

BG Group v. Argentina

Dr Maxi Scherer

Wilmer Cutler Pickering Hale and Dorr LLP

Queen Mary University of London





Overview

- I. Issues at Stake
- II. Previous Case Law
- III. Analysis of the Majority Opinion
- IV. Analysis of the Dissenting Opinion

Art 8 UK/Argentina BIT

“(1) Disputes [under] this Agreement ... shall be submitted ... to the decision of the **competent tribunal of the Contracting Party in whose territory the investment was made [i.e., local courts]**.”

(2)(a)(i) The aforementioned disputes shall be submitted to **international arbitration** ... where, **after** a period of **eighteen months** has elapsed from the moment when the dispute was submitted to the [local courts], the said tribunal has not given its final decision.”

Issues at Stake

- Did the Tribunal in interpreting and applying the local litigation requirement exceed its powers?
- In reviewing the award under the FAA, must US courts give deference to the arbitral tribunals' findings or decide *de novo*?
- “[W]ho – court or arbitrator – bears primary responsibility for interpreting and applying the local litigation requirement to an underlying controversy?”

Previous Case Law (1)

- ***AT&T Technologies v. Communications Workers (1986)***

“Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.”

- ***First Options of Chicago, Inc. v. Kaplan (1995)***

“Courts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clear and unmistakabl[e]’ evidence that they did so.”

Previous Case Law (2)

- ***Howsam v. Dean Witter Reynolds, Inc. (2002)***

Introduces distinction between

- Gateway questions that are “**arbitrability**” questions (submitted to *de novo* review); and
- Gateway questions that are “**procedural**” (deference to arbitral tribunal’s determination)
 - “time limits, notices, laches, estoppel and other conditions precedent to an obligation to arbitrate”

Majority Opinion (Findings)

- 1. Ordinary contract analysis:**
 - local litigation requirement is a procedural condition precedent; and
 - high deference is thus given to the Tribunal's findings
- 2. Treaty analysis:** the fact that the local litigation requirement is contained in a treaty does not lead to a different result
- 3. Review of the award:** review of the Tribunal's finding (with deference) shows that Tribunal did not exceed its powers

Majority : Ordinary Contract Analysis

- Confirms previous case law: distinction “arbitrability” and “procedural” gateway questions
- Qualifies local litigation requirement as procedural:
“The text and the structure [of Art 8] make clear that it operates as a procedural condition precedent.... It determines *when* the contractual duty to arbitrate arises not *whether* there is a contractual duty to arbitrate at all.”
- Cf Swiss Federal Tribunal 6 June 2007 (4A_18/2007)

Majority : Treaty Analysis

- “[A] treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties’ intent.”
- The intent-determining framework that applies to ordinary contracts also applies here
- Leaves open the specific question whether the answer would be different if a treaty specifically labelled the local litigation requirement as “condition of consent” to arbitrate



Majority : Review of Award

- The Tribunal made three findings:
 - The local litigation provision is no “absolute impediment to arbitration”
 - Argentina’s emergency laws hindered BG’s access to the local courts
 - It would be “absurd and unreasonable” to require “an investor to bring its grievance to a domestic court before arbitrating”
- The majority found the first two determinations to be uncontroversial and upheld the third determination because of the substantial deference to the Tribunal



Dissenting Opinion

- Specific nature of treaty-arbitration requires a different analysis
- Art 8 does not contain an arbitration agreement but only the State's unilateral offer to submit to arbitration if certain conditions are met (incl the local litigation requirement)
- If the investor does not meet those conditions, no arbitration agreement is formed
- The local litigation requirement is a condition to the formation of the arbitration agreement, i.e. an “arbitrability” question which must be reviewed *de novo*

Many thanks !

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