

# KLC

LAW FIRM

# ARBITRATION NEWSLETTER

First Issue



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# Welcome to the first issue of KLC Arbitration Newsletter!

KLC's Arbitration Team launches its first Arbitration Newsletter, which we aim to be updating and circulating to select recipients on a quarterly basis from now on. What prompted this initiative is the allure of arbitration itself, being a "fit-all" dispute resolution method, covering diverse markets and plethora of jurisdictions. The aim of this Newsletter is to keep arbitration users updated for all front-page news, trends and exclusive developments on International Arbitration (Commercial and Investment). We are of course aware that the web is full of information in this respect, but especially for local and international arbitration users with an interest in or association to the Greek jurisdiction there seems to be a lack of this kind of offering in English – so here it is!

Each Issue will comprise three main subcategories:

- (I) The "**Editorial**", a brief legal analysis or more generic commentary on trending topics related to arbitration;
- (II) The "**Arbitration Selected Alerts**", containing sectoral updates (pharma, construction, energy etc.), specifically picked from diverse databases across the globe, that are worth paying heed to; and
- (III) **KLC news** on arbitration-related matters, such as landmark cases, conferences, publications and the like.

We hope it proves to be a useful work tool and, most importantly, a pleasant reading!



ARBITRATION

# I. Editorial

## Editor's note: "International arbitration goes **green**"

The recent global shift to cleaner forms of energy goes far beyond a mere "trend", marking a revolutionary fundamental change in how we all live and how businesses operate. Apparently the COVID pandemic has accelerated this "green" transformation which extends to all levels of the geopolitical, economic and personal sphere. The debate is now shifting from what used to be a discussion on climate change to fundamental life and business changes at an unprecedented fast pace. Green energy is in the epicenter of these tectonic developments.

By definition, International Arbitration, laying its foundations on international trade and cross-border investments, could not be left intact. One of the charms and challenges of International Arbitration is that it keeps abreast of and adapts to emerging economic and business developments, much faster than local courts in national jurisdictions, given that arbitration is in the forefront of cross-border disputes resolution. Therefore, fundamental changes on how business operate worldwide are bound to result in the emergence of new types of disputes and in radical changes on the way these disputes are resolved through arbitration.

The signs of reform in International Arbitration triggered by the clean energy (r)evolution have already made their appearance in the form invitations to arbitral institutions and arbitrating parties to embrace "greener arbitration practices", such as remote hearings, reduction of paper use and digitalization of arbitration procedures, in an effort to reduce the environmental impact of arbitrations. However, arbitration institutional rules and guidelines have been slow to acknowledge and adopt calls for "greener" arbitrations despite recent initiatives to this effect, such as the "Campaign for Greener Arbitrations" (whose "Green Protocols" which have been signed only by HCLIAK). Such marginal and ineffective steps are simply "too late, too little": the world is reshaping and arbitration cannot afford to lag behind.

Indeed, as the Paris Agreement emission reduction targets gain political acceptance and momentum, industries and businesses worldwide are required to achieve vast cuts to carbon emissions, while energy producers and users are called to balance increasing energy demand with the need to achieve sustainability of energy supply for future generations. In this context, the exponential growth of renewables projects is setting the pace, marking an unprecedented shift away from coal and gas to cleaner forms of energy. These encompass not only the "mainstream" renewables, solar and wind, but also a new generation of innovative renewable energy sources and energy efficiency schemes, such as hydrogen, biofuel and electricity storage. At the same time, industrial and commercial firms worldwide are aligning their business models to the ESG requirements and the banking system gradually but steadily imposes constraints in the financing of projects bearing a heavy environmental footprint.

This new business paradigm gives rise to novel climate change and renewable energy types of disputes, creating a whole new spectrum of arbitration disputes. In recent years, the boom of renewables investments has already given rise to numerous investor-state (mostly ECT) or intra-state energy disputes, such as the famous saga of investment arbitrations against Spain's renewables state aid reform. When it comes to international commercial arbitration, albeit perhaps less apparent, this "new wave" of energy disputes is underpinning the vast majority of international commercial arbitration energy cases.

International arbitration has long been the preferred resolution forum for energy disputes which account for a dominant portion of international arbitration cases worldwide. The primary advantages of arbitration, including the ability to benefit from specialized arbitrators and experts, the confidentiality of proceedings and the enforceability of arbitral awards in practically every jurisdiction, renders arbitration the most suitable forum for resolving this emerging new type of energy disputes, ranging from the multi-faceted renewable energy disputes arising during the lifetime of a renewables project to complex investor-state and commercial disputes bound to arise as a result of the phasing out of less environmental friendly forms of energy. As concluded by a recent ICC Commission report on Climate Change Disputes, the inherent flexibility and internationalism of the arbitral process makes commercial arbitration an ideal dispute resolution method for climate change and environment-related disputes, which almost invariably have an international dimension.

The fact that arbitration appears as the "natural forum" for the resolution of energy disputes is by no means an excuse for inaction: bold and practical steps are required to be taken without delay by arbitration institutions and arbitration users alike. Calling for the incorporation of arbitration clauses in renewables PPAs, adopting calls for greener arbitration proceedings and rendering arbitrations more business-friendly through the increase of the number of arbitrators with technical rather than legal background are only few of the many steps required to be taken towards this direction.

The shift to cleaner forms of energy worldwide is a wake up call for International Arbitration to go **green** on all fronts!

*Alexandros Tsirigos*  
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## II. Arbitration Selected Alerts

### Arbitration in Greece

**In confidential ruling, Greece is ordered to pay millions to Cypriot bank that suffered discriminatory treatment during 2010 financial crisis bail-out, but state defeats bulk of claims**

CYPRUS POPULAR BANK PUBLIC lodged its [ICSID claim](#) in July 2014, arguing that Greece had violated the Cyprus-Greece bilateral investment treaty (BIT), including by allegedly providing discriminatory access to an “Emergency Liquidity Assistance” (ELA) program during the Greece’s debt crisis. In a recent ICSID award (not published), the tribunal saw no obligation on Greece to provide emergency assistance to financial institutions in the context of its recent debt crisis, adding however that, if such measures were taken, then the BIT protected foreign investors against their discriminatory implementation. Finding that Greece had provided a more favourable treatment to investors from other states (especially from France) in applying the ELA program, the tribunal decided that Greece had violated the BIT through the discriminatory treatment of a local investment bank that was a subsidiary of the claimant. Nonetheless, the tribunal declined to award damages finding that it was the claimant’s home state (Cyprus), rather than the respondent (Greece), that would have had the responsibility under EU banking rules to address the situation of these retail branches. Information provided by [IAReporter](#).

**Judgement No. 201/2021 of Thessaloniki Single-Member Court of Appeal on waiver of arbitration agreement**

In its recent decision, the Greek appellate court ruled on the cases where an arbitration agreement might be considered waived. It found that, if a party fails to respond to the other party’s invitation to appoint an arbitrator, such lack of response constitutes a proposal to contractually abrogate the arbitration agreement under Article 872 of the Code of Civil Procedure. Moreover, in case of an action before civil courts, the arbitration agreement must be invoked at the hearing as a procedural objection; if not raised by the defendant, it is presumed to be an acceptance of the proposal to abrogate the arbitration agreement under Article 886 of the Code of Civil Procedure.

### Energy

**ECJ says ECT doesn’t cover intra-EU disputes**

The European Court of Justice has issued a landmark judgment ruling (Case C-741/19 Republic of Moldova v Komstroy, [click here](#)) that the investor-state arbitration clause in the Energy Charter Treaty does not cover intra-EU investment disputes. By way of reminder, the ECJ in its Achmea ruling found that Articles 267 and 344 TFEU preclude an arbitration agreement in an intra-EU bilateral investment agreement. Although the Achmea ruling has had great influence on the field of intra-EU BITs, its effect on ECT disputes has been more subdued. With this recent ruling, the ECJ extended its Achmea findings to explicitly cover the ECT.

**Solar award triggers EU state aid probe**

The European Commission has begun an in-depth investigation to assess whether a €101 million Energy Charter Treaty award requiring Spain to compensate investors for changes to its renewable energy subsidy regime accords with EU state aid rules.

For more information, click [here](#).

**Spain marks 50th renewables claim as new reforms roil investors**

Spain has been hit with its 50th treaty claim from renewable energy investors and a fresh US enforcement action, as surprise reforms to the sector announced last week raise the prospect of yet more claims.

Information provided by [GAR](#).

**Poland declares win in heat and power dispute**

Poland says it has defeated an Energy Charter Treaty claim worth almost €90 million brought by a group of investors in a project to use natural gas to generate combined heat and power.

Information provided by [GAR](#).

**ExxonMobil has filed an ICC claim against an Iraqi state-owned oil company over a stalled attempt to sell a stake in a US\$50 billion oilfield**

Information provided by [GAR](#).

## Construction & Infrastructure

**Italian utility liable for breaching environmental guarantees**

A Belgian chemicals producer has won a €90 million ICC award against an Italian utility over breaches of environmental guarantees concerning the billion-euro sale of two industrial plants.

Information provided by [GAR](#).

**Indian investor's covid plea can't save claim against Libya**

An UNCITRAL tribunal has terminated an Indian construction company's US\$110 million treaty claim against Libya for a failure to pay required advances, despite a plea from the investor that coronavirus conditions in its home country warranted granting an extension.

Information provided by [GAR](#).

**Kazakh road authority beats bulk of ICC claim**

Kazakhstan's road authority has largely escaped a more than US\$200 million ICC claim brought by Turkish contractors over a motorway project that forms part of China's Belt and Road initiative.

Information provided by [GAR](#).

**Peru faces second ICSID claim over metro project**

A Spanish-Italian consortium has brought a second ICSID claim against Peru over a project to build Lima's second metro line – weeks after the state was found liable in the first case.

Information provided by [GAR](#).

**Romanian and Moldovan Perspectives on Construction Disputes during COVID-19**

To read the full article, click [here](#).

## Life Science & Pharma

### Pharma investor's investment treaty award against Ecuador was upheld

A Dutch court has upheld a US pharmaceuticals company's €44 million investment treaty award against Ecuador, dismissing arguments that the arbitrators took on the role of a final appeal court when they held the state liable for a denial of justice.

Information provided by [GAR](#).

### Belgian centre rules on multibillion pharma fraud claim

A US pharmaceutical company says it has prevailed in what is thought to be the largest-ever case heard at Belgian arbitral institution CEPANI, concerning alleged fraud during a US\$4.3 billion acquisition

Information provided by [GAR](#).

### Belgian-Brazilian hygiene M&A dispute settles

A Belgium-based provider of personal hygiene products has agreed to settle an ICC claim against a Brazilian pharmaceuticals group over a €300 million acquisition.

Information provided by [Latin Lawyer](#).

## M&A and Corporate

### Claims filed over multibillion-euro eyewear merger

Franco-Italian eyewear group EssilorLuxottica is facing a pair of arbitrations over its planned €5.5 billion purchase of a rival Dutch brand, after raising concerns about measures taken by the target company to mitigate the impact of covid-19

Information provided by [GAR](#).

### Swiss Supreme Court confirms that claims against bankrupt Swiss parties do not ipso facto lose their arbitrability

To read the Judgement No. 5A\_910/2019 click [here](#).

### Canadian Courts pro arbitrability of insolvency disputes

The Supreme Court of Canada, in Petrowest Corporation v. Peace River Hydro Partners, votes pro arbitrability of insolvency disputes, holding that it was permissible for a receiver/trustee to enforce an insolvent debtor's contracts, while also disclaiming the arbitration agreements within those contracts

To read the judgement click [here](#).

### ICC rejects challenge over alleged cyber-attack at an M&A dispute

As a Brazilian court lifts a stay on an award in a multibillion-dollar M&A dispute, the ICC Court has rejected a bid to disqualify the entire tribunal based on an alleged cyber-attack

Information provided by [GAR](#).

## Arbitration Due Process

**The European Court of Human Rights has found that an Italian power's company right to a fair trial was violated because of an arbitrator's failure to disclose his ties to Enel**

The case concerned the arbitration of a dispute involving a hydroelectric-power agreement for power generation in Albania involving the applicant company and ENELPOWER, a company which had been spun off from ENEL, the former State power company. It related to, in particular, the impartiality of the arbitration panel, as one of its members (N.I.) had been on the board of ENEL and had worked as that company's lawyer. The Court found in particular that owing to N.I.'s close ties to ENEL and thus connections to ENELPOWER, it could not be said that the arbitration panel had been objectively impartial, leading to a violation.

To read the judgement in the case of No. Beg S.p.a. v. Italy (application no. 5312/11), click [here](#).

**The European Court of Human Rights ruled on the human right to a conflict-free arbitrator**

In case of BEG SpA v Italy, the ECHR dealt with many unanswered questions on the clash between party appointed arbitrators and their independence and impartiality. To read the full judgment click [here](#).

**Why States Should Not Ratify, and Should Instead Denounce, the Hague Choice-Of-Court Agreements Convention**

To read Gary Born's full article click [here](#) for part I, [here](#) for part II and [here](#) for part III. For a response, towards Gary Born's post, read [here](#)).

**In its Judgment no. 1790/2021 of 8 June 2021 Milan Court Torpedoes International Arbitration and Substitutes Own Decision on Merits**

To read the judgement click [here](#). For more information, click [here](#).

**Covid plea fails to blunt razor award**

A Swiss court has upheld an LCIA award against the majority shareholder of an Indian razor manufacturer, rejecting arguments that the arbitrators should have postponed a hearing in light of the covid-19 pandemic.

Information provided by [GAR](#).

**English high court considers scope of arbitration agreement when determining jurisdiction to grant interim relief in support of arbitration**

In [AT and others v Oil and Gas Authority \[2021\] EWHC 1470 \(Comm\)](#), the High Court considered an application by four claimants under s.44(3) of the Arbitration Act 1996 for an order restraining the defendant from circulating a redacted version of a notice to third parties. The Court found that the underlying dispute was not within the scope of the arbitration agreement between the parties and, accordingly, that it lacked jurisdiction to grant such an interim injunction under s.44(3) of the Act.



## Investment Treaty Arbitration

### Guidance from Ukraine: Are Emergency Arbitration Decisions in Investment Treaty Disputes Enforceable?

In [JKX Oil & Gas plc et al. v. Ukraine](#) (JKX case) in 2018 and in [VEB.RF v. Ukraine](#) (VEB case) in early 2021, the Supreme Court rejected recognition and enforcement of two emergency arbitrator awards rendered under the SCC Rules on public policy grounds under the New York Convention. To read the full article, see [here](#).

### The Second Draft of the Code of Conduct for Adjudicators in International Investment Disputes: Towards a Likely Agreement?

To read the draft ICSID code, click [here](#).

### Hungary fails to upend another intra-EU BIT award

An ICSID committee has upheld a €5.2 million award in favour of a Portuguese cake and biscuit producer against Hungary, ruling that it is not bound by the European Court of Justice's ruling on intra-EU bilateral investment treaties in the Achmea case.

Information provided by [GAR](#).

### Ex-Yukos Unit Wins New \$5 Billion Court Judgement Against Russia

A Geneva-seated tribunal has reportedly ordered Russia to pay US\$5 billion to a former affiliate of Yukos, in one of the second wave of treaty claims filed over the oil company's collapse.

To read more click [here](#).

### Colombia found liable in high-mountain mining dispute

A divided ICSID tribunal has found Colombia liable in a US\$700 million claim brought by a Canadian mining company that was deprived of its right to operate within an environmental preservation zone.

Information provided by [GAR](#) and to read more click [here](#).

### Cambodia is facing its first known treaty-based arbitration, as Chinese telecom investors lodge ICSID claim

Information provided by [IAReporter](#).



## Arbitral Rules and Institutions

### UNCITRAL Expedited Arbitration Rules

The United Nations Commission on International Trade Law Adopted the 2021 Expedited Arbitration Rules ("EAR"). To access the rules, click [here](#) and to read the press release, click [here](#).

### Revision of the WIPO Arbitration Rules

The 2021 WIPO Rules have been adapted to reflect modern trends of dispute resolution in an increasingly remote environment. The amendments include a possibility for the parties to conduct remote hearings, an obligation to disclose third-party-funder agreements and a decrease in costs in arbitration proceedings.

To access the rules, click [here](#).

### A Swiss "(R)Evolution": SCAI Becomes the Swiss Arbitration Centre and Enacts New Arbitration Rules

To read more, click [here](#).

### Revised Vienna Arbitration and Mediation Rules Enter into Force on 1 July 2021

To access the rules click [here](#) and to read more, click [here](#) and [here](#).

### The Asian International Arbitration Centre has launched the latest revisions to its Arbitration Rules

To access the rules, click [here](#).

### Claudia Salomon has begun her term as president of the ICC International Court of Arbitration

This marks a milestone in the ICC Court's almost 100-year history as Claudia Salomon becomes the first woman to be appointed President of the world's preferred arbitral institution. To read the announcement, click [here](#) and [here](#).



## III. KLC's News

### KLC hosts international webinar on **Green Arbitration**

On November 2021, KLC, in collaboration with DELOS, will host a webinar on "**Green Arbitration**", much related to today's editorial. To find out more about the event and subscribe, click [here](#).



### KLC features on "DELOS Spotlight" for the publication of Greek Chapter of DELOS Guide to Arbitration Places (GAP)

Delos is an independent arbitral institution established in 2014 to respond to the needs of businesses globally for time and cost efficiency in the resolution of disputes through arbitration. The DELOS Guide to Arbitration Places (GAP) is designed to assist in-house counsel, corporate lawyers and arbitration practitioners with efficiently accessing key insights into a large range of jurisdictions, including for the purposes of negotiating the choice of arbitral seats and conducting arbitral proceedings in those jurisdictions.

For the "**Spotlight on Greece**" click [here](#) and for the Greek Chapter of GAP, prepared by KLC, click [here](#).

### KLC attended the 2021 **Paris Arbitration Week**

The key industry event dedicated to International Arbitration took place from 24 to 28 September 2021 in its home, Paris, comprising a week full of conferences and events, dedicated to International Arbitration.

For further information please see [here](#).

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