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Litigation & Arbitration Group Client Alert: UK Supreme Court rules that an Act of Parliament is required to trigger withdrawal from the European Union

In a highly significant judgment of constitutional and political importance, the UK Supreme Court confirmed yesterday that the initiation of the UK's withdrawal from the European Union (the "**EU**") will require a prior Act of Parliament.[1] The Supreme Court's decision, by a majority of eight to three, sets the stage for considerable further debate in Parliament, at the very least in the period leading up to the end of March 2017, by which time it is the Government's stated aim to invoke Article 50 of the Treaty on the European Union ("**Article 50**").

THE PRINCIPAL ISSUE: THE POWER TO TRIGGER ARTICLE 50

In the referendum held on 23 June 2016, the majority of UK voters voted in favour of leaving the EU. Under Article 50, a member state may decide to withdraw from the EU "*in accordance with its own constitutional requirements*" and is then required to give notice to the European Council of that decision.[2] Thereafter, the treaties governing the EU will cease to apply to that member state either from the date on which any withdrawal agreement comes into force or, failing that, after two years from the date of the notice.[3]

The Government had argued (and maintained on appeal) that it was entitled to invoke Article 50 under the Crown's prerogative powers (i.e., without the authorisation of Parliament), given that the making of, and withdrawal from, international treaties (and the conduct of foreign affairs in general), has traditionally fallen within the scope of prerogative powers.

[1] R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5.
[2] Article 50(1) and (2) of the Treaty on the European Union.
[3] Article 50(3) of the Treaty on the European Union. The two-year period can be extended by unanimous decision of the European Council.

This argument had failed at first instance before a Divisional Court of the High Court.[4] The Divisional Court held that the effect of triggering Article 50 would be to initiate a process under which UK citizens' rights would be altered (as a result of EU law ceasing to apply) and the Government could not take this step in the absence of an Act of Parliament. This was consistent with the constitutional principle that prerogative powers may not be used to effect changes to UK domestic law.[5]

The Government appealed the Divisional Court's decision directly to the Supreme Court, leap-frogging the Court of Appeal. The case was heard by the full bench of eleven
Supreme Court Justices, over the course of four days in December 2016.

THE SUPREME COURT MAJORITY DECISION

The Supreme Court considered that the principal issue turned on the correct interpretation of the European Communities Act 1972 (the "**ECA**"), pursuant to which the UK's obligations under the prevailing treaties governing the EU (the "**EU Treaties**") were given domestic effect. In particular, the court considered the effect of section 2 of the ECA, under which rights and obligations "*from time to time created or arising by or under the Treaties...*" are brought into domestic UK law.[6]

In relation to these provisions, while noting that "[m]*any statutes give effect to treaties by prescribing the content of domestic law in the areas covered by them*", the majority held that the ECA "*does considerably more as well. It authorises a dynamic process by which, without further primary legislation (and, in some cases, even without any domestic legislation), EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes.*"[7]

The court also noted that it was common ground that, "*because the EU Treaties apply as part of UK law, our domestic law will change as a result of the United Kingdom ceasing to be party to them, and rights enjoyed by UK residents granted through EU law will be affected.*"[8]

Against this background, the majority of the Supreme Court held that withdrawal from the EU would effect a number of fundamental changes to the UK's constitutional arrangements, by terminating an "*independent and overriding source of domestic*

[4] R (on the application of Miller) v The Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin).
[5] *Ibid.*, at paragraphs 92 to 96.
[6] Section 2(1) ECA 1972.
[7] [2017] UKSC 5, at paragraph 60.
[8] *Ibid.*, at paragraph 69.

law".[9] Therefore, withdrawal from the EU "*is fundamentally different from variations in the content of EU law arising from further EU Treaties or legislation*" and "*represents a change which is different not just in degree but in kind from the abrogation of particular rights, duties or rules derived from EU law*."[10] Accordingly, the majority rejected the Government's arguments that section 2 of the ECA, by giving effect to EU law only to the extent provided for by or under the EU Treaties, allowed for the use of prerogative powers to trigger Article 50.[11]

In conclusion on the issue of the constitutional effect of withdrawal, the Supreme Court held that such a major change to the UK's constitution cannot be achieved by Government ministers alone, acting under prerogative powers: rather, "*it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation.*"[12]

The majority also considered that the Divisional Court had been correct in holding that withdrawal from the EU Treaties would have the effect of altering UK citizens' domestic rights acquired thereunder. In particular, section 2 of the ECA "*envisages domestic law, and therefore rights of UK citizens, changing as EU law varies, but it does not envisage those rights changing as a result of ministers unilaterally deciding that the United Kingdom should withdraw from the EU Treaties.*"[13] This, therefore, represented
another, albeit related, basis for the majority's decision.

Furthermore, while the Supreme Court accepted that it would have been open to Parliament to make express provision in the ECA for withdrawal from the EU Treaties under prerogative powers, the legislation would have required clear words to that effect. However, no such words appeared in the ECA and the majority held that, in fact, the provisions of the ECA "*support the contrary view*."[14]

THE DISSENTING JUDGMENTS

Three of the eleven Supreme Court Justices gave separate dissenting judgments on the principal issue, concluding that notice under Article 50 could be given by the Government exercising prerogative powers to withdraw from international treaties – powers which remain intact regardless of the ECA.

[9] *Ibid.*, at paragraph 80.
[10] *Ibid.*, at paragraph 81.
[11] *Ibid.*, at paragraph 75.
[12] *Ibid.*, at paragraph 82.
[13] *Ibid.*, at paragraph 83.
[14] *Ibid.*, at paragraphs 87 to 88.

Lord Reed, with whom Lord Carnwath and Lord Hughes agreed, held that this conclusion was right "*because the effect which Parliament has given to EU law in our domestic law, under the* [ECA]*, is inherently conditional on the application of the EU treaties to the UK, and therefore on the UK's membership of the EU*". The ECA "*imposes no requirement, and manifests no intention, in respect of the UK's membership of the EU. It does not, therefore, affect the Crown's exercise of prerogative powers in respect of UK membership.*"[15]

DEVOLUTION

One question which the Supreme Court also had to consider as part of the appeal was whether the Government was required to consult the devolved assemblies before invoking Article 50. The Supreme Court held unanimously that this was not required.[16]

COMMENT

It is obviously too early to discern how the Supreme Court's judgment will affect the UK's withdrawal from the EU. It appears likely that legislation will need to be put before Parliament in the very near future if the Government is to achieve its stated aim of triggering Article 50 before the end of March 2017: indeed, in a statement following the Supreme Court's decision, David Davis, the Secretary of State for Exiting the European Union, said that a bill would be introduced into Parliament "*within days*". That process, however, will introduce several new variables to the situation, as the proposed legislation is subjected to scrutiny and potential amendment by Parliament. In addition, a number of other 'Brexit'-related proceedings are pending or intimated, such that it appears legal challenges are set to continue, at least throughout the remainder of this year.

For all the further debate that will now ensue, however, the Supreme Court's dismissal of the Government's appeal has also confirmed and reinforced - on an international stage - the fundamental independence of the UK's judicial system. That is likely to continue to be highly attractive to international businesses and investors.

[15] *Ibid.*, at paragraph 177.
[16] *Ibid.*, at paragraphs 150 to 151.

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