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Uncertainty Continues to Loom Over BG Group v. Argentina After Supreme Court Oral Argument

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It has been over two years since the DC Circuit Court of Appeals (“Circuit Court”) vacated an award in a bilateral investment treaty arbitration (BG Group PLC v. Republic of Argentina (UNCITRAL)) concluding that the panel did not have authority to adjudicate the dispute because the claimant had not satisfied a pre-arbitration requirement, namely, litigating before the local courts and waiting 18 months to commence arbitration. The decision surprised many in the international arbitration community and cast some doubt on the ability of investment treaty panels in arbitrations seated in the United States to decide their own authority. The case reached the U.S. Supreme Court (“Supreme Court”) and, on December 2, 2013, it [heard argument](#). Although the Justices’ questions gave little indication about which way the Supreme Court is leaning, and notwithstanding an apparent degree of skepticism in the questions to counsel, it may not be wise to bet against a reversal of the Circuit Court’s decision.

By way of background, the underlying dispute stems from an investment by British company BG Group under the protection of a BIT between the United Kingdom and Argentina. That BIT included a provision requiring aggrieved investors to submit their disputes to the Argentine local courts for an 18-month period before commencing arbitration. Fourteen months after Argentina’s [economic crisis](#) impacted BG Group’s interests, BG Group invoked the BIT and commenced arbitration. BG Group did not commence proceedings in the local courts and did not wait 18 months. The jurisdiction of the arbitral panel was questioned by Argentina and the panel determined that, under Article 21(1) of the 1976 UNCITRAL Rules, it could decide the challenge. The panel concluded that it had jurisdiction over the dispute because litigation in Argentina’s local courts would have been fruitless. The arbitration continued and approximately four years later the panel issued a \$185 million [award](#) against Argentina.

A U.S. district court initially [confirmed](#) the award, but on appeal, the Circuit Court [vacated](#) the award. The Circuit Court concluded that the gateway issue of arbitrability at hand—whether BG Group was required to commence litigation before the local courts and wait 18 months before it could commence arbitration—was for a court, and not the arbitral panel, to decide. In the Circuit Court’s view, BG Group needed to exhaust litigation during an 18-month period in Argentina before it could commence an arbitration under the BIT.

The Circuit Court’s decision appears contrary to what is fairly established practice in international arbitration, namely that arbitral panels have the authority to decide gateway arbitrability issues.

The Supreme Court [granted](#) certiorari review in June 2013 and invited the U.S. Solicitor General to file a brief in the case expressing the views of the U.S. government.

During argument Argentina presented the arguments that perhaps faced the greatest skepticism from the Justices. Argentina framed the issue as a matter of contract formation and sought to convince the Supreme Court that it had made a unilateral offer to arbitrate with investors and that the validity of any agreement to arbitrate was expressly conditioned on the investor having first litigated in the local courts for a period of 18 months. In Argentina's view, compliance with this pre-requisite was a pre-condition for Argentina's consent to arbitrate to take effect. This argument did not appear to go a long way, not least because exhausting the 18-month period would have achieved little, if anything, given that any decisions by the local courts would not have been binding. Moreover, in response to a hypothetical posed by Justice Ginsburg (*i.e.* a judges' strike that would have rendered Argentina's courts inoperable), Argentina conceded that under certain circumstances an arbitral panel could find that "the condition was excused" and Justice Kennedy remarked that Argentina's entire argument gave him "intellectual whiplash."

BG Group argued that the issue was not so much about whether Argentina's consent to arbitrate was conditioned upon BG Group exhausting the 18-month litigation period before the local courts, but rather whether the arbitral panel was right to decide the gateway arbitrability issue and continue with the arbitration. BG Group suggested that the Supreme Court should simply follow its precedent in *Howsam v. Dean Witter Reynolds, Inc.* (2002) and *John Wiley & Sons v. Livingston* (1964) and conclude that it was appropriate for the arbitral panel to decide whether pre-conditions to arbitration had been met. Although Justice Kennedy did not let onto his personal views on the matter, he did state that there was "substantial merit" to the argument that it could be an issue decided by a court.

The Solicitor General of the U.S. for its part presented the perspective that prior Supreme Court precedents concerning domestic arbitrations were not appropriate for application to this matter because it concerned an arbitration under a BIT and that investor-state disputes should be treated distinctly. The Justices, however, did not seem all that receptive and struggled to find a basis to treat investment-treaty cases differently. Justice Breyer went as far as characterizing the argument as having "sprung, full blown, from someone's brain" and "not embedded in any law."

Although the Justices' questions hardly illuminated the Supreme Court's thinking, the uncertainty surrounding the Circuit Court's decision will soon be dispelled. Even though it is never a good idea to predict the outcome of Supreme Court decisions, it would be reassuring if it were to follow its trend to afford deference to arbitration and the arbitrators' authority to decide gateway arbitrability issues.



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