

# COMMERCIAL BAR ASSOCIATION BREXIT REPORT ARBITRATION SUB-GROUP

## COMBAR Brexit papers

*Members of COMBAR are leading specialists in many of the areas of commercial legal practice that will or may be impacted by Brexit. A series of detailed papers explaining the potential effect of Brexit on these areas of practice have been produced by teams of COMBAR members, in some cases working with non-COMBAR specialists including solicitors, academics and retired judges in the following areas:*

- 1. Conflicts of Laws, Jurisdiction, Choice of Court Agreements, Choice of Law, Service of Legal Process and Judicial Assistance in Taking of Evidence.*
- 2. Banking.*
- 3. Financial Services.*
- 4. International Arbitration.*
- 5. Competition.*

*These papers were recently submitted to the Ministry of Justice following a meeting with the Lord Chancellor in December attended by a number of members of the COMBAR Brexit Committee. They are now being made available on the COMBAR website. Anyone is welcome to read them and to disseminate them on the understanding that, in doing so, the fact that they were produced by COMBAR will be acknowledged.*

*A second tranche of papers on other areas of legal practice affected by Brexit will be provided in the near future.*

<b>Authors / Contributors</b>	<b>3</b>
<b>Introduction</b>	<b>4</b>
<b>The current state of the arbitration market in London</b>	<b>6</b>
<b>Jurisdiction and Applicable law</b>	<b>9</b>
<i>Jurisdiction</i>	<i>9</i>
<i>Applicable law</i>	<i>14</i>
<b>Investment arbitration</b>	<b>17</b>
<i>Intra-EU treaties</i>	<i>18</i>
<i>Third party States treaties</i>	<i>21</i>
<b>Access to the UK arbitration market</b>	<b>23</b>
<b>Access by UK lawyers to the EU legal services market</b>	<b>29</b>

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## INTRODUCTION

1. London has been a dominant seat<sup>1</sup> for arbitrations in the maritime and insurance sectors for decades. Over the past 20 years London has become universally recognised as one of the dominant seats for the resolution of international commercial disputes of all varieties by arbitration.
2. There is no substantial reason to suppose that the United Kingdom's withdrawal from the European Union should have a substantial impact on the appeal of London as a seat for the arbitration of international commercial disputes. The principal domestic and international instruments governing the enforcement of arbitration agreements and arbitration awards and the other factors influencing the appeal of London as a seat for international arbitration are unaffected by Brexit<sup>2</sup>.
3. Nevertheless, there are no grounds for complacency. Unless steps are taken to cement or improve London's reputation, the general uncertainties caused by Brexit may lead some to question whether to continue to prefer London as a seat for the resolution of their disputes.
4. In the following sections of this report we first provide some general information regarding the state of arbitration in London explaining our optimism. Next, we consider particular issues concerning the recast Brussels and Rome I and Rome II Regulations. We then examine the effect of Brexit on investment arbitration. Finally,

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<sup>1</sup> The word "seat" refers to the juridical seat of the arbitration. Typically, this will be designated in the arbitration agreement itself.

<sup>2</sup> See generally Section A below

we review the current immigration rules providing access to the UK arbitration market and the need for UK lawyers to access the EU market.

5. In summary, we conclude there are some relatively modest steps which might be taken by the UK Government to cement or improve London's reputation, namely:
  - a) at least as a transitional measure, the replication in domestic legislation of the Rome I and Rome II Regulations relating to conflict of laws rules for contractual and non-contractual claims; and
  - b) the making of relatively modest adjustments to the Immigration Rules to clarify that the existing permitted activities and paid engagement rules apply to arbitral proceedings and arbitrators.

In addition, we agree with the recommendations of the working group considering jurisdiction, choice of law and service issues and the Bar Council's paper on Access to the EU legal services market.

## THE CURRENT STATE OF THE ARBITRATION MARKET IN LONDON

6. Respondents to a recent (2015) survey by White & Case LLP and Queen Mary, University of London<sup>3</sup> revealed that London was both the most used<sup>4</sup> and the preferred<sup>5</sup> seat for arbitration<sup>6</sup>. That is unsurprising.
7. In the first place, English law remains a popular choice for parties to international contracts. Broadly speaking, the popularity of English law derives from its relative predictability and sophistication, its reputation for giving effect to the bargain reached between the contracting parties and the justified reputation of English judges as independent and expert. London is the natural seat for the resolution of disputes arising out of contracts governed by English law.
8. Second, the Arbitration Act 1996 provides a stable and satisfactory underpinning for arbitrations conducted in London. This is not the place for an exposition of the detailed provisions of the 1996 Act, but suffice it to say that it affords parties substantial autonomy in the conduct of their disputes and discourages judicial intervention in arbitration proceedings, save where that is strictly necessary to support the arbitral process.

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<sup>3</sup> <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>

<sup>4</sup> The ranking was London (45%), Paris (37%), Hong Kong (22%), Singapore (19%), Geneva (14%), New York (12%), Stockholm (11%)

<sup>5</sup> The ranking was London (47%), Paris (38%), Hong Kong (30%), Singapore (24%), Geneva (17%), New York (12%), Stockholm (11%)

<sup>6</sup> See also *The Current State and Future of International Arbitrations: Regional Perspectives IBA Arb 40 Subcommittee* report which identifies the international popularity of London as a seat for arbitration: <http://www.ibanet.org/Document/Default.aspx?DocumentUid=2102ca46-3d4a-48e5-aa20-3f784be214ca>

9. Third, the United Kingdom acceded to the New York Convention<sup>7</sup> in 1975. The New York Convention is the principal instrument governing the enforcement of arbitration agreements and arbitration awards internationally. 156 countries (including the UK and all other current members of the EU) are parties to it<sup>8</sup>.
10. Fourth, the English Courts have specialist expertise in the wide-range of commercial disputes that are arbitrated and are unapologetically supportive of the arbitral process, both prior to the commencement of proceedings, during their course and on the enforcement of arbitration awards.
11. Fifth, the market for legal services in London is highly sophisticated. Many of the world's leading law firms are head-quartered in London and most (if not all) of the leading firms have a presence in London. Further, the English Commercial Bar enjoys a well-justified international reputation for the quality of its advocacy. At the same time, there are no restrictions on lawyers from other jurisdictions exercising rights of audience before arbitral tribunals in London, which is of particular importance in international cases<sup>9</sup>.
12. Finally, some of the leading arbitral institutions are situated, or have a strong presence, in London. The principal institutions administering arbitrations in London are the London Court of International Arbitration ("the LCIA") and the International Chamber of Commerce ("the ICC"). In addition, there is a large volume of

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<sup>7</sup> The UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958

<sup>8</sup> There were 24 original signatories of the New York Convention. 126 countries (including the UK) have subsequently acceded to the New York Convention. A further 6 countries have become parties to the New York Convention by succession.

<sup>9</sup> See *e.g.* paragraph 46.b) below.

arbitrations undertaken under the rules of the London Maritime Arbitrators' Association ("the LMAA") and a large number of ad hoc arbitrations which are not governed by any institutional rules.

13. None of the characteristics of the English arbitration system described above will be affected by Brexit. Accordingly, there is no substantial reason to suppose that the UK's withdrawal from the EU will have a significant impact on the attractiveness of London as a seat for the arbitration of international commercial disputes. Indeed, if and to the extent that the choice of English Court jurisdiction reduces as a result of actual or perceived difficulties relating to the enforcement of Court judgments, it is reasonable to assume that there will be a correlative increase in the use of arbitration<sup>10</sup>.

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<sup>10</sup> It should, however, be noted that some elements of the arbitration process (its confidentiality, the limited rights of appeal, the difficulties of joining third parties and so on) mean that arbitration cannot provide an appropriate replacement in all types of commercial dispute.

## **JURISDICTION AND APPLICABLE LAW**

14. A separate working group of the Commercial Bar Association is considering in depth the effect of Brexit on jurisdiction, choice of law and service issues. We agree with the conclusions reached by that group. Nevertheless, we discuss below the “arbitration exception” under the recast Brussels Regulation<sup>11</sup> and the approach to the choice of law in international arbitrations seated in London.

### **Jurisdiction**

15. The recast Brussels Regulation is the latest<sup>12</sup> in a string of conventions and regulations on jurisdiction and the enforcement of judgments including the Brussels Convention 1968, EU Regulation No. 44/2001 (“the Brussels Regulation 2001”) and the Lugano Convention 2007 between the EU and Denmark, Iceland, Norway and Switzerland.
16. All of these regimes have included an exception for arbitration (“*This [Convention/Regulation] shall not apply to... arbitration*”<sup>13</sup>). The precise ambit of this exception has, however, been an area of tension between the UK and the other Member States: see notably, the decision of the Court of Justice of the European Union (“CJEU”) in *Allianz SpA v West Tankers Inc* (Case C-185/07), reversing the approach of the House of Lords (at [2007] UKHL 4).

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<sup>11</sup> Regulation No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>12</sup> The recast Brussels Regulation has had effect since 10 January 2015.

<sup>13</sup> Article 1(2)(d) of the Brussels Regulation 2001, the Lugano Convention 2007, and the recast Brussels Regulation.

17. The ambiguity as to the scope of the arbitration exception led to the (in our view) undesirable consequence that the English court was prevented from granting certain relief in support of arbitration or was required to recognise decisions of other EU Member State courts apparently contrary to an arbitration agreement. For example:
- a) in *West Tankers Inc v Allianz SpA (The Front Comor)* (Case C-185/07) the CJEU held that an anti-suit injunction restraining proceedings in other Member State courts, issued in support of arbitration, was incompatible with the Regulation;
  - b) in *Van Uden Maritime BV v Deco-Line* (Case C-391/95) proceedings to obtain provisional measures in aid of arbitration (in that case proceedings before the President of the District Court for Rotterdam for interim payment of certain debts under an agreement, on the grounds that the respondent was not acting diligently to appoint its arbitrator) were held by the CJEU not to fall within the arbitration exclusion; and
  - c) in *The Wadi Sudr* [2010] 1 Lloyd's Rep 193 the Court of Appeal felt itself compelled to enforce a judgment of the Mercantile Court in Almería, Spain reached in apparent contravention of the arbitration agreement in a bill of lading governed by English law.
18. Recital 12 to the recast Brussels Regulation has attempted, however, to clarify the extent of the arbitration exception, through stating that:
- a) a ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being

performed is not subject to the rules of recognition and enforcement laid down in the Regulation;

- b) where a court of a Member State, exercising jurisdiction under the Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that Court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with the Regulation. This is, however, without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the New York Convention, which takes precedence over the Regulation; and
- c) the Regulation does not apply to any action or ancillary proceedings relating to the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

19. The precise effect of the change effected by Recital 12 remains to be fully explored. Inter alia, there remains a somewhat theoretical doubt as to whether Member State courts are able to issue an anti-suit injunction against a party who has commenced proceedings in another Member State in breach of an arbitration clause, although in our view they probably are not and it is unlikely that if the question was referred once more to the CJEU that it would reach any different conclusion to that stated in

*West Tankers*<sup>14</sup>. More importantly, there remains uncertainty as to whether judgments on the merits of another Member State's courts, reached in breach of what (from an English perspective) would be a valid arbitration clause, are enforceable in the UK. So the improvements made by Recital 12 are only partial.

20. Nevertheless, Recital 12 is a real step forward, and the recast Brussels Regulation has been widely welcomed as diminishing the likelihood of arbitral proceedings in London being undermined by parallel court proceedings being commenced in another Member State contrary to an arbitration clause.
21. For the reasons discussed in the report of the separate working group on jurisdiction, it is highly desirable that the government should seek to enter into a UK-EU Agreement (similar to that made by Denmark) to ensure that the recast Brussels Regulation continues to apply between the UK and EU (and Denmark). In addition, although it does not contain Recital 12, the UK should also seek to become a party to the Lugano Convention 2005 (extending similar arrangements to Iceland, Switzerland and Norway). Although some ambiguity remains regarding the scope of the arbitration exception in the Lugano Convention, and it would be preferable to have the improvements provided by Recital 12 than not, the persistence of the old

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<sup>14</sup> In the *West Tankers* case, the CJEU found that anti-suit injunctions to enforce arbitration clauses by restraining proceedings in another Member State were incompatible with the Brussels Regulation 44/2001, in terms that would also apply to the Lugano Convention. However, recital 12 changes the scope of the arbitration exception in ways that affect elements of the CJEU's reasoning. The CJEU had an opportunity to clarify the position under the recast Brussels Regulation in *Gazprom OAO* (Case C-536/13) [2015] 1 WLR 4937 but chose not to endorse Advocate-General Wathelet's Opinion that *West Tankers* has been impliedly reversed by Recital 12 of the recast Brussels Regulation. However, it is our view, and it is the view of most of the academic commentary, that Recital 12 was not intended to make this change, and that neither the English courts nor the CJEU would be likely to adopt Advocate-General Wathelet's view if the question had to be decided. Certainly, no litigant since the coming into force of Regulation 1215/2012 has taken the risk of seeking such an injunction.

text in the Lugano Convention is not a serious problem, and has not in our view damaged London as a premier centre for arbitration.

22. We have considered whether the restrictions imposed on anti-suit injunctions to enforce arbitration clauses by the Brussels-Lugano regime are a reason *not* to continue with the Brussels-Lugano Regime. We do not think so. First, although court anti-suit injunctions are important tools to defend arbitration clauses, other remedies are available such as anti-suit awards by arbitrators (which the *Gazprom* case confirms are consistent with Brussels-Lugano) and awards of damages by arbitrators and courts.<sup>15</sup> Second, arbitration in London has managed to survive comfortably without the protection of anti-suits to restrain proceedings in the EU. Third, and in our view decisively, we think the benefits of perpetuating the Brussels-Lugano regime's rules as a whole (which are addressed by the jurisdiction Working Group) greatly outweigh the disadvantages incurred with regard to anti-suit injunctions. Fourth, overall, arbitration benefits from London's reputation as a leading centre for dispute resolution, which will be supported by coherent and consistent jurisdiction and enforcement arrangements.
23. We have also considered whether it might be possible to improve Recital 12, in whatever version of the Brussels-Lugano regime might be continued, to clarify that anti-suit injunctions to enforce arbitration clauses are permissible. We do not know

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<sup>15</sup> The English courts have concluded that damages awards by courts to enforce arbitration agreements or exclusive jurisdiction clauses are consistent with Brussels-Lugano: see Flaux J's decision in *West Tankers* [ref] and the Court of Appeal's decision in *The Alexandros T* [ref]. The correctness of this has not yet been tested in the CJEU.

what the negotiating landscape will look like, but our present initial view is that this does not strike us as particularly realistic.

### **Applicable law**

24. In the majority of cases resolved by international arbitration in London, parties will have made an express choice of the law that is intended to be applicable to the substance of their dispute. Section 46(1) of the Arbitration Act 1996 requires tribunals to decide the dispute in accordance with that chosen applicable law.
  
25. To the extent that the parties do not make an express choice, section 46(3) entitles the tribunal to apply “*the law determined by the conflict of laws rules which it considers applicable*”. Further, it is common for institutional arbitration rules to confer on the tribunal a similarly wide discretion to determine the applicable law.<sup>16</sup> Notwithstanding this, it is our experience that tribunals seated in London will sometimes consider it necessary to determine the applicable law by reference to English conflict of laws rules.
  
26. The English conflicts of laws rules are currently largely based upon two EU Regulations, both of which will cease to apply following Brexit, save as perpetuated by some form of continuation legislation. Accordingly, the conflict of laws rules applied by tribunals in arbitrations seated in London would be likely to be affected by Brexit absent such continuation legislation. This is an issue that is considered in

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<sup>16</sup> For example, Article 21 of the ICC Arbitration Rules 2012; Article 22.3 of the LCIA Rules of Arbitration 2014

more detail in the report of the working group considering jurisdiction, choice of law and service issues.

27. Nevertheless, the position can be briefly summarised as follows:

- a) the English conflict of laws rules relating to claims in contract are currently governed by the Rome I Regulation<sup>17</sup> which will cease to apply upon Brexit. Accordingly, absent any further statutory provision, at that stage the English conflict of laws rules relating to claims in contract will revert to those provided in the Contracts (Applicable Law) Act 1990, which incorporated the Rome Convention 1980<sup>18</sup> with some exceptions. In practice, reversion to the 1990 Act is unlikely to lead to a significant change in the approach to the applicable law in contract;
- b) so far as non-contractual claims are concerned, the position is currently governed by the Rome II Regulation<sup>19</sup>, which will also cease to apply on Brexit. At that stage, the Private International Law (Miscellaneous Provisions) Act 1995 will apply for claims in tort and the common law will otherwise apply.<sup>20</sup> So far as claims in tort are concerned, the general rule under the Rome II Regulation is that “*the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the*

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<sup>17</sup> Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I).

<sup>18</sup> This was an EC convention whose full title is ‘The EC Convention on the law applicable to contractual obligations’ (Rome 1980).

<sup>19</sup> Regulation (EC) No 864/2007 — the law applicable to non-contractual obligations (Rome II)

<sup>20</sup> The causes of action that fall outside the 1995 Act include, *inter alia*, defamation and unjust enrichment; as to the position on the latter, see Dicey & Morris, *on the Conflict of Laws*, 15<sup>th</sup> Ed., Rule 257; previously, Rule 201 in the 13<sup>th</sup> Ed.; *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613 (Comm) and *Fiona Trust & Holding Corporation and 75 ors. v Yuri Privalov and 28 ors.* [2010] EWHC 3199 (Comm) as discussed in *Alliance Bank JSC v Aquanta Corporation* [2011] EWHC 3281 (Comm), [42] – [43].

*event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur*". By contrast, under section 11 of the 1995 Act, the general rule is that "*the applicable law is the law of the country in which the events constituting the tort or delict in question occur*". Accordingly, the conflict of laws rules related to claims in tort will change significantly post-Brexit.

28. In our view, the government is best advised to ensure continuity with the present position.<sup>21</sup> That can be done relatively easily by ensuring that legislation is enacted replicating domestically the terms of the Rome I and Rome II Regulation, whether as a free-standing Act of Parliament or as part of other legislation incorporating European law into domestic law. If that is done, Brexit will have no impact on the applicable law in arbitration.

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<sup>21</sup> The question of whether there might be desirable reforms to Rome I and Rome II can be left for further consideration in due course. For now the most important thing is to maintain continuity.

## INVESTMENT ARBITRATION

29. In this section of the report we consider the impact of Brexit on the UK's treaties that include investment protection guarantees and provide for Investor State Dispute Settlement ("ISDS").
30. Pursuant to such treaties, a State guarantees certain protections for investors of another contracting State in respect of investments made in its territory such as protection against expropriation without just and equitable compensation, fair and equitable treatment and non-discriminatory treatment. ISDS can take several forms, but commonly disputes under such treaties are resolved by way of either institutional arbitration or *ad hoc* arbitration commonly under the UNCITRAL arbitration rules.
31. Following the entry into force of the Lisbon Treaty in 2009, the EU assumed exclusive competence for a common commercial policy that specifically includes: "*foreign direct investment*". For EU Member States this has an important impact on existing investment treaties and the negotiation of new investment treaties.
32. We explain below the interplay between EU law and legal system on the UK's investment treaties by reference to: (i) intra-EU bilateral investment treaties ("BITs"); and (ii) BITs with non-EU States. In summary, we conclude as follows:
- a) Intra-EU treaties: post-Brexit, the significant complications which have arisen in the context of intra-EU investment treaties should not apply to the UK. However, it is less clear whether the UK's existing intra-EU BITs will survive a new trading agreement between the UK and the EU; and

- b) Treaties with third party States: investment treaties containing ISDS provisions negotiated by the EU on the UK's behalf have not yet come into force. Post-Brexit, the UK will be free to negotiate investment treaties with third party States without the restrictions imposed on EU member States. This includes the ability to include the current ISDS provisions as opposed to the permanent tribunal body which is the current policy of the European Commission.

### **Intra-EU treaties**

33. A recurring, and unresolved, issue of recent years is whether intra-EU BITs, or certain aspects of them, are compatible with EU legal order. This issue has manifested itself in a number of ways.
34. First, respondent States have challenged the jurisdiction of investment treaty tribunals to resolve claims on grounds that a State's obligations under an intra-EU BIT, pursuant to which the claim had been brought, were superseded, affected or terminated by that country's accession to the EU. However, this argument has been rejected by several arbitral tribunals.<sup>22</sup>
35. Second, the European Commission has submitted a number of *amicus curiae* interventions in investment treaty claims in which they have generally argued

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<sup>22</sup> *Eastern Sugar BV (Netherlands) v The Czech Republic* (SCC Case No. 088/2004); *Eureko BV v the Slovak Republic* (PCA Case No 2008-13, UNCITRAL Arbitration Rules) Award on Jurisdiction, Arbitrability and Suspension (26 October 2010); *Binder v Czech Republic* 2007 (unreported) *Electrabel SA v the Republic of Hungary* (ICSID Case No. Arb/07/19)

against investment treaty claims founded on intra-EU BITs on the basis that they are incompatible with EU law and the EU legal order.<sup>23</sup> Arguments of the European Commission have included:

- a) intra-EU BITs are no longer valid or have been superseded;
- b) EU law is supreme and should prevail over investment treaty provisions where there is a conflict with EU law, for example compliance by a Member State with EU State aid law cannot amount to a violation of an investment treaty protection or investment treaty protections may result in preferential treatment for nationals of certain member states resulting in discrimination which is not permitted under EU law; and
- c) the CJEU should be the ultimate decision maker of questions of EU law rather than investment treaty tribunals.

36. While tribunals have consistently rejected these arguments where made by the respondent State and/or the European Commission, they remain a live issue. For example:

- a) Slovakia has applied to the German courts to set aside an arbitral award on the grounds that the applicable intra-EU BIT was incompatible with EU law (*Eureko v Slovak Republic (2010); Docket No. 1 ZB 2/15*). While the German court rejected this argument at first instance, an appeal court has made a reference to the CJEU on the point; and
- b) the European Commission has issued a suspension injunction obliging Romania to suspend any further action in compliance with the arbitral

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<sup>23</sup> *Eastern Sugar BV v The Czech Republic* (SCC Case No. 088/2004); *Electrabel SA v Republic of Hungary* (ICSID Case No ARB/07/19); *Eureko v Slovak Republic* (PCA Case No. 2008-13); *EURAM v Slovakia* (PCA Case No. 2010-17)

award issued in the ICSID arbitration of *Micula v Romania*<sup>24</sup> on the ground that payment would constitute State aid impermissible under EU law.

37. Third, the European Commission has taken the position that intra-EU BITs must be terminated insofar as their scope falls within EU competence. Recently it has taken direct action to achieve this. It has commenced formal infringement proceedings against five Member States<sup>25</sup> and informal procedures against another 21 Member States<sup>26</sup> seeking to compel them to terminate their existing intra-EU BITs.
38. The UK has existing BITs with 12 EU Member States<sup>27</sup> and three of the five candidate countries for EU accession.<sup>28</sup> Depending upon the terms of the UK's new relationship with the EU post-Brexit, it is likely that the UK will not be subject to the same interference from the European Commission and the CJEU. However, it is less clear whether the UK's existing intra-UK BITs will survive a new trading agreement between the UK and the EU. Some of the recent trade agreements concluded by the EU provide that they will replace all existing BITs between EU Member States and the third party State. For example, the EU-Vietnam FTA is intended to replace all of the BITs that EU Member States have with Vietnam.<sup>29</sup>

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<sup>24</sup> *Micula v Romania* (ICSID Case No ARB/05/20)

<sup>25</sup> Austria, the Netherlands, Romania, Slovakia and Sweden

<sup>26</sup> Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia.

<sup>27</sup> Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia

<sup>28</sup> Albania, Serbia and Turkey

<sup>29</sup> This also applies in the case with Comprehensive Trade and Economic Agreement between the EU and Canada, which replaces 8 BITs between EU Member States and Canada.

### **Third party States treaties**

39. Since becoming a member of the EU, the UK has not been prohibited from entering into treaties with third party States to the EU. However, there are at least two important ways in which its membership of the EU has had an impact on relevant treaties with third party States.
40. First, as an EU Member State the UK's ability to enter into treaties with third party States has been regulated by EU Regulation 1219/2012<sup>30</sup>. This includes a requirement that authorisation from the European Commission is obtained to open negotiations or sign new BITs.
41. Second, the EU has recently negotiated important treaties on behalf of the UK; for example, the recent Comprehensive Trade and Economic Agreement between the EU and Canada ("CETA") and the EU-Vietnam Free Trade Agreement ("FTA"). It is also currently negotiating FTAs with Thailand and Singapore. Both CETA and the EU-Vietnam FTA will replace the existing BITs which EU member States have with those countries (as already noted).
42. Further, the European Commission has adopted a policy that the current ISDS system should be replaced with a permanent tribunal body with an appeal mechanism, and this has been provided for in CETA and the EU-Vietnam Free

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<sup>30</sup> Regulation (EU) No 1219/2012 of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries

Trade Agreement.<sup>31</sup> Both CETA and the EU-Vietnam FTA also envisage the possibility that a future multilateral investment court and appeals tribunal be established.<sup>32</sup> Notably, on 13 and 14 December 2016 the European Commission and Canada co-hosted discussions on a multilateral investment court with government representatives from around the world. The ultimate aim is to establish a single permanent body to decide investment disputes, moving away from the current ISDS system.<sup>33</sup>

43. Post-Brexit, the UK will no longer need to comply with EU requirements before negotiating or entering into new BITs – and so will not need to support the existence of a permanent tribunal body which is the current policy of the European Commission. Further, the UK will not be part of the EU negotiating bloc for future investment treaties. For those treaties already agreed by the EU, such as CETA and the EU-Vietnam FTA, the UK is unlikely to remain a party.<sup>34</sup>

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<sup>31</sup> CETA, Chapter 8 Section F; EU-Vietnam FTA, Chapter 8.II Section 3.

<sup>32</sup> CETA, Article 8.29; EU-Vietnam FTA, Article 15.

<sup>33</sup> [http://europa.eu/rapid/press-release\\_IP-16-4349\\_en.htm](http://europa.eu/rapid/press-release_IP-16-4349_en.htm)

<sup>34</sup> These treaties have not yet been ratified. The UK Government has confirmed that it wishes to proceed with the provisional application of CETA in advance of ratification, although this provisional application will not include the permanent tribunal body provided for in CETA (at the insistence of the UK). There is some dispute as to whether investment treaty protection provisionally applied could survive Brexit by application of a sunset clause. It is unlikely, but not impossible, that CETA will be ratified before Brexit. Negotiations in relation to the EU-Vietnam FTA has now concluded and the legal review is underway. This treaty therefore seems even less likely to be ratified prior to Brexit. While there is no BIT between the UK and Canada, there has been a bilateral investment treaty in place between the UK and Vietnam since 2002.

## ACCESS TO THE UK ARBITRATION MARKET

44. Commonly in an international arbitration seated in London neither of the parties will be English, and some or all of the lawyers (whether counsel or lawyers instructing counsel<sup>35</sup>) will be based overseas. Indeed, not infrequently a London-based arbitration will involve no participation from English parties or lawyers.
45. Further, the rules of the LCIA and the ICC impose certain nationality requirements on the selection of arbitrators (see e.g. Article 15.5 of the ICC Rules and Article 6.1 of the LCIA Rules). Thus, if one of the parties is British (or majority-owned by UK shareholders), the chairman of a tribunal or sole arbitrator appointed under those rules is likely to be from overseas.
46. The latest figures available from the LCIA, ICC and LMAA reveal that:
- a) LCIA: 326 arbitrations were referred to the LCIA in 2015. 25% of the parties to those arbitrations were from Europe<sup>36</sup>, 15.6% from the UK, 14.8% from Russia and the CIS, 12% from respectively Asia and the Caribbean<sup>37</sup> and smaller numbers from the US, Middle East and Latin America. The LCIA does not keep statistics as to the nationalities of the lawyers involved. However, the arbitrators (other than those from the UK) came from Australia, Austria, Brazil, Belgium, Canada, China, Cyprus, Denmark, the Netherlands, France, Germany, Greece, Hungary, Iran,

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<sup>35</sup> The counsel may be, and frequently are members of the English Bar, but sometimes are specialist arbitration counsel within solicitors' offices or foreign law firms.

<sup>36</sup> For these purposes Europe includes Germany, Netherlands, Cyprus, Switzerland, Eastern Europe and other Western Europe categories. The Cypriot companies are likely to be foreign-owned

<sup>37</sup> Most of the Caribbean companies will be foreign-owned companies

Ireland, Italy, Latvia, Lebanon, New Zealand, Nigeria, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Tunisia, Ukraine and the US<sup>38</sup>;

- b) ICC: 57 new cases were filed in 2015 where the seat was in the UK. 61 UK and 52 non-UK arbitrators were appointed in those cases. 47 UK and 41 non-UK counsel were involved in the cases<sup>39</sup>. These figures point to the frequent use of international arbitrators and foreign counsel in the same disputes. That impression is underscored by the fact that in the 801 total new cases filed with the ICC in 2015, the parties came from 133 different countries and independent territories. The top ten nationalities of the parties to all 801 new ICC arbitrations in 2015 were as follows: USA: 9.9%; Germany: 4.9%; Italy: 4.8%; Spain: 4.7%; France: 4.2%; Brazil: 3.99%; China (including Hong Kong and Macao): 3.94%; UK: 2.89%; Turkey: 2.63%; and UAE: 2.50%<sup>40</sup>;
- c) LMAA: there were approximately 2,000 new arbitration references in 2015 of which probably no more than 100 were seated outside London. Approximately 85% of those cases are dealt with on documents alone – and European lawyers would be involved in about 50% of those cases. In about 5% of the cases that go to a hearing there will be overseas arbitrators and in perhaps 25-30% overseas lawyers will attend (often with English counsel)<sup>41</sup>.

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<sup>38</sup> Further information can be found at <http://www.lcia.org/LCIA/reports.aspx>

<sup>39</sup> Source: private enquiries of the ICC.

<sup>40</sup> The 2015 statistics are contained within the inaugural ICC Dispute Resolution Bulletin published in 2016, Issue 1.

<sup>41</sup> Source: private enquiries of the LMAA.

47. In light of the foregoing, it is necessary for the immigration system to enable foreign parties, lawyers and arbitrators to attend and participate in arbitration proceedings seated in London. It is our experience that final evidentiary hearings rarely exceed a period of two weeks and that parties, witnesses, experts and arbitrators will typically require to be present at the seat for a period in advance of the hearing<sup>42</sup>. Accordingly, it is sensible for the immigration system routinely to support the presence of parties involved in arbitrations for periods of up to a month, and in exceptional cases for longer than that.
48. Currently the immigration rules differentiate between:
- a) visitors to the UK with passports from the European Economic Area<sup>43</sup> and Switzerland, who are currently permitted to enter the UK and work without requiring a visa;
  - b) “*visa nationals*”, that is to say visitors with passports from the countries listed in Appendix 2 of Appendix V of the Immigration Rules, stateless people and people travelling on a document other than a national passport<sup>44</sup>; and
  - c) “*non-visa nationals*”, that is to say visitors to the UK with passports from one of the 56 countries/territories not so listed. We have attempted to list

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<sup>42</sup> The period of time will depend on a number of factors including time-difference from their home country, but also the required extent of preparation. For example, it is often convenient for the principal witness(es) to attend London before the hearing so that they can devote their attention to the arbitral process rather than their ongoing work responsibilities on site or in their home country.

<sup>43</sup> The EEA countries include all of the countries of the EU, together with Iceland, Liechtenstein and Norway.

<sup>44</sup> <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-v-visitor-rules>

those countries in Appendix 1 to this paper<sup>45</sup>. They include the US, Australia, Canada, Japan and Singapore.

49. A visa national must obtain a visa before they arrive in the UK. As to that:
- a) a standard visitor visa of 6 months enables the recipient to undertake the following “permitted activities”<sup>46</sup>:
    - i) in the case of an expert witness, visiting the UK to give evidence in a UK court. Other witnesses may visit the UK to attend a court hearing in the UK if summoned in person by a UK court; and
    - ii) in the case of an overseas lawyer advising a UK based client on specific international litigation and/or an international transaction<sup>47</sup>.
  - b) a Permitted Paid Engagement visa for up to one month can be provided to a qualified lawyer<sup>48</sup> providing advocacy for a court or tribunal hearing, arbitration or other form of dispute resolution for legal proceedings within the UK, if they have been invited by a client<sup>49</sup>. In addition, guidance on the Immigration Rules suggests that lawyers entering under these provisions are permitted to take an active role in the preparation of a hearing which may need one or more preparatory visits<sup>50</sup>.

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<sup>45</sup> Needless to say, anyone seeking entry to the UK should seek their own advice.

<sup>46</sup> The permitted activities are listed at Visitors Appendix 3 to Appendix V to the Immigration Rules at: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-v-visitor-rules>

<sup>47</sup> See paragraphs 13-14 of Visitors Appendix 3, *ibid*.

<sup>48</sup> This includes counsel, advocates, attorneys, barristers and solicitors: see [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/490874/Visitor\\_guidance\\_v4\\_0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/490874/Visitor_guidance_v4_0.pdf)

<sup>49</sup> See paragraph 1(d) of Visitors Appendix 3 to Appendix V to the Immigration Rules, *ibid*.

<sup>50</sup> See the guidance referred to in footnote 48 above.

50. Non-visa nationals undertaking the permitted activities described at paragraph 49.a) above are not required to apply for a visa unless they are seeking to visit the UK for more than 6 months. Non-visa nationals also do not require a visa for Permitted Paid Engagements of less than one month.
51. The characteristics of the arbitrations described at paragraph 46 above, suggest that these provisions are operating relatively successfully in practice. Nevertheless, it seems to us that the Immigration Rules could be simplified or improved to support arbitration proceedings:
- a) by treating appearance at an arbitration as either witness, lawyer, advocate or arbitrator as a “permitted activity” – thereby avoiding difficulties in the minority of cases where attendance in London for greater than a month is required; or
  - b) alternatively:
    - i) by clarifying that the “permitted activities” include giving evidence as a witness in an arbitration at the request of the arbitrator;
    - ii) by including either as a “permitted activity” or a permitted “paid engagement” appearance as an arbitrator; and
    - iii) by expressly including preparation for the hearing as a “permitted paid engagement”, in line with the current guidance on the Immigration Rules.
52. These modest adjustments ought to clarify and simplify the basis upon which arbitrators and parties (and their advisors and witnesses) can appear in arbitrations in

London and might assist in demonstrating that post-Brexit London remains an enthusiastic supporter of the international dispute-resolution market.

## ACCESS BY UK LAWYERS TO THE EU LEGAL SERVICES MARKET

53. Given the prevalence of an English choice of law in commercial practice and the high-standing in which English lawyers are held internationally<sup>51</sup>, it is common for English lawyers to appear as counsel or arbitrators in hearings that are held overseas, including in Paris and Stockholm.
54. We have not been able to obtain detailed figures relating to such appearances in other Member States of the EU. Internal enquiries of Combar member sets suggest that although the market for barristers' services in other Member States is not comparable to the market for services in arbitrations seated in London, it nevertheless remains a substantial source of work; and undoubtedly provides a very significant flow of work for the larger international law firms in London who have specialist international arbitration departments.
55. Regardless of the precise details, there is an obvious risk to the continuation of some of that work should it be made (or even appear) more difficult for English lawyers to appear in arbitrations which take place in the EU. Accordingly, we agree with the conclusions of the Bar Council's paper on Access to the EU legal services market.

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<sup>51</sup> The high-standing in which English advocates are held is a consequence of their expertise in advocacy and in certain specialist sectors, but also their exposure to arbitration users; hence the importance of maintaining that exposure.

**Appendix 1**  
**List of non-visa nationals**

British Overseas Territories citizens not deriving their statuses from Gibraltar

British National (Overseas)

British Overseas citizens

British protected persons

Nationals with passports from the following countries:

Andorra	Mexico
Antigua and Barbuda	Monaco
Argentina	Micronesia
Australia	Namibia
Bahamas	Nauru
Barbados	New Zealand
Belize	Nicaragua
Botswana	Palau
Brazil	Panama
Brunei	Papua New Guinea
Canada	Paraguay
Chile	Saint Kitts and Nevis
Costa Rica	Saint Lucia
Dominica	Saint Vincent and the Grenadines
East Timor	Samoa
El Salvador	San Marino
Grenada	Seychelles
Guatemala	Singapore
Honduras	Solomon Islands
Hong Kong	South Korea
Israel	Taiwan
Japan	Tonga
Kiribati	Trinidad and Tobago
Macau	Tuvalu
Malaysia	United States of America
Maldives	Uruguay
Marshall Islands	Vanuatu
Mauritius	Vatican City