Hellenic Supreme Administrative Court applies *Achmea* to arbitration clauses in concession agreements

I.

In its recent decision no. 246/2022, the Hellenic Supreme Administrative Court ("HCS") applied CJEU's reasoning advanced in *Achmea* (C-284/16) and *PL Holdings* (Case C-109/20) to the arbitration clause contained in the concession agreement ratified by law for the building, maintaining and operating of the Athens International Airport "Eleftherios Venizelos". On this basis, HCS concluded that the agreement of the parties to arbitrate was contrary to articles 267 and 344 TFEU, that, consequently, administrative courts are entitled (and obliged) to try the merits of the dispute *de novo* without being bound by the findings of the arbitrators in the rendered award.

HCS failed to offer elaborate reasons in support of this conclusion which effectively expands the scope of application of *Achmea* and *PL Holdings* to contract-based arbitration completely unrelated to prior arbitration proceedings under a BIT. It seems that the Court's ruling stems from the propositions, also taken for granted, that concession agreements qualify as investment contracts and that *Achmea* and *PL Holdings* apply to all investment contracts.

Further on, HCS used broad terms in order to describe the legal consequences to be derived from the incompatibility of arbitration clauses contained in investment contracts, such as concession agreements, with EU law. The vague wording of the Court's reasoning allows room to argue that the arbitration clause is null and void and/or that the dispute is not arbitrable and/or that the award is against international public order. For domestic arbitrations governed by the provisions of the Greek Code of Civil Procedure ("GrCCP") the distinction has a critical practical effect: The non-arbitrability of the dispute renders the award non-existent under section 901(1)(b) GrCCP. This means that the award is deemed deprived of any legal effect without the need to be annulled in set-aside proceedings initiated within a

statutory deadline. Hence, at least in domestic arbitrations, the Greek State could, on the basis of the *"Achmea defense",* dispute the legal effect of awards already rendered even if the annulment request against them has been dismissed on its merits or such a request has never been brought. This is of importance given that a great number of disputes arising under concession agreements have been resolved in arbitration proceedings that are considered domestic.

There is much to say against HCS decision no. 246/2022, rendered by the Court's Second Division. For the purposes of this newsletter, it suffices to say that the Court's ruling is premised on a gross oversimplification of the legal issues involved. It remains to be seen whether other Divisions of HCS will embrace the same analysis. Most importantly, given that the jurisdiction to decide on annulment requests brought against arbitral awards lies with civil courts, it remains to be seen whether the Civil Courts of Appeal and the Civil Supreme Court (Areios Pagos) on cassation will also adopt the same approach. There are also available legal theories that may be applied to safeguard the validity of arbitral awards against the *"Achmea Defense"* in domestic arbitrations, at least in cases in which an annulment request against them has already been dismissed on its merits.

That being said, HCS decision no. 246/2022 certainly raises a red flag. Concessionaires may not stay assured that the Greek State will honor the agreement to arbitrate, or, even worse, that the Greek State will not challenge awards already made in domestic arbitration proceedings or future awards rendered in domestic and international arbitration proceedings seated in Greece on the basis of the "*Achmea defense*".

II.

In brief, the facts of the dispute have as follows: The concession agreement in question, ratified by law, provided for a favorable to the concessionaire tax regime (introducing, amongst others, a freezing clause regarding the favorable tax regime then in force). Following an audit for the fiscal years 2005 - 2010, tax assessments were issued by the tax administration against the concessionaire. The concessionaire initiated arbitration proceedings under the LCIA Rules against the Greek State according to the arbitration clause of the concession agreement and argued that the tax assessments in question were not in accordance with the favorable tax regime put in place by Law 2338/1995. The arbitral tribunal found for the concessionaire and held that the tax assessments were not in accordance with the law. Subsequently, the concessionaire brought an action with the Administrative Court of Appeals ("ACoA") seeking to have the tax assessments annulled and invoked the res judicata effect of the arbitral award. Given that arbitral tribunals lack jurisdiction to annul administrative acts, the concessionaire sought to have the tax assessments annulled in the Administrative Court of Appeals (ACoA), invoking the res judicata effect of the already rendered award. The ACoA held

that it was not bound by the award because the tribunal lacked jurisdiction to adjudicate the dispute. According to ACoA's reasoning, the dispute was not on the ratified tax clauses of the concession agreement but on the true meaning of legal provisions to which these clauses referred. On that basis, the ACoA reviewed the merits of the tax dispute de novo, reached a different conclusion and dismissed the petition for annulment of the tax assessment. The case was then brought before HCS which, per its decision no. 582/2015, quashed the decision of the ACoA and remanded for reconsideration. The HCS held that the dispute was within the scope of the arbitration clause of the concession agreement, and, on that basis, that the merits of the tax dispute were finally decided by the arbitrators and were not to be revisited by State Courts in annulment proceedings. On remand, the Greek State raised for the first time the "Achmea defense" arguing that the arbitration clause of the concession agreement was null and void as contrary to articles 267 and 344 TFEU in conjunction with article 19 TEU. The ACoA rejected the defense and annulled the tax assessments based on the findings of the arbitral tribunal that were considered binding. Subsequently, the case was brought once again before the HCS, this time by the Greek State which filed a petition for cassation on the ground that the ACoA violated articles 267 and 344 TFEU as well as article 19 TEU in holding that the award rendered under the arbitration clause contained in the concession agreement was binding upon the administrative courts. The HCS noted that this specific legal question was not resolved with its prior no. 582/2015 decision and went on to apply to the case at hand the ruling of CJEU in Achmea concluding that the arbitration clause in question is contrary to articles 267 and 344 TFEU.

III.

On that basis of the above facts, the HCS quashed the decision of the ACoA and remanded for reconsideration. HCS reproduced verbatim the reasoning of CJEU in *Achmea,* holding as follows:

i. that the concession agreement entered into by the Greek State qualifies as an investment agreement and shall not affect the allocation of powers fixed by the EU Treaties and, consequently, the autonomy of the EU legal system;

ii. that in accordance with article 19 TEU, it is for the national courts and the CJEU to ensure the full and effective application of EU law in all Member States. In this respect, the preliminary ruling procedure provided for in article 267 TFEU is considered as a keystone aiming to secure the uniform interpretation of EU law and thus its consistency, full effect and autonomy;

iii. that the dispute brought before the arbitral tribunal may involve the interpretation and/or the application of EU law on the subject matter of VAT;

iv. that an arbitral tribunal does not form part of the judicial system of the Hellenic Republic, and thus it does not qualify as a court of a member state within the meaning of article 267

TFEU. Hence, it may not (permissibly) submit questions to the CJEU for a preliminary ruling;

v. that, consequently, the arbitration provided for in the respective contractual provision may call into question the preservation of the nature of EU law, which is ensured by the preliminary ruling procedure provided for in article 267 TFEU, is inconsistent with the principle of sincere cooperation between the member states, has an adverse effect on the autonomy of EU law, and runs afoul of articles 267 and 344 TFEU.

The HCS thus concluded that, since the arbitral tribunal is seized of a dispute on the basis of a legal provision that is contrary to the EU Treaties, the award is rendered in excess of the jurisdiction vested in it under law. Consequently, the award is not binding upon the administrative courts that are competent to resolve the dispute anew.

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