

Kluwer Arbitration Blog

BG Group v Argentina: Would ICSID Arbitration Have Been Different?

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Last December, the U.S. Supreme Court heard oral argument on *BG Group v Argentina* – an appeal from a controversial and much-criticized decision of the D.C. Circuit Court of Appeals. The case arose out of emergency actions taken by the Republic of Argentina in late 2001 in the wake of its economic meltdown. BG Group, a UK investor with a sizable stake in an Argentine gas distribution company, was adversely affected by the Argentine emergency measures and initiated UNCITRAL arbitration against Argentina pursuant to Article 8 of the Argentina-UK BIT. BG Group prevailed at the arbitration seated in Washington, D.C., and the resulting award came for review before the U.S. Courts. The spotlight is on Articles 8(1) and 8(2) of the Argentina-UK BIT, which require an investor to litigate its claim for 18 months at the courts of the host State before bringing a claim in arbitration. Although BG Group commenced arbitration without first attempting recourse in the Argentinian courts, the arbitral tribunal held BG Group’s claim to be admissible because Argentina had by its own actions unilaterally prevented or hindered recourse to its domestic judiciary.

The central issue before U.S. Courts is whether the courts must defer to the arbitrators’ decisions on the precondition’s satisfaction, or whether they get to decide that issue *de novo*. The crux, as most commentators agree, is in correctly identifying whether the disputed issue properly raises a mere question of *admissibility* (on which deference should be given to the arbitrators’ decision) or whether it raises a question of *jurisdiction* (reviewable *de novo* by Courts). While the U.S. District Court had denied *vacatur* at first instance, citing necessary deference to the arbitrator’s decision, the D.C. Circuit had controversially ruled on appeal that it could decide *de novo* and vacated the arbitration award. BG Group has pointed out in its Supreme Court brief that this is at odds with the distribution of roles between courts and arbitrators under existing U.S. arbitration precedents, which held that arbitrators’ decisions on the fulfillment of pre-conditions to arbitration are entitled to deference. On the other hand, Argentina has glibly characterized the local litigation precondition as a condition to its *consent* to arbitration, invoking the court’s ability to decide *de novo* whether an arbitration agreement exists at all between the parties. Much is at stake with these fine distinctions, as evidenced by the profusion of amicus curiae briefs filed by sovereign States, trade groups and opposing camps of arbitration academics and practitioners.

As the authors explain in an earlier [paper](#), the difficulty in this case arises because the requirement for non-binding local litigation under the Argentina-UK BIT falls within what Jan Paulsson has

termed the “twilight zone”, i.e. cases that defy easy classification as either jurisdiction or admissibility issues. Because of the provision allowing arbitration after a time-lapse, Article 8 falls short of a requirement to exhaust local remedies, which is generally regarded as *jurisdictional* in nature. On the other hand, unlike multi-stage dispute resolution clauses mandating prior mediation or settlement attempts, which have been considered under U.S. law as *admissibility* matters, Article 8 requires prior recourse to the local courts of Argentina, i.e. to a very different forum with adjudicative powers. In the above-mentioned paper, the authors consider existing tests for navigating the “twilight zone” and show how they fall short in *BG Group*. Two suggested resolutions of *BG Group* are thus proposed, based on: (i) the pyramid shape of the multi-level clause with “all roads leading to arbitration”; and alternatively, (ii) the adoption of a presumption that parties have unconditionally consented to arbitration, absent express stipulation of conditions to consent. The paper also analyzes the comparative treatment of related issues by other jurisdictions, as well as the significance (if any) of the fact that *BG Group* is an investment arbitration case rather than a private commercial arbitration case.

In this blog piece, the authors focus on a simple counter-factual – “If *BG Group* had been an ICSID arbitration, would things have turned out differently?” This is a thought experiment with some practical ramifications. Although ICSID is the most widely used institution for international investment arbitrations today, recent developments, such as high profile withdrawals from ICSID and a number of controversial annulment committee decisions, have raised concerns about its sustained relevance. The comparative merits and demerits of ICSID-rendered awards vis-à-vis non-ICSID awards are thus practically important considerations for many stakeholders in international dispute settlement. Taking *BG Group* as a simple case study, the authors illustrate and map out significant points of departure at the post-award stage, particularly with regard to the review and enforcement of awards.

Differences in Review Architecture

The architecture for award review varies significantly between ICSID and other arbitrations. For ICSID arbitration, a dissatisfied party challenges the validity of an arbitral award by making an application for annulment, which may only be made on the grounds set forth in Article 52(1) of the Washington Convention. An *ad hoc* committee is then constituted, which makes the final decision on annulment, and if no annulment is granted, the “award” is expressed to be binding on parties by virtue of Articles 53(1) and 54(1) of the Washington Convention. The Convention thus creates a self-contained and delocalized award review regime that is internal to the ICSID system; national courts do not get involved at all in determining the validity of awards. Attempts to seek *vacatur* of ICSID awards before national courts have rightly been rejected.¹⁾

For non-ICSID arbitrations, on the other hand, the existing legal framework provides for a degree of judicial review: the losing party can challenge the award’s validity at the courts of the seat of arbitration. As *BG Group* amply illustrates, this option to seek *vacatur* includes the possibility of multiple appeals up to the highest national court.²⁾ Difficult cases involving preconditions to arbitration may therefore present courts at multiple levels with the chance to set aside the award on a *de novo* review. As mentioned above, if *BG Group* had instead been an ICSID-administered arbitration, the process for challenging the award would have been far more streamlined: the losing investor would have had only one shot at for challenging the award’s validity — before the annulment committee – with no prospect of appeal.

The *ad hoc* committee for ICSID annulments consists of three persons appointed by the Chairman of the ICSID Administrative Council. Does having a challenge to an award heard by an international committee of arbitrators rather than national judges make a difference? It might in a “twilight zone” case. The *ad hoc* committee has to be appointed from the ICSID Panel of Arbitrators, and is likely to be better acquainted with the law and practice of international investment disputes than the judges in courts of the seat. Furthermore, in non-ICSID awards, challenges are subject to the vagaries of the national laws of the seat and the idiosyncrasies of national judges.³⁾ In fact, this is deliberately accommodated by the non-ICSID review architecture: Article 34(2)(b) of the Model Law provides, as is common in most arbitral laws, that public policy of the seat and subject-matter arbitrability under the laws of the seat would be grounds for setting aside.

“Manifestly” Exceeded Their Powers

In a case like *BG Group*, what may end up making ICSID a more decisively final forum is the standard of review. In relation to alleged jurisdictional defects with an award, Article 52(1)(b) of the Washington Convention requires proof that the arbitral tribunal “manifestly exceeded” its powers in order to annul an award. In contrast, §10(a)(4) of the U.S. Federal Arbitration Act only requires proof that arbitrators “exceeded their powers” to vacate an award. It is thus *prima facie* less onerous to successfully vacate an UNCITRAL award before the U.S. courts than it is to annul an ICSID award. Indeed, the Preliminary Draft to the Washington Convention did not contain the word “manifestly”, which was included by a German proposal in the First Draft precisely to reduce the risk of frustration of awards.

Although there are two contested interpretations of “manifest” in the practice of *ad hoc* committees, one meaning “obvious” and the other meaning “serious”, it is well accepted that Article 52(1)(b) at least establishes an additional requirement that any excess of powers on the part of the arbitrators be “manifest”. *Ad hoc* committees have consistently rejected the argument that any jurisdictional mistake would necessarily be a “manifest” excess of power.⁴⁾ This makes post-award consent-based challenges by losing parties a far more uphill battle.⁵⁾ In a case like *BG Group*, such *de facto* deference to the arbitrators’ reasoning in relation to jurisdictional issues may make the difference.⁶⁾

The numbers strongly back this view. ICSID statistics indicate that, out of 18 annulment decisions where a “manifest” excess of power was claimed in relation to “excess of jurisdiction” from 1966 to 2013, only 1 (5.56%) was successful and led to full annulment.⁷⁾ Background Paper on Annulment for the Administrative Council of ICSID By way of comparison, a U.S. study focusing on “exceeded powers” challenges over a 12-month sample from 2011 to 2012 across all state and federal courts found that 9 out of 47 challenges (19.15%) were successful, concluding that this was the ground of challenge that succeeded the most often.⁸⁾ A separate study on the setting aside of awards before the Swiss Federal Supreme Court, over a 20-year period from 1989 to 2009, showed that the “jurisdictional” ground of challenge had the highest rate of success (10.1%). The higher threshold for post-award jurisdictional challenges at ICSID appears to be empirically decisive.

Enforcement

Taking the comparison a step further, ICSID arbitration enjoys advantages that extend to the post-award enforcement stage as well. ICSID awards are enforced under the Washington Convention, and Article 54 obliges State parties to enforce the “pecuniary obligations” imposed by the award as if it were a final judgment of the local courts. The Washington Convention significantly constrains the possibility of challenging enforcement of ICSID awards before national courts. Article 53 provides that awards shall be “binding” and “shall not be subject to any appeal or any other remedy” except as provided in the Convention.

In spite of this clear language, some commentators (and countries) have suggested that ICSID awards may not be completely invulnerable to attack, suggesting creative possibilities for refusing enforcement of ICSID awards.⁹⁾ Argentina has specifically argued that, based on its Constitution, ICSID awards must comply with its domestic public law principles and be subject to review by Argentinian courts.¹⁰⁾ Notwithstanding the foregoing, no ICSID award has had its enforcement successfully challenged on any of the suggested grounds, and in any case, the Washington Convention does not stipulate any express grounds for challenging enforcement of the award.

In contrast, non-ICSID awards, including UNCITRAL awards, are usually enforced under the New York Convention, which provides for well-established grounds on which enforcement may be denied, including two separate jurisdictional grounds for challenge, in Articles V(1)(a) and V(1)(c). This makes a difference. A 2007 paper by Professor Van Den Berg surveyed approximately 700 reported decisions on the application of the New York Convention across all Convention countries, and found that enforcement was refused in about 70 cases (10%).¹¹⁾ The number is potentially higher if one looks beyond traditionally pro-arbitration jurisdictions: a survey of cassation court decisions in Russia on the enforcement of foreign arbitral awards in 2008 revealed that enforcement was refused in 8 out of 13 cases (61.54%).¹²⁾

In addition, it is not unusual that even respected and pro-arbitration jurisdictions differ significantly on key issues at the enforcement stage. A good example is the conflicting approach between France and the U.S. on the deference that should be given to the decisions rendered by the courts of the seat, and in particular, whether awards that have been set aside may still be enforced. Under the French approach, as long as an international award fulfills the requirements for enforcement under French law, enforcement will be granted even if the courts of the seat have vacated the award.¹³⁾ On the other hand, the US position is not to enforce awards that have been vacated by the courts of the seat, with only a very narrow exception in the *Chromalloy* decision.¹⁴⁾ This contrast arises from a conceptual discrepancy: whereas France considers that international awards remain in existence even if set aside, principles of comity lead the U.S. to consider improper enforcing an award that has been set aside by the courts of the seat.

What is more, the French and US positions are only 2 out of many more possible interpretations that have been developed by commentators.¹⁵⁾ These conflicting approaches have been permitted because Article V(1)(e) of the New York Convention vests discretion (“may be refused”) in the courts at the enforcement stage. This in turn creates the risk of conflicting decisions amongst the enforcement courts and the courts of the seat, an issue not faced in ICSID arbitrations. The problem is further compounded because courts disagree on whether enforcement proceedings should be stayed if a *vacatur* proceeding is in progress. In relation to scrutiny of non-ICSID awards, this can create embarrassing conflicts between courts, as in *Dallah Real Estate*, where an

award was first refused enforcement in the UK Courts, but subsequently affirmed by the courts of the seat in France.

Conclusion

ICSID is a bespoke institution by design, intended exclusively for investor-State disputes. It is an altogether different animal from other arbitration institutions; UNCITRAL, for instance, is a generalist institution that can decide investor-State, State-State or regular private commercial disputes. As was well put by Aaron Broches, one of the founding fathers of ICSID and the Washington Convention, the drafters sought to create “a complete, exclusive and closed jurisdictional system, insulated from national law.”¹⁶⁾

At the post-award stage, a party who prevails in ICSID arbitration is likely to have an easier time than a similarly placed party in any other arbitration. Indeed, the choice of post-award remedies under the Washington Convention is deliberately calibrated to ensure finality of ICSID awards. This is enabled by a combination of the award review architecture, the higher threshold for challenging awards and the treatment as “final judgments” of ICSID awards. In the pending *BG Group* case, the odds would thus be stacked in favor of the UK investor if it had been ICSID arbitration. This is not to imply, of course, a programmatic pro-investor bias:¹⁷⁾ the ICSID system is structured to support the finality of awards irrespective of who the winning or losing party is.

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References

- ?1 See e.g. *Tembec Inc. et al v. United States of America* 570 F.Supp.2d 137 (2008) (Court held petition for *vacatur* was barred because of *res judicata* and collateral estoppel).
- ?2 While this is true of most jurisdictions, the authors are also aware that there are some exceptions such as Switzerland, which only has one instance of judicial review of awards.
- ?3 This difference, however, is likely to be less pronounced in pro-arbitration jurisdictions, given recent trends towards harmonization and an expectation of judicial deference.
- ?4 See e.g. *Soufraki v UAE*, Decision on Annulment, 5 June 2007, paras 118, 119 (holding that requirement that excess of power be “manifest” applies equally).
An illustrative example is the Decision on Annulment in the *Klöckner I* arbitration. The issue was whether the tribunal manifestly exceeded its powers by assuming jurisdiction over the question of Klöckner’s management, despite the fact that the Management Contract contained an ICC arbitration clause. While the committee was highly critical of the award’s reasoning, and even took the view that the Tribunal had exceeded its jurisdiction in some way, it held that it did not “manifestly exceeded its powers” so long as the tribunal’s position was “tenable and not arbitrary”.
- ?5 A handful of recent ICSID annulment decisions have arguably blurred the line between the limited jurisdictional review contemplated by the Washington Convention and full judicial review for
?6 “errors of law”, raising questions about the appropriate standard of review in annulment proceedings. It remains to be seen, however, how other annulment committees will respond to these few recent decisions, which have received considerable criticism.
- ?7 See [https://” target=”_blank”>Background Paper on Annulment for the Administrative Council of ICSID](#), (Aug 10, 2012), 45.
- ?8 Lawrence R. Mills and Thomas J. Brewer, “‘Exceeded Powers’: Exploring Recent Trends in Cases Challenging Tribunal Authority”, *Alternatives*, Volume 31, No. 8, Sept. 2013.
- ?9 Baldwin, Kantor and Nolan, “Limits to Enforcement of ICSID Awards”, 23(1) *Journal of International Arbitration* 1 (2006), at 6-10.
- ?10 Carlos E. Alfaro and Pedro Lorenti, “*Argentina vs. ICSID: Unconstitutionality of the BITs and ICSID Jurisdiction – the Potential New Government Defenses Against the Enforcement of the ICSID Arbitral Award*”, *Mondaq* (17 May 2005).

- ?11 Albert Jan Van Den Berg, “New York Convention of 1958: Refusals of Enforcement”, ICC International Court of Arbitration Bulletin, Vol. 18(2), 2007.
- ?12 Patricia Nacimiento and Alexey Barnashov, “Recognition and Enforcement of Arbitral Awards in Russia”, White & Case (2010).
- See initially *Société Hilmarton Ltd v Société Omnium de Traitement et de Valorisation (OTV)*, 1st Civil Chamber, Cour de Cassation, 23 March 1994, Rev. Arb 1994, and more recently *Société PT Putrabali Adyamulia v Société Rena Holding*, Cour de Cassation, 20 June 2007, Rev. Arb. 507.
- ?13 *Baker Marine v. Chevron*, 1999 WL 781594 at 2; *Chromalloy Aero-Services v. Arab Republic of Egypt*, 939 F. Supp. 907, D.D.C. 1996.
- ?14 See the 5 positions described by Christopher R. Drahozal, Enforcing Vacated International Arbitration Awards: An Economic Approach, at 461-464.
- ?15 Christina Binder et al, International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer (2009) at 323.
- ?16 The statistics even suggest this would be a wrong view. Out of the 13 partial and full annulments that have been granted in the history of ICSID, 8 were annulments in favor of States, while only 5 were in favor of investors.

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