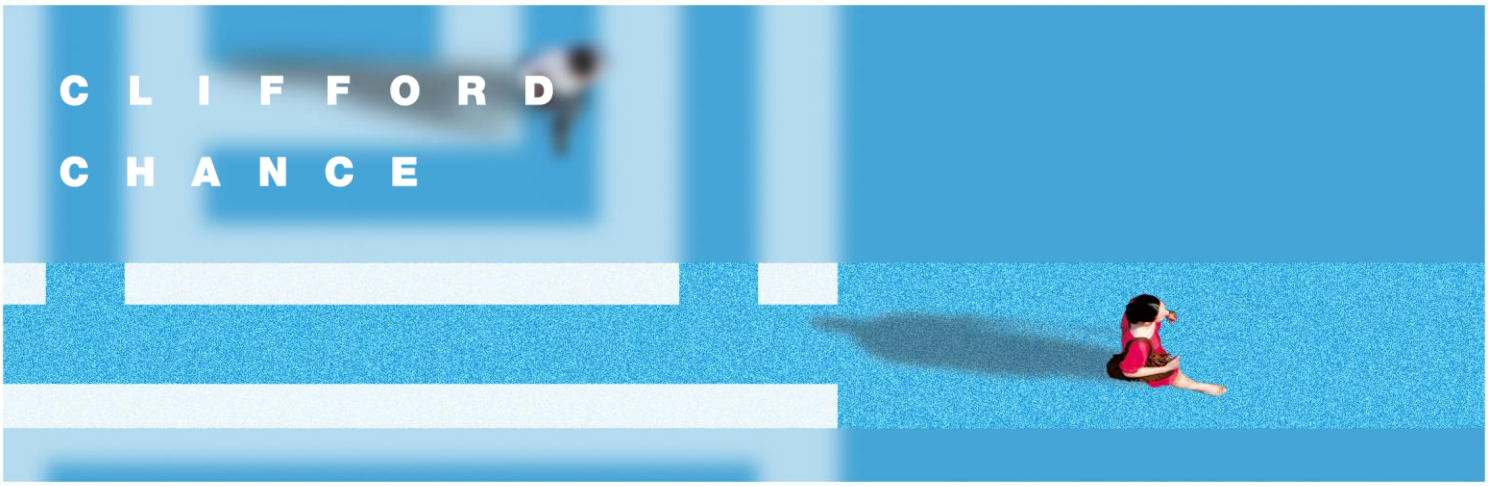

BREXIT COMMENT IN THE HIGH COURT MOVES THE MARKET

The case of R (on the application of Miller) v Secretary of State for Exiting the European Union is a major constitutional test case, which has had the unexpected consequence of a comment made by the Government's lawyer causing sterling to rise on the foreign exchange markets.

The High Court spent three days on the issue of whether the Government can decide on its own to notify the European Council of the UK's decision to withdraw from the EU or whether Parliamentary authority is required first.

During the hearing, the Lord Chief Justice asked Mr James Eadie QC, appearing for the Government, to explain what involvement Parliament would have in the whole withdrawal process, not just in the first stage of the process that was the immediate focus of the litigation. And when the Lord Chief Justice asks, it behoves any counsel, even one as elevated as Mr Eadie (First Treasury Counsel), to answer.

Mr Eadie did not respond immediately to the Lord Chief Justice's question, but undertook to do so on the following day, after due consideration. That delay might in itself be a little surprising since the question is not one that can have escaped the attention of the Government (see, for example, our September briefing entitled Brexit: the constitutional endgame and the need to act now). That is not, of course, to say that the Government's legal service had briefed its Counsel on the point in advance of the hearing since the point was not directly in issue in Miller. If in doubt, time should always be taken to mull over the answer.

When Mr Eadie reverted to the Lord Chief Justice, he said that the Government's position was that it was "likely" that Parliamentary approval would be required for any withdrawal agreement between the UK and the EU (he also acknowledged that it was possible that no agreement would be concluded).

The word "likely" had an impact on sterling. "Pound rises as vote for MPs eases 'hard Brexit' fears" was the lead headline in the Financial Times on 19 October. The story recorded that sterling had reversed a small part of the decline that has ensued since the Prime Minister's speech at her party conference earlier in the month. Although Mr Eadie picked his words carefully, as ever, it seems improbable that even he appreciated the market impact those words would have. Indeed, it is, perhaps, slightly puzzling that the market should have been sufficiently surprised by his words to affect trading in the pound.

It is important to appreciate what the Government was saying and what it was not saying. All Mr Eadie was doing was setting out the Government's view of

its existing legal obligations under the Constitutional Reform and Governance Act 2010 (CRAGA). He was not offering a new undertaking on behalf of the Government to involve Parliament in the withdrawal agreement.

Ratification and the withdrawal agreement

The Miller case concerns the first stage of the UK's departure from the EU, namely whether the Government requires Parliamentary authority before it can notify the European Council of the Government's decision (which, it says, has already been taken) that the UK should withdraw from the EU. Mr Eadie's comment that moved the markets concerns the second formal stage of the withdrawal process, namely what authorisation is required for the UK to be bound as a matter of international law by a withdrawal agreement with the EU. This is the issue addressed in this note, but the stages do not, of course, end there. For example, it will be necessary for there to be domestic implementation of post-Brexit arrangements, whether through the Great Repeal Bill or otherwise (which will involve Parliament), there will be agreements with the EU on the future relations between the UK and the EU, and so on.

Reverting to the question of authorisation for a withdrawal agreement, section 20 of CRAGA provides, in summary, that the Government may not ratify a treaty unless the treaty has been laid before the House of Commons for at least 21 sitting days, and the House has not in that time resolved that the treaty should not be ratified. Section 20 gives legislative effect to a long-standing constitutional convention, known as the Ponsonby Rule after Mr Arthur Ponsonby, the Parliamentary Under-Secretary of State for Foreign Affairs who espoused it on 1 April 1924.

Mr Eadie accepted that a withdrawal agreement between the UK and the EU would be a treaty for the purposes of CRAGA. However, he argued that CRAGA only applies to treaties that are subject to a formal process of ratification. As he also said, most treaties are subject to ratification requirements, but it is possible for a state to enter into and be bound by a treaty without any ratification process – the treaty might be effective as soon as the state signs on the dotted line. Mr Eadie said that the "overwhelming likelihood" was that a withdrawal agreement would require ratification but that "it can't be a guarantee at this stage". He did not say that the Government would only accede to a withdrawal agreement if the agreement required ratification.

The basis for the Government's argument that a treaty without a ratification provision is not subject to Parliamentary approval rests on section 25 of CRAGA. This is set out in the box on this page. Section 25 refers to the ratification that requires Parliamentary approval as being an act that establishes that the treaty is binding on the UK in international law, but restricts this to acts that require the "deposit or delivery of an instrument of ratification".

CRAGA might be taken to refer implicitly to the Vienna Convention on the Law of Treaties. Article 11 provides that the "consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed". Ultimately, however, the meaning of CRAGA is a question of UK law. Did Parliament, through CRAGA, intend only to restrict the Government's ability to bind the UK to treaties that require formal ratification or should the Act be read in a wider manner? If the Government is right, it would be easy for it to circumvent CRAGA – for example, by requiring the exchange of

Section 25 of the Constitutional Reform and Governance Act 2010

"(1) ... "treaty" means any written agreement-

(a) between States or between States and international organisations, and

(b) binding under international law....

(3) ... a reference to ratification of a treaty is a reference to an act of a kind specified in subsection (4) which establishes as a matter of law the United Kingdom's consent to be bound by the treaty.

(4) The acts are-

(a) deposit or delivery of an instrument of ratification, accession, approval or acceptance;

(b) deposit or delivery of a notification of completion of domestic procedures."

instruments constituting the treaty or by providing for the treaty to come into force on signature but then, as in commercial agreements, including conditions precedent for the application of specific articles.

Such ease of circumvention must call into question whether the Government's interpretation is right. If the withdrawal agreement does not contain provision for its ratification by the UK, then it would become binding on the UK (as a matter of EU and international law) on the signature by the UK of the agreement. In this case, it seems more likely that the UK Government's signature of the withdrawal agreement would be regarded as the UK's "acceptance" of the withdrawal agreement "which establishes as a matter of law the United Kingdom's consent to be bound by the [withdrawal agreement]" thus triggering the requirements under CRAGA (although the Government does retain powers under CRAGA to override these requirements, unless and until the House of Commons has voted down the agreement).

The vast majority of treaties do include a requirement for ratification. This may be to meet domestic legal requirements in the states concerned (referendums are required in some), to give time to pass domestic laws or for other reasons. But, to be specific, must a withdrawal agreement between the UK and the EU include ratification procedures?

On the EU's side a withdrawal agreement must "be concluded... by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament" (article 50(2) of the Treaty on European Union (TEU)). So far as the EU is concerned, therefore, there is no formal need for ratification as long as the text has been agreed by the Council and European Parliament before signature.

On the UK's side, there is no constitutional requirement that a treaty entered into by the UK must include ratification provisions. The only general requirement is that in CRAGA. However, it seems strange, politically at least, that the European Parliament will have a say on any withdrawal agreement prior to its conclusion – and for that reason is insisting on an intimate involvement in the process – but the UK Parliament will, on the Government's view, only have a veto after conclusion, and even that could be easily circumvented.

In addition, including ratification provisions in the withdrawal agreement would further reduce the time the UK has to negotiate the withdrawal agreement. Article 50(3) of the TEU sets a two year timetable. The UK and the EU must conclude the agreement within the two years, failing which the UK ceases to be a Member State at the expiry of the two year period. The need for the EU to obtain the approval of the European Parliament before concluding the agreement already shortens the time available for negotiation – the Parliament will need to approve the final agreed text of the withdrawal agreement. If the UK's signature of the agreement is subject to subsequent Parliamentary process and ratification, then this could increase the pressure on the negotiators to reach an early agreement, so that there is time for both the EU and the UK Parliamentary processes to be completed – in sequence – within the two year period (see our September briefing entitled Brexit: the constitutional endgame and the need to act now for discussion of whether the withdrawal agreement can come into force outside the two year period). Running the two processes in parallel could give the negotiators more time to reach agreement

As the Government recognised, a treaty would normally include ratification provisions to allow the Government time after signature to secure the passage

through Parliament of whatever domestic legislation is required to implement the agreement (and it is almost inevitable that some domestic legislation will be required to implement the terms of a withdrawal agreement). But in this case the Government could achieve this through means other than ratification if it were so minded. And, of course, the muchheralded Great Repeal Bill (not the best title, as Mr Eadie observed, since its role is "to drag in EU law rights" to domestic law, not to remove them) could include new provisions covering Parliamentary involvement in the withdrawal agreement, ousting those in CRAGA. Parliament will in all probability have some say, directly or indirectly, on the withdrawal agreement (assuming, of course, that there is a withdrawal agreement) because of the need for domestic implementation, but quite what that will be and when and how it will occur remains somewhat obscure.

Other legislation is also potentially relevant. The European Union Act 2011 requires legislation (not just the absence of Parliamentary disapproval, as under CRAGA) to approve any treaty that "amends or replaces" the TEU or TFEU. If this legislation applies, CRAGA does not (section 23(1)(c) of CRAGA). In Miller, the Government accepted, probably correctly, that a withdrawal agreement would not replace the TEU or TFEU for these purposes, but the interrogation on this point that its lawyers received in Miller from Lord Justice Sales in particular indicates that the point may not be beyond doubt.

The final frontier

Approval of the withdrawal agreement is the second formal stage of departure from the EU. In Miller, the Government did not contend that notice to the European Council of the UK's intention to withdraw from the EU is revocable or can be made conditional on subsequent events. On this basis (though it remains the subject of intense academic debate), delivery of notice of withdrawal means that the UK will – not may – at some future time leave the EU. Departure will be on entry into force of a withdrawal agreement or, failing that, two years after delivery of the notice unless this period is unanimously extended (article 50(3) of the TEU). The Government's case in Miller is that Parliament has no role in the decision to leave, even if it might later have the opportunity to approve or otherwise an agreement setting out the terms of departure, assuming that there is one. If Parliament does not approve those terms, the UK will still leave the EU since it is implausible that there will be any time or scope for renegotiation.

It is also important to distinguish a withdrawal agreement from any agreement covering future relations between the UK and the EU. The withdrawal agreement will cover the nuts and bolts of departure – payments, assets, staff, transitional measures and so on – and in doing so must take "account of the framework for [the UK's] future relationship with the [EU]" (article 50(2) of the TEU). Any agreement as to future relations is distinct from the withdrawal agreement, and was not covered by the comments in Miller.

Conclusion

Parliamentary involvement in the first stage of the UK's departure from the EU depends upon the outcome, still awaited, of the Miller case. The Lord Chief Justice (Lord Thomas), the Master of the Rolls (Sir Terence Etherton) and Lord Justice Sales have reserved their decision, Lord Thomas saying: "We shall take time to consider the matter and give our judgment as quickly as possible." Because of the urgency and constitutional importance of the case, any appeal is expected to be heard by the Supreme Court before the end of the year.

The position on Parliamentary involvement in the subsequent stages of any withdrawal agreement between the UK and the EU, as well as on agreements on future relations, is more nuanced than might be apparent from the market reaction to the comments in Miller. As explained in Brexit: the constitutional endgame and the need to act now, the optimum course is for the Government to legislate comprehensively now, whether through the Great Repeal Bill or otherwise, to lay down what steps will be taken, when and by whom leading to the UK's departure from the EU. At present, there is ambiguity. The sooner this ambiguity is cleared up, the easier the process is likely to be and the less scope there will be for court decisions to affect the process.

CONTACTS

Simon James
Partner

T +44 20 7006 8405
E simon.james
@cliffordchance.com

Chris Bates
Partner

T +44 20 7006 1041
E chris.bates
@cliffordchance.com

Kate Gibbons
Partner

T +44 20 7006 2544
E kate.gibbons
@cliffordchance.com

Dan Neidle
Partner

T +44 20 7006 8811
E dan.neidle
@cliffordchance.com

Phillip Souta
Head of UK Public Policy

T +44 20 7006 1097
E phillip.souta
@cliffordchance.com