

**EU LAW, TRADE AGREEMENTS, AND DISPUTE RESOLUTION MECHANISMS: CONTEMPORARY CHALLENGES**

**22 MARCH 2019**

**CENTRE OF EUROPEAN LAW**

**KING'S COLLEGE LONDON**

**Mini-Moot Question**

*Les Ailes de Mercure* is a company incorporated under the laws of France, which has been operating in the UK transport sector for 10 years. *Les Ailes de Mercure*'s headquarters consist of a 2,000 sq. parking space in Portsmouth.

Following the notification of the Article 50 TEU notice by the UK Government to the EU of 29 March 2017, on 6 April 2017, the UK Secretary of State for Transport notified all EU companies operating in the transport sector that the continuation of their operations in the UK after "Brexit Day", ie. 29 March 2019, will depend on the agreement reached between the UK and the EU.

On 30 September 2018, the UK Secretary of State for Transport published on [ukgov.co.uk](http://ukgov.co.uk) a note addressed to all EU operators in the transport industry carrying out operations in the UK, warning them that, in case of no-deal, "the continuation of their operations in the UK cannot be guaranteed".

On 10 December 2018 the UK Parliament rejected the UK Prime Minister's draft Withdrawal Agreement with the EU. In the subsequent days, negotiations stalled, and no majority could be reached in the UK Parliament on the way forward for EU-UK relations.

On 2 January 2019, the UK Secretary of State for Transport notified *Les Ailes de Mercure* that the company shall vacate its premises in Portsmouth by 29 March 2019, 9.00 am. The note stated that, in view of the high chances that the UK will exit the EU without a deal, the company's premises will be allocated to UK Border Authorities to station lorries awaiting border checks in Portsmouth. In the same letter, the UK Secretary of State for Transport states that the *Les Ailes de Mercure* will receive a compensation of 50,000 GBP for its premises considered that "given the circumstances, it is clear that *Les Ailes de Mercure* would in any case cease its activity in the UK".

On 3, 5, 15 and 25 January, *Les Ailes de Mercure* communicated to the UK Secretary of State for Transport that it does not intend to proceed to vacate its premises and that, in any case, the 50,000 GBP compensation foreseen in the letter of 2 January 2019 is inferior to the normal market price of its premises.

On 27 January, the UK Secretary of State for Transport replied that enforcement officials will be sent to *Les Ailes de Mercure*'s premises at the agreed date and time of 29 March 2019, 9.00 am to ensure the orderly vacation of the Portsmouth premises. The compensation of 50,000 GBP is further described as "fair, given the circumstances."

On 2 February 2019, *Les Ailes de Mercure* filed a notice of arbitration against the UK Government under the 1964 UK-France BIT [fictitious].

Article 6 of the 1964 UK-France BIT reads:

*"Investments by investors of a Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalised or subjected to any other measures, direct or indirect, having an effect equivalent to expropriation or nationalisation, except for a purpose which is in the public interest, on a non-discriminatory basis, in accordance with due process of law, and against prompt, adequate and effective compensation."*

Article 8 of the 1964 UK-France BIT reads:

“(1) *Disputes between one of the Parties and an investor of the other Party, in connection with his investment, shall be submitted to an arbitration tribunal. Such arbitration tribunal shall be constituted ad hoc as follows [...].*

(3) *A state party, an investor, or an affected third party must not exhaust local administrative and judicial remedies before it may submit a claim seeking damages for an alleged breach of the Agreement before the tribunal established under Article 8(1) above.*”

Article 9 of the 1964 UK-France BIT reads:

“(1) *The arbitral tribunal shall decide on the basis of the law, taking into account exclusively: the law in force of the Contracting Party concerned; the provisions of this Agreement, and the general principles of international law.*”

*Les Ailes de Mercure* requests that a) The Tribunal finds that the UK Government’s measure violates article 6 of the France-UK BIT; c) Subordinately, the UK Government shall pay an appropriate price for *Les Ailes de Mercure*’s premises in Portsmouth, quantified in no less than 800,000 GBP; d) In any case, the UK Government shall bear all costs arising out of the procedure.

The UK Government requests that: a) The Tribunal declares that it lacks jurisdiction on the grounds that, on the basis of the ECJ decision in *Achmea*, the UK-France BIT is valid or applicable between the state parties to the investment agreement; b) Subordinately, that it rejects all claims on the basis of the merit; c) In any case, the *Les Ailes de Mercure* shall bear all costs arising out of this procedure.

The Tribunal is constituted on 2 March 2019. The first hearing on jurisdiction, focussed on the preliminary issue of the impact of *Achmea* on the jurisdiction of the Tribunal, is set for 22 March 2019.

Procedural Order No. 1 stipulates that the seat of arbitration shall be London, United Kingdom.

Procedural Order No. 1, further stipulates:

*In view of the hearing of 22 March 2019, the Tribunal orders that, in submitting their comments on the impact of the ECJ Achmea decision (“Achmea decision”) on the present arbitration, the parties specifically address the following issues:*

1. *Whether EU law is to be considered national or international law according to the VCLT;*
2. *Whether the fact that the UK will have left the EU at the time when the award is delivered has an impact on the application of the Achmea decision to this arbitration.*

*The discussion shall take into account both the Achmea decision and the subsequent case-law of European courts and international tribunals.*

## **Time Allocated**

The time will be allocated as follows:

- 20 mins for the opening statements per counsel, which include questions from the Tribunal.
- 10 mins of rebuttal per counsel.