Commentary on the US Solicitor General's Office (CVSG) brief in BG Group PLC v. Republic of Argentina (May 2013)
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The legal acumen of the United States Solicitor General (“SG”) cannot be doubted. Invited by the United States Supreme Court to file a brief expressing the position of the United States on the Petition for a Writ of Certiorari in BG Group PLC v. Republic of Argentina, No. 12-138, the SG might have been expected to provide thoughtful support for the Petition.

The decision for which the Petition sought review, an opinion by Judge Rogers of the United States Court of Appeals for the District of Columbia Circuit, determined that it was for the U.S. District Court, and not for the investment treaty arbitral tribunal, to decide whether the investor-claimant had satisfied a precondition to arbitration. As a result, the D.C. Circuit made its own independent assessment of Article 8 of the Argentina-United Kingdom Bilateral Investment Treaty (“BIT”). In doing so, the D.C. Circuit set aside the BG Group v. Argentina final arbitral award rendered on December 24, 2007, and held that the Article 8 eighteen-month litigation requirement prior to commencing arbitration constituted a "temporal limitation" on Argentina's consent to arbitrate under the Treaty. Not only was this D.C. Circuit decision contrary to the well-reasoned opinions of the majority of other Circuit Courts, but it also revealed ignorance of, or at least lack of interest in, international law, the law applicable to the arbitral dispute.

The D.C. Circuit disregarded the BG Group arbitral tribunal's concern that interpreting the eighteen-month litigation requirement as an absolute impediment to arbitration would allow "the state to unilaterally elude arbitration" and lead to "the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention." The arbitral tribunal had viewed as essential Argentina's and the U.K.'s commitment, under international law, to provide foreign investors with an effective forum in which their claims may be heard. According to the arbitral tribunal, strict application of Article 8's litigation precondition would have left BG Group with no forum to assert its claims.

In opposing the Petition, the Solicitor General has demonstrated a number of analytical blind-spots. For example, the SG argues, on the one hand, that review by the Supreme Court would not necessarily articulate general principles of treaty interpretation because only one of the parties is a sovereign; on the other, the brief contends that Supreme Court review would not affect the construction of “domestic” commercial arbitration because neither party to a domestic commercial arbitration agreement has a sovereign status comparable to that of Argentina. Such an

approach may be regarded as either impressive subtlety or determination to reach a particular result without regard to internal consistency.

The recurrent theme in the SG's brief is that the D.C. Circuit decision is fact-specific because it stems from "unusual circumstances." Thus, in the SG's view, the D.C. Circuit decision, even if wrongly decided, will not affect judicial review of treaty and commercial arbitration cases in the United States. One important reason for this, the SG explains, is that the precondition to arbitration under Article 8(2) of the Argentina-UK BIT differs from most other preconditions to arbitration because it entails the obligation to litigate in the host State's courts. According to the SG, since such a precondition is extremely unusual in modern treaties and particularly in treaties to which the United States is a party, the D.C. Circuit's decision does not implicate the interests of the United States. Interestingly, to reach this conclusion the SG has to disregard its own characterization of Article 8(2) as a "two-tiered system of dispute resolution" (SG brief at 3). The SG does not explain why the D.C. Circuit decision would have a limited impact on judicial assessment of other multi-tiered arbitration clauses.

Moreover, the SG fails to recognize the Supreme Court's distinction in John Wiley & Sons, Inc. v. David Livingston 376 U.S. 543 (1964), and then Howsam v. Dean Witter Reynolds, Inc. 537 U.S. 79 (2002), between substantive and procedural "arbitrability." Despite the shortcomings of the Supreme Court's terminology, this distinction reflects a consistent approach towards differentiating the review of threshold questions that implicate the parties' consent to arbitrate (substantive) from those that do not (procedural), even if they are antecedent to the determination of the merits of an arbitral dispute.

The SG's brief also evinces no understanding of the distinction made by international arbitral tribunals between jurisdiction over a claim and admissibility of a claim. The SG's failure in this respect is all the more surprising considering the extensive treatment its brief accords to the specific content of international law in Argentina's challenge of the BG Group award. The U.S. Government's view, as expressed by the SG, is that even when a State-respondent's standing offer to arbitrate is accepted, and therefore consent to jurisdiction is not at issue, a court, not the arbitral tribunal, has the authority to determine – as a matter of jurisdiction – whether a claim has complied with any preconditions and therefore is admissible. The SG further insists on the distinct nature of a litigation precondition to arbitration, and notes that none of the decisions following Howsam and First Options of Chicago v. Kaplan, 514 U.S. 938 (1995), "concerned a litigation requirement, much less such a requirement in a Treaty between sovereign States." (SG brief at 15, 16).

However, the SG does not explain what makes the obligation to litigate in the host State's courts for eighteen months prior to initiating arbitration different from an obligation to negotiate or to pursue any particular conduct for a specified period of time prior to commencing arbitral proceedings. The arbitration experts,
institutions, and practitioners who filed amicus briefs in support of the Petition saw no reason to differentiate "litigation" from other preconditions to arbitration.

Additionally, the SG fails to recognize that the Supreme Court in *Howsam* posited, as a general rule, that the arbitrator, not the court, is competent to adjudicate procedural preconditions to arbitration. Rather, the SG considers that the line of cases following *Howsam* is specific to the facts before the courts in each of those cases. And in the case of *BG Group*, the SG contends that Article 8(2) of the BIT sets a “temporal limitation” to the parties’ consent to arbitrate. In its Amicus Brief, the American Arbitration Association (AAA) aptly describes the uncertainty that a “new ‘temporal limitation’ on the effectiveness of the UNCITRAL Rules” would create. (AAA brief at 12). The SG seems not to appreciate the AAA’s concern that, “[given] the popularity of the UNCITRAL Rules and multi-tiered dispute resolution clauses, this expansion of judicial scrutiny” would create a dangerous precedent regarding the judicial scrutiny of preconditions to arbitration. The SG is content to hang virtually its entire position on Article 8(2) being sufficiently “unusual” so that the D.C. Circuit’s decision will not expand the regime of judicial review of multi-tiered clauses, whether governed by the UNCITRAL or other arbitration rules. This seems a highly questionable prediction.

While fact-specific, the decisions of U.S. courts on “arbitrability” have developed a pattern of rules that have provided a reasonable degree of predictability. However, the SG’s brief refuses to accept that the D.C. Circuit’s decision departs from the rules on allocation of authority between arbitral tribunals and courts to review threshold issues. Until the D.C. Circuit’s *BG Group* decision, U.S. courts had overwhelmingly considered procedural preconditions to arbitration as calling for an interpretation of the *scope* of the arbitration agreement, which the parties intended for the arbitrators to address. While a party resisting arbitration could characterize virtually any antecedent issue as a matter of consent, the courts have progressively limited court review to issues clearly involving the existence of a party’s intent to arbitrate. The SG ignores the reality that the D.C. Circuit has blurred the line between consent to arbitrate and scope of an arbitration agreement in a way that is very likely to be damaging to the United States as a seat for international arbitration. And none of the factors that are said to limit the D.C. Circuit’s decision to its “unusual” circumstances can counterbalance the uncertainty that the D.C. Circuit Court has created.

As indicated above, there is no basis for the SG’s confidence that the D.C. Circuit’s reasoning can be confined to the relatively few situations where the precondition to arbitration is litigating in the courts. Even if the precondition is a litigation requirement, the issue should still be for the arbitrators, as it entails interpretation of the scope and procedure of implementation of the parties’ agreement to arbitrate. Indeed, a precondition to litigate does not create an agreement to two fora for dispute resolution: the only forum in which parties to multi-tiered arbitration clauses agree to resolve their dispute is arbitration. When litigation is provided for as a preliminary step, the parties’ intent remains the submission of their claims for
final resolution by the arbitrators. Thus, the nature of the precondition to arbitration does not – or at least should not – alter the arbitrability equation as established by the Supreme Court. The additional comfort offered by the SG that the D.C. Circuit’s BG Group judgment will remain limited to instances where a sovereign is a party ignores the fact that the D.C. Circuit itself did not identify the international law component of the case as being relevant to its analysis.

Finally, the SG disagrees that the “D.C. Circuit’s decision sets the United States unhappily apart from other major international arbitration centers.” (AAA brief at 22). The SG notes that both the French and the English courts conduct de novo judicial review of jurisdictional decisions by arbitral tribunals. (SG brief at 19, fn.4). But the SG omits to mention that de novo review of jurisdictional decisions by those courts does not extend to arbitral findings of admissibility of claims. Further, while seeking to rely on Professor George Bermann’s analysis of the “gateway problem” in international commercial arbitration, the SG chooses to ignore the position developed by Professor Bermann and others in the Amicus Brief filed by Professors and Practitioners of Arbitration Law. The Professors’ brief rightly points out that “[t]he Petition provides an opportunity for this Court to make clear that arbitrators’ determinations of threshold questions that do not call into question the consent of the parties to engage in arbitration at some stage of proceedings are entitled to deference from the courts.” (Professors’ brief at 15).

In urging the Supreme Court to deny the Petition, the SG disregards (a) the long-established distinction between “admissibility” and “jurisdiction” in international law, (b) the long-established distinction between procedural and substantive admissibility in U.S. jurisprudence, and (c) the threat that the D.C. Circuit decision poses both to treaty and commercial arbitration in the United States. The SG’s brief is truly a disappointment to international arbitration practitioners, perhaps even more disappointing than the D.C. Circuit’s decision.

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