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CONSUMER PROTECTION AND THE LIMITATION OF LIABILITY IN THE NATIONAL REGULATION OF THE SPACE INDUSTRY

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Abstract

The interests of consumers should not be ignored in the formulation of a domestic space law regime to regulate the developing space industry. This paper examines the lessons that may be learned from EC law in its attempts to protect the consumer in both pre- and post- contractual phases against the competing interests of industry and the role of the Court's image of the consumer in shaping those protections. The proposed American Commercial Space Law Amendment Act is examined from the point of view of the consumer. The paper argues that the image of the consumer as seen in EC law should not be used to mould domestic space law but that similar protections, particularly with regard to the disclosure requirements, limitations on exclusion clauses and, in the case of the Distance Selling Directive, the restriction on consumer waivers should be incorporated into national space law which affects space activities consumers.

INTRODUCTION

As the private space industry continues to show its potential for development, states are being compelled to develop new law or rethink their existing domestic space law regime. The issue of liability is critical during the pioneer stage of an industry, where the allotment of the burden of liability can have a chilling effect on entrepreneurs and their financial backers, as well as limit the development of existing operators. These two factors combine to result in exclusion clauses in space carriage contracts.

However, a distinction should be drawn between payloads. The carriage of goods and the carriage of persons both involve different considerations. In the case of the latter, given the potential imbalance between the parties to the contract, limitations on liability to protect the industry must be balanced by the counter-

vailing consideration of consumer protection. It is both valuable and instructive to examine how EC law has attempted to achieve this balance and to examine whether such laws should be extended to apply to the space tourism industry, if they do not already have the potential to apply as they are.

PROTECTION OF THE TOURIST

It is well established in domestic law that consumers of services have certain entitlements¹, such as an implied undertaking that the supplier has the necessary skill to render the service² and that s/he will supply the service with due skill, care and diligence³. Such laws come from a paternalist perspective on consumer-protection⁴. At a European level, the need to harmonise the law among member states is equally a factor⁵. It would seem discriminatory to allow some tourists to gain certain protections while others do not solely on the basis of destination. Consumer protection within other transport industries is highly advanced, at both national⁶ and

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international levels, although such industries are at a more advanced stage. International conventions such as the Convention Concerning International Carriage by Rail, the Athens Convention relating to the Carriage of Persons and Luggage by Sea 1980, the Montreal Convention 1999/ Warsaw Convention 1929 all provide a measure of protection for consumer/passengers and balance not only the interests of consumers and industry but the competing approaches dictated by paternalism on the one hand and freedom to contract on the other. The Warsaw Convention is an example of a convention drafted during the initial stages of an industry which contains consumer protection elements, such as the invalidity of clauses limiting liability, which acts as a counterbalance to the financial cap on liability accorded to the carriers.

Furthermore, it is accepted that consumer protection generally is in the public interest; this is especially so where health and safety interests are involved. Consumer's economic interests are also protected in Community law⁷. This is critical where the consumer to a contract is the economically weaker party⁸. This economic imbalance has been acknowledged by the European Court of Justice (ECJ)⁹. Community law accepts that consumers not only have rights to the protection of these interests but also to redress, information, education and representation¹⁰. The failure to provide any consumer protection for space passengers in a domestic space law regime would clearly be inconsistent not only with international passenger law but with domestic law generally and such an approach is unlikely, in the long term, to encourage a significant widening of the market-base.

The protection of tourists as consumers of a service¹¹ (viz. space transportation) is in clear conflict with the mandatory requirements of

waiver and cross-waivers of domestic law¹² and would be in conflict with exclusion clauses in contracts for carriage, though recent developments in the US space law regime look promising.

DOMESTIC SPACE LAW

The American domestic space law regime is attempting to encourage the emerging commercial human space flight industry with a number of bills such as the Zero-Gravity-Zero-Tax Act 2001 (HR 2504), Space Exploration Act 2003 (HR 3057), the Spaceport Equality Act (HR 1931) the Invest in Space Now Act 2003 (HR 2358), Space Tourism Promotion Act 2001 (HR 2443) and the Commercial Space Launch Amendments Act 2004 (HR 5382 "CSLAA").¹³ The CSLAA recognizes the commercial spaceflight industry is distinct from the aviation industry and vests its regulation in a single body. Such measures have undoubtedly been beneficial to the industry itself. The CLSAA also takes account of consumer vulnerability. It inserts a new clause stating that "the goal of safely opening space to the American people ... should guide Federal space investments, policies, and regulations." It requires the holder of the licence or permit to inform the space flight participant in writing about the risks of the launch and reentry, including the safety record of the launch or reentry vehicle type. No launch or re-entry may take place unless this has been done and the Secretary has informed the space flight participant in writing of any relevant information related to risk or probable loss during each phase of flight gathered by him/her. The holder of the licence or permit must inform the space flight participant in writing, prior to receiving any compensation from that space flight participant or (in the case of a space flight participant not providing compensation) otherwise concluding any agreement to fly that space flight participant,

that the United States Government has not certified the launch vehicle as safe for carrying crew or space flight participants. In addition, the space flight participant must provide written informed consent to participate in launch and re-entry and written certification of compliance with any regulations promulgated by the Secretary. However, the passengers may have to undergo “an appropriate physical examination prior to a launch or reentry” and meet “reasonable requirements... including medical and training requirements” where the Secretary of Transportation has provided for such by regulations. There is a fear that these regulations may set too high a standard.

Simberg contends that:

“This industry is just too immature to impose unreasonable safety requirements upon it – providers don’t yet know exactly how to do it, and the regulators don’t either, and attempting to do so would raise costs so high that it won’t be possible for anyone, even those willing to take the risk to afford it.”¹⁴

The CSLAA states that: “the regulatory standards governing human space flight must evolve as the industry matures so that regulations neither stifle technology development nor expose crew or space flight participants to avoidable risks as the public comes to expect greater safety for crew and space flight participants from the industry.”

It is anticipated that any regulations set by the Secretary would embody the philosophy of the parent act. However, the CLSAA does not remove the mandatory waivers provided for in the Commercial Space Launch Act of 1984¹⁵. While such waivers were originally found not to exclude liability for willful, wanton, reckless or gross conduct¹⁶, the present position is that statutorily required reciprocal cross-waivers guard against all tort claims

otherwise the Legislature’s intention would be circumvented¹⁷. Such waivers serve to bring space activities outside of the theory of liability and within the theory of insurance.

A BRIEF HISTORY OF EU CONSUMER POLICY¹⁸

The Treaty of Rome, as originally conceived, did not mention consumers aside from some marginal references¹⁹ in articles 33 (ex art. 39), 34 (ex art. 40), 81 (ex art. 85) and 82 (ex art. 86). None the less, consumer policy developed through soft law measures expressly for the protection of consumer interests²⁰ and were recognised by the ECJ in cases where domestic legislation crystallised given consumer habits thus maintaining the advantage of national industries, in conflict with the free market²¹. With the passing of the Treaty of European Union (Maastricht, 1992) the Community at last gained an express competence in the field.

Two previous consumer strategies have acknowledged that “acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts”²². The current consumer strategy 2002-2006 will be replaced by the *Community Programme for Health and Consumer Protection 2007-2013*²³. There are a range of directives and regulations in place on unfair terms²⁴, unfair commercial practices²⁵, package holidays²⁶, distance selling²⁷, doorstep selling,²⁸ consumer credit²⁹, timeshares³⁰, product liability and misleading and comparative advertising³¹ that all offer a measure of protection to the consumer³².

OBJECTIVES AND PRINCIPLES OF COMMUNITY CONSUMER LAW

The goal of Community policy is to ensure “a high level of protection” for the consumer³³.

As with the similarly phrased objective regarding the environment, this does not mean that the Community aims for the highest levels of protection.³⁴ In addition there are a number of guiding principles³⁵; these include having high safety standards, providing effective redress in cases of cross-border disputes, ensuring the consumer is not misled, fair contracts, protection while on holiday, easier price comparison and transparency.³⁶ The Commission has stated that transparency means that “consumers should be able to obtain, prior to conclusion of the contract, the information they need to make their decisions in full knowledge of the facts.”³⁷ The image of the consumer will more or less dictate the level of transparency and the degree and scope of protections afforded to him/her.

THE IMAGE OF THE CONSUMER

Several, sometimes conflicting images of the consumer exist in law. At one end of the spectrum is the concept of the “vulnerable consumer” and this correlates with the most paternalistic approaches. It is seen in Nordic consumer law. Moving along the spectrum is the “weak consumer”, a passive glancer, seen in German law (“*flüchtiger verbraucher*”)³⁸, who is unaware of their rights and choices. Measures taken embodying this image sometimes go beyond what would be considered proportionate often to the point of becoming a measure equivalent to a quantitative restriction on trade within the meaning of the TEC, as happened in *Cassis de Dijon*. Then there is the other end of the spectrum where the ECJ’s image of the consumer is located: “the reasonably circumspect consumer” or “responsible consumer” which equates to the *consomateur moyen* (average consumer) in French civil law³⁹. This consumer actively seeks out information in order to better exercise their freedom of choice. They are expected to be able to read in several languages⁴⁰ and to be

able to understand the information provided. The fact that some consumers may be incapable of reading or understanding the information where provided or are simply passive in the exercise of their choices and thus suffer as a consequence is a small price to pay for the overall benefits brought to the consumer by the integration of the market⁴¹.

Between these two ends of the spectrum one finds the confident consumer which, as Miklitz notes, is “an academic effort to bridge the gap between the opposing concepts and to establish a degree of protection in between the responsible and the weak consumer”⁴². The confident consumer has more protection than the reasonable circumspect consumer but is considered more active and capable of understanding than the weak or vulnerable consumer. It is submitted that given the international flavour to contracts for space carriage, the image of the consumer as seen in the jurisprudence of the ECJ sets too low a threshold for transparency to adequately protect space passengers. While the weak/vulnerable consumer images will provide extensive protection, the approach may be too paternalistic to be adopted into the space law of domestic legal regimes that traditionally have a robust attitude to freedom of contract⁴³. Ideally the confident consumer, representing as it does the equilibrium of all the different approaches, is to be preferred as the image of the consumer behind a space carriage contract.

CONSUMER RIGHTS IN COMMUNITY LAW

The right to information is protected in a number of ways in different directives (e.g. labelling) and provides for transparency in the pre-contractual phase.⁴⁴ Such measures operate with a minimum of trespass upon the freedom to contract as it does not interfere with either the content or form of the

negotiations or contract. As Weatherill observes:

“Viewed in their most favourable light, they yield a more efficient market by promoting negotiation and informed consumer choice, without substituting public decision-making about the contents of contracts for private choice.”⁴⁵

Information disclosure requirements are seen in the consumer credit directive⁴⁶, the recommendation on the transparency of banking conditions relating to cross-border financial transactions⁴⁷, the directive on cross-border credit transfers⁴⁸ and the package holidays directive. Such requirements interact to support other consumer rights. However it is accepted that there may be times when the provision of information is just insufficient to adequately protect consumer rights⁴⁹. Such measures fail “to address substantive unfairness” especially where created by an economic imbalance in the contractual environment and may be inadequate to effectively safeguard consumer rights to health and safety.

In such cases more intrusive measures may be taken. On one level, the failure to provide particular information, such as the identity of a liable party, may result in liability being imposed on the non-disclosing party instead as seen in the products liability directive. On the other hand products failing to meet the safety standards (where established) may not be permitted on to the market, such as meats with unsafe levels of veterinary medicine residues. Admittedly, EU law is lagging behind in the services area, in comparison to the protection of the consumer in the field of goods⁵⁰, with only a few sectors such as financial services and package holidays having been made the subject of consumer-orientated legislation. Rights of redress have been protected through the harmonisation of producer liability. A

proposal for a sister directive on services⁵¹ was withdrawn in favour of this sectoral approach, the result of which lead to the package holiday directive.

THE UNFAIR TERMS DIRECTIVE

The Unfair Terms directive was adopted unanimously by the Council after a gestation period of some six years⁵². The Directive aimed to approximate the laws of the Member States relating to unfair terms in contracts concluded between a seller of goods or supplier of services and a consumer. The existence of a public interest element in rendering unenforceable unfair terms was accepted.⁵³ A consumer is defined widely in article 2 as “any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession”⁵⁴. Sellers are also defined widely as “any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned”. Article 3 provides a test for unfair terms⁵⁵:

“A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.”

Under article 4, the unfairness of the contract is to be assessed by taking into account the

nature of the goods and services and all circumstances attending the contract at the time of the contract's conclusion. Under art.5, all terms in written contracts must always be drafted in "plain, intelligible language" and, in cases of doubt, the interpretation most favourable to the consumer prevails. This encapsulates the principle of transparency. This principle is of some value as there is no right to know in advance the contractual terms conferred by the directive. Although the Council was in favour of such a right, the matter was considered to be outside the framework of the directive. Unfair terms are not binding upon the consumer but the contract will continue to bind the parties if it can survive in the absence of the unfair terms. The annex to the directive provides a list of terms that are regarded as unfair. Of particular note are terms which have the object or effect of:

“(a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier.”

While the scope of the directive in art.1 is expressed to exclude those contractual terms that reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, the absence of any convention governing liability for private space carriage at present means this exclusion cannot be relied on for space carriage contracts where they are subject to the jurisdiction of a Member State.

This directive provides a useful insight into how consumer protection can be integrated into domestic space law regimes attempting to regulate private space carriage and offer a contrasting approach to those regimes that

have already attempted to deal with the subject. Provisions requiring terms to be in clear and intelligible language are particularly important in the early phases of space carriage industry when the scientific vocabulary explaining the risks has still to enter common parlance. The ban on binding exclusion clauses serves to ensure a high level of consumer protection and would be a necessary element of any space carriage convention attempting to place financial caps on the extent of liability.

THE DIRECTIVE ON LIABILITY FOR DEFECTIVE PRODUCTS

Directive 85/375/EEC OJL 210/29, 7.8.1985 as amended by Directive 1999/34/EC OJL 141/20, 4.6.1999 imposes strict (but not absolute) liability on the producer of goods (art.1). This Directive applies to all movables “even if incorporated into another movable or into an immovable” (art.2). “Producer” is defined widely to apply to “the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.” (art. 3 (1)). Under art. 3 (2) importers are deemed to be producers and responsible as such. Where a producer cannot be identified, the supplier is treated as such “unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product.” The burden of proving the injury rests on the injured party (art.4). Art. 6 furnished the definition of a defective product as one which does “not provide the safety which a person is entitled to expect”, taking all circumstances into account, including:

- (a) the presentation of the product;
- (b) the use to which it could reasonably be expected that the product would be put;

(c) the time when the product was put into circulation.

Art. 7 provides for several producer defences including a state of the art defence. Art. 8 provides that there is no reduction in liability where the damage was the result of both the defect and the act or omission of a third party, though it may be reduced or disallowed where the damage was the fault of the injured party or a person for whom the injured party was responsible. Article 10 provides for a limitation period of three years running from the date on which the plaintiff became aware or should reasonably have become aware of the damage, defect and identity of the producer. However, all rights conferred by the directive expire on the passing of ten years from the date on which the product was put into circulation unless proceedings commenced before that date. Liability under the directive cannot be limited or excluded by a provision limiting or exempting him from liability (art.12). However the Directive does "not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified" (art.13) nor does it apply to damage arising from nuclear accidents *and* covered by a ratified international convention. A Member State may provide for a liability cap of not less than 70m ECUs for a producer's total liability for death and personal injury (but not for property) caused by the same defect in identical products. The directive applies prospectively only.

There is nothing in the directive that would indicate that it would not apply to the producers, importers or, where relevant, the suppliers of defective space products, including space vehicles and their component parts, in the Community. This directive has the greatest amount of relevance and

applicability for earth-based space tourism activities and space-related products sold within the E.U.

THE DISTANCE-SELLING DIRECTIVE

The distance-selling directive⁵⁶ applies to contracts for goods or services made using a means of distance communication, such as e-mail, fax, videophone, catalogue etc. Article 3(2) states that articles 4-7(1) do not apply to, *inter alia*, contracts for the provision of accommodation, transport or leisure services where the supplier undertakes to provide the services on a specific date or within a specific period. So space carriage contracts formulated within the Community will probably not come within the scope of the directive. Art.4 sets down the basic prior information such as the identity of the supplier, the main characteristics of the service, the cost (inc. taxes) and the existence of a right of withdrawal, which is to be provided in "a clear and comprehensible manner... with due regard ... to the principles of good faith" Art. 5 provides that the consumer is to receive written confirmation of the information set out in art.4 and information on the withdrawal and complaints procedures during the performance of the contract. However, this is not applicable where the contract is for a service to be supplied only once and invoiced by the operator through distance communication. Nonetheless, the consumer is entitled to know the geographical address of the supplier. Article 6 provides for a right of withdrawal for the consumer within seven working days without penalty or reason, provided performance has not yet begun within the seven days with the consumer's consent. Under art.12 the consumer may not waive the rights conferred by the Directive, nor does the consumer lose the protection of it by virtue of the choice of the law of a non-member country as the law applicable to the contract if the latter has a close connection to the

territory of one or more Member states. Similarly in the Doorstep Selling Directive⁵⁷ there is a detailed right of cancellation furnished to the consumer that cannot be waived (art.6).

THE PACKAGE HOLIDAYS DIRECTIVE⁵⁸

Under the EC Package Holidays Council Directive 90/314/EEC on package travel, package holidays and package tours⁵⁹ organisers and retailers of packages have an obligation to provide correct information regarding the package and the visa and passport requirements⁶⁰ and are liable for failure to perform the contract unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services, because they are attributable to the consumer, or to an unconnected third party and are unforeseeable or unavoidable or due to a case of *force majeure* the consequences of which were unavoidable even with due care or an event which the organizer and/or retailer or the supplier of services could not foresee or forestall⁶¹. The Directive could possibly apply to a space tourism contract when combined with an additional preparation stay and travel to its location as it applies regardless of the location provided the package is sold within a member state. A package here is defined as the pre-arranged combination of two or more of the following: (a) transport; (b) accommodation; (c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package, when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation⁶². Tailor-made packages to consumer's specifications are protected⁶³. Art. 7 requires the organiser/retailer to provide security for the refund of the consumer; this protects the

consumer's rights in the event of the organiser/retailer's insolvency⁶⁴. The directive does allow some reasonable limitation in the case of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, provided it is not unreasonable⁶⁵. One of the benefits of using the directive is that it allows for compensation in cases of non-material damage (such as feelings of dissatisfaction and disappointment) as of a right for the non-performance or improper performance of the contract for the package travel, tour or holiday⁶⁶.

In the regulation of commercial space carriage contracts, there should be a duty upon all space carriage operators to furnish information regarding the medical risks, as well as the financial terms in plain and intelligible language. The informed written consent required by the CSLAA should also be incorporated into other domestic space law regimes, though such a consent will only establish a defence of *volenti* in a tort action and should not operate to exclude actions taken in contract. When the industry reaches a mature phase, the use of the written consent to establish a *volenti* defence should be re-assessed.

SUGGESTED CONSUMER PROTECTION MEASURES

There are a number of suggested consumer protection measures that can be taken. Informing the consumer is vital. In requiring *informed* written consent the CSLAA has to a limited extent provided for this. However, operators should be obliged to make disclosure of all material risks in order for the consent to be classified as informed. Information as to the right of redress where the operator fails to uphold their end of the contract should be disclosed. The contract should be ideally in the language of the

consumer and should be in plain clear and intelligible language in legible print of a reasonable size⁶⁷. All terms and conditions, including the refund policy, should be disclosed and no term should be imposed after the contract has been formed save by operation of law. Exclusion clauses subject to the Unfair Terms Directive will be invalid. Other terms that may be classified as unfair will also fall prey to the same fate under this directive. Such protection would be very valuable to a space activities consumer and should be integrated into space law regimes. Alternatively, a lesser level of protection could permit exclusion clauses where fair and reasonable and specifically brought to the attention of the consumer.

The right to waive one's rights as conferred under the law is restricted in the Community. Similar restriction on the right to waive should be introduced into domestic space law. Waivers of the rights to information, refund and redress should be deemed null and void. Waivers regarding liability should be restricted to payload for goods rather than for passengers in the case of space carriage operators. However, waivers as to conditions to be fulfilled by the supplier of services under the contract (rather than under statute) by the consumer should still be possible. It is worth bearing in mind that the organiser, as opposed to the licensee/permittee could find themselves subject to liability under the Package Holidays Directive where the appropriate conditions are met.

Where any clause is found to be a nullity, the contract should continue to exist where it can survive the severance of the offending clause(s). The burden of proving a term is a nullity should rest of the party asserting it.

CONCLUSION

While the Unfair Terms directive will have a bearing on consumer contracts for space services in the Community and the Package Holidays directive may in some circumstances create liability for space tour operators, it is unlikely that the other directive would be of direct application or relevance at the present stage of the industry. The inability of consumers to waive the rights conferred by certain directives would be of value of space tourists and consideration should be given to its conclusion. While the proposed American legislation has some protection, limitations on exclusion clauses and waivers should be included, as well as greater transparency in measures taken for consumer redress and withdrawal in the event of supplier-caused non-performance.

¹¹ For example, under the Sale of Goods and Supply of Services Act 1980 (IR), Sale of Goods and Services Act 1982 (UK), Consumer Guarantees Act 1993 (NZ); Consumer Protection Act 1999 (Malaysia Act 599), Supply of Goods and Services Act 1996 (Isle of Man IOM 1996-16); Supply of Services (Implied Terms) Ordinance (CAP. 257 Hong Kong); Consumer Protection Law 1969 (NYC).

² Sale of Goods and Supply of Services Act 1980 (IR) part IV, s.39 (a).

³ Sale of Goods and Supply of Services Act 1980 (IR) part IV, s.39 (b).

⁴ See the Sale of Goods Act 1893 (as amended in Ireland by the Sale of Goods and Supply of Services Act 1980) and Case C-168/00 *Leitner v TUI Deutschland GmbH & Co KG* [2002] ECR I- 2631; [2002] All ER (EC) 561. For the pre-Victorian protection measures, see Harvey, Brian and Parry, Deborah, *The Law of Consumer Protection and Fair Trading*, (5th ed. Butterworths, London, 1996) p. 15 *et seq.*

⁵ See C-400/00 *Club-Tour, Viagens E Turismo SA v. Garrido* [2002] ECR I-4051 and Wilhelsson, "Is there a European Consumer Law – and Should there Be One?" *Centro di Studi e Ricerche de Diritto Comparato e Straniero*, Saggi, Conferenze e Semenari, Roma 2000, No.41, p.10-14.

⁶ See Walton, Cooper and Woolf (ed.s), *Charlesworth and Percy on Negligence*, 10th ed., (Sweet and Maxwell, London, 2001) at para. 9-84; *Readhead v. Midland Railway* (1869) L.R. 4 Q.B. 379; *Henderson v. H.E. Jenkins & Sons* [1970] AC 282, *Ritchie v. Western Scottish M.T. Co.*, 1935 S.L.T. 13 and *Pearce v. Round*

Oak Steel Works [1969] 1 W.L.R. 595; *Platzer v. Mammoth Mountain Ski Area* (2002) 104 Cal.App.4th 1253, at p.1260; *Rubin v. United Air Lines, Inc.* (2002) 96 Cal.App.4th 364; Cal.App.4th 364 and *De Vera v. Long Beach Pub. Transportation Co.* (1986) 180 Cal. App. 3d 782, 793; 225 Cal. Rptr. 789.

⁷[1975] O.J. C92/1, Holland, *European Consumer Law*, (Stanbrook & Hooper, Suffolk, 1999); Reich, "From Contract to Trade Practices Law: Protection of Consumers' Economic Interests by the EC" in Wilhelmsson, Thomas (ed.), *Perspectives of Critical Contract Law*, (Dartmouth, Aldershot, 1993), p.55.

⁸ See Harvey and Parry, *op cit*, p.13-21; Goldring, John, "Consumer Protection and the Trade Practices Act 1974-5" 6 *Federal L. Rev.* at p.288 and Hondius, E., "The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis", (2004) 27(3) *Journal of Consumer Policy* 245.

⁹ C-150/77 *Société Bertrand v Paul Ott KG* [1978] ECR 1431, para 12/16.

¹⁰[1975] OJ C 92/1

¹¹ See Joined Cases 286/82 and 26/83 *Luissi and Carbne v Ministero del Tesoro* [1984] ECR II-667, para.16.

¹² For example, the Commercial Space Launch Activities Act 1988, US Code Title 49 ch. 701, s.70112(b).

¹³ See Note: Commercialization of Space, (2004) 17(2) *Harvard Journal of Law and Technology* 619.

¹⁴ Simberg, *Permission to Fly*, Fox News, Oct 15 2003, quoted at p.619

¹⁵ The Commercial Space Launch Act 1984 (US), s.70112(b). In Australia, waivers may be made mandatory under section 65 of the Space Activities Act 1998.

¹⁶ *Appalachian Insurance v. Mc Donnell Douglas* 262 Cal. Rptr. 716 (Cal. Ct. App. 1989). See also *Lexington Insurance v. Mc Donnell Douglas* No. 481713 (Cal. Supr. Ct., Orange Co., May 1990). See Showalter, "In Space Nobody Can Hear You Scream 'Tort!'" (1992-1993) 58 *Air L. & Com. J.* 795 at pp.833-841.

¹⁷ *Martin Marietta v. Intelsat* 763 F. Supp. 1327 (D. Md. 1991), *aff'd* in part, *rev'd* in part, 978 F.2d 140 (4th Cir. 1992). See Diederiks Verschoor, *An Introduction to Space Law*, (2nd ed., Kluwer Law International, London, 1999) at p.119-113, Dietrich, George B., "Third Party Damages in Space Insurance", Government Regulation of Space Activities 389-508, April 14, 2000, available at http://www.iasl.mcgill.ca/spacelaw/spacecourses/dg_3p_d_si.htm

¹⁸ See Weatherill, Simon "Consumer Policy" in Craig, Paul and De Búrca, Gráinne, *The Evolution of EU Law*, (OUP, 1999) at pp. 693-720, Weatherill, *EC Consumer*

Law and Policy, (Longman, London, 1997) ch.1 and Schulze, R., Schulte-Nölke, H. and Jones, J. (ed.s), *A Casebook on European Consumer Law*, pp. 7-8.

¹⁹ Weatherill, *op cit*, p. 693.

²⁰ For example: [1975] OJ C 92/1; [1981] OJ C 133/1; [1986] OJ C 167/1; COM (90) 98.

²¹ For example: Case C-179/78 *Commission v. UK* [1980] ECR 417; [1981] 1 CMLR 716; Case C-178/84 *Commission v Germany* [1987] ECR 1227; [1988] 1 CMLR 780; Case C-154/89 *Commission v France* [1991] ECR I-659, Case C-180/89 *Commission v Italy* [1991] ECR I-709; Case C-198/89 *Commission v Greece* [1991] ECR I-727.

²² [1975] OJ C 92/1 and [1981] OJ C 133/1.

²³ COM (2005) 115 final.

²⁴ Directive 93/13/EEC [1993] OJ L 95/29.

²⁵ Directive 2005/29/EC [2005] OJ L 149/22.

²⁶ Directive 90/314/EEC [1990] OJ L 158/59.

²⁷ Directive 97/7/EC [1997] OJ L 144/19.

²⁸ Directive 85/577/EC [1985] OJ L 372/31.

²⁹ Directive 87/102/EEC [1987] OJ L 42/48.

³⁰ Directive 94/47/EC [1994] OJ L 280/83.

³¹ Directive 84/450 [1984] OJ L250/17.

³² See Micklitz and Weatherill, "Consumer Policy in the EC: Before and After Maastricht" (1993) 16 *Journal of Consumer Policy* 285.

³³ See Stuyck, Jules, "European Consumer Law After the Treaty of Amsterdam: Consumer Policy In or Beyond the Consumer Market" (2000) 27 *C.M.L.Rev.* 367, pp.392-3.

³⁴ C-233/94 *FRG v. Parliament and Council* [1997] ECR I-2405, para.10.

³⁵ Health and Consumer Directorate-General, *Consumer Protection in the European Union: Ten Basic Principles*, 20th July 2004 available at <http://europa.eu.int/comm/consumers/cons_info/10principles/en.pdf>

³⁶ Micklitz, Hans, "Obligation of Clarity and Favourable Interpretation to the Consumer" in *Proceedings of the Conference on Unfair Terms Directive: Five Years Later Evaluation and Perspective*, 1-3rd July 1999 pp.158.

³⁷ *Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, COM 2000/0248/final at III para.3.

³⁸ See the *Scanner Advertising Case*, December 20th, 2001 1 ZR 215/98, cited by Reilly, N., "The Unfair Commercial Practices Directive and the Average Consumer" (2005) 12 (5) *Commercial Law Practitioner* 125 at p. 126.

³⁹ In Directive 2005/29/EC [2005] OJ L 149/22, the term "average consumer" is used, defined in recital 11 as someone who is "reasonably well-informed

reasonably observant and circumspect". See Reilly, *supra*.

⁴⁰ C-85/94 *ASBL Piageme & Others v. Peeters*, [1995] ECR 2955, para.13, C-366/98 *Geffroy* [2000] ECR I 6579 (c.f. [1992] OJ C 94/217 at p.210). The decision has been criticised: see Schulz, *op cit*, p.214 and C-385/96 *Goerres* [1998] ECR I-443.

⁴¹ See Peekmens, "Consumer Interests in the EC Competition Regime: An Economic Perspective" in Goyens, M., (ed.), *EC Competition Policy and the Consumer Interest*, (Cabay, Louvain-la-Neuve, 1985) pp.22-67 c.f. Piper H., "The Effects of the EC Single Market on Germany's Unfair Competition Law" in Micklitz and Weatherill, *European Economic Law*, (Dartmouth, Aldershot, 1997), pp.276-278.

⁴² Micklitz, pp.160-161. See Weatherill, "The Evolution of European Consumer Law and Policy: From Well-Informed Consumer to Confident Consumer" in Micklitz, Hans (ed.), *Rechtseinheit oder Rechtsvielfalt in Europa? Zur Rolle und Funktion des Verbraucherrechts in der EG und den MOE-Staaten*, Schriftenreihe des Vereinigten Instituts für Europäisches Wirtschafts und Verbraucherrecht Band. 1, 1996, 423ss.

⁴³ For example, see the approach in *L'Estrange v. Graucob* [1934] All ER 16 c.f. *George Mitchell Ltd., v. Finney Lock Seeds Ltd.* [1983] 1 QB 296 and *Mc Cord v ESB* [1980] ILRM 163 (SC).

⁴⁴ Weatherill, *EC Consumer Law and Policy*, pp.60-61.

⁴⁵ *Ibid* p. 60.

⁴⁶ Directive 87/102/EC [1987] OJ L42/48, as amended.

⁴⁷ Rec. 90/109 [1990] OJ L67/39

⁴⁸ Directive 97/5/EC

⁴⁹ [1975] OJ C 92/.

⁵⁰ For example, there is no equivalent directive for services for Directive 1999/44/EC [1999] OJ L171/12

⁵¹ COM (90) 482 final - SYN308 - [1991] OJ C 12/8.

⁵² Beginning with COM(84)55 final (Supplement 1/84 of the Bulletin of the European Communities). See also COM(90)322 final, OJ C 243, 28.9.1990.

⁵³ See the comments of the Advocate General in Joint Cases C-240/98 to C-244/98, *Océano Grupo Editorial, S.A. and Salvat Editores, S.A. v Rocio Murciano Quintero et al.*

⁵⁴ See Wilhelmsson, Thomas, "The Scope of the Directive: Non-Negotiated Terms in Consumer Contracts", pp.93-95 and p.102 in *Proceedings of the Conference on Unfair Terms Directive: Five Years Later Evaluation and Perspective*, 1-3rd July 1999.

⁵⁵ See Roppo, Vincenzo, "The Definition of Unfairness: The Application of Art. 3(1), 4(1) and the Annexes of the Directive", pp. 132-143 in *Proceedings of the Conference on Unfair Terms Directive: Five Years Later Evaluation and Perspective*, 1-3rd July 1999.

⁵⁶ As amended by Directive 2002/65/EC [1997] OJ L144/19.

⁵⁷ [1985] OJ L 372/31

⁵⁸ See Leden and Shears, *Consumer Law*, (4th ed., Pitman, London, 1996), ch.10, Schuster, "Package Holidays, Law and Practice - Part 1" and McDonald, "Revisiting Organiser Liability under the Package Travel Directive [2003]" *International Travel Law Journal* 131 (I am indebted to Dr. Schuster for these articles).

⁵⁹ OJ L 158 of June 23rd 1990, pp.59-64. See Saggeron A., *Travel Law and Litigation*, 2nd ed. (CLT Professional Publishing, 2000), ch. 1 and Buttimore J., *Holiday Law in Ireland*, 1992.

⁶⁰ Article 3 and 4 Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158/59, 23/06/1990). See Diniz, GP, *An Excursion on Holiday Law*, 2001, available at <http://www.law.ed.ac.uk/eyl/eyrepGPD01.htm>

⁶¹ Article 5(2) Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (Official Journal L 158, 23/06/1990 P. 0059 - 0064).

⁶² Article 2 Council Directive 90/314/EEC.

⁶³ C-400/00 *Club Tour v Garrido* [2002] 2 ECR I-4051.

⁶⁴ See C-394/96 *Verein für Konsumenten information v Osterreich Kreditversicherungs AG* [1998] ECR I-2949.

⁶⁵ Article 5(2) Council Directive 90/314/.

⁶⁶ Case C-168/00 *Leitner v TUI Deutschland GmbH & Co. KG*. [2002] ECR I-263. See Wiewiórowska-Domagalska, A., Arnokouros, G., Dickie, J. and Loos, M. B.M., "ECJ, 12 March 2002, Case C-168/00 *Leitner v TUI Deutschland GmbH & Co. KG* - Compensation for non-material damage under the Directive on Package Travel", (2003)11(1) *European Review of Private Law* pp. 91-102, Roth, W.H., "Case *Simon Leitner v TUI Deutschland GmbH & Co. KG*" (2003) 40(4) *Common Market Law Review* 937-951 and Mason S., "Damages for Distress and Disappointment - Why Us?" (2001) 8(1) *International Travel Law Journal*.

⁶⁷ See for instance s. 53 of the Sale of Goods and Supply of Services Act 1980.