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International Arbitration ADVISORY ■

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Supreme Court Hears Argument in "Close Case" Regarding Dispute between BG Group PLC and the Republic of Argentina

On December 2, 2013, the U.S. Supreme Court heard argument in *BG Group PLC v. Republic of Argentina*, the British energy company's bid to reinstate a $185 million arbitration award against Argentina. The dispute began more than ten years ago when Argentina enacted several emergency measures designed to combat the collapse of its economy, which severely devalued BG Group's investment in MetroGas, an Argentine gas distribution company. BG Group, like many other investors that were harmed by Argentina's actions, wanted to recover its losses but had little faith in the Argentine courts.

The Underlying Dispute

In April 2003, BG Group initiated arbitration pursuant to the Bilateral Investment Treaty between the United Kingdom and Argentina (the "BIT"). The BIT included a provision stating that disputes between an investor and the host state would be resolved in the host state's courts, but that either party could resort to arbitration if (1) no final decision had been issued by the host state's courts within eighteen months of the date that the dispute was submitted to the competent court, or (2) a final decision had been issued by the state's courts, but the parties were displeased with the result. The BIT also provided that arbitration was available if both parties agreed to it.

BG Group, believing that there was no way that the Argentine courts could issue a final decision in eighteen months, invoked the arbitration clause without first filing a claim in the Argentine courts. The arbitral panel—ruling that it had jurisdiction to resolve the dispute, regardless of the eighteen-month clause—found that Argentina had violated the BIT and awarded BG Group damages. The United States District Court for the District of Columbia upheld the award, but the United States Court of Appeals for the D.C. Circuit reversed and held that BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before commencing arbitration. Importantly, the D.C. Circuit held that the parties to the BIT—the U.K. and Argentina—would have expected a court, not arbitrators, to determine whether an investor's failure to satisfy the eighteen-month provision would preclude recourse to arbitration.

Question Presented to the United States Supreme Court

The central question before the Supreme Court is when can a federal court review arbitrators' findings of jurisdiction in an investor-state dispute? The Court has addressed this issue in commercial arbitrations between private parties, but not in the context of an investor-state dispute.

BG Group, the petitioner in this case, argued that the eighteen-month provision was merely a *procedural* precondition to arbitration, and thus the Court's decisions in *Howsam v. Dean Witter Reynolds, Inc.* (2002) and *John Wiley & Sons v. Livingston* (1964) dictated that the *arbitrators* should decide whether such precondition had been met. In addition, BG Group argued that the BIT made clear that an arbitral tribunal would finally determine any dispute, even if the dispute was submitted to the host state's courts and such courts issued a decision within eighteen months. Accordingly, BG Group contended that it was appropriate for the arbitrators to decide any jurisdictional question.

Argentina, on the other hand, argued that U.S. and international law dictates that *courts*, not arbitrators, have the final authority to determine challenges to the existence of an agreement to arbitrate. For example, in *First Options of Chicago v. Kaplan*, 514 US 938 (1995), the Supreme Court held that parties could agree to have the issue of whether they agreed to arbitrate decided by arbitrators, but the courts—not the arbitrators—have to decide whether they made such an agreement. Argentina stressed that the BIT was an agreement only with the *United Kingdom*, but for *British investors*, it was merely a unilateral offer. In order to accept Argentina's offer, an investor must first give Argentine courts eighteen months to resolve a dispute before initiating arbitration; failure to satisfy this provision would mean that there was no agreement between Argentina and the investor, and thus no consent to arbitration by Argentina. The arbitrators did not have the authority to determine whether or not they had jurisdiction to hear the dispute in light of this absence of consent.

The United States was not a party to the underlying action, but was wary of its implications for future investor-state disputes. Consequently, the United States submitted an *amicus curiae* brief arguing that investor-state disputes are different from private commercial arbitration. Certain Supreme Court precedent relating to the standard of review of arbitral rulings on threshold objections to arbitration in the private commercial context, the United States argued, is not applicable to investor-state disputes, which are premised on a sovereign's consent to arbitration. The United States argued that while courts should independently review arbitral rulings regarding objections based on the lack of a valid arbitration agreement, they should review other rulings deferentially.

What the Justices Revealed at Oral Argument

Justice Kennedy, for one, thinks this is a "close case," but courts should decide whether or not the arbitrators had jurisdiction. He also implied that, on the merits, BG Group should be allowed to initiate arbitration despite its failure to pursue a claim in Argentine courts, but that this question was not presented to the Court.

During oral argument, several Justices were critical of the notion that arbitration agreements in *investor-state* disputes should be treated differently than arbitration agreements in private *commercial* disputes. For example, Justice Sotomayor stated "[t]he Solicitor General [suggested] that [the Court] . . . give some sort of heightened

deference to the foreign state, but I'm not sure why, because the issue is always about what did the parties intend." Justice Breyer suggested that the U.S.-proposed rule "has sprung, full blown, from someone's brain, but is not well embodied in any law that I could yet find."

Chief Justice Roberts disparaged BG Group's decision to bypass the Argentine courts entirely, and gave examples in the United States where comparable waiting periods are effective. "A lot of times nobody thinks that's going to change anything," Chief Justice Roberts said, "but you can understand Argentina or any other country saying . . . before we're going to arbitrate, . . . try our courts, you may find – you may be surprised, right?" The Chief Justice also highlighted that the structure of the BIT called for resort to courts in the host state before arbitration could be initiated.

Other Justices voiced doubts when Argentina argued that BG Group should have sued in Argentina's courts before pursuing arbitration. Justice Alito seemed convinced by BG Group's argument that the eighteen-month requirement, which no longer appears in Argentina's BITs, is a "historical vestige" that is "unlikely to be a condition of consent." In the same vein, Justice Scalia pushed Argentina's counsel: "Why are you complaining about the other party not initiating proceedings in the Argentine courts when if you really wanted those proceedings to occur, *you* could have initiated proceedings in the Argentine courts?"

Stay Tuned

Many are following this case closely, as it could impact investment treaty arbitration in the United States. As the Justices' questions demonstrated, the issue of whether a U.S. federal court may review arbitrators' finding of jurisdiction in an investor-state dispute is an important one. As they deliberate, the Justices must consider the need for parties to satisfy contractual condition precedents before initiating arbitration, while at the same time not allowing that to become a back door to permit federal court review of jurisdictional issues when parties clearly intended the arbitrator to decide them. Either way, it is difficult to predict how the Supreme Court will rule simply from the Justices' comments at the recent oral argument. And, there is always a chance that the Court may limit its decision to the case at bar. Stay tuned, as we will report at the end of June when the Court's ruling is expected.

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