

# What IP lawyers need to know about the Retained EU Law Act

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# What IP lawyers need to know about the Retained EU law Act

- Plan for today:
  1. Where did we come from? The position before Brexit
  2. The interim position – European Union (Withdrawal) Act 2018 (the “**Withdrawal Act**”)
  3. The new law – Retained EU Law (Revocation and Reform) Act 2023 (the “**Retained EU Law Act**”) in particular, its amendments to the Withdrawal Act
  4. Likely practical consequences and questions flowing from these changes
  5. Conclusions

# 1. The position before Brexit

- EU law supreme (s2(1) and s3(1) European Communities Act 1972)
- Significant effects:
  - EU Regulations had direct effect in UK law
  - EU Directives had “indirect effect” in the UK (the “Marleasing principle”). UK domestic statutes which implemented directives (and indeed any other UK domestic statutes) had to be interpreted consistently with those directives, even where the language of the UK implementing Act diverged.
  - CJEU decisions on applicable law were binding on UK Courts – so even a decision of the General Court of the CJEU was binding on UK Courts.

## 2. The interim position

- **Withdrawal Agreement**
  - Terms for the UK leaving the EU were agreed in October 2019 and came into force at 11pm on 31 Dec 2020.
- **European Union (Withdrawal) Act 2018 (as amended)**
  - “Retained EU law” : s6(7) and ss 2, 3, 4 and 6(3) and 6(6)
  - “Retained case law” (“Retained EU case law” and “Retained domestic case law”): s6(7)
  - Supremacy of EU law: Distinction drawn between statutory provisions amended and unamended since 31 Dec 2020

# Interim position continued...

## Withdrawal Act

### Important definitions (s6(7)):

- "retained EU law" means anything which, on or after IP completion day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or subsection (3) or (6) above (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time);
- "retained general principles of EU law" means the general principles of EU law, as they have effect in EU law immediately before IP completion day and so far as they-
  - (a) relate to anything to which section 2, 3 or 4 applies, and
  - (b) are not excluded by section 5 or Schedule 1,(as those principles are modified by or under this Act or by other domestic law from time to time).

# Interim position continued...

## Withdrawal Act

Important definitions continued (s6(7)):

6(7) In this Act-

"retained case law" means-

- (a) retained domestic case law, and
- (b) retained EU case law;

# Interim position continued...

## Withdrawal Act

### Important definitions continued (s6(7)):

- **"retained domestic case law"** means any principles laid down by, and any decisions of, a court or tribunal in the United Kingdom, **as they have effect immediately before IP completion day** and so far as they-
  - (a) relate to anything to which section 2, 3 or 4 applies, and
  - (b) are not excluded by section 5 or Schedule 1 ,(as those principles and decisions are modified by or under this Act or by other domestic law from time to time);
- **"retained EU case law"** means any principles laid down by, and any decisions of, the European Court, **as they have effect in EU law immediately before IP completion day** and so far as they-
  - (a) relate to anything to which section 2, 3 or 4 applies, and
  - (b) are not excluded by section 5 or Schedule 1(as those principles and decisions are modified by or under this Act or by other domestic law from time to time);

# Interim position continued...

## EU Withdrawal Act

Statutory provisions *unamended* post-31 Dec 2020

- EU law supremacy continued for “retained EU law” – ss 5(2) and 6(3)

5(2) ...the principle of the supremacy of EU law continues to apply on or after IP completion day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP completion day.....

6(3) Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it (a) in accordance with any retained case law and any retained general principles of EU law, and (b) having regard (among other things) to the limits, immediately before IP completion day, of EU competences.

# Interim position continued...

## EU Withdrawal Act

Statutory provisions *amended* post-31 Dec 2020

- EU law supremacy discontinued for “retained EU law” to the extent that the intention of the amendment is consistent with the principle of supremacy

5(1) The principle of the supremacy of EU Law does not apply to any enactment or rule of law...made on or after IP Completion Day

(3) Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after IP Completion Day of any enactment or rule of law passed or made before IP completion day if the application of the principle is consistent with the intention of the modification.

6 (6) Subs [6](3) does not prevent the validity, meaning or effect of any retained EU law that has been modified on or after IP Completion Day from being decided as provided for in that subsection if doing so is consistent with the intention of the modifications.”

## Interim position continued...

### EU Withdrawal Act

- In deciding meaning and effect etc of retained EU law, the High Court (and Courts below) remained bound by retained EU case law, and by retained domestic case law that would otherwise normally bind it: s6(3)
- However, the Supreme Court and Court of Appeal were not bound by Retained EU case law, and only bound by retained domestic case law that would otherwise bind them: s6(4)
- See *Lipton v City Flyer* [2021] 1 W.L.R 2545 per Green LJ at [68]-[69]

## Interim position continued

An Example of the Court of Appeal departing from retained EU case law under the Withdrawal Act:

- *Industrial Cleaning Equipment (Southampton) v Intelligent Cleaning Equipment Holdings* [2023] EWCA Civ 1451; [2023] F.S.R. 3

Some examples of the Courts flagging the need for care in considering the potential for divergence from EU law under the altered regime:

- *Lipton v City Flyer* [2021] EWCA Civ 454; 1 W.L.R 2545 per Green LJ at [53] and [83i]
- *E-Accounting Solutions (t/a Advancetrack) v Global Infosys (t/a GI Outsourcing)* [2023] EWHC 2038 (Ch); [2024] 1 E.T.M.R. 1 per HHJ Tindall at [14]

# 3. The new law – Retained EU Law Act

## Retained EU Law (Revocation and Reform) Act 2023

- Came into force on 1 January 2024.
- Broad aim of the Act is to set up a structured scheme for revocation and reform of Retained EU Law (referred to as “REUL” in the supporting explanatory materials), and a 6-monthly reporting process for government to update a public “dashboard” showing progress in the government’s revocation and reform program.
- For our purposes, the Act amends the Withdrawal Act to further reduce the force of Retained EU Law. In broad terms it:
  - Removes the principle of EU law supremacy for assimilated law.
  - Provides further mechanisms for judicial divergence from assimilated case law

# The new law – continued...

## Retained EU Law Act

- Retained EU law is rebadged as “assimilated law”
- Retained retained case law rebadged as “assimilated case law”
- Section 4 amends section 2 of the EU Withdrawal Act to remove all rights and liabilities derived from retained EU law.
- Section 3 amends section 5 of the EU Withdrawal Act to remove the supremacy of EU law in respect of domestic enactments whenever passed, and provides that “assimilated law” (i.e. Retained EU Law) must now be “read compatibly with domestic law”.
- Section 5 amends section 4 EU Withdrawal Act to provide that “No general principle of EU law “is part of domestic law after the end of 2023.

# The new law – continued...

## Retained EU Law Act

- The powers of the superior Courts to depart from “assimilated case law” at section 6 of the Withdrawal Act remain essentially the same save for the removal of reference to “retained general principles of EU law” some tweaking to wording (e.g. “assimilated case law” for “Retained case law”: i.e. The Supreme Court and Court of Appeal are not bound but the High Court remains bound.

## The new law – continued...

### Comparison of s6(3) Withdrawal Act before and after entry into force of the Retained EU Law Act

- (3) Any question as to the validity, meaning or effect of any ~~retained EU~~ assimilated law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it-
- (a) in accordance with any ~~retained~~ assimilated case law ~~and any retained general principles of EU law~~, and, and
  - (b) having regard (among other things) to the limits, immediately before IP completion day, of EU competences.

# The new law – continued...

## Comparison of s6(3) Withdrawal Act before and after entry into force of the Retained EU Law Act

- (4) But-
  - (a) the Supreme Court is not bound by any **retained**. **assimilated** EU case law,
  - (b) the High Court of Justiciary is not bound by any **retained**. **assimilated** EU case law when-
    - (i) sitting as a court of appeal otherwise than in relation to a compatibility issue ... or a devolution issue .. , or
    - (ii) sitting on a reference under... [Criminal Procedure (Scotland) Act 1995 ...
  - (ba) a relevant court or relevant tribunal is not bound by any **retained**. **assimilated** EU case law so far as is provided for by regulations under subsection (5A), and
  - (c) no court or tribunal is bound by any **retained**. **assimilated** domestic case law that it would not otherwise be bound by.
- (5) In deciding whether to depart from any **retained**. **assimilated** EU case law [ by virtue of subsection (4)(a) or (b) , the Supreme Court or the High Court of Justiciary must apply the same test as it would apply in deciding whether to depart from its own case law.

# The new law – continued...

## Retained EU Law Act

- Note that the Withdrawal Act retains the following provision:

6(1) A court or tribunal-

- (a) is not bound by any principles laid down, or any decisions made, on or after IP completion day by the European Court, and
- (b) cannot refer any matter to the European Court on or after IP completion day.

(2) Subject to this and subsections (3) to (6), a court or tribunal may have regard to anything done on or after IP completion day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.

# The new law – continued...

## Retained EU Law Act

- However, a new reference procedure is provided which allows increased scope for departure from assimilated law in court's of first instance.
- Section 6A(1) provides for references from lower courts or tribunals where there is a point (or points) of law arising on retained case law relevant to proceedings before the court or tribunal and where the relevant court or tribunal is:
  - (a) bound by the retained case law; and
  - (b) considers that the point of law is of general public importance

# The new law – continued...

## Retained EU Law Act

- A reference under s6A(1) may be made on the Court's own motion or pursuant to an application by one of the parties to the proceedings: s6A(2)
- Where the reference concerns (wholly or in part) retained case law of the Supreme Court, the reference must be to the Supreme Court. Otherwise the reference is to the Court of Appeal (or other proscribed appellate court) in the first instance: s6A(3)
- A decision by an appeal court on a referred question may be appealed, with permission, to the Supreme Court: s6A(8)
- The decision of a first instance court or tribunal to grant a reference or not may not be appealed: s6A(7)

## 4. Practical consequences and questions

- Likely to see a substantial increase in attempts by parties in litigation to diverge from assimilated EU case law now that there is a mechanism to seek references on points of law at first instance.
- Practitioners will therefore need to be particularly mindful when advising on matters concerning “assimilated” EU law and EU case law to take into account the potential for divergence both in terms of:
  - Substantive advice on merits.
  - Tactical litigation advice.
  - Advice on costs.

# Practical consequences and questions continued...

## Questions to be determined

A number of unresolved questions will need to be determined by the courts. For example:

- How permissive will first instance courts be on referral applications (particularly re the “general public importance” requirement).
- To what extent is the freedom of the Supreme Court and Court of Appeal not to follow “assimilated” case law curtailed by section 6(3) of the Withdrawal Act, which still says that questions of assimilated law are to be determined in accordance with assimilated case law:

6(3) Any question as to the validity, meaning or effect of any ~~retained EU~~ assimilated law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it-

(a) in accordance with any retained assimilated case law ~~and any retained general principles of EU law~~, and, and ...

# Practical consequences and questions continued...

## Questions to be determined continued...

- To the extent that the superior courts are required to decide questions of assimilated law in accordance with assimilated case law, what happens where EU case law has, since IP completion day, departed from the assimilated EU case law at IP completion day?
- In this regard, note that section 6(2) of the Withdrawal Act as amended is expressed to be subject to section 6(3):

6(2) Subject to this and subsections (3) to (6), a court or tribunal may have regard to anything done on or after IP completion day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.

# Practical consequences and questions continued...

## Questions to be determined continued...

- With reference to the preceding questions, and as a general question, what is the significance of the amendments:
  - Removing the principle of EU law supremacy in respect of assimilated law.
  - Removing “retained general principles of EU law” from the definitions of retained/assimilated law and the requirements for determination of assimilated law questions at s6(3).

# Conclusions

- From a position pre-Brexit where EU law was supreme and the decision of the CJEU binding, we have seen significant changes with the introduction of the Withdrawal Act and then the amendments to that Act made by the Retained EU Law Act
- EU law is no longer supreme
- “Assimilated” EU and domestic case law are no longer binding on the higher Courts
- As of 1 January 2024, there is a new reference procedure for departure from assimilated EU and domestic case law at first instance.
- There is therefore likely to be a significant increase in attempted divergence.
- Significant questions as to the operation of the Withdrawal Act as amended remain to be determined.
- Practitioners should be mindful of the fluid position when advising on merits, tactics and costs.

Thank you

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