METAXAS & ASSOCIATES
ATTORNEYS AT LAW

3rd Quarter 2018

INSIDE THIS ISSUE

Read a dedicated presentation on Energy arbitration and dispute settlement procedures under the Energy Charter Treaty by Professor Antonis Metaxas

Note from the editor

The 3rd quarter of 2018 presented numerous interesting challenges for the Greek and European energy market.

In this issue we present our recent practice highlights accompanied with articles, analysis and opinions on critical issues that dominated public conversation on Energy and EU law as well as Arbitration and Competition law.

Looking forward to the 4th quarter of 2018, read about our support to upcoming prestigious scientific and business European conferences, like the 3rd Athens Conference on European Energy Law on December 7th and the Economist Southeast Europe Summit, in Berlin on December 3rd, 2018.

In this quarter, Metaxas & Associates Law firm has successfully represented clients in their legal disputes with market operators and regional state-owned suppliers. Also, our law firm had the privilege of being selected to participate in a major energy-related study on a European level contributing with our expertise on energy and EU law.

In this issue, we explore the links between blockchain and transparency in Investment Arbitration and we present the recent agreement by European Union legislators on the dynamic pricing of electricity.

Also, critical issues on Energy arbitration and dispute settlement procedures under the Energy Charter Treaty and their correlation with EU law procedures are presented and discussed.

Recent practice highlights

→ **M&A Law Firm represented** a leading company in the Greek gas supply sector in its successful legal dispute with a former regional monopolistic, state-owned gas supplier and distribution company.

→ **M&A Law Firm successfully** represented RES investors in their disputes over interest rate delays from the Greek market operator. *Relevant link*

→ **A new book** on the regulatory and political challenges of energy networks in the EU and the Eastern Mediterranean has been published with the contribution of M&A's Managing Partner professor Metaxas as co-editor and author. *Relevant link*

→ **Our legal team** has been a part of a selected group of European Legal Firms that prepared the 2018 Energy Investment Risk Assessment (EIRA2018) as expert Law Firm for Greece. EIRA is a publication of the Energy Charter Secretariat that evaluates specific risks affecting energy investment that can be mitigated through adjustments to policy, legal and regulatory frameworks. *Relevant link*

→ **Our Managing Partner**, Professor A. Metaxas delivered a dedicated presentation on Energy arbitration and dispute settlement procedures under the Energy Charter Treaty at the 1st International Arbitration Forum that took place in Athens this September. *Relevant link*

Recent practice highlights

→ **A new, distinguished associate** joins our team. M&A has been proud to welcome a new associate in its ranks, Mr. Ioannis Floros, an experienced Athens lawyer specialized in Commercial and EU Law. Prior to his cooperation with M&A, Mr.Floros has been designated legal consultant of the Greek Minister of Finance for cases of Commercial and EU Law.

→ **A new Of Counsel** strengthens our team. M&A has been proud to also welcome a new Of Counsel in its team. Dr Anna Plevri, a certified Mediator on Civil, Commercial Disputes and ODR, certified Mediator's Trainer and an Arbitrator (Adr-Odr International, MCIArb), will further enhance our Energy law dispute Department.

→ **M&A Law Firm is actively supporting the upcoming 3rd Athens Conference on European Energy Law.** The prestigious conference is a joint initiative of the Energy Union Law Area of the Florence School of Regulation and the Hellenic Energy Regulation Institute, that will take place on December the 7th in Athens. You can learn more about the agenda and registration *here*.

Hellenic Energy Regulation Institute

FSR Florence School of Regulation

→ **M&A Law Firm sponsors the upcoming Economist Southeast Europe Summit**, in Berlin on December 3rd, 2018. The prestigious summit is a co-operation of The Economist Events with the Hellenic-German Chamber of Commerce and Industry (AHK), the support of the Federation of German Industries (BDI) and the Association of German Chambers of Commerce and Industry (DIHK) It will address critical issues for the future of Southeast Europe. *Relevant link*

The future of Intra-EU BITs on Investor-State Arbitration after CJEU's Achmea Judgment

A much-anticipated judgment by the Court of Justice of the European Union in Slovak Republic v. Achmea B.V. (Case C-284/16), on March the 6th this year, ruled that the arbitration clause contained in Article 8 of the 1991 Netherlands-Slovakia Bilateral Investment Treaty (BIT) has an adverse effect on the autonomy of EU law, and is therefore incompatible with EU law.

This landmark decision by the CJEU sets the first precedent with respect to the incompatibility of arbitration clauses contained in intra-EU BITs with EU law. The Court found that the Investor-State arbitration provision in the Achmea case is contrary to Articles 344 and 267 of the Treaty on the Functioning of the European Union (TFEU).

The TFEU ensures the effective application of EU law by prohibiting, under Article 344, EU Member States from submitting disputes concerning the interpretation or application of EU law to dispute settlement methods other than those provided for in the EU founding treaties, as well as by establishing, under Article 267, a preliminary reference procedure that allows the Court and EU Member State courts to engage in a judicial dialogue on the interpretation of EU law.

A landmark decision by the CJEU sets the first precedent with respect to the incompatibility of arbitration clauses contained in intra-EU BITs with EU law

In the Achmea judgment, the CJEU ruled that Investor-State arbitration under an intra-EU BIT carries negative effects for the autonomy of EU law, and is therefore incompatible with the duty of sincere cooperation incumbent upon EU Member States to ensure that EU law will be effectively and uniformly applied.

The CJEU held that an investment treaty tribunal does not qualify as a "court or tribunal of a Member State" that is competent, pursuant to Article 267 of the TFEU, to request preliminary rulings on the interpretation of EU law from the CJEU.7 At the same time, the Court found that in the context of resolving an investment treaty dispute, arbitral tribunals constituted under intra-EU BITs are called upon to interpret and apply EU law, as part of the law in force in the host State and as international norms in force between the Contracting Parties to the BIT.

The Court confirmed that the preliminary reference procedure is a keystone of the judicial system of the EU legal order that allows a judicial dialogue between the CJEU and EU Member State courts, thereby ensuring the uniform and effective application of EU law.

The Court stressed that investment treaty arbitration, effectively removes, disputes that may concern the interpretation or application of EU law from the jurisdiction of the domestic courts.10 At the same time, judicial review by EU Member State courts of investment treaty awards is limited in scope. The Court concluded that where EU Member States had entered into BITs that include an Investor-State arbitration mechanism, this could result in disputes under the BITs being adjudicated in a manner that undermines the full effectiveness of EU law.12 The Court accordingly held that investor-State arbitration under intra-EU BITs impaired the autonomy of EU law, which is ensured by Articles 344 and 267 TFEU.13 Having found that Investor-State arbitration under intra-EU BITs is incompatible with EU law, the Court did not rule on the question whether such arbitration is also incompatible with Article 18(1) of the TFEU, which enshrines the principle of non-discrimination.

The judgment is expected to generate relevant implications in different areas. In the first place, it should probably create a negative effect towards investment disputes currently pending before arbitrators that are bound to apply EU law as part of the sources of law applicable to the dispute under the relevant intra-EU BITs. In cases where the award is in favor of the private investor, it should be expected that the State would challenge it before the competent national courts and ask them to apply the Achmea ruling to set aside the award. The Achmea judgment relates to the ongoing debate regarding the future of Investor-State arbitration within the European Union. The European Commission, supported by some Member States, has long preserved the opinion that Investor-State arbitration is incompatible with EU law. On the other hand, investment treaty tribunals facing questions of EU law have routinely held that investor-State arbitration is not incompatible with EU law, and have found themselves competent to interpret questions of EU law.

The Achmea judgment relates to the ongoing debate regarding the future of Investor-State arbitration within the European Union

The judgment is thus likely to have a profound impact on Investor-State arbitration within the European Union. Following a consistent line of CJEU judgments affirming the supremacy of the EU legal order over obligations imposed under treaties concluded between EU Member States, the judgment may curb international arbitration as a means for EU investors to settle disputes with EU Member States.

By Professor Antonis Metaxas in http://www.macropolis.gr/?i=portal.en.legal.7473

Progress on the dynamic pricing of electricity and the role of Aggregators

Negotiations between the European Commission, the European Parliament and the Member States on the proposed reconstruction of the EU electricity market, seems to have resulted in an agreement over the dynamic pricing of electricity.

The agreement refers to the introduction of "aggregators", functioning as virtual power plants, pooling the electricity consumption of households and selling off their unused power during peak hours, when demand is high. Aggregators can profit from storing electricity or managing the energy consumption of their clients. The achieved agreement will allow them to massively enter the electricity market thus disrupting the sector and boosting competition in a way similar to the disruption that virtual network operators brought into the telecoms market in the past.

Electricity supply with dynamic pricing is a field of innovation in retail markets which is made possible by the development of efficient wholesale markets and the availability of smart meter data.

The Clean Energy Package defines dynamic electricity price contract as an electricity supply contract between a supplier and a final customer that reflects the price at the spot market or at the day ahead market at intervals at least equal to the market settlement frequency. It also requires Member States to ensure that every final customer is entitled, on request, to a dynamic electricity price contract by his supplier.

The achieved agreement will allow aggregators to massively enter the electricity market thus disrupting the sector

Under the recently achieved deal, energy companies with more than 200,000 clients will be obliged to provide households with at least one offer comprising dynamic price contracts. The essential element of the deal is that aggregators won't have to ask energy suppliers for prior permission to enter the market. In exchange, energy suppliers will receive compensation in case the electricity they produce is lost, while details of the compensation are still to be agreed.

Earlier studies on this issue recommended that for the successful implementation of dynamic pricing, the Commission should ensure that action will be taken on informing customers about the opportunities and risks of dynamic pricing contracts aiming that as these contracts become more commonplace, consumers' awareness and learning will further increase.

However, concerns have been raised in the suppliers' ability to built adequate IT support for setting up such pricing structures i.e. pricing models, consumption data treatment, invoicing processes for all options, a factor that might represent an important entry barrier that can do more harm than good for consumers, particularly if there is not a high demand for these kind of offers or if meter functionalities only exist for a small number of clients.

Demand-response services are still fairly new in the electricity market, but their importance is only expected to grow as power grids come under increasing strain from intermittent renewable energy sources.

With the recent deal, EU negotiators also agreed to establish regional cooperation centers by 2023, as a way to facilitate cross-border exchanges of electricity and ensure unused excess power does not go to waste. Such regional centers will take a more prominent role in balancing markets, which will allow cross-border balancing of electricity flows and bring benefits in terms of market integration.

According to estimates by the Regulatory Assistance Project (RAP), this could unlock up to €3 billion savings annually by 2030.

Regional centers will take a more prominent role in balancing markets, which will allow cross-border balancing of electricity flows

Implementing blockchain technologies in Investment Arbitration

Although there are various conflicting opinions when it comes to digital currencies and the weight they can gain within the global financial system, there is one estimation that seems to be constant within technology experts: Blockchain technologies are here to stay, offering a wide spectrum of applications in business and trade with indisputable benefits in terms of efficiency and even transparency of transactions.

Blockchain technologies consist of databases that records and stores "blocks" or "chains" of data in order to form a comprehensive and reliable record of information. Build on a non-central database system and using thousands of computers globally, blockchain technologies offer calculating power, security and endurance from attacks or corruption.

A rather accurate definition by Dr. Pavel Kravchenko, a decentralized systems expert, explains blockchain as "a mechanism for reaching consensus regarding the state of a shared database between multiple parties who don't trust each other." Blockchain eliminates the need of intermediary (e.g. bank, agent) with each computer connected to the network having a copy of the blockchain, thus ensuring the transparency of transactions.

Consensus between parties who don't trust each other, as well as transparency of transactions, present a solid base in examining the future use of blockchain technologies in investment arbitration

These two elements -consensus between parties who don't trust each other and transparency of transactions- present a solid base in examining the future use of blockchain technologies in investment arbitration.

The idea of transparency may have once been unfamiliar in international arbitration. However, recent regulations have popularized the concept that investment arbitration needs to move from being a highly confidential mechanism to one where transparency is a key component to the legitimacy and credibility of the system.

Transparency as a concept corresponds to openness, clarity, and reliability, elements found in the core concept that gives value and meaning to blockchain technologies. Blockchain is more than just a platform that further enhances our ability to communicate. It is a technology that tackles the issue of trust between peers.

So how could blockchain be used in investment arbitration?

Advocates of the concept argue that arbitrators could -in the near future- share directly to a blockchain system the information that the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration dictates.

According to such analyses, this could lead to the introduction of a protocol to protect highly sensible information under the limits of the Transparency Rules.

Consequently, the system would be automated to minimize the discretion to be exercised by the arbitral tribunal and enhance the efficiency in the process. Higher transparency however, requires the information to be shared with all participants simultaneously in a fast-paced manner.

Using a blockchain system to share the information directly by the arbitrators could mean that third parties and non-disputant parties can learn about a given dispute faster thus enhancing the participation in the arbitration process earlier.

In conclusion, a strong trend seems to be forming, supporting the notion that blockchain and the Transparency Rules could be compatible since they both strive to achieve an effective balance between that necessary cost – imposed on behalf of the public interest in transparency– and ensuring the efficiency and fairness of the proceedings for the disputing parties.

Using a blockchain system to share the information directly by the arbitrators could mean that third parties and non-disputant parties can learn about a given dispute faster

It is being noted though that despite the advantages, transparency in investment arbitrations does have some disadvantages. Primary among them is the notion that transparency can result in delays and higher costs. Allowing the stream of information and involvement of non-parties would require more time and, consequently, higher costs.

The future use of advanced technologies like blockchain in investment arbitration still remains to be seen.

METAXAS & ASSOCIATES
ATTORNEYS AT LAW

M&A Law Firm, 154 Asklipiou str,
11471 Athens - Greece
www.metaxaslaw.gr
info@metaxaslaw.gr
+30 210 33 90 748