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The Business Suit

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The Supreme Court Decides *BG Group PLC v. Republic of Argentina* Why You Should Care About This Sleeper Case

by Brodie M. Butland

On March 5, 2014, the U.S. Supreme Court decided *BG Group PLC v. Republic of Argentina*. Though *BG Group* received little attention from court watchers and the popular media, its importance to international arbitration cannot be overstated. The Court held, for the first time and over a fiery dissent by Chief Justice Roberts, that its precedents for commercial arbitration agreements apply with equal force to international investment treaties—even though investors are not technically parties to those treaties. In reversing the D.C. Circuit, the Court placated numerous members of the arbitration community—many of whom submitted *amici* briefs—who feared that the D.C. Circuit's decision would undermine the United States' position as a premier forum for international arbitration.

Background of the case

The United Kingdom and Argentina signed a bilateral investment treaty. Section 8(1) of the treaty provided that if an investor desired to bring a claim against the government for violating the treaty, it must first sue in that country's courts. Under Section 8(2), if the tribunal failed to render a decision within 18 months, or if a dispute remained after the tribunal rendered a decision, then the dispute could be submitted to binding international arbitration. The parties could also agree to proceed directly to 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.

The Supreme Court accepted review "[g]iven the importance of the matter for international commercial arbitration."

The Majority Opinion

The seven-Justice majority opinion contained three parts.

Part 1: Under the Court's precedents, satisfaction of the litigation requirement is to be decided by an arbitrator, not a court.

Under *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), where the parties do not state in their contract who decides "threshold" questions about

arbitration, a court uses two presumptions:

1. courts decide questions regarding "arbitrability," i.e., whether an arbitration clause applies to a particular type of controversy.
2. arbitrators decide questions regarding the meaning and application of particular procedural preconditions to arbitration (including waiver,

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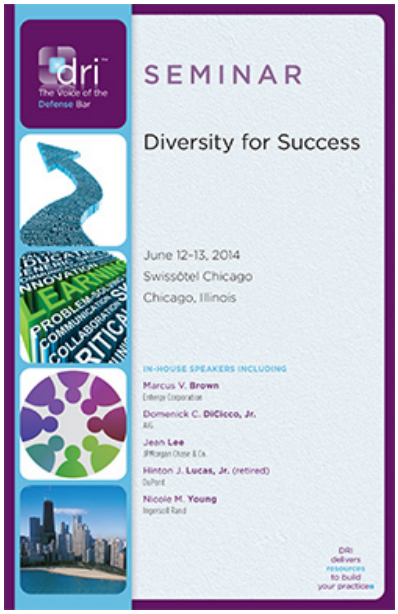

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delay, and conditions precedent to arbitration).

The Court found that the treaty's litigation requirement concerned *when* the contractual duty to arbitrate arose (which presumably is for arbitrators), not*whether* there is a contractual duty to arbitrate (which presumably is for courts). And since the treaty did not specify whether a court or arbitrator was to decide the issue, the Court held, consistent with presumption 2, that questions regarding the meaning and application of the litigation requirement were for an arbitrator.

Part 2: The Court's precedents apply even though the contract at issue is a treaty.

The United States argued that because the Court's prior precedents concerned commercial agreements, rather than an agreement between two nations, the prior precedents did not apply. The United States urged the Court to remand to determine whether the litigation requirement was a condition on Argentina's consent to enter into an arbitration agreement.

Numerous Justices expressed skepticism of this position at oral argument, and the Court was equally dismissive in the majority opinion. The Court held that a treaty is a contract, and like other contracts, courts should attempt to ascertain the parties' intent based on the language used. The Court found no reason to deviate from its prior precedents explaining how to divine that intent based on an ethereal notion of "consent." Further, the Court noted, even if the notion of "consent" to arbitrate was important, the treaty did not state that the litigation requirement was a condition of consent.

Part 3: The arbitrators did not act unreasonably in their award to BG.

Because the litigation requirement was an issue for the arbitrators to decide, the Justices concluded by reviewing whether the arbitrators exceeded their powers under the Federal Arbitration Act. The Court found that the arbitrators did not ignore the treaty or dispense their own brand of justice when they excused BG from the litigation requirement. Thus, the Court reversed the D.C. Circuit and reinstated the award.

The Dissent

As noted in my prior article, Chief Justice Roberts and Justice Kennedy were the only two Justices to meaningfully challenge BG's position during oral argument—indeed, Justice Kennedy even said he found "substantial merit" in the D.C. Circuit's opinion. Perhaps unsurprisingly, then, they were the only Justices to dissent.

The main contention of the 17-page dissent, authored by the Chief Justice, is conceptually simple: the treaty was between the United Kingdom and Argentina,*not* between Argentina and U.K-based investors (such as BG); therefore, the litigation requirement was not a procedural precondition to arbitrate, but a condition of Argentina's consent to arbitrate with investors. The dissent aptly summarized its position in an introductory paragraph:

> When there is no express agreement between the host country and an investor, they must form an agreement in another way, before an obligation to arbitrate arises. The Treaty by itself cannot constitute an agreement to arbitrate. How could it? No investor is a party to that Treaty. Something else must happen to *create* an agreement where there was none before. Article 8(2)(a) makes clear what that something is: An investor must submit his dispute to the courts of the host country. After 18 months, or an unsatisfactory decision, the investor may then request arbitration.

Though acknowledging the plausibility of the dissent's reading, the majority disagreed with it for three reasons. First, the dissent did not supply "any different set of general principles that might guide its analysis." This concern echoes Justice Kagan's frustration during oral argument that the United States' consent-based position required that the Court's prior "line of cases . . . go out the window and not be replaced with anything else."

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Second, the litigation requirement "on its face concerns arbitration's timing, not the Treaty's effective date; or whom its arbitration clause binds; or whether that arbitration clause covers a certain kind of dispute." It therefore did not read as a condition to consent or a unilateral offer to arbitrate.

Finally, the Court's interpretation was supported by "the bulk of international authority" interpreting similar types of clauses.

Conclusion

In previous discussions of this case [insert hyperlinks], I suggested that it had the potential to significantly impact both commercial arbitration agreements and the interpretation of international treaties containing arbitration provisions. The Court did not disappoint—not only did it affirm (and even clarify) its prior framework for commercial arbitration agreements, but it applied that framework to international investment treaties. Though *BG Group* is not likely to garner much popular attention, it undoubtedly will—quietly—have a significant impact on commercial and international relations.

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