# No Sunset of Retained EU Conflict of Laws in the UK, but Increased Risk of Sunburn

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The sunset of retained EU law in the UK has begun: the Retained EU Law (Revocation and Reform) Act 2023 received Royal Assent at the end of June. The Act will revoke many EU laws that have so far been retained in the UK by the end of 2023.

The good news for the conflict of laws is that the retained Rome I and II Regulations are not included in the long list of EU legal instruments which are affected by the mass-revocation. Both Regulations have been retained in the UK post-Brexit by section 3 of the European Union (Withdrawal) Act 2018 and were modified by the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (as amended in 2020). The retained (modified) Rome I and II Regulations will thus be part of domestic law beyond the end of 2023. Yet this retained EU law must not be called by name anymore: it will be called "assimilated law" according to section 5 of the Retained EU Law (Revocation and Reform) Act 2023 (although the title of this enactment, like others, will strangely continue to contain the phrase "Retained EU Law" and will not be changed to "Assimilated Law", see section 5(5)).

Equally, the special conflict of laws provision in regulation 1(3) of the Commercial Agents (Council Directive) Regulations 1993 (as amended in 1998) is not revoked either. This is particularly interesting because these Regulations have not been updated since Brexit, which means they still refer, for instance, to "the law of the other member State".

Although international jurisdiction of UK courts is largely determined by domestic law these days, which replaced the Brussels I Recast Regulation, the Regulation's rules on jurisdiction in consumer and employment matters have been autonomously transposed into sections 15A–D of the Civil Jurisdiction and Judgments Act 1982 by the Civil Jurisdiction and Judgments (Amendment) (EU

Exit) Regulations 2019 (as amended in 2020). The mass-revocation will not affect them either, which means that they will continue to benefit consumers and employees in UK courts beyond the end of 2023.

However, a significant difference to the current situation will arise with regard to how strictly courts will continue to follow precedent on the interpretation of the "assimilated law". This matters for decisions by the Court of Justice of the EU (CJEU) as well as for UK court decisions on the interpretation of the Rome I and II Regulations (and the Commercial Agents Directive/Regulations). The concern is that continuing to apply the EU law which will not be sunsetted, but without continuing to strictly follow the established interpretations, has the potential of increasing the risk of uncertainty or, metaphorically speaking, sunburn.

So far, the risk of sunburn has been mitigated by section 6(3), (4)(a), and (5) of the European Union (Withdrawal) Act 2018 as amended by the European Union (Withdrawal Agreement) Act 2020: the existing body of CJEU decisions has remained binding post-Brexit on the Supreme Court to the same extent as the Supreme Court's own decisions. The Supreme Court can, like previously the House of Lords, depart from precedent in line with the Practice Statement [1966] 1 WLR 1234 (see *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28, at [25]), but the Supreme Court is very hesitant to do so in order to maintain legal certainty and predictability. The Court of Appeal has been given a similar power to divert from CJEU case law, section 6(4)(b)(i) and (5A) of the amended European Union (Withdrawal) Act 2018. Decisions of the CJEU handed down after 2020 have in any event not been binding anymore on UK courts, section 6(1) of the amended European Union (Withdrawal) Act 2018, but it has been permitted to take them into account in the UK ("may have regard", section 6(2)).

The Retained EU Law (Revocation and Reform) Act 2023 will change how UK courts can deviate from CJEU case law and their own precedent. This will reduce the protection from uncertainty (or sunburn), which has been maintained so far.

- A UK court will in principle still be obliged to interpret "assimilated law" as established by the CJEU's "assimilated case law" (only the "retained general principles of EU law" have been omitted in the new section 6(3)(a)).
- However, the Supreme Court and the Court of Appeal will not anymore be

restricted by the ordinary domestic rules on deviation from precedent as mentioned above. Rather, according to the new section 6(5), CJEU case law will be treated like "decisions of a foreign court", which in principle are not binding. When deviating from "assimilated case law" by the CJEU, UK courts are solely instructed to have regard to "any changes of circumstances which are relevant to the retained EU case law, and the extent to which the retained EU case law restricts the proper development of domestic law."

- Furthermore, according to the newly inserted section 6(5ZA), a UK court will be permitted to depart from its own "assimilated domestic case law" (which means UK case law on "assimilated law" in contrast to "assimilated case law" by the CJEU) without the usual domestic restrictions on deviation from domestic precedent. Instead, when deviating from its own case law, the UK court will only have to consider "the extent to which the assimilated domestic case law is determined or influenced by assimilated EU case law from which the court has departed or would depart; any changes of circumstances which are relevant to the assimilated domestic case law; and the extent to which the assimilated domestic case law restricts the proper development of domestic law."

Departing from CJEU and UK case law on the Rome Regulations (and the Commercial Agents Directive) will thus become a lot easier, at the expense of "assimilated" legal certainty and predictability. The time at which the change by the Retained EU Law (Revocation and Reform) Act 2023 will become effective has yet to be determined in line with its section 22(3).

Interestingly, in the above-mentioned Civil Jurisdiction and Judgments Act 1982, section 15E(2) explicitly prescribes that the jurisdictional rules for consumers and employees in sections 15A–D are to be interpreted with regard to CJEU principles on consumer and employee jurisdiction under the Brussels regime. More precisely, "regard is to be had to any relevant principles laid down" before the end of 2020 by the CJEU in connection with the Brussels jurisdictional rules; by contrast, the phrases "retained EU law" or "retained case law" are not mentioned. Since the Retained EU Law (Revocation and Reform) Act 2023 does not revoke any rules of the Civil Jurisdiction and Judgments Act 1982 or the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, this specific mandate to have regard to CJEU principles when interpreting the retained jurisdictional rules

will be maintained in its own right beyond the end of 2023. And since the Civil Jurisdiction and Judgments Act 1982 does not use the technical language of retained EU law or retained case law, whose binding character would be affected by the Retained EU Law (Revocation and Reform) Act 2023, the retained jurisdictional rules should not suffer from uncertainty and sunburn. Yet, despite this reasoning, the interpretation of the consumer and employee jurisdictional rules might in practice be condemned to the same fate as the assimilated case law that will be up for grabs.

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