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U.S. Supreme Court Oral Arguments in BG Group PLC v. Republic of Argentina: Four Things We Learned

by Brodie M. Butland

On December 2, 2013, the Supreme Court heard oral argument in *BG Group PLC v. Republic of Argentina*. You can read about the background of the case my prior article [http://www.porterwright.com/files/upload/ButlandBusinessSuit2013.pdf#] in *The Business Suit* regarding the case.In a nutshell, this case involved an arbitration award under a bilateral investment treaty between Argentina and the United Kingdom. The treaty provided that if an investor desired to bring a claim against the government for violating the treaty, it must first 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, or if there was still a dispute after the tribunal rendered a decision, then the dispute could be submitted to international arbitration.

Believing that its treaty rights had been violated, BG Group PLC, a U.K. company, filed an arbitration action against Argentina in Washington, D.C., without first suing in an Argentine court. The arbitration panel held that the litigation requirement was excused under international law because Argentina had taken extraordinary measures to prevent access to its courts, and awarded BG $185.3 million. The D.C. Circuit reversed, holding that whether BG must fulfill the "litigation requirement" was a "question of arbitrability" for the court to decide, and that BG could not escape the litigation requirement. 665 F.3d 1363 (D.C. Cir. 2012).

Here are what I believe to be the four biggest takeaways from the argument.

1. BG Group wants the Court to focus on its precedents; Argentina wants the Court to focus on contract law.

During the argument, BG asked the Court to follow its precedents and narrowly resolve the case on the question presented: whether the litigation requirement is an issue for the arbitrator or the court to decide.

Argentina, by contrast, argued that the treaty established a unilateral offer by Argentina to arbitrate only if an investor first satisfied the litigation requirement. (Though Argentina conceded during oral argument that the litigation requirement may be unnecessary under certain circumstances—for example, if the Argentine courts and clerk's offices were closed, making the filing of suit impossible.) Thus, according to Argentina, because BG did not satisfy the litigation requirement, no contract to arbitrate had been established. BG disputed this claim, noting that the only binding decision under the treaty was one rendered by an arbitrator (as noted above, even if an Argentine court rendered a decision, the decision was not binding on either party). Since the litigation requirement was unlikely to accomplish anything, BG argued, the Court could not reasonably deem it to be a precondition to an arbitration agreement.

Were the Court to side with BG, it is very likely that the Court will issue an opinion clarifying the at-times murky rules in its prior precedents—in particular *First Options of Chicago, Inc. v. Kaplan*, *John Wiley &*

Sons, Inc. v. Livingston, and *Howsam v. Dean Whittier Reynolds, Inc.* This could have significant implications not only for international arbitration agreements, but for domestic commercial agreements as well.

2. Argentina and the D.C. Circuit appear to be in trouble.

It is well-established that more cases are reversed than affirmed by the Supreme Court, so it is hardly a stretch to assume that reversal is more likely for this case. The oral argument, however, suggested that several of the Justices were troubled by Argentina's position, making a reversal even more expected.

First, the Justices questioned Argentina's assumption that the litigation requirement was a condition of consent to arbitrate, and, therefore, no agreement to arbitrate existed until this condition was fulfilled. Justice Kagan noted that Argentina had signed an important treaty with the United Kingdom, and that under any domestic commercial agreement, the court would say that an agreement to arbitrate had been made. Justice Alito was more explicit, suggesting that the very purpose of the treaty was to remove disputes from "distrust[ful]" courts and put them into an international arbitral tribunal, where international law could be applied. He also questioned the purpose of requiring BG to first bring suit in an Argentine court, since it "isn't going to achieve anything." Even Justice Kennedy, who early in the argument suggested that this was a "close case," said that Argentina's later concession that some circumstances might waive the litigation requirement gave him "intellectual whiplash."

Second, the Justices indicated that the litigation requirement was the type of condition that the parties expected an arbitrator, not a court, to decide. Chief Justice Roberts suggested that the litigation requirement was a question for the arbitrator under prior Supreme Court cases, and he pushed Argentina to explain why the treaty provisions differed from those precedents. Justice Breyer similarly asked Argentina for evidence that the treaty parties expected a court, rather than arbitrators, to resolve the "gateway" litigation requirement.

By contrast, aside from Chief Justice Roberts, the Justices largely did not challenge BG, though they did ask questions to clarify the parties' arguments.

3. Justice Kennedy is on the fence.

Notwithstanding his "intellectual whiplash" quip, Justice Kennedy found "substantial merit" in the D.C. Circuit's position that a court, not an arbitrator, should decide whether a failure to satisfy the litigation requirement rendered an arbitration void. But he also noted a difficulty in the case: that if the Court, after reviewing the case, believed that Argentina had waived the litigation requirement based on its conduct (and, therefore, the arbitration could proceed), the Court could not reach that question because it had not been raised on appeal.

Justice Kennedy's questioning suggests that although he may see merit in the legal rule applied by the D.C. Circuit, he disagreed with the D.C. Circuit's application of that rule. This raises a real possibility of a split opinion in this case, with a majority opinion reversing the D.C. Circuit in its entirety, and Justice Kennedy concurring in the result only.

4. The Justices were skeptical of the United States's position.

The Supreme Court asked the United States to brief its view of the dispute in light of the potential international implications. The United States argued that the Supreme Court's prior precedents should not govern the treaty because those cases related to domestic commercial contracts, not international treaties. The United States 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, but (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 whether the Treaty's litigation requirement was a condition to Argentina's consent to arbitrate.

To say the Justices were unimpressed would be an understatement. Justice Breyer described the United States's legal theory as "sprung, full blown, from someone's brain, but is not well embedded in any law[.]" He was also bothered by the prospect that under the United States' unilateral-offer-to-arbitrate view, even something "as purely procedural as I can imagine" could be decided by a judge. Justice Scalia—uncharacteristically silent through most of the argument—was more blunt: "I must say I don't follow that line of argument."

Justices Ginsburg and Kagan also were frustrated by the United States's failure to opine whether the litigation requirement in this case involved a "consent to arbitrate" provision (requiring *de novo* review under the United States's proffered rule) or some other objection (requiring deference to the arbitrators), thereby providing no inkling as to how to apply its proposed rule. As Justice Kagan quipped: "all the techniques that we use in the *Howsam-First Options* line of cases seem to go out the window and not be replaced with anything else."

Conclusion

In short, if the Justices' questions are any indication of where they are leaning, it appears that the D.C. Circuit will be reversed, and that the Justices will decide the case by reference to the Court's prior precedents. There is, however, a possibility that *BG Group* will garner more than one opinion, even if the Justices generally agreed that the arbitrators' award in BG's favor should stand.

Brodie M. Butland *is an associate at Porter, Wright, Morris & Arthur LLP. He concentrates his practice on complex commercial litigation, including contract, trade secret and intellectual property matters. He is also an active member of his legal community.* *bbutland@porterwright.com*