Brexit Newsflash: Article 50 and the *Miller* Case

November 4, 2016

In a ruling released yesterday morning, three senior judges of the High Court of Justice of England and Wales (the "**High Court**")[1] handed the UK Government a significant defeat in relation to its Brexit plans. The High Court ruled that the UK Government could not use executive powers under the 'Royal prerogative' to trigger the mechanism for the UK to exit the European Union (the "**EU**"). Instead, assuming the UK Government's appeal to the UK Supreme Court is unsuccessful, the UK may only begin the process of Brexit following UK parliamentary approval. Although this development is unlikely to lead to a reversal of Brexit, it could well have significant implications for both the timetable and the terms. The decision has the potential to cause delay and will subject the UK government's negotiating position to more parliamentary scrutiny and debate.

Article 50 and the *Miller Case*

Context

Article 50 of the Treaty on European Union (the "**TEU**") sets out the process by which a member state may withdraw from the EU. It provides that a member state may decide to withdraw "in accordance with its own constitutional requirements" and that a member state which decides to withdraw must notify the European Council of its intention (the "**Article 50 Notice**"). The service of the Article 50 Notice triggers a two-year period (unless extended by the European Council in unanimous agreement with the remaining member states) in which to negotiate a withdrawal agreement, at the end of which the relevant member state will exit the EU, whether or not a negotiated withdrawal agreement is in place.

The EU has indicated that it will not begin negotiations on the terms of the UK's withdrawal from the EU until that Article 50 Notice has been served. After much media speculation, the UK Prime Minister announced, on October 2, 2016, that the UK Government would serve the Article 50 Notice by the end of March 2017 without prior parliamentary approval.

The *Miller Case*

On October 13, October 17 and October 18, 2016, the case of *Regina (on the application of Gina Miller and Ors) v The Secretary of State for Exiting the European Union* (the "***Miller Case***"), brought by a fund manager (Gina Miller), a hairdresser and a number of expatriates, was heard in the High Court. The claimants asserted that the UK Government does not have the power to serve the Article 50 Notice without first obtaining the approval of Parliament. A link to the judgment and a summary provided by the High Court is available here.

On November 3, 2016, the High Court held that as a matter of constitutional law and statutory interpretation, the UK Government does not have the power in its own right (i.e. under the 'Royal prerogative') to give the Article 50 Notice for the UK to withdraw from the EU. The result is that an Act of

[1] The senior courts of England and Wales (the Crown Court, the High Court and the Court of Appeal) sit below the Supreme Court, which is the final court of appeal.

Parliament must be passed to grant such authority to the UK Government to enable the Article 50 Notice to be given.

The Decision

The UK's constitutional law is not found entirely in a written document, but is contained in part in the form of statutes which have particular constitutional importance and in part in fundamental rules of law recognized by both Parliament and the courts. The High Court declared that one of the most fundamental rules of the UK's constitution is that Parliament is both sovereign and supreme and can make and unmake any law it chooses. The Crown (or to put it in more modern terms, the executive government) has certain inherent 'Royal prerogative powers' which include the right to conduct international relations and make and unmake international treaties (including the TEU). However, the High Court found that, as a matter of constitutional principle, the exercise of the Royal prerogative power to make and unmake treaties cannot deprive individuals of rights which they enjoy in domestic law without the intervention of Parliament.

The High Court found that Parliament intended, by the European Communities Act 1972 (the "**ECA**"), to introduce EU law into domestic law and that the Article 50 Notice would 'undo' certain domestic rights that Parliament had brought into effect by enacting the ECA. The High Court reasoned that allowing the UK Government to exercise its Royal prerogative without the consent of Parliament would be akin to allowing the UK Government to withdraw rights originally created by Parliament. As this would be contrary to the constitutional principle that, unless Parliament legislates to the contrary, the UK Government should not be able to vary the law of the land by its Royal prerogative powers, the High Court found that the UK Government does not have the power under the Royal prerogative to serve the Article 50 Notice.

Government Appeal

Immediately after the High Court's judgment, the first claimant, Gina Miller, expressed hope that the UK Government would make "the wise decision of not appealing but pressing forward and having a proper debate in our sovereign Parliament." Perhaps unsurprisingly, however, the UK Government has indicated that it will appeal. A spokesperson for the Prime Minister stated that the UK Government is "determined to respect the result of the referendum". It is anticipated that the UK Supreme Court, with a panel comprising all of its 11 Justices, will hear the appeal on December 7 or 8, 2016 (in an expedited process 'leapfrogging' the intermediate UK Court of Appeal). Given the rather trenchant rejection of the UK Government's arguments by the High Court, it would now be a surprise if the UK Supreme Court were to overrule the High Court.

Consequences

If the UK Government's appeal in December is unsuccessful, the UK Prime Minister will be unable to give the Article 50 Notice in March 2017 without an Act of Parliament granting that power. The UK parliamentary process involves the drafting of a Bill, debating it in the House of Commons, voting on amendments, placing it before the House of Lords and then addressing amendments introduced by the House of Lords in the House of Commons again.

Accordingly, if an Act of Parliament is required as a result of the UK Supreme Court decision, the legislative process is likely to delay the date of the Article 50 Notice beyond March 2017 (although the UK Government has indicated that it regards the timetable for serving the Article 50 Notice as unchanged). It also means that Parliament may be able to dictate when and under what conditions the UK Government can give the Article 50 Notice. To add further political risk, any outright rejection of such legislation by the House of Commons would be highly likely to trigger a general election in the UK.

The Governor of the Bank of England, Mark Carney, yesterday described the High Court judgment on Brexit as "one of the examples" of the uncertainties that are haunting the UK economy. On the evidence of recent months, it is hard to argue with an assertion that uncertainty and volatility will be the hallmarks of the Brexit negotiation process.

Davis Polk

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Thomas J. Reid	**+1 212 450 4233**	tom.reid@davispolk.com
John D. Amorosi	**+1 212 450 4010**	john.amorosi@davispolk.com
John Banes	**+44 20 7418 1317**	john.banes@davispolk.com
Leo Borchardt	**+44 20 7418 1334**	leo.borchardt@davispolk.com
Kirtee Kapoor	**+1 650 752 2025**	kirtee.kapoor@davispolk.com
Will Pearce	**+44 20 7418 1448**	will.pearce@davispolk.com
Simon Witty	**+44 20 7418 1015**	simon.witty@davispolk.com
Connie I. Milonakis	**+44 20 7418 1327**	connie.milonakis@davispolk.com
Michael Sholem	**+44 20 7418 1027**	michael.sholem@davispolk.com
Joanna A. Valentine	**+44 20 7418 1323**	joanna.valentine@davispolk.com

About Lex et Brexit — The Law and Brexit

Davis Polk is pleased to publish *Lex et Brexit*, a firm newsletter focused on Brexit developments. Read previous issues at **www.davispolk.com/brexit >**

Sign up to receive Lex et Brexit >