The Arbitration Newsletter

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(John Allen Chalk, Sr., Editor)

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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More Commentary on F.A.A. Arbitrability

BG Group PLC v. Republic of Argentina, 134 S.Ct. 1198 (2014)

The United States Supreme Court has now answered another "arbitrability" question, presumptively answerable by a court,[2] versus questions that are purely procedural, and left to the arbitrator. Questions are often raised as to the arbitration agreement's meaning, and while "it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide,"[3] where an arbitration agreement "is silent on the matter of who primarily is to decide 'threshold' questions about arbitration, courts determine the parties' intent with the help of presumptions."[4] In this case, the Court ultimately decided a condition precedent to arbitration is procedural and, thus, presumed to be intended for arbitrators to decide.[5]

The dispute arose out of a bilateral investment treaty between the United Kingdom and the Republic of Argentina containing a dispute resolution provision, applicable to disputes between one of those nations and an investor from the other (the "Treaty"). In the early 1990's, BG Group PLC ("BG"), a British company, made a major investment in MetroGAS, an Argentinean natural gas distributor. In 2001, due to an economic crisis, Argentina enacted emergency legislation that required MetroGAS to collect tariff revenues in Argentinean pesos rather than in U.S. dollars previously permitted. This government action resulted in MetroGAS profits turning to losses that prevented BG from receiving a return on its investment. Simultaneously, Argentina adopted legislation that stayed all lawsuits arising from the emergency measures. In 2003, BG sought recourse under the investment treaty.

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[1] Nothing in *The Arbitration Newsletter* is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader's independent legal counsel. My thanks to Nicole Muñoz, third-year law student at Texas A&M University School of Law, for her research and drafting assistance.

[2] "On the one hand, courts presume that the parties intend courts, not arbitrators, to decide what we have called disputes about 'arbitrability'." *BG Group PLC v. Republic of Argentina*, 134 S.Ct. 1198, 1206 (2014).

[3] *BG Group*, 134 S.Ct. at 1206.

[4] *Id.*

[5] *Id.* at 1207.

The Treaty authorized either party to submit a dispute "to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made… And it provides for arbitration '(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]…, [and] the said tribunal has not given its final decision; [or] (ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute.'"[6]

When BG invoked the Treaty's dispute resolution provision, it sought arbitration and the parties appointed arbitrators to sit in Washington, D.C., and decide if the Argentinean legislation violated the Treaty. While the arbitrators decided motions, received evidence, and conducted hearings in Washington, D.C., Argentina argued that the arbitration tribunal lacked "jurisdiction" to hear the dispute because, among other things, BG initiated arbitration without first litigating its claims for eighteen (18) months in Argentina's courts, according to the Treaty's local court litigation requirement.[7] In 2007, the arbitration panel reached a final decision, starting with the decision that it had jurisdiction to consider the merits of the dispute and that Argentina's own conduct had waived, or excused, BG's failure to comply with the local litigation requirement.[8] The panel decided that the President of Argentina's issuance of a decree staying for 180 days the execution of its courts' final judgments in suits claiming harm as a result of the new economic measures "hindered" recourse "to the domestic judiciary" to the point where the Treaty implicitly excused compliance with the local litigation requirement.[9] On the merits, the panel issued an award in favor of BG for $185 million in damages.[10]

Both parties filed "petition[s] for review" in the U.S. District Court for the District of Columbia under the New York Convention and the Federal Arbitration Act. Argentina sought to vacate the award, in part, on the ground that the arbitrators exceeded their powers because they lacked jurisdiction.[11] The District Court denied Argentina's claims and confirmed the award. The Court of Appeals for the District of Columbia Circuit reversed, stating the interpretation and application of the local litigation requirement in the treaty was a matter for courts to decide *de novo*, and that the arbitrators did not in fact have jurisdiction due to BG's failure to comply with the local court litigation requirement.[12]

The central issue before the Supreme Court was "who—court or arbitrator—bears primary responsibility for interpreting and applying Article 8's local court litigation provision."[13] Ultimately the issue turned on whether it is for the court or arbitrator to decide if a precondition to arbitration has been satisfied, and if it is for the arbitrator, should a U.S. court review the arbitrator's decision *de novo* or with the deference that courts ordinarily afford arbitral decisions?

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[6] *Id.* at 1203. Referred to as the "local court litigation" requirement of the dispute resolution provision in the treaty.
[7] *Id.* at 1204.
[8] *Id.* at 1204-05.
[9] *Id.* at 1205.
[10] *Id.*
[11] *Id.*; *see* 9 U.S.C. § 10(a)(4).
[12] *BG Group*, 134 S.Ct. at 1205.
[13] *Id.* at 1206.

In determining the appropriate decision maker on the local court litigation provision issue, the Court analyzed whether the issue was a question of arbitrability or purely procedural. Questions of arbitrability are presumed to be left to courts to decide and include questions regarding "whether the parties are bound by a given arbitration clause" or "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy."[14] On the other hand, "courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration."[15] Procedural questions often include claims of waiver, delay, defenses to arbitrability, as well as the "satisfaction of 'prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate.'"[16]

After concluding that the local litigation requirement "determines **when** the contractual duty to arbitrate arises, not **whether** there is a contractual duty to arbitrate at all,"[17] the Court determined the provision is purely a procedural "claims-processing rule;" therefore, it was a question presumed for the arbitration panel to decide.[18] The Court explained this requirement was not an arbitrability question because it concerned an arbitration's timing, not the Treaty's effective date, validity, or scope.[19] Whether a party has satisfied a precondition to arbitration, such as a local litigation prerequisite, is a procedural matter left for arbitrators under ordinary contract law.

The Court then considered whether the fact that the arbitration agreement is contained within a treaty between sovereigns changes the application of ordinary judicial presumptions and whether the arbitration panel's final award and interpretation of the Treaty's local litigation requirement provision should be reviewed *de novo* or with deference. As a general matter, a treaty is a contract, the Court said, and its interpretation is a matter of interpreting the parties' intent.[20] The Court held that absent explicit language stating the parties intended otherwise, the fact that an arbitration agreement is contained in a treaty does not make a difference in applying the ordinary judicial presumptions. Here, the Court observed that the Treaty does not show any such contrary intention. The Court referenced several cases compelling treaty interpretation to follow the concepts of ordinary contract law.[21] Because the Treaty does not make a difference in the Court's analysis, the Court subsequently held "reviewing courts cannot review their [arbitration] decisions *de novo*. Rather, they must do so with considerable deference."[22]

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[14] *Id*.
[15] *Id.* at 1207.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.* at 1211-12.
[20] *Id.* at 1208 (*citing Air France v. Saks*, 470 U.S. 392, 399 (1985).
[21] *Id.* (*quoting Sullivan v. Kidd*, 254 U.S. 433, 439 (1921) ("[T]reaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals, and are to be executed in utmost good faith, with a view to making effective the purposes of the high contracting parties.")).
[22] *Id*. at 1210.

OBSERVATIONS

1. All issues the parties to an arbitration agreement want answered by the arbitrator, not the court, must be plainly and unequivocally stated by the parties in the arbitration agreement.

2. If parties to an arbitration agreement wish to bypass the arbitration presumptions about who should decide threshold arbitration issues, then they should plainly express those intentions in their arbitration agreement.

3. If the issue concerns **when** the contractual duty to arbitrate arises, not **whether** there is a contractual duty to arbitrate at all, the question is presumed to be for the arbitrator(s) to decide.

4. Where the provision in question resembles a claims-processing requirement and is not a requirement that affects the arbitration contract's validity or scope, the court will presume that parties—even sovereigns—intended the arbitrators to decide.

5. The fact that an arbitration agreement is a provision within a treaty, rather than in a traditional contract, does not prohibit the application of ordinary contract interpretation principles and presumption rules.

6. The Supreme Court acknowledges that international arbitrators are likely more familiar than are judges with the expectations of foreign investors and sovereigns regarding the operation of arbitration agreement provisions.

7. The Court opined that because the Treaty's local litigation requirement provision did not explicitly state the provision was a "condition of consent" to arbitration, the Court left "for another day" the question of interpreting treaties that explicitly include conditions of consent.[23]

[23] *Id.*