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Who knows what the future holds? The fate of the EU's *acquis* in English Contract Law

Christian Twigg-Flesner *

Introduction

This contribution considers the fate of the EU's contract law *acquis communautaire* (primarily the *consumer* contract law *acquis*) within English Contract Law, following the completion of the United Kingdom's withdrawal from the European Union in 2020. During almost 50 years of EU membership, many areas of domestic law were influenced or even shaped entirely through the EU's *acquis*. Following the referendum on continued EU membership on 23 June 2016, resulting in a majority vote in favour of withdrawal, and the formal process of withdrawal by triggering Art. 50 TEU on 29 March 2017,¹ the flow of the EU contract law *acquis* into English Contract Law slowly ground to a halt. Even before withdrawal from the EU had been formally completed, the UK had stopped taking steps to implement more recent directives into domestic law. For instance, no action was taken to transpose the new Consumer Sales Directive (2019/771/EU) and the Digital Content and Digital Services Directive (2019/770/EU) into domestic law, notwithstanding the fact that both measures contain provisions that would have enhanced the UK's existing legislation in this field,² found in chapter 3 of Part 1 of the Consumer Rights Act 2015.

Withdrawal from the EU in 2020 did not result in the instant deletion of all traces of EU law from domestic law; rather, the European Union (Withdrawal) Act 2018 froze EU Law at the moment withdrawal took effect and instantly created a UK twin of much of EU Law. Changes were made to ensure that the scope of this "retained EU Law" reflected the limitation of its geographical scope of application to the UK, and measures dealing with cross-border co-operation were repealed instantly. But for the most part, the legacy of the EU's contract law *acquis*, built up over almost four decades, has remained part of domestic law, at least for now.

The obvious question is what the future might hold: will English Contract Law continue to apply those aspects of the *acquis* which were part of it at the point of withdrawal from the EU, or will provisions of EU origin diminish and eventually disappear altogether? And what,

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¹ Under s.1(1) of the European Union (Notification of Withdrawal) Act 2017. This had to be enacted first so Parliament would confer the necessary power on the prime minister. See *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

² Paula Gilliker, "Legislating on Contracts for the Supply of Digital Content and Services: An EU/UK/Irish Divide?" [2021] *J.B.L.* 143.

if any, influence will future developments of the Contract Law *acquis* have on English Contract Law? This contribution will offer one possible set of answers to these questions. Ultimately, the fate of the *acquis* in domestic Contract Law will be primarily a political decision rather than just a matter of legal development. However, it will be argued in this paper that much of English law based on the *acquis* will not change significantly in the near future, and quite possibly well into the future; furthermore, it is not entirely unlikely that some EU developments will eventually find their way into domestic law. A key reason for this view is the fact that the EU's Contract Law *acquis* is generally reflected in domestic legislation, including Acts of Parliament, whereas much of English Contract Law is developed through the common law and spread across an endless sea of judgments. In the common law, legislation is generally treated as a confined derogation from the common law in more-or-less clearly defined circumstances; although legislation can be used to directly change the common law (e.g., by overturning a legal principle established in the case-law). As the UK government remains committed to consumer protection, such legislation is unlikely to be repealed altogether. Moreover, *acquis*-derived legislation has become familiar to both the courts and enforcement bodies, and continuity of practice will likely mean that this legislation will remain for the time being. Of course, one cannot predict which way the political wind will blow.

This paper first examines the integration of the EU Contract Law *acquis* during the UK's membership of the EU, before turning to the withdrawal process, and finally the way in which the influence of the EU's *acquis* might change in the future. Invariably, the latter point will be speculative as there are limited signs as to what might happen as yet. The focus of this paper is primarily on consumer contract law, although reference will be made to other EU contract law *acquis* measures as appropriate.

[Integrating the EU Contract Law *acquis* before the withdrawal process](#)

In order to gauge effect of withdrawal from EU, first it is necessary to consider what the impact of the *acquis* on English Contract law has been. Here, the starting point is the obvious: English Contract Law is part of the common law, and as such has evolved primarily through case-law, supplemented by legislation. There is no codification of the general principles of Contract Law; only selected aspects have been partially codified.³ Insofar as there is legislation on aspects of Contract Law, it has generally been adopted because the

³ The best-known example is the Sale of Goods Act 1893, now consolidated in the Sale of Goods Act 1979. It is a partial codification on the law relating to contracts for the sale of goods, but it still relies heavily on the common law for a wide range of aspects.

common law had reached a position which was regarded as unsuitable, and so statutory intervention was deployed to correct or supplement the common law. Typical examples are the Law Reform (Frustrated Contracts) Act 1943,⁴ the Misrepresentation Act 1967,⁵ the Unfair Contract Terms Act 1977,⁶ or the Contracts (Rights of Third Parties) Act 1999.⁷

The development of the EU *acquis* in aspects of Contract Law therefore did not raise questions about whether and how to integrate this into the general law of contract, as the absence of a code and the associated challenges this presents did not arise for English law. Instead, effect was given to the EU *acquis* either by adopting secondary legislation under the European Communities Act 1972,⁸ or by enacting primary legislation. In fact, the bulk of the *acquis* was implemented into English law through secondary legislation under the 1972 Act. This Act was the primary vehicle for giving effect to EU law in domestic law, and provided for a power to implement EU legislation into domestic law through secondary legislation. This meant that the procedure for enacting legislation to implement an EU measure was less cumbersome than the process of adopting primary legislation through Parliament. Whilst secondary legislation (statutory instruments) based on s.2(2) of the 1972 Act could follow either the negative or the affirmative resolution procedure,⁹ secondary legislation implementing EU directives was generally laid before Parliament subject to the negative resolution procedure”, under which secondary legislation becomes law once signed by the relevant Secretary of State, subject to annulment if a motion to annul was moved and passed in either House of Parliament.¹⁰

The UK’s approach to implementing the EU *acquis* was mostly compliance focused – i.e., legislation was often a near-verbatim transposition of the corresponding EU measure. It was committed to avoid “gold-plating”,¹¹ i.e., going beyond the requirements of the EU measure in the case of minimum harmonisation measures. As there were few instances where there was pre-existing legislation that might need to be amended¹² to give effect to an EU

⁴ This Act was adopted to provide for the possibility of restitution of moneys paid or benefits conferred prior to the point at which a contract is frustrated by a supervening event, thereby changing the effect of the House of Lords ruling in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32.

⁵ This Act supplements the remedies available under the common law doctrine of misrepresentation.

⁶ This Act created a statutory power for reviewing certain types of exclusion and limitation clauses, rendering some ineffective altogether.

⁷ The Act created a broad exception to the common law principle of privity of contract – but it has not abolished the doctrine, and it continues to apply when the Act does not.

⁸ Hereafter “the 1972 Act” or “ECA”.

⁹ See Schedule 2, paragraph 2 (2).

¹⁰ In contrast, the “affirmative resolution procedure” would have required a vote in Parliament before a statutory instrument implementing an EU measure could take effect in domestic law.

¹¹ Her Majesty’s Government, *Transposition Guide: How to implement European directives effectively*, April 2011, at para. 2.7.

¹² Exceptions included the Consumer Credit Act 1974 or the Timeshare Act 1992, which both existed before the EU adopted its directives in this area.

measure, the implementation of the *acquis* was frequently done through free-standing legislation. This had the effect of “bolting on” the *acquis* onto the common law and carving out derogations from the otherwise applicable common law in respect of contracts which fell within the scope of the relevant measure. With much of the EU’s contract law *acquis* in the field of consumer law, the effect has been to gradually hive off consumer contracts from the common law,¹³ without interfering in the common law. Indeed, the view that “English contract law is not for everyone...It is in effect designed for big business”¹⁴ has been strengthened by the adoption of so much legislation specific to consumer contracts, leaving the common law to focus on commercial contracts (and contracts between private parties – although few of these seem to trouble the higher courts these days).

Although implementation of the *acquis* through secondary legislation was the most commonly chosen method, there were some instances where an EU measure overlapped with a pre-existing domestic statute. This caused rather more difficulties for the implementation process than it should have. For instance, the Unfair Contract Terms Directive (93/13/EEC) was initially implemented through secondary legislation in the form of the Unfair Terms in Consumer Contracts Regulations 1994,¹⁵ but there was some overlap with provisions of the Unfair Contract Terms Act 1977 (UCTA). The latter had been adopted primarily to police certain types of exclusion and limitation clauses, and it applied to consumer contracts as well as commercial contracts. The minimum harmonisation status of the Unfair Contract Terms Directive¹⁶ meant that the provisions of UCTA rendering certain types of exclusion and limitation clauses ineffective in consumer contracts could be retained, and so both measures co-existed for over 20 years. It took two Law Commission reports¹⁷ before the two regimes were finally brought together in a single one, now found in Part 2 of the Consumer Rights Act 2015.

The first Consumer Sales Directive (99/44/EC) gave rise to even greater complications. The Directive was implemented by amending the existing legislation in this area - primarily the Sale of Goods Act 1979 (a generally applicable statute, not confined to consumer sales contracts).¹⁸ The requirement in Art.2 of the Directive that goods must be “in conformity

¹³ Roger Brownsword, “Regulating Transactions: Good Faith and Fair Dealing” in G. Howells and R. Schulze (eds.) *Modernising and Harmonising Consumer Contract Law* (Sellier, 2009).

¹⁴ Hugh Beale, “The Impact of the Decisions of the European Courts on English Contract Law: The Limits of Voluntary Harmonization” (2010) 18 *European Review of Private Law* 501- 526 at 526.

¹⁵ S.I. 1994/3159; subsequently replaced by the Unfair Terms in Consumer Contracts Regulations 1999, S.I. 1999/2083.

¹⁶ Art. 8, Directive 93/13/EEC.

¹⁷ Law Commission, *Unfair Terms in Contracts – LC292* (2005); *Unfair Terms in Consumer Contracts Advice Paper* (2013).

¹⁸ Changes were also made to the Supply of Goods (Implied Terms) Act 1973 and the Supply of Goods and Services Act 1982, which deal with other contracts involving the supply of goods, to maintain consistency in the English equivalent to the “conformity with the contract” requirement in Art.2 of the Directive. See

with the contract” was deemed to be covered sufficiently by the terms implied by ss. 13 and 14 SoGA.¹⁹ However, the remedies in Art. 3 of the Directive were novel, particularly in providing for corrective performance (repair or replacement), and were therefore implemented by adding a new Part 5A. The difficulty was that the existing remedial scheme under the SoGA provided for a right to reject goods and terminate the contract as a primary remedy, so it was decided that this existing right should be retained, and the new remedies were bolted onto this regime. The effect was that consumer remedies for faulty goods became incredibly complex – so much so that a government review²⁰ identified this as a particular bad example of implementing EU Law. In due course, the Law Commission was asked to propose reforms,²¹ and its proposals formed the basis of the new remedy provisions in Part 1 of the Consumer Rights Act 2015.²²

The Consumer Rights Act 2015 merits highlighting for a number of reasons. First, as will already be apparent, it made a number of key reforms of areas of consumer contract law where the overlap between pre-existing legislation and *acquis*-based legislation had made the law too complex. In consequence, it provided a new home for several key consumer *acquis* measures.²³ However, despite its name, it does not constitute a full consolidation of consumer law,²⁴ and secondary legislation giving effect to other EU measures continue to co-exist with the Consumer Rights Act 2015.²⁵ This is regrettable, not least because preparations for what became the Act over a period of many years²⁶ had in part been triggered by the proposal for the Consumer Rights Directive²⁷ – ironically, this had to be implemented through a separate statutory instrument²⁸ because of the time taken to draft

generally, Robert Bradgate and Christian Twigg-Flesner, *Blackstone's Guide to Consumer Sales and Associated Guarantees* (Oxford University Press, 2003).

¹⁹ Although an amendment to reflect the special emphasis on public statements in the directive was made by adding ss. 14(2D)-(2F) to supplement the “satisfactory quality” test.

²⁰ Neil Davidson, *Davidson Review - Implementation of EU Legislation* (London: HMSO, 2006).

²¹ Law Commission, *Consumer Remedies for Faulty Goods* (London, 2009).

²² See Christian Twigg-Flesner and Rick Canavan, *Atiyah and Adams' Sale of Goods*, 14th ed. (Pearson, 2021), ch. 19 (esp. pp. 482-490).

²³ See Paula Gilliker, “The Consumer Rights Act 2015 - a bastion of European consumer rights?” (2017) 37 *Legal Studies* 78-102.

²⁴ Cf. Christian Twigg-Flesner, “Some thoughts on Consumer Law Reform – Consolidation, Codification, or a Restatement?” in L. Gullifer and S. Vogenauer (eds.), *English and European Perspectives on Contract and Commercial Law – Essays in Honour of Hugh Beale* (Oxford: Hart, 2014).

²⁵ E.g., the Consumer Protection from Unfair Trading Regulations 2008, S.I. 2008/1277.

²⁶ Department of Trade and Industry, *Extending Competitive Markets: Empowered Consumers, Successful Business* (Department for Trade and Industry, 2004).

²⁷ HM Government, *A Better Deal for Consumers – Delivering Real Help Now and Change for the Future* (London: TSO, 2009).

²⁸ Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013; S.I. 2013/3134; Article 19 of the Directive was implemented earlier via the Consumer Rights (Payment Surcharges) Regulations 2012 S.I. 2012/3110.

the Act.²⁹ Furthermore, the Act is a long way off something that could be called a “consumer contract code”,³⁰ as it still leaves many issues to be determined through the common law, including contract formation, some of the vitiating factors, or claims for damages.

One might therefore identify the *de facto* creation of a separate consumer contract law within English law as one legacy of the EU’s *acquis*. This marks a change from the previous practice of regulating consumer contracts within legislation applicable to contracts more generally – the Unfair Contract Terms Act varied the application of some of its provisions in circumstances where one party was “dealing as a consumer”,³¹ and the Sale of Goods Act 1979 contained a number of provisions added over the years to reflect specific consumer concerns.³² But this separation within English Contract Law is incomplete, and the common law has a continuing role.

The Interaction in respect of consumer contracts between legislation, mostly based on the *acquis*, and the common law might prompt the question whether there has been an indirect influence on the common law caused by the implementation of the *acquis*. For example, an obvious feature of the *acquis* which might have had the potential to upset a well-established position of the common law was the introduction of the “good faith” concept via the Unfair Contract Terms Directive. As a result, good faith has become a criterion in the assessment of the unfairness of terms in consumer contracts. In *Director-General of Fair Trading v First National Bank*,³³ the House of Lords found a particularly English way of interpreting the good faith element of the Directive’s fairness test when it might have considered a reference to the Court of Justice under the preliminary rulings procedure.³⁴ The refusal by the House of Lords to make a reference to the Court of Justice is one interesting characteristic of the attitude of the English courts whenever they were faced with a question of interpretation regarding EU-based legislation.³⁵ Time and again, the courts found a way to avoid making a reference,³⁶ albeit not always in an entirely

²⁹ For a fuller account of the 2015 Act, see e.g., Christian Twigg-Flesner, “Consolidation rather than Codification – or just Complication? The UK’s Consumer Rights Act 2015” [2019] *Zeitschrift für Europäisches Privatrecht* (ZEuP) 170-201.

³⁰ See also Christine Riefa, “Codification: The Future of English Consumer Law?” (2015) 4 *EuCML* 12.

³¹ S. 12 UCTA, as originally enacted. The section was amended in 2003 as part of the implementation of the Consumer Sales Directive (99/44/EC), before being repealed altogether by the Consumer Rights Act 2015.

³² Many of these stemmed from Law Commission, *Report 160 - The Sale and Supply of Goods* (1987), implemented through the Sale and Supply of Goods Act 1994 which amended *int. al.* the Sale of Goods Act 1979.

³³ [2001] UKHL 52; [2001] 1 All ER 97, HL.

³⁴ Meryl Dean, “Defining unfair terms in consumer contracts – crystal ball gazing? *Director General of Fair Trading v First National Bank plc*” (2002) 65 *Modern Law Review* 773.

³⁵ See also Christian Twigg-Flesner, *The Europeanisation of Contract Law*, 2nd ed. (Routledge, 2013), ch. 4, pp. 141-145.

³⁶ *Page v Combined Shipping and Trading Co Ltd* [1997] 3 All ER 656 (CA); *Lonsdale v Howard & Hallam Ltd* [2007] UKHL 32 (HL); *Office of Fair Trading v Abbey National plc and others* [2009] UKSC 6 (SC).

convincing way. It is ironic that one of the last preliminary rulings by the CJEU, handed down some time after the UK had withdrawn from the EU, concerned a question involving the Commercial Agents Directive (86/653/EEC), albeit one of scope rather than substance.³⁷

However, the House of Lords in *First National Bank* had no difficulties in working with the good faith element in its reasoning, but this was clearly confined to the specific context in which the good faith test appeared. The judgment did not change the general view that English Contract Law does not need a doctrine of good faith, preferring instead to rely on narrower and targeted doctrines.³⁸ Nevertheless, in 2005, the Law Commission recommended to replace the good faith criterion with a “fair and reasonable” one instead, and to omit good faith altogether.³⁹ Its 2005 recommendations were not enacted, but some were revisited in the run-up to the Consumer Rights Act 2015. The Law Commission was asked to update its recommendations on consumer contracts, and concluded that the test from the Directive should be retained, not least because there was case-law which had not identified the test as problematic.⁴⁰ Consumer law had therefore adapted well to the *acquis*-based test.

Not long after the implementation of the Unfair Terms Directive into English Law, Teubner famously suggested that the introduction of good faith might provide an “irritant” to English Contract Law.⁴¹ Initially, there was no effect on contracts outside the scope of the implementing legislation, and good faith did not become a general feature of English Contract Law. However, a debate about a general doctrine of good faith was ignited by Leggatt J (as he then was) in *Yam Seng v International Trade Corporation*.⁴² Although Leggatt J did not seek to pronounce the existence of a general duty on contracting parties to act in good faith, he *did* suggest that such a duty might be an implied obligation in the context of a particular contract.⁴³ In his view, English law was “swimming against the tide”⁴⁴ because other jurisdictions, including other common law jurisdictions,⁴⁵ already recognised a good faith duty. At the time of this judgment, the Draft Common Frame of Reference was a recent

³⁷ Case C-410/19 *The Software Incubator Ltd v Computer Associates (UK) Ltd* ECLI:EU:C:2021:742, on the question of whether “goods” in the Directive included computer software. A detailed analysis in the Court of Appeal ([2018] EWCA Civ 518) had led to a negative answer. The Supreme Court referred this to the CJEU for a preliminary ruling, which took the opposite view. The Supreme Court then allowed the appeal by order without giving a reasoned judgment.

³⁸ *Interfoto Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433.

³⁹ Law Commission, *Unfair Terms in Contracts* (2005), paras 3.90-3.91.

⁴⁰ Law Commission, *Unfair Terms in Consumer Contracts Advice Paper* (2013), para. 6.46.

⁴¹ Gunther Teubner, “Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences” (1998) 61 *Modern Law Review* 11-32.

⁴² [2013] EWHC 111.

⁴³ *Ibid.*, para [131].

⁴⁴ *Ibid.*, para [124].

⁴⁵ A year later, a watershed moment was the Canadian Supreme Court’s ruling in *Bhasin v Hrynew*, 2014 SCC 71, [2014] 3 S.C.R.494, recognising a legal duty of good faith in Canadian contract law.

publication,⁴⁶ and work on the since-abandoned *Common European Sales Law* was still underway,⁴⁷ leading Leggatt J to conclude that “There can be little doubt that the penetration of this principle into English law and the pressures towards a more unified European law of contract in which the principle plays a significant role will continue to increase.”⁴⁸ Several cases following *Yam Seng* stressed the lack of a general duty of good faith in English Contract Law, but also showed willing to work with express or implied terms in the particular contract in dispute.⁴⁹ Indeed, Leggatt J reinforced his arguments at first instance in *MSC Mediterranean Shipping Company SA v Cottonex Anstalt*,⁵⁰ but the Court of Appeal firmly put a stop on recognising a general duty of good faith in English contract law. Moore-Bick LJ noted that “The recognition of a general duty of good faith would be a significant step in the development of our law of contract with potentially far-reaching consequences... There is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement.”⁵¹ Whilst this would seem to close the door on a general good faith duty, it is not completely locked either. English Law appears to have begun to recognise “relational contracts”⁵² as a new category of contract type which can attract an implied term requiring the parties to act in good faith.⁵³ Most recently, in *Bates v Post Office (No 3)*,⁵⁴ Fraser J accepted that in relational contracts, there is an implied obligation of good faith or fair dealing.⁵⁵ Although Fraser J seemed to assume that this would be implied into all relational contracts,⁵⁶ it has yet to be settled whether this would be implied as a matter of law, only in fact based on the context of a particular contract.⁵⁷ It

⁴⁶ Study Group on a European Civil Code/Research Group on the Existing EC Private Law (Acquis Group) (Eds.) *Principles, Definitions and Model Rules on European Private Law – Draft Common Frame of Reference* (Munich: Sellier, 2009).

⁴⁷ COM (2011) 635 final. The proposal was withdrawn at the end of 2014.

⁴⁸ [2013] EWHC 111, para [124].

⁴⁹ E.g., *Mid Essex Hospital Services NHS Trust v Compass Group (t/a Medirest)* [2013] EWCA Civ 200; *TSG Building Services plc v South Anglia Housing Ltd.* [2013] EWHC 1151 (TCC); *Monde Petroleum SA v Westernzagros Limited* [2016] EWHC 1472 (Comm).

⁵⁰ [2015] EWHC 283 (Comm).

⁵¹ [2016] EWCA Civ 789, para. [45]

⁵² Cf. David Campbell (ed), *The Relational Theory of Contract: Selected Works of Ian Macneil* (London, Sweet & Maxwell, 2001).

⁵³ *Yam Seng Pte Ltd v International Trade Corp* [2013] EWHC 111 (QB); *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch); *Al Nehayan v Kent* [2018] EWHC 333 (Comm).

⁵⁴ *Bates v Post Office (No 3)* [2019] EWHC 606 (QB), a lengthy judgment in complex litigation arising out of the so-called “Horizon scandal”, where the Post Office was found to have wrongly accused numerous sub-postmasters of accounting inaccuracies.

⁵⁵ *ibid* [711].

⁵⁶ Cf Paul S Davies, “Excluding good faith and restricting discretion” in PS Davies and M Raczynska (eds), *Contents of Commercial Contracts – Terms affecting freedoms* (Oxford, Hart Publishing, 2020), pp 94–97.

⁵⁷ It is also debatable whether a good faith term is needed at all: Haward Soper, ‘Occam’s razor or Leggatt’s multiblade – good faith or clean shave?’ [2021] *JBL* 580.

is also important to note that the recognition of relational contracts has occurred at first instance and not (yet) been endorsed by the Supreme Court.

Up to a point, therefore, Teubner may have been correct. Leggatt J's judgment in *Yam Seng*, which triggered discussions about good faith in English Contract Law in subsequent cases, was clearly influenced by developments in the EU *acquis*. However, subsequent cases have been much more cautious, and an expectation that EU law would drive English Contract Law to recognise a general good faith duty has not become reality.⁵⁸ Whether English Law will ever change its view on good faith would depend on the Supreme Court getting the opportunity to address this issue.⁵⁹

One may therefore conclude that English Contract Law has been shielded from the impact of the EU *acquis*, and has continued on its own path. There has been recognition of the existence of EU Law and the impact this has had on some contract types, especially consumer contracts, but this has been treated as a confined derogation from the common law and has not led to wider changes within the common law itself.

Indeed, one might argue that the *acquis* has not only not found its way into the common law of contract, but that its implementation into English law has allowed the common law to develop in an altogether different way: whereas the *acquis* is often concerned with the protection of weaker contracting parties, the common law has in recent years strengthened its generous view of freedom of contract and the concomitant obligation on the contracting parties to ensure that their interests are adequately protected. This has, for example, been reflected in cases preferring a textual reading of a contract term despite its seriously disadvantageous effect on one party,⁶⁰ an increased threshold before a liquidated damages clause might be struck down as a penalty,⁶¹ or a narrow conception of duress due to an illegitimate, but lawful act.⁶² Although there is no causal link between the *acquis* and the recent evolution of the common law, one could argue that the greater legislative intervention to protect certain categories of contracting parties has allowed the common

⁵⁸ It also seems unlikely that the reference in Art.8 of Reg. 2019/1150 on promoting fairness and transparency for business users of online intermediation services that "contractual relations ... are conducted in good faith and based on fair dealing" could open a new route towards a general duty of good faith. See Christian Twigg-Flesner, "Online Intermediary Platforms and English Contract Law" in PS Davies and T Cheng-Han, *Intermediaries in Commercial Law* (Hart,2002). After withdrawal, it became retained 'direct EU legislation' under s 3(1) and (2) of the European Union (Withdrawal) Act 2018 and is still in force.

⁵⁹ The current Supreme Court includes Lord Leggatt, as he now is, so if such an opportunity were to arise, it could lead the Supreme Court to take a different view on good faith: see Hector MacQueen, "Third Ole Lando Memorial Lecture: European Contract Law in the Post-Brexit and (Post?)-Pandemic United Kingdom" (2022) 30 *E.R.P.L.* 3, at 23.

⁶⁰ *Arnold v Britton* [2015] UKSC 15.

⁶¹ *Cavendish Square Holding BV v Talal El Makdessi / ParkingEye Ltd v Beavis* [2015] UKSC 67.

⁶² *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] UKSC 40.

law to evolve with less regard to weaker parties, trusting that Parliament would intervene where required instead.

Withdrawal from the EU

The UK left the EU on 31 January 2020, but whilst negotiations for the Trade and Cooperation Agreement (TCA) governing the future relationship between the UK and the EU continued, a transitional period of 11 months produced an effective stand-still as far as the application of EU Law in the UK was concerned, until 1 January 2021.

The legal mechanism for effecting the UK's withdrawal from the EU is the European Union (Withdrawal) Act 2018 ("EUWA"),⁶³ subsequently amended by the European Union (Withdrawal Agreement) Act 2020. A key feature of the EUWA is that it repeals the European Communities Act 1972,⁶⁴ although it continued to remain in effect for the duration of the "implementation period" until the end of 2020.⁶⁵ Consequently, EU Law remained applicable as it did before withdrawal, including s.2(2) of the 1972 Act providing the legal basis for much of the secondary legislation on consumer law, and s. 2(1) on the legal effect of directly applicable EU Law in domestic law. Section 2 ceased to have effect when the implementation period ended.⁶⁶

The broad approach to withdrawal was to ensure continuity in the law as much as possible. In the EUWA, this is done by giving so-called "retained EU Law" continued effect in domestic law from 1 January 2021. However, the provisions of any "retained EU Law" can be amended or repealed by the legislature, irrespective of developments in corresponding EU Law.

The category of "retained EU Law" covers a multitude of domestic law measures with an EU origin. "EU-derived domestic law"⁶⁷ covers both the secondary legislation previously enacted on the basis of s. 2(2) of the 1972 Act⁶⁸ and any other domestic provision which originates in EU Law.⁶⁹ "Direct EU legislation" includes regulations and decisions, in particular.⁷⁰ As well as legislation, case-law is also included as "retained case-law", covering both decisions by the EU's courts and domestic cases dealing with the interpretation of EU-

⁶³ Cf Christopher Bisping and Christian Twigg-Flesner, "Preparing for withdrawal from the European Union in the United Kingdom" in Malte Kramme, Christian Baldus and Martin Schmidt-Kessel (eds.), *Brexit: Privat- und wirtschaftsrechtliche Folgen* (Nomos, 2020).

⁶⁴ S. 1. This took effect on "Exit Day", which was 31 January 2020 at 11pm (s. 20(1) EUWA).

⁶⁵ S. 1A EUWA.

⁶⁶ S. 1A(5) EUWA.

⁶⁷ See s. 2 EUWA.

⁶⁸ S. 1B(7)(a) EUWA.

⁶⁹ To a degree, this seems to be "overkill", because any domestic law contained in an Act of Parliament or in secondary legislation not based on the 1972 Act would have remained in effect in any case.

⁷⁰ S. 3(2) EUWA.

law, including any implemented EU Law.⁷¹ This extends to all the elements of EU Law which were binding law in the UK immediately before the end of the implementation period (i.e., 11pm on 31 December 2020).

An immediate difficulty with many EU measures is their geographical application, or their cross-border effect. The EUWA made provision for amending retained EU Law to correct “deficiencies”.⁷² Typical examples of corrections of such deficiencies are the replacement references to the “EU” with the “UK”, or the repeal of retained EU Law which no longer works because it assumes co-operation with the EU and/or Member States.⁷³ For example, in the consumer law field, the Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018,⁷⁴ amended several domestic measures in order to replace references to the EU or the EEA with references to the United Kingdom, as well as making corresponding amendments. Regulation 3 of the 2018 Regulations amended references in the Consumer Rights Act 2015 to the “EU” and to a “non-EEA State”. Regulation 8 replaced references in the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013,⁷⁵ to the EU Directives on Package Travel (2015/2302/EU) and Timeshare (2008/122/EU) with the title of their UK implementing legislation. Furthermore, the Consumer Credit (Amendment) (EU Exit) Regulations 2018⁷⁶ amended references to the EU in the Consumer Credit Act 1974 and related secondary legislation. The Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019⁷⁷ amended the Consumer Protection Act 1987 which, *int. al.*, gave effect to the Product Liability Directive (85/374/EEC).⁷⁸ As well as geographical references, a power in s.8 of the 1987 Act to amend the Act to give effect to changes to the Product Liability Directive was repealed. Similar technical changes were made to the General Product Safety Regulations 2005 by Schedule 9 by the 2019 Regulations.

This general overview of the EUWA’s approach to ensuring continuity in the applying of EU Law in the UK as part of the transition away from the EU following withdrawal suffices, although the EUWA itself is a very complex piece of legislation.⁷⁹ In effect, the EUWA froze EU Law (except for the provisions in the treaties) as it stood at the moment the Implementation Period ended, and converted this into UK versions of EU Law. To an

⁷¹ S. 6(7) EUWA.

⁷² The term used in s. 8 EUWA.

⁷³ See s. 8(2) EUWA for the kinds of “deficiencies” covered by this provision.

⁷⁴ S.I. 2018/1326.

⁷⁵ S.I.2013/3134 (implementing the Consumer Rights Directive (2011/83/EU)); Regulation 6.

⁷⁶ S.I. 2018/1038.

⁷⁷ S.I. 2019/696.

⁷⁸ Schedule 3 to the Regulations.

⁷⁹ For a more detailed analysis, see Simon Whittaker, “Retaining European Union Law in the United Kingdom” (2021) 137 *Law Quarterly Review* 477, pp. 478-488.

outsider, this will seem somewhat peculiar: an EU Regulation now exists in two versions, its original EU version applicable throughout the EU, and its UK “twin”, frozen on 31 December 2020. In consequence, legislation implementing EU directives and other measures has continued in force in the UK without interruption. For the time being, retained EU Law has a special status within UK law, although the government announced plans to change this status and to review the substance of many aspects of retained EU Law in September 2021.⁸⁰

Retained EU case-law, including the many cases on consumer law issues, could eventually be “overruled” either by the Supreme Court⁸¹ or by other “relevant courts”⁸² (such as the Court of Appeal). Initially, the power to overrule such case-law had only been granted to the Supreme Court, but it was subsequently extended to other courts. The test to be applied in determining whether a court should depart from retained EU case-law is the same test which the Supreme Court applies in deciding whether to depart from any of its previous decisions (or decisions of the Judicial Committee of the House of Lords, its predecessor).⁸³ In this regard, an interesting point regarding the temporal effect of a decision to depart from retained EU case law has been raised by Professor Simon Whittaker. In domestic law, the departure by the Supreme Court from one of its earlier decisions generally has retroactive effect. If this were also the case in respect of decisions to depart from retained EU Law, the question will arise whether this should also have a retroactive effect, and how far this should reach. In Whittaker’s view, any retroactive effect should only be limited to the date when the Implementation Period ended, because it was then that “retained EU legislation” was created.⁸⁴

Conversely, there is still scope for rulings by the CJEU handed down *after* the end of the implementation period to be considered by domestic courts when interpreting and applying retained EU law – English courts are not precluded from doing so but not required to do so

⁸⁰ A review of ‘retained EU legislation’ was announced on 16 September 2021, with particular measures identified in a list published as *Brexit Opportunities: Regulatory Reform* (available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1018386/Brexit_opportunities-regulatory_reforms.pdf [last accessed 21 March 2022]).

⁸¹ S. 6(4)(a) EUWA.

⁸² As defined in Regulation 3 of the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (S.I. 2020/1525).

⁸³ Set out in the *Practice Statement (Judicial Precent) 1966* [1966] 1 W.L.R. 1234. Its continued application was confirmed by the Supreme Court in *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28 (para [25]).

⁸⁴ Whittaker, “Retaining European Union Law in the United Kingdom”, p. 486.

either.⁸⁵ Thus, English courts can continue to have regard to CJEU rulings, but unlike CJEU rulings handed down before withdrawal, they are no longer bound by these rulings.⁸⁶

The immediate effect of withdrawal from the EU on consumer law in the UK has therefore been limited, with most provisions continuing in effect without change. However, there are exceptions to this picture of continuity. For example, the Consumer Protection Enforcement Cooperation Regulation (2017/2394),⁸⁷ which deals with the co-operation between national enforcement authorities, was repealed,⁸⁸ and provisions on consumer law enforcement regime in the Enterprise Act 2002 were amended as a result.⁸⁹ Furthermore, provisions in the Enterprise Act 2002 giving effect to the Injunctions Directive (2009/22/EU) were removed or amended for the same reason. The Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 repealed the retained EU Law version of the Online Dispute Resolution (ODR) Regulation (524/2013).⁹⁰

As far as the impact of EU Consumer Law on domestic consumer law is concerned, the picture has been one of continuity for much of consumer law. Any changes made thus far have been mostly technical adjustments of retained EU Law, particularly to their geographical scope. Retained EU (consumer) law has only been repealed where it addressed to cross-border issues: the retained Consumer Protection Enforcement Cooperation Regulation and ODR Regulation applied to cross-border situations within the EU and had no role with a geographical scope limited to the UK. So far, the changes that have been made have not removed the substantive *acquis* from consumer contract law.

The future of the *acquis* as a part of English Contract Law

It seems inevitable that there will be a gradual divergence between UK Law and EU Law across a wide range of areas, including consumer law. In part, this will be the inevitable result of new legislation being adopted by the EU which will not be implemented into UK Law; but it is also likely that, over time, there will be changes to UK consumer law driven by domestic policy concerns. As a result, the continuing effect of the *acquis* is likely to wane, up to a point, over time.

⁸⁵ See s. 6(2) EUWA.

⁸⁶ For an example, see *Civil Aviation Authority v Ryanair DAC* [2022] EWCA Civ 76, esp. paras. [21]-[22].

⁸⁷ Somewhat ironically, the UK had to *implement* relevant provisions by making changes to the legislation dealing with enforcement issues during the Implementation Period: see The Consumer Protection (Enforcement) (Amendment etc.) Regulations 2020 (S.I. 2020/484).

⁸⁸ Regulation 8, The Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/203).

⁸⁹ The Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019, S.I. 2019/203.

⁹⁰ Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018, S.I. 2018/1326, Regulation 10.

It is worth noting the very limited effect the UK-EU TCA would have in constraining the UK's ability to make changes to its consumer law legislation. The TCA was finalised at the end of 2020 and has been fully in force since 1 May 2021, following ratification by the European institutions.⁹¹ It was implemented into UK Law by the European Union (Future Relationship) Act 2020 ("EU(FR)A"). An immediate point is that the TCA actually says very little about consumers – there are 57 mentions of "consumer" in a document comprising over 2,500 pages. Digging a little deeper, one uncovers some relevant provisions. Thus, point 7 of the Preamble provides that the UK and EU have "autonomy and rights to regulate within their territories in order to achieve legitimate public policy objectives such as the protection and promotion of...consumer protection... while striving to improve their respective high levels of protection". Under the TCA, therefore, the UK is free to legislate on consumer protection but is committed to improving the existing levels (which are largely EU-derived, of course). Quite what is envisaged with this commitment seems open to interpretation. For instance, an improvement might be purely practical, e.g., making it easier to enforce existing consumer rights; it could mean basic law reform in order to clarify the law, remove gaps and inconsistencies; but it could also cover increases in the level of substantive consumer protection. It does not commit either party to the TCA to mutual alignment of consumer protection laws, however; nor does it require either to retain existing consumer laws. The focus on point 7 seems to be on the overall level of consumer protection in both the UK and the EU. This is reinforced by point 12 of the Preamble, which states that the TCA should "contribute to consumer welfare through policies ensuring a high level of consumer protection and economic well-being".

These commitments in the Preamble are aspirations, rather than concrete obligations, and so one needs to look for more specific provisions in the operative parts of the TCA. Crucially, there is no separate title or chapter in the TCA on consumer protection. Instead, consumer protection is mentioned in the context of more specific policy areas dealt with in the TCA. Art. 123 TCA (Title II, chapter 1 on services and investment), para.2, is just one example⁹² of a provision confirming the regulatory freedom of the EU and UK with regard to, int.al., consumer protection. A more detailed provision with direct relevance to consumer protection is Art. 208 TCA in Title III on Digital Trade, although the commitment to adopting or maintaining a number of measures relevant to e-commerce transactions seems to require very little substantive action, as much of Art.208 seems to have been addressed in

⁹¹ Available e.g., at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/982648/TS_8.2021_UK_EU_EAEC_Trade_and_Cooperation_Agreement.pdf [accessed 21 March 2022].

⁹² See also e.g., Art. 198 or Art. 302.

the pre-withdrawal *acquis*.⁹³ A further important provision is Art.438 TCA in the chapter on aviation, referring in particular to “compensation in case of denied boarding, cancellation or delays”. There is existing EU legislation dealing with this (Regulation 261/2004⁹⁴), and a “retained EU Law” version of this is in force in the UK,⁹⁵ albeit with the amendments to the geographical references made to other measures (see discussion above).⁹⁶ Beyond these instances, however, the TCA has very little to say about consumer protection.

As a consequence, the UK is mostly free to develop domestic consumer law as it sees fit, subject to the aspirational commitment not to reduce existing levels of consumer protection – but as noted above, this can be understood in a variety of ways and certainly does not require the UK to leave consumer law (including *acquis*-derived measures) untouched. The general position, therefore, is that the UK can develop its own legislative policy for consumer law, and can amend domestic legislation as it wishes.

However, this does not mean that there will be a significant departure from the substance of UK Consumer Law in its current form. For all political parties, consumer law has generally been something they have supported; indeed, the most recent significant consumer law development, the adoption of the Consumer Rights Act 2015, originated in a policy decision taken under the pre-2010 Labour government; the Act was eventually adopted at the end of the coalition government’s Parliament in 2015.⁹⁷

Although the present government is ideologically different from its recent predecessors, the early signs are that improving consumer protection will remain an important aspect of its work. In 2021, the Department for Business, Energy and Industrial Strategy (BEIS) consulted on possible changes to consumer law.⁹⁸ It put forward a number of proposals for possible reform. Some of these concerned subscription contracts, auto-renewals and introductory offers; others related to the problem of fake reviews. Two of the proposals on fake reviews resemble the changes made to the Annex of the UCPD by the Better Enforcement and

⁹³ For a fuller discussion, see Simon Whittaker, “Retaining European Union Law in the United Kingdom (2021) 137 *Law Quarterly Review* 477, esp. pp. 498-501.

⁹⁴ Regulation (EC) No 261/2004 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights (2004) O.J. L 46/1.

⁹⁵ See the discussion of this in *Lipton v BA City Flyer Ltd* [2021] EWCA Civ 454.

⁹⁶ Air Passenger Rights and Air Travel Organisers’ Licencing (Amendment) (EU Exit) Regulations 2019, S.I. 2019/278.

⁹⁷ The coalition government consisted of the Conservative Party and the Liberal Democrats, with David Cameron as its Prime Minister.

⁹⁸ BEIS, *Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers*, CP 488, July 2021.

Modernisation Directive (2019/2161/EU).⁹⁹ However, this parallel is not mentioned in the Consultation Paper; rather, these reform proposals are presented as based on work undertaken by the Competition and Markets Authority (CMA).¹⁰⁰ Other proposals concerned the refund practices of traders in light of difficulties encountered by many consumers in the early phase of the Covid-19 pandemic in 2020. There are also plans to implement a Law Commission draft bill on prepayment protection¹⁰¹ which would result in changes to the legal rules on the transfer of ownership in consumer transactions. Whether any of these proposals will result in new legislation remained to be seen at the time of writing.

Nevertheless, this consultation is a reassuring indicator that there is a continued commitment to ensuring strong levels of consumer protection in the UK, and that areas where a need for action has been identified will be considered for legislative intervention. It is also revealing about what the consultation paper does not say. There are very obvious parallels between some of the proposals made by BEIS and legislation already adopted by the EU, but there is no mention made in the consultation document of EU law at all. In particular, it lacks any kind of express discussion of how the UK might, in future, monitor new EU legislation in consumer law and whether it might consider making corresponding changes to domestic legislation based on EU law. The EU's legislative actions in Consumer Law, especially in the context of its Digital Agenda, have already resulted in several important developments which do not have a full parallel in domestic law. Whilst the UK is no longer obliged to implement such EU developments, it might also be missing the opportunity to improve domestic consumer law by properly considering the work already being done at the European level.¹⁰² Many of the legal issues which have been identified as part of the EU's Digital Agenda will be as relevant to UK consumers as they are to EU consumers, and the legislative steps already taken by the EU would be worth considering. This does not mean to say that the UK should continue to amend domestic consumer law in response to every new EU measure. However, it would seem entirely appropriate to closely analyse such measures, to determine whether the UK should or should not adopt corresponding legislation, and, indeed, whether the UK could go further or take a different approach from that chosen by the EU. The fact that some of the proposals BEIS consulted on last year have strong parallels with EU law reforms already put in place suggests that this

⁹⁹ Article 3 BEMD inserted points 23b and 23c to Annex I (prohibiting the publication of reviews without checking that consumer reviews are by consumers who have bought or used the product, and prohibiting the submission of, or the commissioning of someone to submit, false consumer reviews).

¹⁰⁰ Cf. paras. 2.32 and 2.43 of the Consultation Paper. Another proposal corresponds with changes made in point 11a of Annex 1 (not identifying paid-for search results as such).

¹⁰¹ Law Commission, *Consumer sales contracts: transfer of ownership*, Report No. 398 (HC 1365).

¹⁰² One only needs to consider the Digital Content Directive (2019/770/EU), which has some overlaps with Part 3 of the Consumer Rights Act 2015, but contains several additional aspects (supply in return for access to data; updates).

kind of analysis might well already be happening behind the scenes. It would be sensible to have a public discussion about this practice and to develop a clear process by which EU developments could be monitored and analysed, particularly where this would affect domestic law based on the *acquis*.

These early signs about the political attitude towards the continued relevance of the EU's consumer *acquis* for UK consumer law suggest an ambiguous picture. Based on the evidence of BEIS' 2022 consultation paper, the EU *acquis* will continue to have some influence, albeit in an obscured manner. At the same time, not every significant development at EU level will find its way into domestic consumer law. There might be good reasons for disregarding some actions taken at EU level, as they are sometimes far from perfect, but they are nevertheless a useful indicator of potential priorities for intervention also in the UK. It may be that, in due course when a period of time since withdrawing from the EU has passed, hard-line political attitudes amongst some parliamentarians will soften or shift to other matters, and this might allow for more transparent engagement with EU developments.

Conclusions, and what's next?

The discussion of the impact of the EU's contract law *acquis* on English law has revealed that the common law of contract has remained unaffected by the *acquis*. Instead, legislation implementing EU measures has been mostly confined to the scope of the corresponding EU measure rather than becoming a trigger for more fundamental change. Even concerns over potential leakage into the common law of European concepts such as good faith have proven unfounded. The influence of the *acquis* is generally confined to consumer contracts. However, as shown, the growth in legislation on consumer contracts has created a *de facto* separation of general contract law and consumer contract law, albeit an incomplete one. Nevertheless, the common law has generally resisted EU influences. The effect of withdrawing from the EU has not had any immediate effect on the continued existence of *acquis*-derived measures, although there is no guarantee that this will remain so in the medium term.

One would hope, rather than anticipate, that as the political excitement of withdrawing from the EU fades into the distance, future discussions about reforming domestic law will take due note of developments at the EU level. Whilst the common law of contract will continue on its "*acquis* free" path, English consumer contract might remain in touch with the *acquis* in the long run.