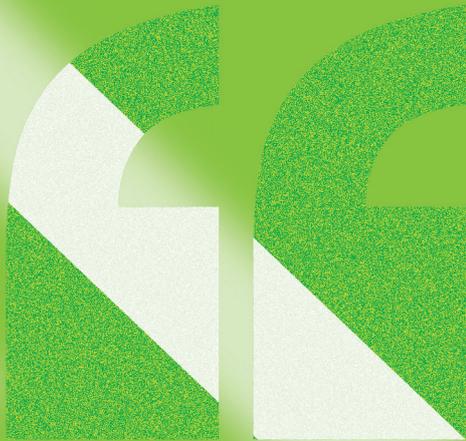


C L I F F O R D

C H A N C E



BREXIT
IMPLICATIONS
FROM THE
UK GENERAL ELECTION



— **THOUGHT LEADERSHIP**

JUNE 2017



BREXIT

Implications from the UK General Election

The inconclusive outcome of the UK's general election on 8 June 2017 has magnified the uncertainties surrounding Brexit. For business those uncertainties mean that the prudent planning assumption remains that Brexit will happen and that it may be hard. Equally, business must ensure that the Government understands the needs of business.

Key Issues

- No party has an overall majority
- The Conservative Government will be reliant on the DUP
- The question is what Brexit should look like, not whether it should happen
- All options for Brexit are back on the table in the UK
- Negotiations between the UK and the EU could face considerable difficulties

The “great city”, according to Walt Whitman as long ago as 1856, is “where the populace rise at once against the never-ending audacity of elected persons”. The populace of Great Britain, along with that of Northern Ireland, certainly rose on 8 June 2017 against the audacity of elected persons. The populace's uprising has, however, increased the challenges faced by those elected persons in seeking to execute the populace's wish, expressed a year earlier, to extricate the UK from over 40 years of ever closer union within the EU. Parliament will need to be involved in the process of withdrawal from the EU – new laws and political consent will be necessary – but the lack of a clear Parliamentary majority for any political party and the lack of a consensus as to what the UK's future outside the EU should look like will make political engagement within the UK anything but easy. And that's before the UK's negotiators cross the Channel to discuss withdrawal with their EU counterparts.

In theory, 326 MPs are required to form a majority, but Sinn Fein members do not, as a matter of principle, take their seats, reducing the number of sitting MPs from 650 to 643. Neither the Speaker of the House of Commons nor his two deputies vote, reducing the effective number of MPs to 640 (but also reducing the Conservatives by two and Labour by one). A majority is, therefore, 321 MPs, with the Conservatives having 316 voting MPs, still five short of an overall majority. Hence the need for the Conservatives to find a partner in order to offer them some hope of controlling the House of Commons.

The Conservatives' chosen partner, and the only one realistically available, is the Democratic Unionist Party, which has ten MPs for constituencies in Northern Ireland. The DUP was established by the (late) Rev Ian Paisley as the political expression of the church he founded, the Free Presbyterian Church of Ulster. The party came to the fore by opposing any form of compromise with Irish (Catholic) nationalists, whether in the Sunningdale Agreement of 1974, the Anglo-Irish Agreement of 1985 or the Good Friday Agreement of 1998, before reaching a power-sharing agreement with Sinn Fein within the Northern Ireland executive in 2007. The DUP has always opposed the UK's membership of the EU, and, consistently with that position, supported Brexit in the referendum of 23 June 2016 (despite which, a majority in Northern Ireland voted to remain in the EU).

The election result

Conservatives 318 (-13)

Labour 262 (+30)

SNP 35 (-21)

Liberal Democrats 12 (+4)

DUP 10 (+2)

Sinn Fein 7 (+3)

UKIP 0 (-1)

Others 6 (-5)

The election result

The UK general election results are set out in the Schedule to this briefing. One can speculate as to the reasons why the outcome was as it is rather than as expected: UKIP an irrelevance but two-thirds of its former vote (re)turning to Labour rather than to the Conservatives? a higher than anticipated youth vote? the quality of the campaigns? Whatever the reason, no party has an overall majority in the House of Commons.

Confidence and supply

In the 2010 general election, no single party secured an overall majority in the House of Commons. On that occasion, the largest party, the Conservatives again, entered into a formal coalition with the Liberal Democrats. This coalition involved both parties agreeing on the coalition Government's programme, and both Conservatives and Liberal Democrats taking posts within that Government. At the 2015 general election, the Liberal Democrats were reduced from 57 seats in the House of Commons to nine, leaving the Conservatives with a working majority of 15.

The Conservatives will not enter into a coalition agreement with the DUP. Instead, the Conservatives and the DUP will, it seems at the time of writing, reach a "confidence and supply" arrangement. This will provide for the DUP to vote with the Conservative party if there is a vote of no confidence in the Government and in order to ensure that the Government can raise money through taxation to fund Government activities, but it allows the DUP to choose whether to support other Government measures on an issue by issue basis.

The need for this arrangement gives the DUP far more influence than its ten MPs would normally enjoy, at least if the other parties represented in the House of Commons are organised and united in their opposition to the Government.

The price of the DUP's support is likely to be Government support for measures favoured by the DUP. This could include, for example, higher public expenditure in Northern Ireland, even though expenditure there in 2015/16 was already £5437 per head greater than revenue (in contrast, public sector expenditure in London was £3070 per head lower than revenue).

Without DUP support, the Government could struggle to secure the passage of legislation through Parliament. The Government's small majority (even with the DUP on board) also gives power to

backbench Conservative MPs since it would take only five of them to rebel against the Government in order to extinguish the Government's majority (again, assuming a united opposition). This has the potential to make the process of government unstable. Conservative MPs opposed to the EU have a long history of challenging their own Governments by siding with the opposition on key votes, most notably during Prime Minister John Major's Governments of 1990 to 1997, and it was internal Conservative Party friction that led to the Brexit referendum.

The parties' position on Brexit

None of the main parties is seeking to challenge the EU referendum result. The consensus is that the 51.9% vote in favour of Brexit on 23 June 2016 means that the UK must leave the EU. The Liberal Democrats' manifesto for the 2017 general election advocated a second referendum, but (despite increasing its number of MPs from eight to twelve, on a reduced share of the vote) this did not obtain much traction with the electorate. The main parties are committed to delivering Brexit. The question is what Brexit means.

The Conservative's policy set out in its manifesto for the 2017 general election was, unsurprisingly, the same as the previous Conservative Government's, ie withdrawal from the EU's single market and customs union, control over immigration, and the removal of the UK from the jurisdiction of the Court of Justice of European Union. The Conservatives also stressed that they would seek a "deep and special partnership" with the EU, while also maintaining that "no deal is better than a bad deal for the UK".

Any reliance on the Conservative manifesto by the Government will now have to be governed by the politics of the possible. If a measure won't secure support in the Commons, it will be

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“pruned” in the words of a senior Government minister. Whether this means that the Government will be more open, for example, to staying in the customs union, either as an interim measure or permanently, or softening its policy on immigration remains to be seen, but the Government will be susceptible to pressure from those favouring a softer Brexit, as well as to pressure from those who want a clean break with the EU.

The Labour Party’s manifesto, equally unsurprisingly, condemned the policies of the previous Conservative Government, but its approach overlapped in practice. “We will... have a strong emphasis on retaining the benefits of the Single Market and the Customs Union” (a deep and special partnership?) but “[we] will reject “no deal” as a viable option and if needs be negotiate transitional arrangements to avoid a “cliff-edge” for the UK economy”. Seeking to retain the benefits of the single market and the customs union is not the same as seeking to stay within them. The Labour Party does not want to

remain in the single market, though comments from some senior figures may, perhaps, indicate a more flexible approach to the customs union.

The DUP’s manifesto for the 2017 election was more aspirational than specific (13 pages, against the Conservatives’ 88 and Labour’s 128). It said that the DUP would seek “ease of trade with the Irish Republic and throughout the European Union”, a “frictionless border with the Irish Republic for those working or travelling in the other jurisdiction”, a “[c]omprehensive free trade and customs agreement with the European Union”, and to make “Northern Ireland... a hub for trade from Irish Republic into the broader UK market” with “no internal borders” in the UK. At the same time it also wanted “[p]rogress on new free trade deals with the rest of the world” and “[c]ustoms arrangements which facilitate trade with new and specific markets”.

The Good Friday Agreement

It has been suggested that the proposed Conservative confidence and supply arrangement with the DUP places the UK in breach of the Good Friday Agreement (also called the Belfast Agreement) of 1998 between the UK and Ireland. This argument rests on the commitment by the two Governments that, whether Northern Ireland remains part of the UK or joins the Republic, “the power of the sovereign government... shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities” (ie the protestant/unionist and Catholic/nationalist communities).

The mere entry into a confidence and supply arrangement with the DUP will not breach this commitment. It is what the Government actually does that matters. One policy mentioned in this context is the possible banning of overseas donations to political parties in Northern Ireland. Sinn Fein receives significant funding from the US. However, this measure would merely bring Northern Ireland into line with the rest of the UK. Just because it might affect nationalists more than unionists would not necessarily mean that it affected the “diversity of their traditions”, their “civil rights” or their “identity, ethos, and aspirations” within the meaning of the Good Friday Agreement.

Relations between the DUP and Sinn Fein are not good. Early in 2017, Sinn Fein pulled out of the power-sharing executive with the DUP in the wake of a scandal over renewable heat incentives. Despite a subsequent election in Northern Ireland, there is still no Northern Ireland executive in place, raising the possibility of direct rule from Westminster.

Press comment has argued that the Prime Minister may be forced to soften her attitude to Brexit – most MPs were opposed to Brexit and are likely to favour a gentle departure slope rather than a more vertiginous drop. A former leader of the Conservative Party, Lord Hague, even suggested that a cross-party commission should be set up to take charge of Brexit, an idea also floated by some Labour politicians and by the SNP. That is probably unlikely: what Government would willingly cede control of the main political and economic issue affecting the country? But the arithmetic in the House of Commons may force the Government to explore what form of Brexit will actually secure a majority, which will require at least consideration of the views of opposition MPs, even discussions with them (whether formal or informal). The European Communities Act 1972 was only passed by the then Conservative Government in the face of Labour Party hostility with the aid of a significant number of europhile opposition MPs.

The EU's position on Brexit

What the UK's political parties would like Brexit to mean is, of course, only half the story (if, indeed, it is that much).

The withdrawal agreement, customs union, the single market and any other "soft" deal with the EU must be agreed with the EU (and possibly others), and a deal must be struck before 29 March 2019 (and, in reality, well before that) if there is to be an agreement at all. Absent agreement, the UK will leave the EU at midnight on 29/30 March 2019, trading with the EU on World Trade Organisation terms (though departure can be delayed if the UK and all members of the EU agree to put back the date). Time is not the UK's friend.

Negotiations between the EU and the UK are scheduled to begin on 19 June 2017. The EU has laid down three initial priorities for the negotiations, which it demands be resolved (or, at least, "sufficient progress" be made) before it will move on to trade talks. These priorities are EU citizens in the UK and vice versa, money and the Irish border. The EU's chief negotiator, Michel Barnier,

has reiterated since the election that the sequencing of negotiations is non-negotiable. At the same time, the EU has taken its customary approach to all negotiations, namely that they should be "conducted as a single package" in which "nothing is agreed until everything is agreed".

It is hard to believe that a deal cannot be reached on citizens' rights. It may well be unacceptable to create what one former judge of the CJEU described as "a super-privileged caste in the future UK (as will the UK migrants in the EU Member States)" with special rights enduring for ever, but there is a mutuality of interest between the UK and the EU in ensuring the fair and equitable treatment of their respective citizens who have exercised their rights to live and work in other EU member states. Even with the UK's stated desire to control immigration, with good will a deal can be found.

Money is more difficult. The EU's negotiating guidelines demand a "single financial settlement... [covering] all [the UK's] legal and budgetary commitments as well as liabilities, including contingent liabilities". There are legal uncertainties as to what, if any, liabilities the UK might have on withdrawal from the EU (see our March 2017 briefing entitled *Brexit: Will the UK have to pay to leave the EU?*) but demands by the EU for an upfront payment in a sum even approaching that quoted in the press (up to EUR100 billion) could prove politically difficult even for the most europhile politicians in the UK.

The sequencing required by the EU for the money discussions could exacerbate this problem. UK politicians may feel able to agree to pay something to the EU in return for a satisfactory trade deal, but being forced to agree what that payment should be at the outset – the ultimate zero sum game – without knowing what, if any, trade agreement will be achieved could be more difficult.

This is not to say that money cannot be agreed. For example, whether and, if so, what the UK is obliged to pay the EU and vice versa could be treated as a legal issue and, as such, referred for resolution

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to an international tribunal, whether an existing one or an ad hoc tribunal established for the purpose, though this may require some finessing of the CJEU's requirement that it be the ultimate arbiter of EU law. Negotiations on other matters could then take place in parallel with the legal proceedings. However, the EU may be reluctant to relinquish this negotiating card. Legalising the money issue in this way would remove the political and economic pressure on the UK as to the price for departure, which could (given that international legal procedures are seldom fast) create a hole in the EU budget as early as 2019.

The position of Northern Ireland and the Irish Republic could also pose problems for the negotiations, particularly given the Conservative Government's reliance on the DUP. If the UK leaves the EU with no deal, *prima facie* there will be a hard border between Northern Ireland and the Republic at which customs duties will be payable on imports going in both directions. The EU's negotiating guidelines say that "flexible and imaginative solutions will be required, including with the aim of avoiding a hard border, while respecting the integrity of the [EU's] legal order". If the UK were to join the customs union, that might solve the problem, as might offering some sort of special status to Northern Ireland (though whether either of these would be compatible with the DUP's manifesto is open to question). Alternatively, technological solutions may be available to avoid the principal objections to a hard border.

The triple issues of citizens, money and the Irish border pose significant challenges for both the UK and the EU. It is possible that negotiations could break down on one or more of these issues before discussions even touch on trade issues. Equally, with good will, it may be possible for the negotiators to resolve those three issues and move on to agree transitional arrangements (an "implementation phase", as the Conservatives call it) or even substantive agreements as to the future. But what the negotiators agree will then need to be returned to the politicians to enact.

The UK politics of withdrawal

Any withdrawal agreement between the UK and the EU will need the approval of the House of Commons (also of the European Parliament), as will any agreement on future trade and other relations. Brexit could come in many different shapes – whether staying within the single market, staying within the customs union, moving to an EFTA/EEA model, being more flexible on freedom of movement, adopting a Ukraine-like model, leaving the EU with no deal, or something else altogether. The inconclusive election has brought all options back into play in UK politics. But again UK politics is only one aspect of the issue. Unless it wishes to withdraw with no substitute agreements in place, the UK does not have sovereignty of action. For example, if the UK wanted to join EFTA, that would require the consent of the existing members of EFTA, and staying in the EU's customs union would require the EU's consent, with whatever price tag the EU chose to place on its consent.

It is questionable whether there is a majority within the House of Commons for any one particular form of Brexit. This could raise the risk that even if an agreement is reached, it will be rejected by Parliament. Rejection may in reality be implausible because any deal with the EU is likely to be available only on a take it or leave it basis, even if Members of Parliament might wish it otherwise. Politicians may dislike this or that aspect of the deal, but the possibility of renegotiation with the EU will in practice be slim (unless an agreement is reached with wholly unforeseen haste). It may be possible to involve politicians in the negotiations – at least to keep them informed – but ultimately the choice is likely to be between the deal on offer, warts and all, or no deal. There may be some who would prefer no deal ("no deal is better than a bad deal for the UK"), but they are unlikely to form a majority in the House of Commons – assuming, at least, that the deal has enough attractions and incentives in it.

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A breakdown of negotiations between the UK and the EU at a relatively early stage would bring political pressure on the Government, as would the subsequent rejection of any deal reached by the Government. Would the DUP remain committed to the Conservative Government in those circumstances? The DUP has a eurosceptic heritage, but its position might depend upon who was perceived to be to blame for the collapse or rejection. If the DUP were to continue to back the Conservative Government, it could create a Government that could survive votes of no confidence, but which struggled to secure the passage of substantive measures through the House of Commons.

The threat of the Government falling and another general election would likely bring a leadership challenge to Theresa May or her resignation since it is widely reported that many Conservative MPs are reluctant to contemplate another general election campaign under Mrs May's leadership after the disappointment of the last one. Mrs May's weakened position has already been shown by the removal of her two closest lieutenants immediately after the election, her inability to reshape significantly her Cabinet and her mea culpa to the backbench MPs of the 1922 Committee. Any leadership vacuum or general election could produce a hiatus in the UK's negotiations with the EU – at the least, uncertainty as to who can agree what or whether deals already provisionally made would be reopened.

A challenge to the Conservative leader can be triggered if 15% of MPs write to the Chairman of the 1922 Committee of backbench MPs saying that they have no confidence in the leader. If this is done, MPs select two of their number between whom the party membership as a whole then chooses. The fact that the leader must be an existing MP prevents, for the time being, the popular leader of the Scottish Conservatives, Ruth Davidson, from standing.

Revocation of the UK's article 50 notice?

Ms Davidson's relative success in Scotland has seen off any imminent risk of a second Scottish independence referendum, which had been demanded by the SNP, but another possibility, though undoubtedly remote at the moment, is a second referendum on Brexit. It is hard to find any appetite for another referendum within the leaderships of either of the main parties. Including this in their manifesto did not bring many votes to the Liberal Democrats at the general election, and their leader has now resigned. However, staring at a hard Brexit, whether because there is no agreement with the EU or because a deal has been rejected, could possibly bring fresh focus to the minds of some politicians (or even inspire more Machiavellian politicians to reject a deal).

If there were a new referendum and if the decision of 2016 were to be reversed, that begs the question of whether the UK could then revoke its withdrawal notice given under article 50 of the Treaty on European Union. The wording of article 50 might suggest not, but the person responsible for drafting article 50 (Lord Kerr) is insistent that notice was intended to be revocable. The fate of UK's membership of the EU would then depend upon a decision of the CJEU or the agreement of the 27 (other) EU member states.

The Great Repeal Bill

The Government is expected to introduce the Great Repeal Bill into Parliament shortly. This will provide for the continuation of EU law within the UK after Brexit, subject to changes necessary to make it work in practice. There will also be a number of other pieces of substantive legislation (up to fifteen bills have been suggested) where policy changes to existing EU law are required as a result of Brexit (eg customs and immigration).

Any leadership vacuum or new general election could produce a hiatus in the UK's negotiations with the EU.

Ultimately, some form of legislation that domesticates EU law is necessary.



The Labour Party's manifesto for the 2017 general election said that it "would drop the Conservative's Great Repeal Bill, replacing it with an EU Rights and Protections Bill that will ensure there is no detrimental change to workers' rights, equality law, consumer rights or environmental protections as a result of Brexit. Throughout the Brexit process, we will make sure that all EU-derived laws that are of benefit – including workplace laws, consumer rights and environmental protections – are fully protected without qualifications, limitations or sunset clauses." This enunciates clearly an intention to oppose the Great Repeal Bill, an intention that has been repeated since the election, but whether there is any substantive difference in approach may be more questionable. For example, the Conservative manifesto declares that "workers' rights conferred on British citizens from our membership of the EU will remain".

Nevertheless, the Great Repeal Bill and other legislation to domesticate EU law on Brexit could face a difficult passage through Parliament. If the opposition parties are united in opposing the Government's measures, it would only take a small number of Conservative MPs to enter the opposition voting lobbies to defeat the Government. Areas such as the extent of the flexibility to be allowed to the executive to amend EU law in the course of domestication could be highly contentious, and the Government may be forced to give Parliament a greater role than it might otherwise have wished.

The House of Lords may prove an unknown quantity so far as legislation is concerned. The Salisbury Convention provides that the House of Lords (which is not elected) will not reject measures approved by the House of Commons that were set out in the governing party's election manifesto. This self-denial reflects the democratic mandate given to the Government by the electorate, but whether all members of the House of Lords would feel that it applies to the manifesto of a minority Government is a different matter.

Ultimately, however, some form of legislation that domesticates EU law is necessary (see our March 2017 briefing entitled *Brexit: What will the Great Repeal Bill do?*). If there were none, EU directives enacted into domestic law might continue in place, though those that rely on mutuality or that refer to EU institutions may become hard, even impossible, to apply in practice, but EU regulations that are directly applicable in UK law would fall away, potentially leaving a gap in some aspects of UK law.

The possibility of Brexit without a Great Repeal Bill, whether under that name or another, is hard to contemplate. Nevertheless, the uncertain, potentially febrile, atmosphere of minority politics may make it a possibility. Responsible politics requires that something be done, but an agreement as to exactly what that is may be harder to identify.

Conclusion

The UK's general election has not (so far) called Brexit itself into question, but it has reopened debate within the UK as to what Brexit means, adding to the numerous uncertainties already surrounding Brexit. For business, the only prudent planning assumption is that Brexit will happen and that the landing may be hard, but it is equally important for business to ensure that the Government understands what business needs from Brexit in order to continue to generate wealth for the UK.

Schedule

The results of the UK general election held on 8 June 2017

United Kingdom

Party	Seats	Seats +/-	% vote	% +/-
Conservative	318	-13	42.4%	+5.5%
Labour	262	+30	40.0%	+9.5%
Scottish National Party	35	-21	3.0%	-1.7%
Liberal Democrats	12	+4	7.4%	-0.5%
Democratic Unionist Party	10	+2	0.9 %	+0.3%
Sinn Fein	7	+3	0.7%	+0.2%
UKIP	0	-1	1.8%	-10.8%
Other	6	-5	3.8%	-2.5%
Total	650			

England

Party	Seats	Seats +/-	% vote	% +/-
Conservative	297	-22	45.6%	+4.6%
Labour	227	+21	41.9%	+10.3%
Scottish National Party	-	-	-	-
Liberal Democrats	8	+2	7.8	-0.4%
Democratic Unionist Party	-	-	-	-
Sinn Fein	-	-	-	-
UKIP	0	-1	2.1%	-12.1%
Other	1	0	2.6%	-1.8%
Total	533			

Scotland

Party	Seats	Seats +/-	% vote	% +/-
Conservative	13	+12	28.6%	+13.7%
Labour	7	+6	27.1%	+2.8%
Scottish National Party	35	-21	36.9%	-13.1%
Liberal Democrats	4	+3	6.8%	-0.8%
Democratic Unionist Party	-	-	-	-
Sinn Fein	-	-	-	-
UKIP	-	-	-	-
Other	0	0	0.3%	+0.2%
Total	59			

Schedule

The results of the UK general election held on 8 June 2017

Wales

Party	Seats	Seats +/-	% vote	% +/-
Conservative	8	-3	33.6%	+6.3%
Labour	28	+3	48.9%	+12.1%
Scottish National Party	-	-	-	-
Liberal Democrats	0	-1	4.5%	+4.5%
Democratic Unionist Party	-	-	-	-
Sinn Fein	-	-	-	-
UKIP	0	0	2.0%	-11.6%
Other	4	+1	11.0%	+0.8%
Total	40			

Northern Ireland

Party	Seats	Seats +/-	% vote	% +/-
Conservative	-	-	-	-
Labour	-	-	-	-
Scottish National Party	-	-	-	-
Liberal Democrats	-	-	-	-
Democratic Unionist Party	10	+2	36.0%	+10.3%
Sinn Fein	7	+3	29.4%	+4.9%
UKIP	-	-	-	-
Other	1	-5	34.6%	-12.3%
Total	18			

CONTACTS



Simon James
Partner
London
T: +44 20 7006 8405
E: simon.james@cliffordchance.com



Chris Bates
Partner
London
T: +44 20 7006 1041
E: chris.bates@cliffordchance.com



Kate Gibbons
Partner
London
T: +44 20 7006 2544
E: kate.gibbons@cliffordchance.com



Jessica Gladstone
Partner
London
T: +44 20 7006 5953
E: jessica.gladstone@cliffordchance.com



Simon Gleeson
Partner
London
T: +44 20 7006 4979
E: simon.gleeson@cliffordchance.com



Dan Neidle
Partner
London
T: +44 20 7006 8811
E: dan.neidle@cliffordchance.com



Mark Poulton
Partner, Head of Corporate
London
T: +44 20 7006 1434
E: mark.poulton@cliffordchance.com



Phillip Souta
Head of UK Public Policy
London
T: +44 20 7006 1097
E: phillip.souta@cliffordchance.com



Malcolm Sweeting
Senior Partner
London
T: +44 20 7006 2028
E: malcolm.sweeting@cliffordchance.com

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C H A N C E

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London, E14 5JJ

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