Kluwer Arbitration Blog

Gateway Issues in International Arbitration

Andrea Bjorklund (UC Davis School of Law) · Tuesday, April 2nd, 2013 · Institute for Transnational Arbitration (ITA), Academic Council

On this first of April I thought it might be useful and timely to remind blog readers that the U.S. Supreme Court is considering whether to grant certiorari in BG Group Plc. v. Republic of Argentina. The Supreme Court asked the Solicitor General's Office for its views on the cert. petition, which suggests that at the least the case has captured the Court's interest; whether that interest will survive the SG's filing in the case remains to be seen – and likely will be seen by early May (I plan to update you when the SG files his views).

For those of you who cannot wait until May to consider the pressing issues raised by the BG Group case, and other "gateway" issues as well, I commend to you the upcoming conference to be hosted in two days (on the morning of April 3) by the Institute for Transnational Arbitration and the American Society of International Law (ASIL) just prior to the ASIL annual meeting. This 10th ITA-ASIL event – Gateway Issues in International Arbitration – has an all-star line-up. George Bermann, Jean Monnet Professor of EU Law and Walter Gellhorn Professor of Law at Columbia Law School and Chief Reporter for the ALI's Restatement of the U.S. Law on International Arbitration, will present the keynote address. His remarks will be followed by two panels. The first, chaired by Tom Stipanowich of Pepperdine University's Law School, features Alan Rau of the University of Texas and Tim Nelson of Skadden Arps and will address gateway issues primarily as they intersect with commercial arbitration. The second panel, chaired by Sophie Nappert, arbitrator and solicitor dual-qualified in Canada and the U.K., will feature Larry Shore of Herbert Smith and Abby Cohen Smutny of White & Case, who will discuss the peculiarities that arise when gateway matters meet international investment arbitration. For a reminder about the gist of the BG Group decision, see below.

In Republic of Argentina v. BG Group PLC, 665 F.3d 1363 (D.C. Cir. 2012), the D.C. Circuit determined that the arbitral tribunal exceeded its authority by exercising jurisdiction notwithstanding BG Group's failure to seek relief in Argentine courts for 18 months before submitting a claim to arbitration, as required under the applicable investment treaty. The court followed typical U.S. practice in using the term "arbitrability" to "denote every condition or requirement that must be met in order for an arbitration to go forward", rather than adopting the more limited use of the term common in most of the rest of the world to denote only those matters that are "legally incapable of being arbitrated."

The D.C. Circuit asked two questions. First, did the contracting parties (Argentina and the United Kingdom) intend that an investor should be able submit a claim to arbitration without having

fulfilled the treaty requirement that an investor seek relief in Argentine courts for an antecedent period of time? Second, as an antecedent matter, did the contracting parties intend that question to be answered by a court or by an arbitrator? That latter question illustrates an idiosyncrasy of U.S. arbitral practice: if the parties agreed to submit the arbitrability question itself to the arbitrators, then their decision on that point is entitled to special deference from a reviewing court. “Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court’s standard for reviewing the arbitrator’s decision about that matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate.” First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995). In this respect U.S. practice gives more deference to arbitrators than most other jurisdictions. The D.C. Circuit sought the answer in the Argentina – U.K. BIT. It is not altogether surprising that the court found it difficult to identify evidence of the intent of the contracting parties vis-à-vis the arbitrability question given that neither of the parties negotiated the treaty with U.S. arbitral law in mind. Yet the court determined that most jurisdictional issues under the treaty were entrusted to the arbitrators; the 18-month period, in contrast, preceded the proper constitution of the tribunal. Thus differences arising from a failure to honor the 18-month local-remedies period could not be entrusted to the tribunal.

Though not necessarily fatal to its consideration of the other question – whether failure to comply with the 18-month waiting period negated consent to arbitrate under the treaty – the D.C. Circuit’s approach to the arbitrability issue foreshadowed its decision on that issue. Much of the D.C. Circuit’s decision, including its decision about allocating authority regarding arbitrability, might be understood as trying to grapple with what the parties intended with respect to the condition precedent. Questions of procedural arbitrability – including questions of ripeness – are usually treated as matters of admissibility, with an arbitral tribunal determining the effect of nonexistent or ineffective recourse to other remedies. The D.C. Circuit recognized the relatively easy analogy between the 18-month recourse to local courts and multiple cases in which attempts at conciliation or mediation are to precede the arbitral process. Attempting to distinguish those cases explains the court’s emphasis on the treaty’s requirement that redress initially be sought in court rather than in mediation or conciliation. Further evidence of party intent might have been found had the court considered more fully the follow-on question: could Argentina have impeded or made difficult access to its courts and thus thwarted the constitution of the investment tribunal? Those considerations evidently animated the B.G. Group tribunal, because Argentina had required for some months an automatic stay of all cases challenging Argentina’s emergency measures and precluded licensees who challenged the measures from participating in the contract renegotiation process.

The cert. petition emphasizes prior U.S. case law that whether or not a party has complied with a multi-stage arbitration process is a question for arbitrators to decide and emphasizes the Circuit split caused by the B.G. Group decision. The opposition to certiorari focuses primarily on whether or not Argentina had ever consented to arbitrator given the failure to comply with the 18-month local court requirement. If there was never a valid arbitral agreement, then there are simply no questions for an arbitral tribunal to decide because there is no valid arbitral tribunal.

The case challenges most of the presumptions that have surrounded the investor-state dispute settlement process. The D.C. Circuit’s approach would seem to be inconsistent with the very purpose of the treaty – to accord substantive protections to an investor and permit it to vindicate those rights in a neutral forum – because it gives host government the authority to impede access to the tribunal. In addition, that neutral tribunal would seem the appropriate body to determine whether the preconditions of access to it were fulfilled or otherwise excused.

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