Justiciability of a Non-Merit Condition Precedent to Arbitration

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On January 17, 2012, the United States Court of Appeals for the District of Columbia Circuit vacated an arbitration tribunal's award of damages to BG Group in the amount of $185,285,485.85. BG Group responded by filing a petition for a writ of certiorari (Petition) and claimed, among other things, that the D.C. Circuit violated Supreme Court precedent and joined the Eleventh Circuit in a troubling split with the First, Sixth, Seventh, and Eighth Circuits. There is an underlying dispute between BG Group and Argentina that is based upon preconditions to arbitration in a bilateral investment treaty between the United Kingdom and Argentina (Treaty). The D.C. Circuit held that it was for a court?not an arbitrator?to decide whether BG Group violated the Treaty's condition that an investor file suit in an Argentine court and wait eighteen months prior to arbitration. The Petition asks the Supreme Court to consider its argument that an arbitrator?not a court?has the authority to decide whether BG Group satisfied the eighteen-month condition precedent to arbitration. This Article argues that the D.C. Circuit was correct to hold that it is for the court to decide whether BG Group satisfied the eighteen-month precondition. Part I explains the facts underlying the dispute between BG Group and Argentina. The first section also articulates the importance of international arbitration for foreign investments and the potential impact on international arbitration if the Supreme Court either denies the Petition or upholds the D.C. Circuit's opinion. Part II discusses the history of the Federal Arbitration Act in Supreme Court opinions related to the D.C. Circuit decision. Part III addresses the Petition's claim that there is a circuit split and finds that no such split exists through an assessment of those appellate decisions.

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