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The dissenting opinion in BG v Argentina before the US Supreme Court

Georgios Fasfalis (Linklaters LLP) · Tuesday, April 1st, 2014

As reported earlier, the US Supreme Court has recently adjudicated on the issue of the standard of review in relation to arbitration agreements in international investment arbitration.

It is a fact that the majority of the Court has decided that deference should be given to arbitral tribunals to examine questions of procedural conditions, as it characterized the issue of litigation before the domestic courts of Argentina for 18 months before initiating arbitral proceedings. It seemed to the majority of the Court that the issue pertains to whether a duty to arbitrate arises, and not whether such a duty exists at all.

In determining the issue at hand, the majority found that the United Kingdom – Argentina Bilateral Investment Treaty (the "BIT") is not different from a contract, and did not refer to the customary rules of treaty interpretation, as codified by the Vienna Convention on the Law of Treaties ("VCLT"), while a reference to the VCLT was made by the District Court of Appeals.

In general, the US Department of State supports the policy that the VCLT has to be treated as the authoritative guide to current treaty law and practice (See *United States v Yousef*, 2003). Moreover, Courts in the United State have stated that the Convention enjoys the status of customary international law, meaning that it should also be considered to be "law of the land", in other words to form part of US national law (See *Gonzalez v Gutierrez,* 2002). Nevertheless, the US Supreme Court has refrained from citing it as a source of interpretation of treaties, doing so only sporadically (*Sale v Haitian Ctrs Council, Inc*, 1993).

The majority of the Court refers to the grammatical interpretation of the BIT, as required by Article 31 VCLT. However, even if the majority refers to the text and structure of the dispute settlement provision found in the BIT, it does not seem to embrace the view that a grammatical interpretation of the BIT would favour the argument that a resort to the domestic courts of Argentina for 18 months is a condition to the consent of Argentina to arbitration, given the fact that the relevant provision (Article 8 BIT) stipulates that an arbitration can be requested only after the domestic courts have had a first crack on the dispute.

The latter reasoning, even if not adopted by the majority of the court, is employed by Chief Justice Roberts, who is also joined by Justice Kennedy in this respect. It is interesting, in this respect, to analyse the opinion of the dissenters. It is reminded that an offer to arbitration by a State remains incomplete until the investor decides to comply with the offer. Until then, the offer remains

inchoate. Issues pertaining to the question whether there is an arbitration agreement are, according to the dissenters, for the Court to determine and not for the arbitrators. For Chief Justice Roberts, the rule in the dispute settlement clause in the BIT is not relevant to the question when the duty to arbitrate arises, but whether such duty has arisen. The dissenters criticize the majority for not elaborating on the question what the terms "after a period of eighteen months has elapsed" really mean, and for failing to recognize that the really pertinent question is not whether the requirement of litigation before the domestic courts is a condition to the performance of the contract, but whether the requirement is a condition to the formation of a contract, namely in that case the formation of the arbitration agreement.

It is interesting that the dissenting opinion is in line with the dissenting opinions of Brigitte Stern and John Christopher Thomas QC, in recent cases.

In *Impregilo v Argentina*, Brigitte Stern suggested that a State can shape its consent to international adjudication as it sees fit, by providing the conditions it deems necessary, *rationae personae*, *rationae materiae*, *rationae temporis* and *rationae voluntatis.* The condition of litigation before the domestic courts falls under the last category of the abovementioned conditions. Besides, there is no inherent right of access to a jurisdictional recourse. If these criteria are not met, then there is no consent by the State to international arbitration. Hence, in case an investor does not fulfil all of the necessary criteria imposed by the State, an agreement to arbitration should not be considered to be reached.

In *Hochtief v Argentina*, John Christopher Thomas QC suggests that this form of procedural requirement found in a dispute settlement clause is a standing offer to arbitrate, under certain criteria. If the consent of the investor to arbitration does not match the offer of the State, then there is no meeting of the minds and the consents do not match, and therefore an agreement to arbitrate is not formed.

Similar decisions which found that provisions asking for a period of litigation before domestic courts were to be considered as conditions to a State's consent to arbitrate (see *ICS Inspection and Control Services Ltd v Argentina Republic*, 2012; *Daimler Financial Services v Argentine Republic*, 2012; *Wintershall Aktiengesellschaft v Argentine Republic*, 2008). These cases have also been cited by the dissenters in their opinion in the present case.

For the above-mentioned reasons, it can be concluded that the decision of the US Supreme Court does not entirely clear up the issue of litigation before the domestic courts, as the interpretations vary and tribunals and courts have reached contradictory judgements. Hence, only future can tell which interpretation will form good law.

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