

US SUPREME COURT REJECTS ARGENTINA'S CHALLENGE TO ARBITRATION AWARD

Introduction

In a decision dated 5 March 2013, the US Supreme Court upheld an arbitration award in favour of BG Group against Argentina, dismissing Argentina's arguments on the arbitrator's lack of jurisdiction.

The successful appeal by BG Group against the earlier decision of the US Court of Appeal is all the more significant as it is rare that an arbitration dispute reaches and is considered in such detail by the US Supreme Court. The majority decision (and the dissent by two of the Supreme Court justices) provides helpful guidance from the US's highest court on how agreements to arbitrate in international treaties will be interpreted by the American courts, along with the implications of the local litigation provisions in such a treaty.

Background

BG Group plc, a British firm, belonged to a consortium with a majority interest in MetroGAS, an Argentine entity awarded an exclusive license to distribute natural gas in Buenos Aires.

At the time of BG Group's investment, Argentine law provided that gas "tariffs" would be calculated in U. S. dollars and would be set at levels sufficient to assure gas distribution firms a reasonable return. Argentina later amended the law, changing (among other things) the calculation basis to pesos. MetroGAS' profits soon became losses.

BG Group commenced arbitration in Washington DC under an bilateral investment treaty between Argentina and the United Kingdom (the "Treaty"), on the basis that Argentina's new laws and practices contravened the principle of "fair and equitable treatment" and constituted expropriation within the meaning of the Treaty.

Argentina denied BG Group's claims, and also argued that the arbitrators lacked "jurisdiction" to hear the dispute on various grounds, including that BG Group had not complied with Article 8 (*Settlement of Disputes Between an Investor and the Host State*) of the Treaty which provided:

(1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled shall be submitted, at the request of one

of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.

(2) The aforementioned disputes shall be submitted to international arbitration in the following cases:

(a) if one of the Parties so request, in any of the following circumstances:

(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;

(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;

(b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

The arbitral tribunal concluded that it had jurisdiction, finding, among other things, that Argentina's conduct (such as also enacting new laws that hindered recourse to its judiciary by firms in BG Group's situation) had excused BG Group's failure to comply with Article 8's requirement, and held that Argentina had breached the "fair and equitable treatment" requirement, awarding BG Group damages.

Both sides sought review in the US courts: BG Group to confirm the award under the New York Convention and the Federal Arbitration Act (the "FAA"), and Argentina to vacate the award, in part on the ground that the arbitrators lacked jurisdiction under the FAA.

The US District Court confirmed the award. The Court of Appeals reversed this decision, finding that the interpretation and application of Article 8's requirement were matters for courts to decide without deference to the arbitrators' views; that the circumstances did not excuse BG Group's failure to comply with the requirement; and that BG Group had to commence a lawsuit in Argentina's courts and wait 18 months before seeking arbitration.

BG Group appealed.

Decision

The Supreme Court upheld BG Group's appeal, ruling 7-2 in its favour.

Justice Breyer, giving the decision of the majority of the Supreme Court, held that a court of the United States, in reviewing an arbitration award made under the Treaty, should interpret and apply "threshold" provisions concerning arbitration using the framework developed for interpreting similar provisions in ordinary contracts. The Treaty should be treated no differently than "*an ordinary contract between private parties.*"

On the basis of that approach, the requirement as to whether BG Group was required to litigate in the local courts first was a matter for arbitrators primarily to interpret and apply, and the Court had to review their interpretation with deference.

The Treaty should not be interpreted in a “*critically*” different way from an ordinary contract, and the normal presumptions should apply – namely that it should be presumed that the parties intended courts to decide disputes about “*arbitrability*,” and arbitrators to decide disputes about the meaning and application of procedural preconditions for the use of arbitration.

In the present case, Article 8 determined when the contractual duty to arbitrate arose, not whether there was a contractual duty to arbitrate at all - as this was a procedural (rather than substantive) matter, it was a provision for the arbitrators to interpret and apply.

While Argentina was entitled to court review (under a properly deferential standard) of the arbitrators’ decision, that review by the Supreme Court showed that the arbitrators’ determinations were lawful. Their conclusion that the litigation provision could not be construed as an absolute impediment to arbitration lay well within their interpretative authority and their conclusion that Argentina’s actions made it “*absurd and unreasonable*” to read Article 8 to require an investor in BG Group’s position to bring its grievance in a domestic court, before arbitrating, was not barred by the Treaty.

Dissent

Chief Justice Roberts (along with Justice Kennedy) dissented from the majority of the Supreme Court, on that grounds that under the wording of the Treaty, Argentina had agreed to arbitration only on condition that that investors first submitted their dispute to an Argentine court before resorting to arbitration. He rejected the majority’s approach to treat the Treaty as “*an ordinary contract between private parties*”, and held that after the majority had started “*down the wrong road*”, it came as no surprise that it ended up at the wrong place.

However, Chief Justice Roberts’ support of Argentina’s legal position came not without criticism, as he noted, “*None of this should be interpreted as defending Argentina’s history when it comes to international investment. That history may prompt doubt that requiring an investor to resort to that country’s courts in the first instance will be of any use.*”

22th April 2014