“Intellectual Whiplash”: One Day, Two International Cases, And Two Different Results At The U.S. Supreme Court

On December 2, 2013, the case of *BG Group v. Argentina* was argued at the Supreme Court. As the argument neared its end, Justice Anthony M. Kennedy quipped to Argentina’s counsel: “Your – your whole argument gives me intellectual whiplash.” Last Wednesday, when the Court released its decisions in *BG Group* and *Lozano v. Montoya Alvarez*, the same might be said back to the Court. I’m not the first commentator to feel this way.

Lozano concerned the Hague Convention on Civil Aspects of Child Abduction, which in essence says that if one parent unilaterally takes their child to another country, and the child is found within a year, the child must be automatically returned home. Otherwise, a court must consider the best interests of the child, who may have developed ties in the new country. But what to make of the clandestine parent and a child whose location could not be discovered for 16 months? Is there a principle of “equitable tolling” under the Convention, according to which the one-year period should only begin after the child’s location can be ascertained? This is certainly a familiar doctrine under U.S. law—equity tolls statutory limitations periods all the time. So as not to reward a clandestine parent, the father in the Lozano case wanted the same principle applied to his case.

The Supreme Court refused this request. The Convention, they said, was not a federal statute—it was a “contract between . . . nations”—so it would be “particularly inappropriate to deploy this background principle of American law” when interpreting it. Interpreting the Convention to preclude equitable tolling is more consistent with its text; if the drafters of the Convention had wanted the one-year period to start when the left-behind parent actually discovered where the child was, they could have easily said so. Because they didn’t, the uniquely common law notion of equitable tolling could not justify the father’s suit for automatic return.

The notion of a treaty as a contract pervaded the *BG Group* decision, too. On their face, the two cases had some similarities. Both involved UK parties with rights under an international treaty. The similarities, however, ended there. Lonzano was a father seeking the return of his foreign-domiciled daughter. BG Group was a British multinational oil and gas company who had invested in an Argentine gas distribution company, and whose investment was harmed by Argentine emergency legislation. BG Group filed a Notice of Arbitration against Argentina under the UK-Argentina Bilateral Investment Treaty ("BIT"), and sited the arbitration in the United States under the UNCITRAL Rules.

But Article 8(2) of the BIT provides that disputes under the Treaty between an investor and Argentina must first be submitted to a competent court in the sovereign state where the investment was made. Subsequently, the dispute can go to international arbitration at one party's request only if (1) a period of eighteen months has elapsed since the dispute was presented to the court and no decision has been made; or (2) a final decision was made by the court, but the parties still disagree. Argentina opposed jurisdiction of the arbitral tribunal because the dispute had not been submitted to Argentine courts at all. BG Group argued that waiting to meet the requirements of Article 8(2) of the BIT would have been futile. The arbitral tribunal determined that they had jurisdiction because Argentina had enacted laws hindering judicial recourse for foreign investors, and ultimately issued an award on the merits in favor of BG Group.

Both parties filed petitions for review in the United States District Court for the District of Columbia, which deferred to the arbitrators and upheld the arbitration award. The United States Court of Appeals for the District of Columbia Circuit, however, overturned that decision. It found that the arbitral tribunal did not have jurisdiction because BG Group had not complied with the local litigation requirements of Article 8(2) of the BIT. As a result, it set aside the award. The Supreme Court was asked to decide the question that had split the inferior U.S. Courts, namely: "whether a court of the United States, in reviewing an arbitration award made under the Treaty, should interpret and apply the local litigation requirement de novo, or with the deference that courts ordinarily owe arbitration decisions."

Now here comes the "intellectual whiplash." A majority of the Supreme Court "treat[ed] the [treaty] before us as if it were an ordinary contract between private parties." In doing so, Justice Breyer—citing the Court's domestic, commercial arbitration jurisprudence—found that the local litigation requirement was a procedural condition precedent to arbitration, which determined "when the contractual duty to arbitrate arises, not whether there is a contractual duty to arbitration at all." Thus, as a procedural precondition rather than a substantive bar to arbitrability, Breyer found that, "courts presume that the parties intend arbitrators, not courts, to decide disputes about [the local litigation requirement's] meaning and application." The Court found nothing in Article 8 of the BIT to overcome this presumption, and thus saw "no reason to abandon or increase the complexity of [its] ordinary intent-determining framework" for contractual arbitration clauses. (Of course, it remains an open question of what the Court would do if the Treaty were more express on the obligatory nature of the local litigation provision). Under a deferential review of the arbitrators' decision, the award was allowed to stand.

The dissent, authored by Chief Justice Roberts and joined by Justice Kennedy, harkened back to *Lozano* and took issue with the majority's decision to consider the BIT as an ordinary contract between private parties. In their view, when looking at the BIT as an act of state between co-equal sovereigns, with all deference that comes with that conclusion, the local litigation requirement can only be viewed as a textual precondition to the formation of an agreement to arbitrate against the state. "By focusing first on private contracts, the majority "start[s] down the wrong road" and "ends up at the wrong place," the dissent noted. "It is no trifling matter for a sovereign nation to subject itself to suit by private parties," the Chief Justice said; "we do not presume that any country-including our own-takes that step lightly." Thus, without having submitted to the local courts before it initiated arbitration, the dissent would have held that BG Group had no agreement to arbitrate against Argentina.

In some contexts, sovereign consent to convene an arbitration deserves a special place in the law. At least one federal judge has said that the federal policy in favor of arbitration carries special force when the agreement to arbitrate is contained in a treaty as opposed to a private contract. And take, for example, the recurring situation where parties use the U.S. courts to seek evidence by way of 28 U.S.C. § 1782 for use in international arbitration proceedings. Where that arbitration is convened by treaty and not by contract, U.S. courts will more readily lend their assistance. On its face, the *BG Group* decision runs counter to the idea that U.S. courts will treat investment treaty arbitration with greater deference than commercial arbitration. On the other hand, however, upholding the award furthers the above jurisprudence, the Supreme Court's recent string of pro-arbitration rulings, as well as the "basic objective of . . . investment treat[ies]." But "intellectual whiplash" still occurs when we consider that, in *Lonzano*, the Court was unwilling to "rewrite the treaty" in order to "advance its objectives."