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Notes

* Segments of the article at the section entitled 'Endorsing deference to international arbitral awards' appeared in Barry Leon, Daniel Taylor & John Siwiec, 'Canadian Supreme Court Refuses Mexico's Attempt to Appeal NAFTA "Upstream" Losses Award', *North American Free Trade & Investment Report*, Vol 22, No 9, 15 May 2012.

1 See **www.arbitrationplace.com**.

2 *Seidel v TELUS Communications Inc*, 2011 SCC 15.

3 Martin J Valasek & Michael Kotrly, 'Has the Supreme Court of Canada changed its attitude towards arbitration?', *IBA Arbitration News* Vol 16 No 2 September 2011 at 134.

4 *Momentous.ca Corp v Canadian American Association of Professional Baseball Ltd*, 2012 SCC 9.

5 *United Mexican States v Cargill, Incorporated*, 2012 CanLII 25159 (SCC).

6 In bringing their motion, the respondents relied upon Rule 21.01(3)(a) of the Ontario *Rules of Civil Procedure* (RRO 1990, Reg 194) in which a defendant may apply to have an action stayed or dismissed on the ground that the Ontario court does not have jurisdiction over the subject matter of the dispute.

7 See above, note 4, at paragraph 7.

8 *Ibid*, at paragraph 9. The Supreme Court was invoking its previous decision in *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27.

9 See also Barry Leon and John Siwiec, 'Canadian Supreme Court Sends Dispute to Arbitration Despite the Filing of a Defence in Court Litigation', *Kluwer Arbitration Blog*, **www.kluwerarbitrationblog.com**, 23 March 2012.

10 See above, note 5.

11 *Mexico v Cargill, Incorporated*, 2011 ONCA 622.

12 *Supreme Court Act*, RSC 1985, chapter S-26, section 40(1).

13 United Mexican States, *Application for Leave to Appeal in the Supreme Court of Canada*, 'Memorandum of Argument' (2 December 2011) at paragraph 29.

14 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v United Mexican States*, ICSID ARB(AF)/04/05 (NAFTA), (Award, 21 November 2007); *Corn Products International, Inc v United Mexican States*, ICSID ARB(AF)/04/01 (NAFTA), (Decision on Responsibility, 15 January 2008); and *Cargill Inc v United Mexican States* ICSID ARB(AF)/05/2 (NAFTA), (Award, 18 September 2009).

15 *International Commercial Arbitration Act*, RSO 1990, c I.9.

16 As reported in *IBA Arbitration News* Vol 17 No 1, April 2012: Barry Leon, Andrew McDougall and Daniel Taylor, 'Ontario Court of Appeal upholds NAFTA award and interprets *Dallah*' at 89.

Republic of Argentina v BG Group, PLC: US appellate court vacates international investment award for failure to comply with condition precedent*

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The public policy of the US in favour of international arbitration is 'emphatic'.[1] More emphatic still, however, is the insistence of the federal courts of the US that, for parties to be required to arbitrate, they must have agreed to arbitrate the particular dispute at issue.[2] No pro-arbitration finger of public policy presses on the scale of that determination. It is simply a matter of contract interpretation, to determine the intent of the parties. A US court charged with the review of an arbitration seated in the US will determine first whether the specific issue of arbitrability raised by the parties has 'clear[ly] and unmistakab[ly]' been delegated to the arbitrators.[3] If not, the court, applying federal law, will itself determine whether the dispute is arbitrable.

The US Court of Appeals for the District of Columbia Circuit (the 'DC Circuit'), in *Republic of Argentina v BG Group PLC*,[4] recently voided a US$185m award in favour of an investor against the Republic of Argentina in an arbitration under the Argentina–UK Bilateral Investment Treaty (BIT)[5] after determining that the investor had not complied with a condition precedent to the commencement of arbitration–litigation for 18 months in Argentine courts.

The legal regime governing international investment arbitration in the US

In the US, the terms of international investment arbitration, for the resolution of disputes between investors and sovereigns, are governed in the first instance by the applicable BIT. US courts view a BIT (depending on its wording) as a unilateral contract offer by the sovereign to arbitrate; the investor accepts the offer by initiating arbitration under the terms of the BIT.[6] The BIT may set preconditions for bringing arbitration, and may identify administrative and procedural regimes (arbitral institutions, rules) that the parties may select, or which will serve as the default should the parties not agree. Arbitration under the Argentina–UK BIT, for example, may be conducted under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), or by an ad hoc tribunal pursuant to the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. Absent agreement, arbitration is to be conducted under UNCITRAL rules.[7]

In the US, ICSID arbitration awards receive special enforcement. The ICSID Convention requires that awards be treated as judgments by contracting states, of which the US is one.[8] Thus, rather than requiring confirmation or being subject to challenge for vacatur or modification, ICSID awards are treated by the US federal courts as if they were state court judgments, and are thus entitled to the 'full faith and credit' given to such judgments.[9] Under Chapter 2 of the Federal Arbitration Act (FAA),[10] non-domestic arbitration awards (for example, as to which at least one party is not a US citizen) rendered outside the US are entitled to less accepting, but still relatively gentle, treatment on confirmation pursuant to section 207 of the statute and the New York Convention.[11]

Non-ICSID, non-domestic awards rendered within the US, however, are subject to the same review – still deferential but less so – as domestic awards, as well as review under the New York Convention.[12] Under section 10 of the FAA, a court may vacate arbitration awards for, among other things, the arbitrators exceeding their powers.[13] Because the arbitration award in *BG Group* was rendered by a UNCITRAL panel sitting in Washington, DC, the DC Circuit's review took place under the basic standards of the FAA.

Factual background

The case was one of many arising out of Argentina's economic reforms of the early to mid-1990s and the financial crisis that began in 2001. In about 1993, at the same time as the Argentina–UK BIT took effect, Argentina privatised its state-owned gas transportation and distribution company, breaking it into ten different companies. BG Group acquired a substantial direct and indirect interest in one of the companies, MetroGAS. In early 2002, Argentina implemented a series of emergency measures, including currency devaluation and contract changes that further reduced the company's value, as well as mandatory renegotiation of public service contracts. Companies that filed lawsuits in Argentina were excluded from the renegotiation process. From March to September 2002, Argentina also stayed compliance with injunctions and execution on final judgments in lawsuits related to its response to the financial crisis.[14] As a result, according to BG Group, it suffered substantial damage to its investment in MetroGAS.

BG Group arbitrates

Article 8(2)(a) of the Argentina – UK BIT provides in part:

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

(a) if one of the Parties so requests, 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….'[15]

Eight months after Argentina's stay of injunctions and judgment enforcement lapsed, in April 2003, BG Group, without pursuing relief in the Argentine courts, commenced arbitration. Because it did not reach agreement with Argentina on an arbitral forum, the parties entered into UNCITRAL arbitration.

BG Group argued that it was not required to comply with Article 8(2)(a) because it would take the Argentine courts at least six years to resolve its claims, so that Article 8(2)'s litigation requirement was, in its word, 'senseless'.[16] Alternatively, BG Group argued that customary international law did not

mandate exhaustion of local remedies, and that the BIT's most-favoured nations clause nullified the requirement, as Argentina's BIT with the US does not contain an exhaustion of remedies provision.

The arbitrators rejected BG Group's arguments, but found instead that the dispute was arbitrable because Argentina's restrictions on access to the courts and exclusion of litigants from the contract renegotiation process meant that 'a literal reading of the Treaty would produce an "absurd and unreasonable result."'[17] As a result, under Article 32 (Supplementary means of interpretation) of the Vienna Convention on the Law of Treaties, the arbitrators decided that they did not need to give Article 8 its operative meaning.[18] Thus, in an award dated 24 December 2007, the tribunal ultimately found that Argentina had violated its duty of fair and equitable treatment of investments and awarded BG Group over US$185m.

Argentina seeks vacatur and loses in the lower court

Before the federal district court, Argentina moved for vacatur of the award on numerous grounds, and BG Group moved to confirm the award. In two opinions,[19] the district court denied Argentina's request for vacatur and confirmed the award. The district court found that Argentina conceded the tribunal's jurisdiction to determine arbitrability.[20] The district court also upheld the arbitrators' determination that BG Group was not required to litigate in Argentina for 18 months as a colourable application of the Vienna Convention and other sources to the Argentina–UK BIT.[21] It therefore found that the arbitrators had not exceeded their powers. It denied vacatur and confirmed the award.

Argentina wins on appeal

Argentina appealed to the DC Circuit, which reversed the district court. As an initial matter, the appeals court found that Argentina had not, as a factual matter, conceded that the arbitrators had jurisdiction to determine whether Article 8(2)'s requirement of litigation prior to arbitration was valid.[22]

The DC Circuit then undertook its own analysis of whether the Argentina–UK BIT clearly and unmistakably gave the power to make that determination to the arbitrators. The Court concluded it did not. First, the Court found that the investor-initiated arbitration provision, Article 8(3) (which in the present case would trigger application of the UNCITRAL Arbitration Rules, which give arbitrators power to determine arbitrability), would not be triggered until the 18-month litigation provision had been met. As a temporal matter, the Court found that the arbitrators have power to determine arbitrability only once arbitration becomes available.[23] It found that there was no evidence that the Argentina–UK BIT intended to give the arbitrators that power before the litigation condition was met. Indeed, another provision of the treaty, concerning state-initiated arbitration, which provided that the arbitrators would have the power to determine arbitrability, showed that the parties did not intend to give the arbitrators that power in investor-initiated arbitration.

Indeed, the Court held, the question of whether the 18-month litigation provision was or needed to be satisfied was 'a prime example of a situation where the "parties would likely have expected a court" to decide arbitrability'.[24] Because the threshold condition – litigation – itself involves resort to a court, the DC Circuit found that the parties would have expected that court, and not an arbitrator, to decide whether that condition was satisfied. As the Court concluded, '[t]he question of arbitrability here precedes rather than grows out of the dispute.'[25]

The Court then turned to the issue of arbitrability, disposing of it briefly. The language of the Argentina–UK BIT, it said, was clear: '[W]here, as here, the contracting parties provided that an Argentine court would have 18 months to resolve a dispute prior to resort to arbitration, a court cannot lose sight of the principle that led to a policy in favour of arbitral resolution of international trade disputes: enforcing the intent of the parties.'[26] Because the contract demonstrated the parties' intent to require 18 months of litigation before commencing arbitration, the Court vacated the award.

The arbitrability of the issue of the satisfaction of conditions precedent

As the long history of, and multiple opinions in, *BG Group* attest, whether satisfaction of a condition precedent to arbitration is to be determined by a court or an arbitrator is a thorny issue under US law. Because non-ICSID investment arbitration awards rendered in the US will be subject to the same review

as commercial awards, *BG Group* presents a note of caution for potential claimants in arbitrations, both investment and commercial, based in the US. The decision of the DC Circuit makes clear that claimants fail to fulfil conditions precedent to arbitration, even arguably unfair ones, at their peril.

Notes

* Ryan Suser, an associate at Seward & Kissel, assisted in the research and preparation of this article.

1 *Mitsubishi Motors v Soler Chrysler-Plymouth, Inc*, 473 US 614, 631 (1985).

2 *Granite Rock Co v Int'l Bhd of Teamsters*, 130 S Ct 2847, 2856 (2010).

3 *First Options v Kaplan*, 514 US 938, 943 (1995) (internal quotation marks omitted).

4 665 F.3d 1363 (DC Cir 2012).

5 Agreement for the Promotion and Protection of Investments, Argentina–UK, 11 December 1990, 1765 UNTS 33.

6 *Republic of Ecuador v Chevron Corp*, 638 F.3d 384, 392-93 (2d Cir 2011).

7 Argentina–UK BIT Article 8 (3).

8 Convention on the Settlement of Investment Disputes between States and Nationals of other States, 27 August 1965, Article 54, 575 UNTS 159. Notably, the ICSID arbitration process includes a right to seek annulment of an award within ICSID; ICSID Convention Article 52.

9 22 USC § 1650a(a) (stating the FAA does not apply to enforce awards issued under the Convention and granting federal district courts exclusive jurisdiction over ICSID awards).

10 9 USC §§ 201-208.

11 Convention on the Recognition and Enforcement of Foreign Arbitral Awards Article 5, 10 June 1958, 330 UNTS 38 ('New York Convention').

12 See, eg, *Ario v Underwriting Members of Syndicate 53*, 68 F.3d 277, 292 (3d Cir 2010); *Gulf Petro Trading Co v Nigerian Nat'l Petroleum Corp*, 512 F.3d 742, 746 (5th Cir 2008); *Jacada (Europe) Ltd v Int'l Mktg Strategies, Inc*, 401 F.3d 701, 709 (6th Cir 2005); *Yusuf Ahmed Alghanim & Sons, W L L v Toys R Us, Inc*, 126 F.3d 15, 21 (2d Cir 1997).

13 9 USC § 10(a). Other grounds listed in section 10 include corruption or fraud in procuring the award, evident partiality or corruption of the arbitrators; failing to provide fair procedures, such as not postponing the hearing for good cause or refusing to hear pertinent evidence; and failing to make 'a mutual, final, and definite award.'

14 665 F.3d at 1367.

15 *Ibid* at 1366 [emphasis in opinion].

16 *Ibid* at 1367.

17 *Ibid* at 1368 [quoting the award].

18 *Ibid* at 1367-68.

19 *Republic of Argentina v BG Grp. PLC*, 764 F.Supp.2d 21 (DDC 2011); *Republic of Argentina v BG Grp PLC*, 715 F.Supp.2d 108 (DDC 2010).

20 764 F.Supp.2d at 33.

21 715 F.Supp.2d at 122; 764 F.Supp.2d at 33-34.

22 665 F.3d at 1370.

23 *Ibid* at 1370-71.

24 *Ibid* at 1371 [quoting *Howsam v Dean Witter Reynolds, Inc*, 537 US 79, 83 (2002)].

25 *Ibid* at 1372.

26 *Ibid* at 1373.

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Conflicts of interest and disclosure under US law

The importance of complete and accurate disclosure by arbitrators cannot be overstated. The integrity of the process is secure only if arbitrating parties are confident that all participants have been fully apprised of actual or potential conflicts that might influence an arbitrator. Because compliance with the rules of disclosure is largely dependent upon an individual's own assessment of what constitutes a potential conflict, the integrity of the arbitrator and the guidance offered by applicable laws and institutional rules are all critical.

Typical of many disclosure regimes, the ICC requires nominated arbitrators simply to check one of two boxes:

- I am independent of each of the parties and intend to remain so; to the best of my knowledge, there are no facts or circumstances, past or present, that need be disclosed because they might be of such nature as to call into question my independence in the eyes of any of the parties; or
- I am independent of each of the parties and intend to remain so; however, in consideration of Article 7, paragraphs 2 and 3 of the ICC