CLIFFORD
CHANCE

Newsletter August 2016

Contentious Commentary

Contract

Settlements and certainty

A false claim made in a case can undo a settlement agreement.

In principle, a settlement agreement is a contract just like any other. If it was induced by a misrepresentation, rescission can result. In practice, the courts have tended to afford settlement agreements greater sanctity than other contracts in the name of finality of legal proceedings. But they may do so less in future in the light of *Hayward v Zurich Insurance* [2016] UKSC 48.

Hayward concerned a personal injury claim. D was suspicious that C was exaggerating his claim but settled it nonetheless on terms set out in a Tomlin Order. D later obtained firm evidence, accepted by the court, that C had indeed fraudulently exaggerated his claim. D sought rescission of the settlement agreement. But, said C, D didn't believe his claim anyway, so how could his fraud have induced D to enter into the settlement agreement?

The Supreme Court decided that, for rescission, it is necessary for a false statement to have induced D to enter into the agreement. This is a question of fact. But D does not need to believe the truth of the statement, nor does the statement need to be the sole inducement: D need only be influenced by the statement. In this case, D might not have believed C's claims as to the extent of his injuries, but C's false statements influenced D because D was aware of the risk that the judge might believe C. This was sufficient for rescission purposes.

The Supreme Court thus reversed the Court of Appeal's decision, which had been dictated by the need for finality in litigation. This did not feature in the Supreme Court's reasoning, which was concerned solely to ensure that a fraudster was not rewarded.

This decision could undermine settlements by enabling a paying party to rely on subsequently discovered evidence that the claimant's case was wrong. In these circumstances, the terms of the settlement agreement will be key. A claimant will want to ensure there is a sufficiently wide no reliance clause in order to prevent the defendant from subsequently asserting that it had relied on the claimant's pleadings, witness statements etc in reaching a settlement. The Tomlin order in this case had nothing of that sort.

Insurers uninsured

An insurance claim succeeds despite irrelevant lies.

Insurers are a protected species at common law (hence, in part at least, the Insurance Act 2015, in force from 12 August 2016). If an invalid claim is made on an insurer, the insurer need not pay. No great surprise there; it is the same with any contract. But, unlike contract law generally, if a fraudulently exaggerated claim is made, the insurer is again absolved from all liability, even for the valid part of the claim (see section 12 of the Act). The issue in *Versloot Dredging BV v HDI Gerling Industrie Versicherungen AG* [2016] UKSC 45 was whether this super-protection extended far enough to allow an insurer to reject the whole claim if a lie (a "fraudulent device" or "collateral lie") was told in the course of a claim under an insurance policy but the lie did not affect whether the insurer was liable or the amount of the liability.

The Supreme Court decided (Lord Mance dissenting) that the insurer could not avoid payment in these circumstances. So the fact that an insured had told a lie about a bilge alarm on a ship, a lie that was irrelevant to the merits of the claim, did not excuse the insurer from paying. The Supreme Court could not bring itself to conclude that irrelevancies absolved an insurer from liability. The policy of deterring fraud goes only so far.

Contents

CLIFFORD
CHANCE

One-way street

A Part 36 offer is a counter-offer for contractual purposes.

As a matter of general contract law, a counter-offer constitutes a rejection of the earlier offer with the result that the earlier offer is no longer available for acceptance. Part 36 is different because it is said to be a self-contained code: *Gibson v Manchester City Council* [2010] EWCA Civ 726. Thus a Part 36 offer does not constitute a rejection of an earlier Part 36 offer by the other side; the earlier offer is still open for acceptance until expressly withdrawn under CPR 36.9.

But what if a contractual settlement offer is made, without prejudice save as to costs, the response to which is a Part 36 offer? Does the Part 36 offer constitute a counter-offer for contractual purposes such that the contractual offer can no longer be accepted? In *DB UK Bank Ltd v Jacobs Solicitors* [2016] EWHC 1614 (Ch), the judge considered that the contractual offer was no longer available for acceptance. Part 36 might be a self-contained code, but an offer under Part 36 is still a counter-offer for contractual purposes.

Agents limited

An agent's authority is generally revocable even if said to be irrevocable.

In *Bailey v Angove's Pty Limited* [2016] UKSC 47, the Supreme Court dredged up some rather antique case law - law inconsistent with general contract law - in deciding that an agent's authority to act for its principal (in this case, to collect payments from third parties) was always revocable even if the agency was contractual and was described as irrevocable. If authority is revoked in breach of contract, the agent might have a claim in damages, but the agent's authority will still cease. The Court of Appeal had analysed the case more in line with general contract law rather than treating agency law as something apart. (Compare with *Cottonex*, below.)

To every rule there are exceptions. The main (but not only) exception to this rule is if the agency is expressed to be irrevocable and it is intended to secure a financial interest of the agent. If so, the agency is genuinely irrevocable. The agent's interest in obtaining commission is not enough for these purposes, though an interest in recovering a debt owed by the principal might be.

The facts of *Bailey* involved the English distributor of an Australian company's wine. The distributor went into administration at a time when substantial sums were owed by third parties for wine. The wine company terminated the agency agreement in accordance with its provisions, including the distributor's right to collect the payments. The Supreme Court was satisfied that termination did, indeed, terminate the agent's authority even for payments due at the time, and that there was nothing

Without prejudice

Legal blackmail

Threats made in a without prejudice communication can be pleaded under the unambiguous impropriety exception.

In the course of without prejudice negotiations through a mediator, D increased the sum it was prepared to accept by way of settlement and demanded an answer within 48 hours. The reason for the increase were said to be that evidence of wrongdoing by C had been discovered, which, absent settlement, would lead to charges of perjury, perverting the course of justice, contempt and other adverse consequences for C, including publicity about C's errant ways. No settlement was reached. C applied for permission to amend its pleadings by including details of these threats. The question was whether the threats were covered by the without prejudice rule, and could not therefore be relied on, or whether their nature took them outside the rule.

In *Ferster v Ferster* [2016] EWCA Civ 717, the Court of Appeal decided that the nature of the threats was such that they fell within the unambiguous impropriety exception to the without prejudice rule and that C could therefore rely on them. The Court of Appeal said that whether this was so involved an evaluation of whether the threats unambiguously exceeded what was permissible in settlement of hard fought commercial litigation. The threats in this case did exceed what was proper because they involved threats of criminal action, of ramifications for C's family and of publicity. The threats were made in order to gain a financial advantage with no connection between the alleged wrong and the increased demand. It was not necessary for the threats to constitute the crime of blackmail.

Ferster illustrates the caution that is required in circumstances like these. All is not fair in love and litigation. Any threats or similar going beyond the consequences of the claim or the proceedings themselves are fraught with difficulty, and generally should not be made.

in the contract that purported to make the agency irrevocable or that was sufficient to make it a security.

The other point addressed by the Supreme Court, obiter, concerned what the situation would have been if the agent had still been entitled to collect the payments from third parties. The wine producer argued that the payments would have been held by the agent as a constructive trustee and thus payable in full to the producer. The Supreme Court disagreed, overruling the well-known cases of *Neste Oy v Lloyds Bank* [1983] 2 Lloyds Rep 658 and *In re Japan Leasing Europe plc* [1999] BPIR 911.

The mere fact that, at the time of receipt of the payments, the agent knew that it could not perform its obligation to pass the money on to its principal was not enough to give the principal a proprietary interest in the payments. The payer intended to part with the entire interest in the money, and there was no wrongdoing or such like by the agent. The agent remained entitled under its contract to collect the payments, and it was simply a consequence of insolvency law that the principal would not receive its full entitlement but could only prove in the insolvency for its debt. Appeals to conscience and such like were too discretionary to give rise to a trust. Property rights must be fixed and ascertainable.

Frustrated by breach

A breach of contract that amounts to frustration can automatically terminate the contract.

The facts of *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] EWCA Civ 789 are fairly clear. Not much else is, but it may be that the Court of Appeal has broken new ground by deciding that a repudiatory breach of contract can automatically terminate a contract even if the repudiation is not accepted by the innocent party. But it may also be that ships are different or that the ratio is something else entirely.

The facts were that cotton in containers was shipped to Chittagong in 2011. There the cotton and the containers remain because the consignee refused to accept them and the Bangladesh courts have granted various injunctions stopping anyone dealing with them. The containers belong to the carrier, and the relevant contract requires the shipper to redeliver the containers by a certain date (long gone) or to pay demurrage (ie liquidated damages) for each day of delay. The issue is whether the carrier could claim demurrage for ever or whether there was any limit. The containers are worth just over $3k; demurrage now runs to many times that sum.

The first instance judge decided that, from about three months after the containers arrived in Chittagong, the carrier was in repudiatory breach in failing to return the containers and that the carrier had no sufficient reason not to accept the shipper's repudiatory breach of contract (*White & Carter (Councils) Ltd v McGregor* [1962] AC 413). The contract therefore ended at that time, and with it the carrier's right to demurrage.

The Court of Appeal reached the same result, though they put the shippers' repudiation at about six months rather than three. The Court of Appeal's reasoning is, however, not the same. They did not regard this as a *White & Carter* type case where the issue was whether the shipper had a legitimate interest in continuing the contract (though, if necessary, the Court would have held that it did not). Instead, the Court of Appeal's thrust appeared to be that, after six months, the shipper was in repudiatory breach because of the delay. This delay, akin to frustration, rendered the remaining obligations under the contract radically different from those originally undertaken. Because the commercial purpose of the venture had been frustrated by the shipper's breach, performance by the shipper was impossible and the option of affirming the contract was no longer available to the carrier. It was as if the containers had been destroyed. The contract therefore ended, apparently automatically.

This analysis is not easy to follow. It seems to be contrary to the general positions that an innocent party has the right to choose whether to accept a repudiatory breach and terminate the contract or to continue with the contract (*White & Carter* is an established, if controversial, exception to this general principle) and that a party can't rely on its own wrongdoing. It may be that ships and shipping are different, but that is not a satisfactory explanation, or perhaps it should be treated as resting on the construction of the agreement. Time will tell.

More usefully, the Court of Appeal echoed other courts in rejecting the continuing attempts of the first instance judge, Leggatt J, to impose a general duty of good faith in English contract law. The Court of Appeal did not think it appropriate to look for some "general organising principle" of good faith and, indeed, observed that if a general principle were established, it would be invoked to undermine the terms which the parties had agreed.

Selling non-pups

Another misselling claim fails.

Marsden v Barclays Bank plc [2016] EWHC 1601 (QB) is a fairly routine swaps misselling claim. C settled his claims in 2011, but subsequently threw the legal book at the bank. The judge decided that the 2011 settlement of all claims "which arise

directly or indirectly, or may arise, out of or in any way connected with the Swaps" was enough to settle all claims, including fraud claims. Fraud might not have been pleaded, but it was sufficiently on the table at the time of the settlement to be covered by the settlement.

The judge also decided that, in any event, C's claim that D's misselling of swaps was so wide-ranging and contrary to regulation as to render C's swaps illegal or contrary to public policy was unarguable. Regulatory failings don't render swaps void. Similarly, D's conduct of the FCA's misselling review did not give rise to any rights, but in any event C had no ground for complaint. Generally, C's claims were hopeless.

Labour's love lost

An incumbent leader of the Labour Party does not require nominations to stand for his existing job.

The Labour Party's constitution forms a contract between its members. In *Foster v McNicol* [2016] EWHC 1966 (QB), one member sued to enforce the provisions of that contract regarding the election of the Party's leader and, in particular, to argue that an incumbent leader requires the same level of nominations from the Party's MPs and MEPs to stand in a leadership election as a challenger to him or her. The Party's governing body, the NEC, decided that an existing leader does not require any nominations.

The rules state: "(i) In the case of a vacancy for leader... each nomination must be supported by 15 per cent of the combined [MPs and MEPs]... (ii) Where this is no vacancy, nominations may be sought by potential challengers... In this case, any nomination must be supported by 20 per cent of the combined [MPs and MEPs]..." There is currently no vacancy, and so rule (ii) applies. Foskett J found the decision on the wording easy. Challengers must secure nominations in order to stand against the incumbent, but nothing in the rules says that the incumbent must also do so. The audience for the rules is ordinary Party members, and it required far too much subtlety to reach any other conclusion. Accordingly, Jeremy Corbyn can stand in the forthcoming leadership election without the difficulty of securing nominations from 20% of the Party's MPs and MEPs.

Another issue was whether the NEC's decision on the meaning of the constitution was final, as the constitution said, or whether the court could intervene on the basis that the rules could not oust the court's jurisdiction. Foskett J expressed scepticism as to whether a decision by the NEC on a point of law of this sort could be final, but, since he agreed with the NEC, he did not express a final view.

In *Evangelou v McNichol* [2016] EWHC 2058 (QB), Hickinbottom J expressed the same scepticism and, going further, decided that the jurisdiction of the courts to determine points of law, such as the proper interpretation of the Party's constitution, could not be excluded. The judge went on to hold that the NEC's decision that members voting in the leadership election must have been members since at least 12

Tort

Splits and divisions

There is a tort of malicious pursuit of civil proceedings.

In *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17, the Privy Council decided by a 3-2 majority that there is a tort of malicious prosecution of civil proceedings in Cayman law. The majority (Lords Wilson and Kerr and Lady Hale) and the minority (Lords Neuberger and Sumption) disagreed over just about everything, from legal history to legal policy and the likely consequences of the tort.

In *Willers v Joyce* [2016] UKSC 43, the Supreme Court decided by a 5-4 majority that there is a tort of malicious prosecution of civil proceedings in English law. The majority (Lords Toulson, Kerr, Wilson, Clarke and Lady Hale) and the minority (Lords Neuberger, Sumption, Mance and Reed) disagreed over just about everything, from legal history to legal policy and the likely consequences of the tort.

Majority rule means that the tort exists. It might even extend not just to the pursuit of legal proceedings by a claimant but also to a defence and to an interim application in the course of proceedings. The requirements for the tort seem to focus on the party having no "reasonable and probable cause" for bringing the case and being actuated by malice.

In order to have a reasonable and probable cause for bringing a claim, the party does not need to believe that its case will succeed but it does need to believe that, on the material on which it acted, there was a proper case to lay before the court. What this means in practice may be less easy.

Malice requires that the party deliberately misuses the process of the court, eg that the proceedings are brought in the knowledge that they are without foundation, that the party is indifferent whether an allegation is supportable or that the proceedings are not brought for the bona fide purpose of trying the issue but for some collateral reason.

Look out for threats of this tort. But bear in mind that it will be hard to prove.

January 2016 went beyond the NEC's powers. The Party's constitution allowed the NEC to make rules governing the procedure for the election, but not on substantive issues such as voting rights. The NEC's decision would have excluded about one quarter of the Party's membership, but they can now, subject to appeal, vote.

Illegality

Crime pays

A broad analysis of policy is required in order to determine whether a claim is barred for illegality.

The nine members of the Supreme Court were agreed on the outcome of *Patel v Mirza* [2016] UKSC 42. C and D had entered into a contract under which C paid D money to speculate on shares in a bank with the intention that D should do so on the basis of inside information that D expected to receive. No inside information was received and no shares were bought. But D refused to return the money paid by C, ultimately on the basis that the contract was clearly illegal and that courts should not help crooks who have fallen out. The Supreme Court rejected D's argument, seeing no reason to deprive C of his claim to the return of his money on grounds of unjust enrichment. This was not enforcing the illegal contract.

The reasoning of the judges did not display the same unity. It revealed, as the recent cases in the Supreme Court had already shown, "a long-standing schism between those judges and writers who regard the law of illegality as calling for the application of clear rules, and those who would wish [to] address the equities of each case as it arises" (Lord Sumption).

The latter – the take each case as it comes crew - were in the majority (6-3, maybe 5½-3½).

The reasoning of the majority (Lords Toulson, Kerr, Wilson and Hodge, Lady Hale and, generally, Lord Neuberger) was set out by Lord Toulson. He said:

> "... one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without a) considering the underlying purpose of the prohibition which has been transgressed, b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy."

The various factors that go into the mix in order to decide whether to bar a claim on grounds of illegality include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was a marked disparity in the parties' respective culpability. It is also necessary to bear in mind that punishment is the province of the criminal courts and regulators, not the civil courts.

The minority in reasoning (Lords Mance, Clarke and Sumption) considered this to be too vague - a discretion or unprincipled "value judgment, by reference to a widely spread mélange of ingredients about the overall "merits" or strengths", exhibiting far too much by way of "complexity, uncertainty, arbitrariness, and lack of transparency".

How lower courts will apply the Supreme Court's re-writing of the law is anyone's guess – but the recent history of cases on illegality indicates that it might not be without difficulty.

Regulation

Equality of opportunity

Fairness demands that a regulator treats parties in the same position consistently.

When the Competition and Markets Authority (as it now is) was investigating a supposed tobacco cartel, it settled with two groups of defendants, both of which paid fines. The settlement with the first of these groups was on the basis that if any other defendant appealed and won, this group would be given the benefit of that appeal. The second group didn't ask for this assurance and wasn't offered it. A third group appealed and won. The first group was then refunded its fine. When the second group found out about this, it too demanded a refund. The CMA refused.

In *Gallaher Group Ltd v Competition and Markets Authority* [2016] EWCA Civ 719, the Court of Appeal decided that the second group was entitled to be refunded its fine. Regulators were obliged to be consistent, and there were no material differences in the positions of the first and second groups. The argument that got the CMA home at first instance was that it had been a mistake to give the assurance to the first group (the needs of certainty and finality should have led the CMA to refuse), and the CMA should not be required to repeat that mistake. The Court of Appeal did not agree.

The Court of Appeal decided that the fact that the assurance given to the first group was a mistake (not seriously in dispute) was not a trump card for the CMA. The question was whether the less favourable treatment afforded to the second group was fair in all the circumstances. The CMA had expressly committed itself to treating the various tobacco parties equally, and it had not done so. This

was not a case of one official making a mistake (eg as to tax) that would then have to be replicated across millions. It was a confined area with a small repayment. There was no objective justification for a difference in treatment. The second group was therefore entitled to its repayment.

Sanctioned payments

Payment of a debt does is not dealing with the debt.

The sanctions against Libyan entities imposed two requirements: all funds belonging to or owned, held or controlled by the entities shall be frozen; and no funds shall be made available to or for the benefit of the entities (articles 5(1) and (2) respectively of Regulation 204/2011/EU, now 44/2016/EU). Funds include debts and guarantees, and freezing includes any alteration or dealing with funds that would result in any change in their amount, location, possession or character or that would enable the funds to be used. So is payment of a debt due under a guarantee blocked by the sanctions?

In *Libyan Investment Authority v Maud* [2016] EWCA Civ 788, the Court of Appeal thought that, in context, payment of a debt was not blocked by article 5(1) since paying a debt is not dealing with the debt; it is simply performing the obligation to which the debt gives rise. However, payment would fall within article 5(2), ie as making new funds available. Post-Gaddafi changes in the sanctions now allow new funds to be made available, so D could not use the sanctions as a reason not to pay.

Limitation

Collateral damage

The grounds upon which a contribution towards a settlement can be resisted are limited.

C sues D1 for follow-on damages in the light of a finding that D1 was part of a cartel; D1 denies liability but also pleads that C's claim is time-barred; C pleads in reply that, if its claim would otherwise be time-barred, D1 had deliberately concealed the cartel so as to bring the case within section 32 of the Limitation Act 1980, with the result that C's claim is not time-barred; D1 settles the case with C; D1 seeks a contribution towards the settlement sum from another of the cartelists, D2. What defences can D2 raise in order to resist D1's contribution claim?

This turns upon section 1(4) of the Civil Liability (Contribution) Act 1978. This provides that a person (D1) who has made a bona fide settlement is entitled to recover from another person liable for the same damage a contribution to the settlement "without regard to whether or not [D1] is or ever was liable in respect of that damage, provided, however, that [D1] would have been liable assuming that the factual basis of the claim against [D1] could be established." The purpose of this is to avoid putting D1 in the absurd position of having to prove against D2 that C's factual case against D1 was correct (a case that D1 denied), though D2 can, it seems, take points of law based on the assumed facts. But how far does the factual assumption in the proviso go? Does it mean that D1 must prove that C's claim was not time-barred because of section 32?

In *WH Newson Holding Ltd v IMI plc* [2016] EWCA Civ 773, the Court of Appeal decided that D2 could not raise the limitation point, overruling a couple of first instance decisions. The assumption in section 1(4) meant that all D1 must show in order to be able to obtain a contribution from D2 is that, as a matter of law, C's claim as set out in the Particulars of Claim would have succeeded. Defences raised by D1, whether on the basis of the facts pleaded by C or otherwise, were irrelevant, as were C's responses to those defences. All the Court of Appeal left open was the possibility of argument as to the quantum of C1's liability, about which section 1(4) makes no assumption.

Immunity

Consular access

Premises used for consular purposes are immune from enforcement.

Premises owned by a state and used for consular purposes (issuing passports and visas etc) are not in use for commercial purposes and therefore cannot be the subject of action to enforce a judgment debt. That much is obvious. But what if the state leases in return for rent the premises to a commercial entity, which carries out for a fee the consular activities for the state? Are the premises then in use by the state for commercial purposes as required by section 13(4) of the State Immunity Act 1978 such that enforcement measures can then be taken against the premises?

No, according to *LR Avionics Technologies Ltd v The Federal Republic of Nigeria* [2016] EWHC 1761 (Comm). It is the purposes of the state that count, not those of the commercial entity. The issue of passports etc is not a commercial activity, and does not become so even if the state uses a for-profit entity to carry out that activity. The English courts therefore continue their approach of taking a rather restrictive attitude to the State Immunity Act, making it very difficult to enforce against a sovereign in England.

Brexit

Fifty shades of grey

A notice under article 50 of the TEU may, or may not, be revocable.

The Treaty on European Union has historically been terra incognita so far as the real world is concerned, a

place where dragons roam. But everyone is now an expert on article 50 of the TEU (even if some make the mistake of calling it article 50 of the Lisbon Treaty).

Article 50 provides the mechanism for member states to leave the EU. Whether the Government can serve the withdrawal notice required by article 50 notice under the Royal prerogative or whether an Act of Parliament is needed will be decided at a hearing before the Lord Chief Justice in mid-October, with the possibility of a direct appeal to the Supreme Court, leap-frogging over the Court of Appeal.

One related point is whether an article 50 notice can be revoked, ie whether the UK could serve the notice but later change its mind about leaving the EU. If the Supreme Court were to decide that the prerogative/Act issue turned on the revocability of an article 50 notice, the Supreme Court would be obliged to refer the question of revocability to the Court of Justice of the European Union for decision since revocability is a matter of the proper interpretation of the TEU. The absurdity of asking the CJEU what the UK's constitutional requirements are for leaving the EU will surely make the Supreme Court keen to avoid that conclusion.

Article 50 is silent on revocability: it doesn't say that notice can be revoked, and it doesn't say that notice can't be revoked. Does silence grant consent or impose a prohibition? The prevailing, if tentative, view is probably that revocation of an article 50 notice is possible because the EU has no reason to cleave from its bosom a member state that has genuinely seen the error of its departing ways. Article 68 of the Vienna Convention on the Law of Treaties also says that notices of withdrawal from a treaty may be revoked at any time before it takes effect.

But the textual indications could, arguably, point in the other direction. Article 50(2) says that the EU's treaties "shall cease to apply to the State in question... two years after the notification" unless this period is extended by unanimous agreement. Does the notification cease to be such for these purposes if a member state purports to withdraw it? Could a state intending to depart buy extra time by serving notice under article 50, withdrawing it 23 months later, and serving a new notice? This latter issue may be solved by the implication of a requirement of good faith, perhaps "sincere cooperation" under article 4 of the TEU.

Ultimately, no one can be sure what the answer is. Absent clear wording, the CJEU could reach either conclusion without contrivance. Which answer the CJEU would give, if asked, will depend upon the politics – judicial and otherwise – at the time.

But one argument that can be dismissed with greater certainty is that put by the more extreme Brexiteers, namely that the UK need not invoke article 50 but, instead, can leave the EU immediately under article 62 of the VCLT (other arguments based on the VCLT, such as under article 54, require the consent of all parties, which will not be forthcoming).

Article 62 allows a party to renounce a treaty if there has been a "fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of the treaty, and which was not foreseen by the parties" provided that those circumstances "constituted an essential basis of the consent of the parties to be bound by the treaty" and "the effect of the change is radically to transform the extent of obligations still to be performed". The argument runs that the referendum result is a fundamental change of circumstances within the meaning of article 62. This is clearly wrong. The possibility of an EU member state deciding to leave the EU was foreseen by the parties to the TEU – that is what article 50 is about – and the referendum has had no effect, let alone a radically transformative effect, on the UK's future obligations under the TEU or TFEU.

So article 50 it is. But the road to service of the article 50 notice is anything but Roman; and the route after service of the notice is shrouded in a greater mystery.

Contentious Commentary is a review of legal developments for litigators

Contacts

Simon James
Partner

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

Anna Kirkpatrick
Senior PSL

T: +44 20 7006 2069
E: anna.kirkpatrick
@cliffordchance.com

Susan Poffley
Senior PSL

T: +44 20 7006 2758
E: susan.poffley
@cliffordchance.com

CLIFFORD
CHANCE