EU withdrawal under the 2018 Act, and its impact on civil litigation

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A. Introduction

1. **Introduction.** The United Kingdom's withdrawal from the European Union is brought into effect at a domestic level by the European Union (Withdrawal) Act 2018 (**"the Act"**). As has been extensively reported, the Act and the subordinate legislation that it will give rise to, constitute the single largest legislative reform programme that this country has witnessed.

2. **The scope of this paper.** This paper addresses: (i) the structure of the Act, and how it is expected to operate in practice; and (ii) the implications of withdrawal for civil litigation. It is important to remember when considering the implications of withdrawal, that the domestic legislation only forms one part of the analysis, and that one also needs to consider the consequences of the United Kingdom becoming a 'third party' state under EU Law.

B. The Structure of the Act

3. **The core structure.** The Act adopts (so far as relevant to this talk) a 4-part approach to ensuring the continuity of the law, consisting of the following:

   a. repealing the European Communities Act 1972 (s.1);

   b. transplanting into domestic law, a body of law referred to as "*retained EU law*" (ss. 2-5) and explaining how that is to be given effect and interpreted (ss. 6-7);

   c. creating a wide, rule-making power for "*dealing with deficiencies arising from withdrawal*" (s.8). It is under this provision that swathes of sector-specific statutory instruments have already been passed in order to prescribe how the law will continue to apply, with or without modification, on and after "*exit day*"; and

d. creating a separate rule-making power for implementing any withdrawal agreement reached with the EU (s.9).

4. Before analysing those provisions in more detail, it is worth first summarising that the Act therefore operates by transposing the corpus of "*retained EU law*" as it exists at a fixed point in time, *i.e.* "*exit day*", currently defined as 19 March 2019 at 11pm: **Act, s.20(1)**.[1] The development of that law *after* exit day will depend partly on subordinate legislation, and partly on the direction to UK courts to "*have regard*" to developing EU jurisprudence.

5. **Repeal of ECA 1972.** The 1972 Act has been judicially described as the conduit pipe which not only permits EU Law to become a source of law in the United Kingdom, but also enables it to take precedence over all domestic sources of UK Law, including statutes.[2] It is the mechanism that provides authority, and constitutional legitimacy, for EU law to be given precedence over inconsistent national law.

6. By repealing section 2 of the 1972 Act, rights and obligations created or arising by or under the European Treaties, and which the UK was obliged under EU Law to recognise in its domestic law as a Member State, would cease to be "*recognised and available*" in national law. It was under that provision (via the UK's Treaty obligations) that enforceable EU rights could arise from enforceable Treaty obligations, EU Regulations, and EU Directives that were capable of having direct effect.[3] The repeal of that enactment has made it necessary to define what happens to that body of law.

[1] HM Government has laid draft legislation before Parliament to postpone the 'exit day' (in accordance with European Council Decision (EU) 2019/476) to either 11.00 p.m. on 12 April 2019 or 22 May 2019: European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) Regulations 2019. It is also worth noting there are no general transitional provisions in the event of the UK reaching agreement on a withdrawal agreement with the EU, although the Government has indicated that, if there were agreement on a transition period, transitional provision would be contained in the Act approving the deal so that existing EU law would be transposed only at the end of that period: https://www.parliament.uk/documents/lords-committees/constitution/Correswithministers/CDL2611.pdf

[2] R. (Miller and another) v Secretary of State for Exiting the European Union [2017] 2 WLR 583 (SC), at [60].

[3] Case 26/62 van Gend en Loos NV v Nederlandse Belastingadministratie [1963] ECR 1 (direct effect of clearly-defined treaty provisions); Art. 288 TFEU (direct applicability of EU Regulations); Case 41/74 Van Duyn (Yvonne) v Home Office (No 2) [1974] ECR 1337 (direct effect, as between private citizens and emanations of the State, of provisions in EU Directives that are sufficiently clear, precise and unconditional). Further, because of the obligation to interpret all domestic legislation, if at all possible, so as to comply with EU law (see Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentación SA [1990] ECR I-4135), EU Law could have a broader reach, in more limited circumstances, as between private individuals.

C. The Continuing Effect of Retained EU Law

7. **What is 'retained EU law'?** It has 3 aspects:

   a. domestic legislation made under the 1972 Act, passed for the purpose of implementing EU law, or "*relating otherwise to the EU or the EEA*". It is preserved and "*continues to have effect in domestic law on and after exit day*" (s.2). That is uncontroversial and was no doubt thought necessary in consequence of the repeal of the law-making powers under the 1972 Act by virtue of which those enactments had been made.

   b. existing EU statute law, in particular that arising under EU Regulations and Directives addressed to the UK.[4] It "*forms part of domestic law on and after exit day*" (s.3).

   c. other enforceable EU rights to which the UK was bound to give effect on exit day. These "*continue on and after exit day to be recognised and available in domestic law*" (s.4).

8. That retained EU law is transposed into domestic law. It is all capable of being amended by subordinate legislation passed under section 8 of the Act, for a period of 2 years after exit day, if the appropriate Minister considers that necessary to address any failure of retained EU law to operate effectively, or to address any other deficiency in EU law. Perhaps of more significance, the Act provides for how that law is to be interpreted on or after exit day.

9. **The interpretation of retained EU law after exit day.** It is only the English language version of EU statute law that is transposed, although other language versions may be used as a guide to its interpretation (ss.3(1), (4)). But neither that provision, nor the fact that retained EU law becomes "*domestic law*", means that it will henceforth become divorced from traditional European principles of interpretation.

10. So far as retained EU law remains unmodified after exit day, its validity meaning or effect is to be decided, "*so far as they are relevant*" to the question, in accordance with *existing* CJEU or domestic case law, and existing general principles of EU law. The principle of supremacy of EU law continues to apply in order to interpret any *existing* enactment (ss. 6(3), 5(2)). It is therefore to be expected that first instance courts and the Court of Appeal

[4] Schedule 6 of the Act creates a category of "*exempt EU instrument*" which includes Decisions, Directives and Regulations which will not be transposed. In practice they are limited to particular legislation that the UK was permitted a carve-out from implementing under individually-negotiated Protocols, such as protocol on the Schengen *acquis*.

will continue to apply *existing* EU case law when interpreting retained EU law that has not been modified. Conversely, the Supreme Court is "*not bound*" by any retained EU case law but, in deciding whether to depart from it, must apply the same test as it would apply in deciding whether to depart from its own case law (s.6(5)). No court or tribunal can make a reference to the CJEU (s.6(1)(b)).

11. By contrast, if domestic provision is made to modify any existing (pre-exit day) enactment or rule of law, the relevance of *existing* case law will depend on the court's analysis of the purpose of the modification. Retained case law and existing general principles of EU law *might* still be considered, as relevant to the validity, meaning of effect of the amended provision "*if doing so is consistent with the intention of the modifications*" (s.6(6)). The principle of supremacy *might* still apply in the same situation (s.5(3)).

12. Any new, domestic enactment or rule of law made after exit day is not subject to the principle of supremacy of EU law (s.5(1)). Equally, however, the Act expressly recognises that nothing prevents the UK from replicating in domestic law any EU law made on or after exit day (s.19(a)).

13. The analysis up to now has focused on what relevance *existing* case law is likely to have. Rather more difficulty arises when considering how *future* EU case law is to be treated by the UK courts. That is dealt with in two ways.

    a. First, it is clear that future decisions under EU Directives cannot give rise to directly-enforceable rights if they are "*not of a kind recognised*" by the existing jurisprudence of the CJEU or domestic courts (s.4(2)(b)). Any such newly-recognised enforceable right will not form part of "*retained EU law*" as that concept is defined in the Act. Nor can a general principle of EU law form part of domestic law if it was not recognised as such in a case decided by the CJEU before exit day (Sch.1, para. 2).

    b. Secondly, however, a broad discretion is conferred by which a domestic court or tribunal "*may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant*" to any matter before it. The court or tribunal is not bound by any such CJEU decision (s.6(1)(a),(2)).

14. That discretion is remarkable for both its breadth and its lack of direction, and gave rise to expressions of concern by senior members of the judiciary who gave evidence to the House of Lords Constitution Select Committee. The problem is potentially compounded by the over-inclusive nature of the drafting by which all sources of EU law are retained.

For example, it is ambiguous under section 4 whether enforceable EU rights are intended to be incorporated only to the extent of having vertical effect (as against emanations of the state) or also horizontally (as between private individuals). It is unlikely, one would have thought, that the legislature was intending to give EU Law a greater extent than the *status quo*, which points towards the former.

15. Limited guidance can be given as to how this discretion will be exercised. It is a familiar cannon of statutory construction that, where a statute is passed in order *to give effect* to the UK's international obligations under a treaty, the statute should if possible be given a meaning that conforms to that treaty.[5] But section 6 of the Act is almost unique in requiring the UK courts to have regard to a system of jurisprudence that, by virtue of triggering of article 50 of the Lisbon Treaty, it has no international obligation to comply with. The best guidance can perhaps be drawn from the context of the provision within the scheme of the Act. The principal area of application will be in a situation where EU law has been retained and has not been modified by any statutory instrument (since, in that situation, the court is instructed to have regard to the purpose of the modification). Consequently, the court may well consider developing EU law to have persuasive effect on its UK interpretation, not least because of the need for consistency in the law.

D. The impact on civil litigation

16. **The Withdrawal Agreement.** If the Withdrawal Agreement with the EU[6] were ratified by the UK, it contains in Title VI provisions to maintain a transitional period (currently up to December 31, 2020 but subject to an agreed extension of up to 2 years) that would preserve the effect of European Regulations on conflicts of laws. Those would include the Rome I and Rome II Regulations (on the law applicable to contractual and non-contractual regulations, respectively); the recast Brussels I Regulation (on jurisdiction and recognition and enforcement of judgments); the recast Insolvency Regulation; as well as miscellaneous procedural enactments.[7] International instruments by which the UK is currently bound because of their conclusion by the EU will also continue to apply. Those include, notably, the Lugano Convention (which covers much of the same territory

[5] *Bennion on Statutory Interpretation* (7th ed, 2017), section 24.16.
[6] The Agreement on the Withdrawal of the United Kingdom from the European Union and the European Atomic Energy Community, as endorsed by leaders at the special meeting of the European Council on November 25, 2018.
[7] In particular, the EU Service Regulation, the European Order for Payment Regulation, the European Small Claims Procedure Regulation, the European Enforcement Order for uncontested claims, and the Mediation Directive.

as the recast Brussels Regulation, but for EEA states that are not Member States) and the Hague Convention on Choice of Court Agreements 2005.

17. Consequently, if the Withdrawal Agreement were to be ratified, the *status quo* would be preserved, at least through the transition period and pending the negotiation of a future partnership, not only in relation to the application of jurisdictional rules by UK and Member State Courts, but also in relation to the recognition and enforcement of UK judgments among the various Member States.

18. **No deal.** If the Withdrawal Agreement were not passed, the entire suite of European Regulations would cease to apply from the date that article 50 took effect. The Government has issued guidance[8] explaining how it is intended to apply conflicts of law rules, and rules on international civil cooperation, in those circumstances, which have now been reflected in various statutory instruments made under section 8 of the Act. The following paragraphs summarise the most significant points.

E. Civil litigation in a 'no deal' situation

19. **Jurisdictional rules.** Jurisdiction in civil and commercial matters which are connected to the territory of Member States is currently governed by the recast Brussels Regulation.[9] Jurisdiction is generally founded on the domicile of the defendant, subject to more favourable treatment for certain contracts (insurance, consumer and employment), and particular rules for exclusive jurisdiction that are not dependent on domicile (proceedings relating to real property rights, the validity or constitution of companies etc., or the validity of entries in public registers, intellectual property rights, or concerned with the enforcement of judgments).

20. Those rules are revoked as of exit day, as are the equivalent provisions of the Lugano Convention that applied to EEA states that are not Member States.[10] The Government guidance explains that these rules were dependent on reciprocity, and cannot therefore continue to operate in the absence of agreement from the EU.

[8] HM Government Guidance, "*Handling civil legal cases that involve EU countries if there's no Brexit deal*" (13 September 2018)
[9] Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters(recast)
[10] The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2009, SI 2019/479. The regulations contain transitional provisions for existing proceedings.

21. In the absence of those rules, the English Court's jurisdiction will be determined by reverting to common law rules, *i.e.* those currently applied to determine whether the English Court has jurisdiction against defendants domiciled *outside* the EU and EEA states, and which depend on the English Court permitting service abroad. Those rules provide a broader discretion to decline jurisdiction depending on the appropriateness of the forum. The CPR are consequentially amended by the Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019 (SI 2019/521) in order to withdraw the automatic entitlement to serve a claim form on a European lawyer or at an address in a Member State (**CPR r.6.33**). Permission of the court will generally be required.

22. Two exceptions need to be considered.

    a. First, will English jurisdiction clauses continue to be respected in EU Member States? The Member States will continue to apply the recast Brussels Regulation, but that only requires the recognition of agreements to the effect "*that a court or courts of a Member State are to have jurisdiction*" (art. 25). The Regulation is without prejudice to international instruments (see Chapter VII), which includes the Hague Choice of Court Convention 2005 that has been adopted by the EU on behalf of the Member States. The problem at the moment is that the UK is not a signatory in its own right, although provision has been made for that to happen, and subordinate legislation has been enacted to give effect to the Convention in domestic law.[11] Once the UK is a party to the Convention, exclusive jurisdiction clauses will be upheld in the Member States, and judgments based on such clauses will be entitled to general recognition and enforcement.

    b. Exceptions are retained for establishing jurisdiction in relation to consumer contracts and in relation to individual contracts of employment, which are more generous to the consumer/employee and provide them with a broader discretion as to where to initiate proceedings. Those rules are retained by making amendments to introduce new sections 15B to 15E of the Civil Jurisdiction and Judgments Act 1982.[12]

23. Finally, one needs to consider the effect of proceedings in the UK, once it becomes a third party state, where related proceedings are commenced in the EU. That situation will

[11] See Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018 (SI 2018/1124)
[12] The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2009, SI 2019/479, reg.26.

be dealt with by the Member State Court applying articles 33 and 34 of the recast Brussels Regulation.

a. If proceedings are pending in the UK concerning the same parties and cause of action, the Member State court will have a discretion to stay its proceedings, but only if: (i) it is expected that the judgment obtained in the UK will be capable of recognition and enforcement in that Member State; and (ii) the stay is necessary for the proper administration of justice.

b. If the two sets of proceedings are not identical, but related, there is an additional requirement that it must be expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments.

There are weaknesses in those provisions, not least that they are discretionary and only apply where the EU proceedings are founded on particular forms of jurisdiction. In consequence, the EU court would not be bound to decline jurisdiction where, for example, those proceedings are brought in breach of an exclusive jurisdiction clause. Once the recast Brussels Regulation ceases to apply to the UK that may be dealt with by the availability of an anti-suit injunction.

24. **Applicable law.** The current rules determining the applicable law in cross-border situations are the Rome I (for contractual disputes) and Rome II (for non-contractual disputes) Regulations.[13] Since (by articles 2 and 3 respectively) these are of universal application and apply whether or not the identified law is that of a Member State, they do not create the same problems as the jurisdictional rules considered above. They are not based on reciprocity and are maintained after exit day.[14] They are amended only to make minor modifications to EU terminology that is no longer appropriate.

25. One important consequence of the universal application of the Rome I Regulation is that EU Member States will continue to give effect to English governing law clauses.

26. **Recognition and enforcement of judgments.** Following the revocation of the recast Brussels Regulation and the Lugano Convention, the rules by which a judgment *obtained in the EU/EEA* will be recognised here will revert: (i) in respect of those countries for

[13] Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) and Regulation EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II).
[14] The legislation is in draft: The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019.

which there are reciprocal, bilateral treaties in force (Austria, Belgium, France, Germany, Italy, Norway and the Netherlands), to those enacted under the Foreign Judgments (Reciprocal Enforcement) Act 1933; and (ii) in respect of all remaining countries, to common law principles.

27. Similarly, the recognition and enforcement of *English judgments* in the EU will depend on the national laws of the particular member state. As stated above, as and when the UK becomes a signatory to the Hague Convention, judgments obtained in proceedings whose jurisdiction is founded on an exclusive jurisdiction clause will be entitled to automatic recognition and enforcement in EU states. In the meantime, for clients whose business is dependent on frequent enforcement of judgments within the EU, consideration might be given to incorporating an arbitration clause, since an award would be enforceable in each state that is a party to the New York Convention.

28. **Miscellaneous procedural rules.** A series of other legislative instruments have been passed to revoke the continuation of a number of miscellaneous procedural measures, which were again thought to depend on reciprocity: the EU Enforcement Order, the EU Order for Payment, the EU Small Claims Procedure, the EU Service Regulation and the Cross-Border Mediation Directive.[15]

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[15] Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019/469; European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc.) (EU Exit) Regulations 2018/1311; Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provisions) (EU Exit) Regulations 2018/1257