dri™ The Voice of the Defense Bar

The Business Suit

The Newsletter of the Commercial Litigation Committee

Volume 16 Issue 9/10
November 15, 2013

BG Group PLC v. Republic of Argentina: One of the Most Significant Business Cases that You Have Never Heard of

by Brodie M. Butland

On December 2, 2013, the Supreme Court is hearing oral argument in *BG Group PLC v. Republic of Argentina*, a case that could dramatically impact commercial arbitration practice, international investment, and even international relations more generally.

And yet, unless you have an active practice in international arbitration, you probably have never heard of it.

At first glance, it is difficult to discern why the Court thought this case was worth considering. It involves an international arbitration action by a British company against the Republic of Argentina, pursuant to a bilateral treaty between Argentina and the United Kingdom. The case is in United States courts only because the arbitrator was seated in Washington, D.C.

Upon closer examination, however, the case will likely impact issues fundamentally related to both domestic and international arbitration practice (at a time where businesses are increasingly relying on arbitration as a means of controlling costs) and international investment. Even though respondent has not yet filed its brief, the American Arbitration Association, the Council for International Business, and nineteen law professors and practitioners of international arbitration have already filed amicus briefs arguing that the lower court's opinion undermines the purposes of commercial arbitration and compromises the standing of the United States as a seat of international arbitration. The United States also has filed an amicus brief.

So why, exactly, did the Court take the case, and what impact will its ruling have on our business clients? Though it is difficult to answer this question without the benefit of oral argument, this primer will outline the deceptively substantial issues in this case.

Factual Background of the Suit

To encourage foreign investment, many countries have signed bilateral investment treaties that grant various protections to foreign investors. These treaties typically provide for international arbitration when a foreign investor believes that the host country has violated its treaty rights. According to one amicus, there are an estimated 3,000 bilateral investment treaties in effect today. The United States is party to at least forty-six such treaties, as well as several similar multi-lateral investment treaties.

In 1990, Argentina executed a bilateral investment treaty with the United Kingdom, which created a two-tiered system of dispute resolution. First, investors had to bring a claim in a

tribunal in the country where the investment was located. If that tribunal failed to render a final decision within 18 months, then the dispute could be submitted to international arbitration.

BG Group, a U.K. company, invested in the Argentine natural gas distribution industry. The Argentine economic collapse in 2001-02, however, prompted economic reforms that undermined the regulatory framework inducing BG's investment. At the same time, Argentina severely restricted investors' access to its courts.

BG filed an arbitration action in Washington, D.C. The arbitration panel held that although the Treaty normally required a claim to be brought first in Argentine courts, the condition could be excused under international law because Argentina had taken extraordinary measures to prevent access to its courts. The panel found that Argentina's reforms violated BG's substantive rights under the Treaty and awarded $185.3 million.

Argentina filed suit in the U.S. District Court for the District of Columbia seeking vacation of the award because, among other reasons, BG did not first sue in an Argentine court. The district court held that the arbitrators were to decide whether petitioner must comply with the precondition to arbitration, and it deferred to the arbitrators' determination that the condition was excused. *Rep. of Argentina v. BG Group PLC*, 715 F. Supp. 2d 108 (D.D.C. 2010). The D.C. Circuit reversed and vacated the award, finding that there was not "clear and unmistakable" evidence that the parties intended for an arbitrator to decide whether preconditions for arbitration were met or could be excused. The court held that BG could not ignore the precondition of bringing suit in an Argentine court. 665 F.3d 1363 (D.C. Cir. 2012).

Prior Case Law

The Supreme Court has not decided any cases involving international arbitration agreements. It has, however, issued a handful of domestic arbitration cases that "decide who decides" whether an issue is arbitrable—a court or an arbitrator.

In 1995, the Court held in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), that just as the parties' intent controlled what substantive issues were arbitrable, the parties' intent similarly controlled *who should decide* whether a case is arbitrable. Thus, if the parties intended for the arbitrator to decide whether a case was arbitrable, then courts should respect that intent and review the arbitrator's decision regarding arbitrability with exceptional deference. Hesitant to force parties to arbitrate where they may not have intended, however, the court established the presumption that "[c]ourts should not assume that the parties agreed to arbitrate arbitrabilityunless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 943-44. Where no such clear and unmistakable evidence exists, courts decide "questions of arbitrability" and need not give any deference to an arbitrator's determination of whether a dispute is arbitrable. *Id.* at 947.

Under *First Options*, it is fairly intuitive that "gateway" disputes—such as whether parties are bound by an arbitration clause, or whether an arbitration clause applies to the particular type of controversy—are generally issues for a court unless the parties agree otherwise. The Court acknowledged as much in *Howsam v. Dean Whittier Reynolds, Inc*. 537 U.S. 79 (2002).

But *Howsam*also added a qualifier: "where parties would likely expect that an arbitrator would decide the gateway matter," the *arbitrator*, and not the court, decides arbitrability.[1] The Court held that parties would expect an arbitrator to decide issues of waiver, delay, or like defenses to arbitrability, as well as any other "'procedural' questions which grow out of the dispute and bear on its final disposition.'" These questions, the Court held, "are presumptively *not* for the judge,

but for an arbitrator to decide." *Id.* at 84. The Court thus has held that an arbitrator, not a court, decides whether a claim was brought within the six-year limitations period set by the arbitration rules (*Howsam*) and whether preconditions to arbitration in a collective bargaining agreement were followed (*John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964)).

These precedents have created some confusion, as evidenced by the D.C. Circuit's opinion in *BG Group*. On the one hand, *BG Group* seems to involve a gateway determination of whether Argentina is bound by the arbitration clause in light of BG's failure to first bring suit in an Argentine court, which is typically reserved for courts absent clear and unmistakable evidence (of which the D.C. Circuit found none). On the other hand, BG asserts that Argentina's economic and political reforms violated its Treaty obligations—and it was those same reforms that, in BG's view, rendered futile a suit in an Argentine court. The case thus seems to involve preconditions to arbitration implicating the merits of the action, which are typically reserved for arbitrators.

The Issue Presented in this Case

So what, precisely, is the issue presented in this case? It depends who you ask.

BG's certiorari petition asked the Court to resolve a general question: In disputes involving a multi-staged dispute resolution process, does a court or the arbitrator determine whether a precondition to arbitration has been satisfied? Some amici similarly argued a need for the Court to reverse the D.C. Circuit to clarify the law for commercial arbitration agreements. Given the somewhat blurry precedents, the Court could use this caseto craft a more workable precedent that applies to commercial arbitration agreements generally.

The United States, however, has argued that unlike an agreement to arbitrate as considered in the Court's prior precedents, an investment treaty creates a "standing offer" to arbitrate if particular conditions are satisfied—and where those conditions are not satisfied, no arbitration agreement binds the parties. The United States thus urged the Court to adopt a new rule for investment treaties, where (1) courts would review *de novo* arbitral rulings concerning objections based on an asserted lack of a valid agreement to arbitrate, and (2) courts would deferentially review any other objections, unless the treaty limits the arbitral tribunal's authority to rule on such matters. The United States argued that the Court should remand the case to the D.C. Circuit to determine, using interpretation of international treaty principles, whether the Treaty's litigation requirement was a condition to Argentina's consent to arbitrate.

It is not yet clear how the Court will resolve the case. What does seem clear, however, is that the D.C. Circuit's opinion bothered at least four members of the Court, as well as the amici. What is also clear is that the Supreme Court's decision is likely to have important ramifications at least for international investment treaty interpretation and how disputes under those treaties are handled. And, possibly, a significant impact on the case law governing domestic arbitration agreements.

Brodie M. Butland, Porter Wright Morris & Arthur LLP, bbutland@porterwright.com or 216-443-2571.

---

[1]*Id.* at 84.