit the contract."

64. *Phoenix General Insurance Co v Halvanon Ins. Co Ltd* [1988] Q.B. 216 CA (Civ Div) is an example of such a case, where the now repealed Insurance Companies Act 1974 was held to make unenforceable any contract of insurance entered into by an insurer outside the scope of their authorisation.
65. *Ashmore Benson Pease & Co Ltd v Dawson Ltd* [1973] 1 W.L.R. 828 CA (Civ Div) is an example of such a case in which consignor and consignee acted in concert in overloading a vehicle pursuant to an otherwise lawful contract of carriage with the consequence that the contract was rendered void through illegality.
66. In *Archbolds (Freightage) Ltd v Spanglett* [1961] 1 Q.B. 374 CA a consignment of whisky was lost in the course of illegal carriage by the carrier in an unlicensed vehicle unbeknown to the consignor. While the carrier would not have been able to sue for the freight, the consignor was able to recover damages for the loss of the consignment.
67. *Ashmore Benson Pease* [1973] 1 W.L.R. 828.
68. See for example *Phoenix General v Halvanon* [1988] Q.B. 216 where the issue in the Court of Appeal in part turned on the fact that the unilateral prohibition placed on insurers under the Insurance Companies Act 1974 was not limited to the business of "effecting contracts of insurance" but extended to the business of "carrying out contracts of insurance", which had the effect of making them void for illegality as they could not lawfully be carried out.
69. See for example *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 Q.B. 267 QBD in which Devlin J. held that overloading a vessel in breach of the prohibition in s.44 Merchant Shipping (Safety and Load Line Conventions) Act 1932 (to the effect that the ship "shall not be so loaded as to submerge" the appropriate load-line) did not necessarily make contracts of carriage illegal.
70. As in *Waugh v Morris* (1872-73) L.R. 8 Q.B. 202 QBD where Blackburn J. held that the jointly held intention of charterer and owner to land French hay in London, in ignorance of a statutory prohibition against the import of French hay, was insufficient to render the charter illegal when the required contractual performance was that of loading alongside in London and, in the event, the hay was transhipped in London and exported elsewhere.
71. As this would be the mandated outcome of the Community concept of equivalence if the REACH prohibitions are accorded direct effect by the EU Courts, albeit subject of course to the operation of the EU concept of effectiveness which this article goes on to consider.
72. See for example *Bowmakers Ltd v Barnett Instruments Ltd* [1945] K.B. 65 CA where the Court of Appeal accepted that the sale of tools in wartime without the required regulatory approval was illegal.
73. For the reasons given by Baron Parke in *Cope v Rowlands* (1836) 2 M. & W. 149.
74. This article goes on to discuss the normal effect of illegality under English law, but it is worth noting now that the effect of illegality will be to engage principles of contractual validity not only arising under the governing law of the contract, but also the law of the place of performance and the law of the dispute forum as is apparent from the decision in *Regazzoni v K.C. Sethia (1944) Ltd* [1956] 1 Lloyd's Rep. 435 CA, the 1980 Rome Convention on the Law Applicable to Contractual Obligations (arts 3(3), 5, 7(2) and 16) and the Rome I Regulation (R593/2008 arts 9(2), 9(3) and 21). While the 1980 United Nations Convention on Contracts for the International Sale of Goods (the CISG) has been ratified throughout the EEA (with the notable exceptions of the UK, Eire and Malta), issues of contractual validity are excluded from the scope of the convention by art.4 of the CISG.
75. *Anderson v Daniel* [1924] 1 K.B. 138 CA.
76. *Marles v Philip Trant & Sons Ltd* [1954] 1 Q.B. 29 CA.
77. See *Mahmoud and Ispahani, Re* [1921] 2 K.B. 716 CA where the sale of linseed oil without a licence was prohibited and the contract was held illegal by the Court of Appeal even though responsibility for the failure lay with the vendor rather than the purchaser. Accordingly the principle of illegality can be seen to operate to the prejudice of wholly innocent parties under English law. Reasons why such should be the case under English common law were expressed in the following terms by Lord Mansfield in *C.J. Holman v Johnson* (1775) 1 Cowp. 341: "The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."
78. As in *Mahmoud and Ispahani, Re* [1921] 2 K.B. 716, where the seller was unable to obtain redress against a buyer who refused to take delivery of goods under a contract rendered illegal by reason of the buyer's failure to obtain the required dealer's licence.
79. See the judgment of Millett L.J. in *Taylor v Bhail* [1996] C.L.C. 377 CA (Civ Div).
80. In *Group Josi Re v Walbrook Ins Co Ltd* [1996] 1 Lloyd's Rep. 345 CA (Civ Div), Saughton L.J. considered that, had the reinsurance

contracts at issue in those proceedings been illegal, letters of credit opened to pay sums arising due under those illegal contracts would be unenforceable as against any bank otherwise liable to make payment under them.

- [81.](#) See *Harse v Pearl Life Assurance Co* [1904] 1 K.B. 558 CA where recovery of insurance premiums paid pursuant to an illegal insurance contract was denied, even though the claim made was for rescission by way of restitution resulting from innocent misrepresentation.
- [82.](#) See *Waugh v Morris* (1872-73) L.R. 8 Q.B. 202.
- [83.](#) See *Scarfe v Morgan* (1838) 4 M. & W. 270 at 281 where Parke B. stated unequivocally that "if the [illegal] contract is executed, and a property either special or general has passed thereby, the property must remain ...".
- [84.](#) *Bowmakers v Barnet Instruments* [1945] K.B. 65.
- [85.](#) [1945] K.B. 65 at 72.
- [86.](#) Per Mellor J. in *Taylor v Chester* (1869) L.R. 4 Q.B. 309 at 314.
- [87.](#) See *Cavalier Insurance Co Ltd, Re* [1989] 2 Lloyd's Rep 430 Ch D where the insured under a prohibited insurance policy was able to recover the premium paid to the insurer by way of an action for money had and received.
- [88.](#) See *Hughes v Liverpool Victoria Legal Friendly* [1916] 2 K.B. 482 CA in which an insured recovered premiums paid for illegal life assurance policies where she had been dishonestly advised by the insurer's agent that the policy was legal.
- [89.](#) See Russel L.J.'s reasons in *Taylor v Bhail* [1996] C.L.C. 377 for dismissing a contractor's claim for contractual rescission and restitution for unjust enrichment by reason of building work having been carried out under an illegal contract on the grounds that the enrichment was not unjust and it was too late for rescission as the illegal contract had been performed.
- [90.](#) *Boissevain v Weil* [1950] A.C. 327 HL in which a restitutionary claim made by the lender, under an illegal loan, for the repayment of the loan was denied. It is submitted that the broad principle of the effect of illegality has not been affected by the subsequent decision of the House of Lords, in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 HL, that restitutionary claims are based on the avoidance of unjust enrichment rather than any imputed promise to pay.
- [91.](#) *Harse v Pearl Life Assurance* [1904] 1 K.B. 558.
- [92.](#) *Taylor v Bowers* (1875-76) 1 Q.B.D. 291 CA.
- [93.](#) *Mohammed v Alaga & Co* [2000] 1 W.L.R. 1815 CA (Civ Div) (at 1825 and 1827 respectively) in a case in which a person providing interpretation services to lawyers under a prohibited client fee sharing arrangement was allowed to pursue a quantum meruit claim for reasonable remuneration and/or claim damages for negligence by reason of the lawyers failing to advise as to the illegality, although Robert Walker L.J. appeared to draw a distinction between such a prohibited fee sharing arrangement and prohibitions also involving criminal offences.
- [94.](#) See the obiter dictum of Longmore L.J. in *AL Barnes Ltd v Time Talk (UK) Ltd* [2003] EWCA Civ 402; [2003] B.L.R. 331 (where the contract was held not illegal) to the effect that "[i]f the contracts were illegal there would be much to be said for the view that a claim can be made by the less culpable party to a reasonable fee for services rendered, as the Court of Appeal thought was arguable in *Mohammed v Alaga & Co*. There is also something to be said in favour of the view that it would amount to an indirect enforcement of the contract, as disapproved in *Taylor v Bhail* where, however, the parties were equally culpable."
- [95.](#) See *Goodinson v Goodinson* [1954] 2 Q.B. 118 (concerning a clause purporting to oust the jurisdiction of the court) and *Goldsoll v Goldman* [1915] 1 Ch. 292 (concerning a clause in unlawful restraint of trade) and *m V.A.G. France SA v Etablissements Magne SA* (10/86) [1986] E.C.R. 4071 confirming that the consequences of contractual invalidity arising under EU law (at least in respect of EC Treaty art. 81 (now TFEU art. 101)) are matters to be determined by national law.
- [96.](#) Per Somervell L.J. in *Goodinson* [1954] 2 Q.B. 118: principles of equal application to non-compliance with REACH punishable by criminal sanction pursuant to SI 2008/2852 (see below fn. 111) and to be contrasted with severance in the context of any breach of EC art. 81 (now TFEU art. 101) (not involving a criminal offence under the Enterprise Act 2002) as discussed by Field J. in *EWS Railway Ltd v Eon UK Plc* [2007] EWHC 599 (Comm); [2007] U.K.C.L.R. 1653.
- [97.](#) To be contrasted with the facts of *Waugh v Morris* (1872-73) L.R. 8 Q.B. 202.
- [98.](#) *Group Josi Re v Walbrook* [1996] 1 Lloyd's Rep. 345 at 362-363.
- [99.](#) Illegality tainting contracts for the carriage of goods by sea would however trigger breach of the implied warranty of legality arising

pursuant to s.41 of the Marine Insurance Act 1906 and lead to loss of indemnity under contracts of marine insurance governed by English Law.

- [100.](#) *Bowmakers v Barnett Instruments* [1945] K.B. 65; see above, text to fn.85.
- [101.](#) Sale of Goods Act 1979 s.14(2).
- [102.](#) Sale of Goods Act 1979 s. 14(3).
- [103.](#) See *Amstrad Plc v Seagate Technology Inc* 86 B.L.R. 34; [1998] Masons C.L.R. Rep. 1 QBD, where computer software was rendered unfit by reason of the misleading instructions which accompanied it.
- [104.](#) *Sumner Permain & Co Ltd v Webb & Co Ltd* [1922] 1 K.B. 55 CA where mineral water delivered f.o.b London for carriage to Argentina was held of merchantable quality even though unsaleable for human consumption in Argentina owing to national quality rules.
- [105.](#) For instance, pursuant to Sale of Goods and Services Act 1982 s.13.
- [106.](#) As the Privy Council commented in *Tan Chye Choo v Chong KewMoi* [1970] 1 W.L.R. 147 PC (Malaysia), breach of statutory obligations requiring a particular standard of care may be considered evidence of negligence, but the obligations imposed by REACH tend to be absolute rather than relative, leaving little scope for such arguments in the case of REACH.
- [107.](#) See *Henderson vMerrett Syndicates Ltd (No. 1)* [1994] 2 Lloyd's Rep. 468 HL.
- [108.](#) See judgment of the House of Lords in *Hague v Deputy Governor of Parkhurst Prison* [1992] 1 A.C. 58 HL in two conjoined cases where prisoners unsuccessfully sought damages in tort for breach of statutory duty and/or false imprisonment for segregation decisions taken under the Prison Rules by the governors of their prisons.
- [109.](#) See the "fundamental question" posed by Lord Bridge in *Hague* [1992] 1 A.C. 58 at 159.
- [110.](#) K.M. Stanton, "New Forms of the tort of breach of statutory duty" (2004) 120(Apr) L.Q.R. 324, where Professor Stanton suggests that little or nothing turns on the characterisation of the claim as a claim for breach of statutory duty as the claim remains one in tort entirely framed by the statute which grants it.
- [111.](#) SI 2008/2852 came into force on December 1, 2008. By reg. 11 any non-compliance with one or more 63 separately listed (by Sch.2) statutory obligations under REACH is made a criminal offence punishable on conviction summarily (by a fine not exceeding the statutory maximum and/or to imprisonment not exceeding three months) or on indictment (by fine and/or imprisonment not exceeding two years). By reg.3 enforcement obligations are placed on various national and local authorities who are also empowered by reg.20 to seek any "appropriate" civil remedy where such enforcement authority considers criminal action would be "ineffectual" and courts are given the express power by reg. 16 to order a convicted person to remedy the non-compliance.
- [112.](#) Judgment of Lord Simonds in *Cutler v Wandsworth Stadium Ltd* [1949] A.C. 398 HL at 407.
- [113.](#) *Cutler v Wandsworth Stadium* [1949] A.C. 398 HL at 407.
- [114.](#) As Lord Diplock described the principle in *Lonrho Ltd v Shell Petroleum (No.2)* [1982] A.C. 173 HL at 185.
- [115.](#) Per Lord Tenterden C.J. in *Doe d. Murray B vBridges* (1831) 1 B. & Ad. 847 at 859.
- [116.](#) *Lonrho v Shell* [1982] A.C. 173 at 185.
- [117.](#) Per Brett J. in *Benjamin v Storr* (1874) L.R. 9 C.P. 400 at 407. A similar principle, to the effect that EU law permits national domestic law to require a claimant to demonstrate an actual economic interest protected by the EU legislation thereby differentiating the claimant from other economic operators, was also asserted by A.G. Geelhoed in *Muñoz* [2002] E.C.R. I-7289 at [76] of his Opinion.
- [118.](#) *Hague* [1992] 1 A.C. 58 at 170-171.
- [119.](#) Lord Bridge in *P v E Liverpool Daily Post and Echo Newspapers Plc* [1991] 2 A.C. 370 at 420.
- [120.](#) *Gorringe v CalderdaleMBC* [2004] UKHL 15; [2004] 1 W.L.R. 1057; esp. analyses of Lord Hoffmann at 1068-1069 and Lord Scott at 1078-1079.

- [121.](#) Stanton, "New Forms of the tort of breach of statutory duty" (2004) 120(Apr) L.Q.R. 324.
- [122.](#) *Levez v Jennings Ltd* (C-326/96) [1998] E.C.R. I-7835 in which the ECJ required determination of similarity for the application of the principle by reference to what was described at [43] of their judgment as "both the purpose and the essential characteristics of allegedly similar domestic actions".
- [123.](#) Paolisa Nebbia, "Damages actions for the infringement of EC competition law: compensation or deterrence" (2008) 33(1) E.L. Rev. 23.
- [124.](#) Nebbia, "Damages actions for the infringement of EC competition law" (2008) 33(1) E.L. Rev. 23.
- [125.](#) *Van Genden Loos* [1963] E.C.R. 13: evidenced by the judicial pronouncement that "[t]he vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted ... to the diligence of the Commission and of the Member States".
- [126.](#) Particularly evidenced by the judicial pronouncement at [27] of the judgment in *Manfredi* (Joined Cases C-295 to 298/04) [2006] E.C.R. I-6619 that "the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it were not open to any individual to claim damages for loss caused ..." and further confirmed by the ECJ's judgment in *Unibet* [2007] E.C.R. 1-2271 at [37] that the principle of effectiveness stems from "the constitutional traditions common to the Member States, which has been enshrined in Arts 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms" and (at [42]) "requires that the national legislation does not undermine the right to effective judicial protection".
- [127.](#) Which Lenaerts and Corthaut argue (Koen Lenaerts and Tim Corthaut, "Of birds and hedges: the role of primacy in invoking norms of EU law" (2006) 31(3) E.L. Rev. 287) is the dominant principle behind the enforcement of EU law in the national legal systems of the Member States.
- [128.](#) Previously as required by art. 10 of the EC Treaty and by the interpretative duty being "inherent in the system of the Treaty" as so described by the ECJ in *Pfeiffer v Deutsches Rotes Kreuz* (Joined Cases C-397 to 403/01) [2004] E.C.R. I-8835 at [114] and now as required by TEU art.4(3).
- [129.](#) In "Contract law: fulfilling the reasonable expectations of honest men" [1997] L.Q.R. 433 Lord Steyn argues that it is a theme of English contract law that effect be given to the reasonable expectations of honest contracting parties. Certainty in commercial contracts is underpinned by the fulfilment of these expectations.
- [130.](#) See in particular the decisions of: *Courage* [2001] E.C.R. I-6297 and *Manfredi* [2006] E.C.R. I-6619 in the context of issues of EU competition law arising under art. 81 of the EC Treaty (now TFEU art. 101); *Muñoz* [2002] E.C.R. I-7289 in the context of agricultural product regulation; and *City Motors* [2007] E.C.R. I-653 as to the EU law criteria for the displacement of national law: see above fn.59.
- [131.](#) *Muñoz* [2002] E.C.R. I-7289; *Courage* [2001] E.C.R. I-6297; although in *Unibet* [2007] E.C.R. 1-2271 the ECJ appeared to stress (at [40] and [41]) that new EU remedies would only be imposed when national law provided "no legal remedy ... to ensure, even indirectly, respect for an individual's rights under Community law" (at [41]) and, in contrast to their decision in *Muñoz*, considered a right to judicial review to be a sufficient legal remedy (at [61]).
- [132.](#) *Manfredi* [2006] E.C.R. I-6619.
- [133.](#) *Manfredi* [2006] E.C.R. I-6619. It should be noted that such invalidity arose in the context of the express provisions of art. 81 (2) of the EC Treaty (now TFEU art. 101).
- [134.](#) *Courage* [2001] E.C.R. I-6297.
- [135.](#) In *Devenish Nutrition v Sanofi-Aventis SA* [2008] EWCA Civ 1086; [2008] U.K.C.L.R. 783 (in the course of the Court of Appeal dismissing an attempt by a trader to recover, in the absence of loss, an account of the profits earned by their supplier in alleged cynical and deliberate contravention of EU competition law) Arden L.J. characterised the doctrine of effectiveness as being "directed to ensuring sufficient remedies rather than the fullest possible remedies". However, ultimately it is the EU Courts which will determine what is "sufficient" in respect of breach of any particular statutory duty arising under REACH. As the ECJ held in *Unibet* [2007] E.C.R. 1-2271, EU law is concerned to ensure any national remedy is "no less favourable than those governing similar domestic actions (principle of equivalence) and [does] not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)" (at [43]) and any national law provision alleged to obstruct effectiveness "must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances" (at [54]).
- [136.](#) Notwithstanding the common law rules to the effect that the illegality barrier, once raised, operates against both guilty and innocent parties alike subject to the intricate web of exceptions referred to above. These include the possibility of quantum meruit, and, by analogy, perhaps quantum valebat claims being permitted "by the less culpable party" as canvassed in *Mohammed v Alaga* [2000] 1 W.L.R. 1815 and Longmore L.J. in *A L Barnes v Time Talk* [2003] B.L.R. 331 discussed in fn.94 above. Such possible claims may find encouragement in the EU law principle that the party without "significant responsibility" for the illegality should be permitted recovery.
- [137.](#)

Bowmakers [1945] K.B. 65.

- [138.](#) The decision in *Manfredi* [2006] E.C.R. I-6619 suggested that invalidity arising under art. 81(2) EC Treaty (now TFEU art. 101) should be considered absolute in the present, past and future.
- [139.](#) See *Courage* [2001] E.C.R. I-6297 and Muñoz [2002] ECR I-7289; although in the case of *Courage* the House of Lords eventually determined in *Crehan v Inntrepreneur Pub Co (CPC)* [2006] UKHL 38; [2007] 1 A.C. 333 that there had been no breach of art. 81 EC Treaty (now TFEU art. 101).
- [140.](#) REACH arts 6(1) and 7(1) as to registration obligation and arts 62(2) as to use authorisation interpreted pursuant to art.3. Also see the related obligations imposed by the CLP Regulation 1907/2006.
- [141.](#) REACH art.4 provides expressly that any appointment, by any manufacturer, importer, or downstream user of a third party representative to facilitate compliance will not relieve the principal of "full responsibility" for compliance with REACH. This express provision mirrors the traditional analysis under English law that statutory obligations are non-delegable--see *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)* [1961] 1 Lloyd's Rep. 57 HL as to the seaworthiness obligation imposed by the Carriage of Goods by Sea Act 1971. Although it should be noted that the appointment by a non-EU manufacturer of an only representative under REACH art. 8 apparently discharges the importer of its registration obligations under REACH and transforms the importer into a downstream user; see above fn.39.
- [142.](#) Steyn J. in *First Energy (UK) Ltd v Hungarian International Bank* [1993] 2 Lloyd's Rep. 194 CA (Civ Div) at 196 described such aim of English law thus: "A theme that runs through [English] law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or a principle of law. It is the objective which has become and still is the principal moulding force of [English] law of contract."
- [143.](#) See *Fedesa (C-331/88)* [1990] E.C.R. I-4023 and other EU cases cited and discussed by Craig and de Búrca, in *EU Law, Text, Cases and Materials*, 4th edn (OUP, 2007), pp. 551-558.

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