Keynote address by Christopher Vajda KC to the European Circuit and AlphaLex

Middle Temple, London 10 June 2025

Good morning,

When Fergus Randolph KC asked me to give this keynote address, it was an invitation I could not refuse. Most, if not all, of you do not know that Fergus was my first pupil when I was practising EU law in Brussels. I could see straight away that Fergus would do well at the Bar. The moment that he walked into Chambers in the morning, I could detect his presence even before I saw him, owing to his booming voice.

This morning he has given me a blank canvas. The flyer for the programme simply states I "will deliver the keynote introduction and set the tone for this high-level event."

What I propose to do is briefly to look back at the period when the UK was a member of EU and then spend a little more time looking at the legal impact of Brexit within the UK some five years on.

In looking back I am conscious that what I will say is, at least to some extent, marked by my own experiences. When I left Cambridge University with a degree in English law, I planned to study at postgraduate level in the United States. By that stage I had joined Gray's Inn and sought the wisdom of the emeritus Professor of Comparative Law, Jack Hamson and an honorary bencher of Gray's Inn. He told me, in no uncertain terms, that the future for a young lawyer in England lay on the continent of Europe rather than the United States. He recommended that I undertake a Master's Course at the Institut d'Etudes Européennes in Brussels and that I should apply for a scholarship to cover my costs. I duly did that. After my year's study - indeed probably only after a few months - I concluded that I wished to practise in the field of what was then known as EEC law. I had become familiar with the concepts of direct effect and supremacy as well as the dynamic approach of the Court of Justice in the development of EEC law. I was also introduced to the subject that I knew nothing about and has occupied me professionally for over 40 years – that is to say competition law. At the start of the 1980s, most of the EEC law done in the UK was competition law. This involved advising clients, and occasionally travelling to either Brussels or Luxembourg for a competition hearing. It certainly did not involve what a real barrister did, namely litigation. Indeed I remember my

clerk saying that if I was interested in pursuing this exotic system of law, I did not need the bible all barristers, the White Book.

Of course, as we all know, his advice proof short-lived. It proved short-lived in some measure to the efforts of the late David Vaughan QC who ensured, to use Lord Denning's words, that EU law did indeed flow up all the estuaries not only of England[1] but also of Wales. Unsurprisingly David was a leading light in setting up the Bar European Group and also later in his career the European Circuit who are co-organisers of today's event. English barristers started to appear regularly before the Court of Justice in Luxembourg. Their wig and gown alone gave them a USP. However English barristers did not live simply by their wig and gown. They soon became recognised as amongst the best advocate hearing before the court. They were able to deliver speeches in a manner that suggested that they were not simply reading from a pre-prepared script (even if they were). They engaged with the Court when questions started to be asked.

Fast forward to 2012 when I was appointed as a judge in Luxembourg. As you will know, the general rule is that a party does not have a right to an oral hearing. The test is whether an all hearing "would add value" to the written pleadings. During my time at the court the vast majority of cases had an oral hearing. Throughout my time at the Court I cannot recall any hearing where there were not questions. In many cases the exchanges between Bar and Bench were little different in nature to those one witnesses in the Court of Appeal or Supreme Court. The British influence at the Court was also enhanced by the active involvement of the UK Government in participating in proceedings before the court. The UK government realised the importance that the Court plays in the development of EU. Indeed quite remarkably by the time the UK left the EU, the UK had intervened in as many cases as Germany even though Germany had a head start of almost 15 years.

Unfortunately the British presence did not always have the same positive effect on the reasoning in judgments. I remember doing a case in the Court of Appeal when the presiding judge, Mummery LJ, asked me to explain a passage in a judgment of the ECJ that was central to the appeal. He put it to me that he could understand perfectly what was said at paragraph 20 as well as what was said in paragraph 22 but he could not understand paragraph 21 which was intended to explain how the court got to paragraph 22. Of course Mummery LJ was completely

[1] See *Bulmer v Bollinger* [1974] EWCA Civ 14 where Lord Denning famously observed that "[EU law] is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back."

right. The reasoning had indeed gone into a black box from which it never really recovered. Frustrated as I was on occasions by the delphic nature of some of the reasoning in cases that I had to look at, I tried very hard when I was a judge to ensure that cases on which I sat were reasoned as clearly as possible. I doubt very much whether I succeeded but this is an ongoing process.

So to conclude on the past, I think that the United Kingdom Bar and indeed Bench can be proud of the enormous part it played in the development of EU law between 1973 and 2020.

I will now turn to consider some of legal effects of Brexit on the UK. I say "some" because inevitably time does not permit anything like a full review. I will look at the role of the UK Parliament in UK trade agreements, then the role of the UK courts in sketching out the post Brexit judicial landscape and lastly the impact of Brexit on EU law arbitration in London.

Let me begin with Parliament and trade agreements. You will recall that the ability to negotiate and conclude our own trade agreements was part of the "take back control" agenda.

When the UK was a member of the EU trade agreements were, as a general rule, the exclusive competence of the EU. However, in deciding on a negotiating mandate the EU would have to consult the Member States as well as the European Parliament ("EP"). Under the umbrella of the TFEU, detailed arrangements have been developed to ensure that the EP is fully informed at all stages of the negotiations. Thus the Framework Agreement between the European Commission and the EP[2] states that:

"23. Parliament shall be immediately and fully informed at all stages of the negotiation and conclusion of international agreements, including the definition of negotiating directives. …

24. The information referred to in point 23 shall be provided to Parliament in sufficient time for it to be able to express its point of view if appropriate, and for the Commission to be able to take Parliament's views as far as possible into account. …

25. ... The Commission undertakes, where applicable, to systematically inform the Parliament delegation about the outcome of negotiations."

Article 218(6) TFEU requires the Council to obtain the consent of the EP before concluding a trade agreement. Article 218(10) requires the EP "shall be immediately and fully informed at all stages of the procedure". As the Court of Justice of the European Union ("CJEU") held in

[2] OJ 2010 l304/47.

European Parliament v Council[3]: " The aim of that information requirement is, inter alia, to ensure that the Parliament is in a position to exercise democratic control over the European Union's external action." The EU Council can only ratify a Treaty with the EP's consent. This ensures that the involvement of the EP in the negotiation process is taken seriously.

Thus these provisions give the EP significant influence in the formulation of EU trade policy. This was demonstrated in the negotiations for the ultimately ill-fated Transatlantic Trade and Investment Partnership where the EP requested reform to the well-established ISDS mechanism – a mechanism which is based on the *ad hoc* appointment of arbitrators to sit on a particular case. The position adopted by the EP led the Commission to propose an investment court system based on the idea of a permanent judicial body with permanent judges in the appellate panel on which made more explicit the right to regulate by public authorities in the public interest.

By contrast the involvement and influence of the United Kingdom Parliament in trade agreements is more limited. The legal framework is provided by the Constitutional Reform and Governance Act 2010 ("CRoG") which codified the so-called Ponsonby Rule dating back to 1924. This was a non-legislative convention that required the government to lay treaties before Parliament for a minimum of 21 sitting days before they could be ratified. CRoG now enables the Commons, but not the Lords[4], also to delay the ratification of a Treaty indefinitely by the passing of a resolution. As Treaties do not form part of UK domestic law, they will generally need to be incorporated into domestic law through Parliamentary legislation, either in the form an Act of Parliament or secondary legislation such as a statutory instrument ("SI"). But by this stage Parliament is presented with a *fait accompli.* Although the limited legal rights that Parliament has under CRoG have been supplemented by some non-statutory commitments, the scrutiny arrangements are much less than the EP has over EU trade agreements. A House of Commons research paper, dated 23rd October 2024 entitled "Treaty-making and parliamentary scrutiny: recent developments", concluded that "the current tools available to the UK Parliament to scrutinise treaties are not commensurate with its responsibility to hold the Government to account, especially when commitments made at the international level affect

[3] C-263/14 ECLI:EU:C:2016:435

[4] On 22 January 2024 the House of Lords resolved that the government should not ratify the UK- Rwanda Agreement on an Asylum Partnership "until the protections it provides have been fully implemented since Parliament is being asked to make a judgement, based on the Agreement, about whether Rwanda is safe:" On 25 April 2024 the Government made a statement under section 20(8)of CRoG setting out why it considered the Treaty should be ratified. It ratified the Treaty on the same day.

fundamental aspects of citizens' lives." The Government's response has been that to require parliamentary consent of a trade agreement would "not be suited to the UK's constitutional settlement." No reasons have been given for this conclusion.

To see how this constitutional settlement works in practice, let us take the amendments to the EU-UK Withdrawal Agreement made by the so- called Windsor framework in 2023. In a press release issued in February 2023 the Government stated that the Windsor framework "fundamentally amends the texts and provisions of the original Protocol to uphold Northern Ireland's integral place in the United Kingdom, addresses the democratic deficit and sets out a new way forward." So this is pretty important stuff. However, as this was an amendment to a Treaty it did not fall within the definition of ratification under CRoG and hence fell outside the scope of that statute. Nevertheless the Government had said in the past that it would expect the majority of important Treaty amendments to be voluntarily submitted to Parliament for scrutiny under CRoG. But this would not be the case where only technical changes were made. The Government relied on this exception to say that the Windsor framework was a case of largely technical amendments to the UK-EU Withdrawal Agreement even though, as I have just pointed out, at the time the Windsor framework was announced, the Government had described those amendments as being "fundamental". Nor did the Government make time available for debate on the amended Protocol. Instead the Government published a draft SI which was laid before Parliament and it treated the vote on the SI as a vote on the Windsor framework. The debate on the SI in the Commons took place on 22 March 2023, two days before the EU-UK joint committee adopted the Windsor framework. The debate was limited to 90 minutes. The debate in the Lords took place on 29 March, several days after the Joint Decision had already entered into force under the Withdrawal Agreement.

It is hard to see what happened here to be a case of effective scrutiny by the UK Parliament of the Windsor framework. This lack of effective Parliamentary scrutiny extends to other trade agreements that the UK is negotiating or has negotiated.

As we all know, the UK is now in the process of negotiating a trade deal with the US, termed the Economic Prosperity Deal (EPD). This raises three issues. The first is the compatibility of the EPD with international law, specifically the WTO. A number of commentators have questioned how the proposed UK tariff reductions on US beef and ethanol are compatible with the most favoured nation principle which lies at the heart of the WTO to which the UK remains committed. The second concerns what is called "Strengthening Alignment and Collaboration

on Economic Security" which covers the "co-ordination to address non-market policies of third countries" and co-operation on the effective use of investment security measures, export controls, and ICT vendor security". These very broad provisions are clearly capable of limiting the sovereignty of the United Kingdom in its relations with third countries. That leads to the third issue, namely whether there can be effective scrutiny of the EPD by Parliament, in particular on its compatibility with international law and also the potential loss of economic sovereignty that the EDP might entail. If the Government offers Parliament nothing more than the existing constitutional arrangements, I am somewhat pessimistic about effective review by Parliament.

Let me turn to the courts. They have indeed regained control over the EU law that remains on our statute book and indeed pre- and post-Brexit CJEU case law. The more interesting question is how they are exercising this control. Last year in *Lipton v CityFlyer*[5] the UK Supreme Court ("UKSC") had to decide whether it should follow pre- and post-Brexit[6] CJEU case law in respect of what used to be called retained EU case law and is now called assimilated EU case law. The case involved a claim for compensation for a cancelled flight, pursuant to Regulation (EC) 261/2004 at a time when the UK was still a member of the EU. The reason for the cancellation was the sickness of the pilot. CityFlyer relied on the defence of extraordinary circumstances in Article 5(3) of the Regulation. After a careful review of both the pre- and post-Brexit CJEU case law on the defence of extraordinary circumstances, the UKSC decided to follow that case law. In essence the point was a short one: the sickness of a pilot is something that can be expected to occur in the normal course of an airline operation and therefore could not be said to be due to extraordinary circumstances. The UKSC found, in effect, that the post-Brexit CJEU case law was a logical development of its pre-Brexit case law.[7] The message appears to be that if the CJEU departs too much or unexpectedly from its previous case law that would be a reason for not following it.

The same message comes from the more recent Court of Appeal case in the *Umbrella Interchange fee* case.[8] This was a case where the claimants also relied on a cause of action that

[5] [2024] UKSC 24.
[6] More accurately post Implementation Day, being 31 December 2020.
[7] It should be added that there was a much more fundamental point in the appeal as to how EU rights acquired at the time the UK was a member of the EU were transposed into UK law where there was a division of opinion between the Justices. This point occupied most of the judgments although it is *obiter* on the facts of the case. See further my article *Accrued EU law Rights Encounter Brexit Some Brexit Turbulence* [2024] E.L. REV 632.
[8] [2024] EWCA Civ. 1559.

accrued pre-Brexit. The Court of Appeal decided[8] not to follow two post-Brexit CJEU decisions, *Volvo* and *Heuruka* which held that the principle of effectiveness meant that a limitation period in respect of a claim under Articles 101 and 102 TFEU only started to run when the infringement ceased, the so-called Cessation Requirement. The Court of Appeal concluded that Cessation Requirement "was not an established principle of EU law before *Volvo* and *Heuruka"*[9]. This case suggests that UK courts will be wary in following CJEU post-Brexit judgments which rely on the development of general principles, as opposed to the interpretation of a specific text, particularly in an area where legal certainty is paramount, such as limitation periods. The Supreme Court has refused leave to appeal.

By contrast in the more recent Court of Appeal judgment in *Merck Sereno v Comptroller-General of Patents*[10] the Court of Appeal refused to exercise its power[11] to depart from the preBrexit CJEU judgment in *Santen,* part of retained/assimilated EU case law, which was said to be contrary to the earlier CJEU judgment in *Neurim,* a case incidentally that I had to consider when a CJEU judge in another case called *Abraxis.*[12] *Santen* and *Neurim,* involved detailed textual analysis of a technical EU Regulation, namely on the grant of the supplementary patent certificates. In contrast to the approach in the *Umbrella interchange fee case,* the Court considered that aligning itself with the most recent CJEU authority reduced legal uncertainty and tended towards greater coherence and consistency particularly where the Court is interpreting an international instrument where one is seeking a uniform across interpretation across different jurisdictions. But it is clear from its reasoning that it considered the earlier case of *Neurim* to be the outlier and that the approach in *Santen* was to be preferred.

Those three cases illustrate, in my view, that there is no "one-size-fits-all" approach taken post-Brexit by the English courts to pre- and post-Brexit judgments of the CJEU. But what is clearly of importance to UK courts is legal certainty which is likely to limit the impact of post-Brexit CJEU judgments that develop EU law through the use of general principles not found in a legislative text. Another factor to bear in mind is that there is likely to be legislative divergence in the development, including amendment, of EU legislation and the equivalent UK assimilated

[8] Under section 6 of the European Union (Withdrawal) Act 2018.
[9] [34].
[10] [2025] EWCA Civ. 45
[11] Pursuant to the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations SI 2020/1525 which provides, broadly speaking, the same powers to the Court of Appeal to depart from retained EU case law as the Supreme Court has to depart from one of its own precedents.
[12] ECLI:EU:C:2019:238

law which may make future CJEU judgments less relevant to the interpretation of UK assimilated law.

Nevertheless, the UK legal profession will need to keep abreast of CJEU case law as a source of interpretation of EU assimilated law. Even where there is no EU assimilated law, I suggest that CJEU case law will still be an important source for interpreting some UK legislation. Let me take as an example public procurement where there is now a wholly domestic regime in Public Procurement Act 2023. On its face it is intended to mark a clean break with EU law and to be a self-standing UK legislative measure. Yet, one of the key principles in any public procurement regime is the principle of non-discrimination. During my time in Luxembourg I was amazed how often this principle was key to deciding a case because the relevant, and very detailed, EU legislation did not cover the particular point in issue. There is a vast body of EU case law on the application of the principle of non-discrimination in public procurement. Some of it may be helpful – and indeed cited - in working out concepts under the UK regime. Similar issues arise in the field of competition law and what is now termed subsidy control where there are stand-alone UK Acts of Parliament that have never been retained EU law. But in both competition and subsidy/state aid law there are similar concepts in UK and EU law. Indeed the Competition Act 1998 repeats almost word for word what are now Articles 101 and 102 TFEU. Thus, in the arbitrations that I have sat in since Brexit which raises questions on the interpretation of the Chapter 1 and Chapter 2 prohibition in the Competition Act 1998 Counsel agreed that we should follow the CJEU case law both pre and post Brexit.

I would like to finish by looking briefly at how Brexit has affected another form of litigation, namely international arbitrations that are seated within the United Kingdom. Some of you will know that in *Eco Swiss*[13] the CJEU accepted that it was possible to arbitrate EU competition law disputes in an EU seat provided that when it came to enforcement within the EU there was in effect a heightened level of review pursuant to Article 5 of the New York Convention. More recently in *ISU*[14] the CJEU had to decide whether it was permissible for the Court of Arbitration and Sport ("CAS") which is situated in Switzerland, a state outside the EU, to adjudicate on EU competition law. The case arose out of a challenge, on grounds of EU competition law, to the rules of the International Skating Union. The CAS rules provide for a review by the Swiss

[13] ECLI:EU:C:1999:269
[14] ECLI:EU:C:2023:1012

Federal Court. The CJEU accepted (unlike in *Achmea*[15]) that an arbitral Tribunal could adjudicate on EU law in a regulatory field. However, the CJEU ruled that the principle of effectiveness requires that decision of the Tribunal must be capable of being reviewed by a Court in a Member State of the EU, which would therefore preserve the ability of a subsequent reference to the CJEU under Article 267 TFEU. As a result of this ruling, CAS has set up an alternative centre outside Switzerland, in Dublin, to deal with cases that raise questions of EU law. London of course is a major arbitration centre and has a number of Institutions that administer arbitration. Such arbitrations could encompass arbitrating EU competition law disputes. To my knowledge, at least one of them is considering how to respond to the *ISU* ruling in terms of seat of the arbitration when an EU issue is raised.

Further consideration may also need to be given to the use of London seats in intra-EU investment arbitration. You will recall in *Achmea* and *Komstroy*[16] the CJEU declared that intraEU BITs, and an intra-EU dispute within the confines of the Energy Charter Treaty to be contrary to EU law. Much has been written about the possibility of such disputes being resolved in third countries, which now includes the United Kingdom. This precise issue arose in a very recent decision, *Poland v LC Corp*[17] given by the Amsterdam Court of Appeal. The Court of Appeal ordered LC Corp, the claimant in an intra-EU BIT in an UNCITRAL arbitration seated in London, to cooperate in terminating that arbitration, failing which a daily penalty payment would be imposed on the claimant. The Court of Appeal found that, as a matter of EU law, there was no longer a standing offer by Poland to arbitrate. The Court in effect granted Poland an anti-suit injunction to bring the arbitration proceedings in London to an end. As many of you may know from *West Tankers*[18] the CJEU does not permit anti-suit injunctions within the scope of the Brussels Regulation[19] as they breach the principle of mutual trust between courts of the EU Member States. However, leaving aside the question as to whether the Dutch proceedings fall within the scope of the Brussels Regulation, one may wonder whether EU law would preclude the grant of an anti-suit injunction to restrain proceedings in a third country which are said to circumvent the judgments of the CJEU in *Achmea* and *Komstroy.*

[15] ECLI:EU:C:2018:158

[16] ECLI:EU:C:2021:655

[17] ECLI:NL:GHAMS:2025:1065, Gerechtshof Amsterdam, 200.328.367/01

[18] ECLI:EU:C:2009:69

[19] Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

To conclude, five years on from Brexit, we are a little wiser on its legal effects on the UK constitution and legal system but, to paraphrase Lord Denning, how far judgments of the CJEU will continue to flow into our rivers and estuaries, and with what effect, remains a work in progress to which I have no doubt those in this room will make an important contribution.