SCOTUS: *BG Group* v. *Argentina*: Presumption that Arbitrators Decide Preconditions to Arbitration Extends to the Interpretation of Treaties

On March 5, 2014, the Supreme Court issued its decision in *BG Group PLC* v. *Republic of Argentina*,[1] upholding an arbitration panel's award of damages against Argentina for breaching an international investment treaty. The Court held that although the party initiating the arbitration had failed to satisfy an express condition precedent to arbitration, the case properly proceeded to arbitration and federal courts were obligated to enforce the award.

I. Facts and procedural history

A 1990 bilateral treaty between the United Kingdom and Argentina "contain[ed] a dispute-resolution provision, applicable to disputes between one of those nations and an investor from the other."[2] The provision entitled any party to proceed unilaterally to arbitration,[3] provided that the dispute was first submitted to a court in the country where the investment was made—which the Court termed the "local litigation" provision.

In 2003, after Argentina changed the way it calculated gas tariffs, negatively impacting petitioner BG Group (a British firm which was a part-owner of former state-owned gas distribution assets in Argentina), BG Group sought arbitration against Argentina for violating substantive provisions of the treaty. BG Group did not first seek relief in the courts of Argentina.

The arbitration took place in the United States, with the panel ultimately issuing its final decision in Washington, D.C. Argentina denied that it had violated any substantive provisions of the treaty and asserted that arbitration was improper because BG Group did not comply with the local litigation requirement. Argentina lost on both counts and BG Group was awarded $185 million, with the arbitration panel finding that BG Group was excused from first filing a suit because of a decree the President of Argentina had made which hindered BG Group's recourse in their courts and thus "implicitly excused compliance with the local litigation requirement."[4] Both parties then filed petitions for review in the United States District Court for the District of Columbia—BG Group seeking to confirm its monetary award and Argentina seeking to vacate it arguing the panel lacked jurisdiction. The district court confirmed the award, but the Court of Appeals for the D.C. Circuit reversed. The court of appeals decided it owed no deference to the arbitration panel on the question of whether the condition precedent to arbitration should be excused, and thus took it upon itself to decide that the Presidential decree was insufficient to excuse BG Group's noncompliance.

II. Background law

The Supreme Court has issued over a dozen decisions specifically addressing the question of which issues are for arbitrators to decide and which are for courts. The general rule is that "courts determine the parties' intent with the help of presumptions," which are conclusive unless the parties "clearly and unmistakably provide" for a

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[1] No. 12-138, slip op. 572 U.S. ____ (March 5, 2014), *available at* http://www.supremecourt.gov/opinions/13pdf/12-138_97be.pdf. This case is separate from the widely publicized *Republic of Argentina* v. *NML Capital* litigation, regarding defaulted Argentinian debt.

[2] *Id.* at 1.

[3] The treaty also allowed parties to mutually agree to arbitrate their disputes, without restriction. *Id.*

[4] *Id.* at 4.

contrary result.[5] The presumptions are that questions of "arbitrability" (*i.e.*, whether there is an agreement to arbitrate at all, and the enforceability and scope of that agreement) are decided by courts, while questions about "particular procedural preconditions" or "defenses" to arbitration (*i.e.*, whether the claim is timely, there was adequate notice, or waiver or estoppel were applicable) are decided by arbitrators.[6]

The distinction matters for at least two reasons: (1) arbitrators may be more likely to make decisions that enhance their own power; and crucially (2) courts review such decisions properly submitted to arbitration with "considerable deference,"[7] as opposed to *de novo* (with no deference).

III. The Court's decision

All nine Justices agreed that the treaty's local litigation requirement was of the procedural variety, and thus that applying the Court's "ordinary presumption" would mean that the arbitrators should decide whether it was excused.[8] The issue that divided the Court was whether to treat the treaty as it would "an ordinary contract between private parties."[9] Justice Breyer, writing for the majority noted that a treaty is simply a contract between nations and it is settled law that they are to be interpreted in a manner similar to ordinary private contracts. So the Court concluded that the question of whether the local litigation requirement was excused was for the arbitrators to decide. It then upheld the arbitrators' decision under the considerable deference standard.

Justice Roberts, joined by Justice Kennedy, dissented. While not disputing that the treaty was a contract, Justice Roberts focused on the fact that the treaty was not a contract between the parties to the dispute. In his view, BG Group and Argentina had no contract providing for arbitration at all. Rather the treaty represented a "unilateral standing *offer*" by both countries to arbitrate with investors if the local litigation requirement was met.[10] And because BG Group had not fulfilled the condition, unless it could establish a valid excuse for failing to do so, it could not accept the offer. Therefore, the dissent viewed the issue of whether or not BG Group should be excused from the condition not as a matter of procedure in an otherwise valid arbitration agreement, but as a matter of whether a contract containing an arbitration agreement was ever formed at all—a matter for courts to decide. Accordingly the dissent would have remanded the case to have the lower courts determine for themselves (without any deference to the arbitration panel) whether the condition was excused.[11]

IV. Significance

While the decision broke some new ground in its application of arbitration principles in the context of treaties, it otherwise followed established precedent. In addition to *BG Group*'s obvious relevance in the international context, the decision more generally illustrates the rigidity of the distinction between questions of

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[5] *Id*. at 7.

[6] *Id.* at 7-8. The Court has also held that whether a contract has been formed at all is a question for courts, *see, e.g.*, *Granite Rock Co.* v. *Teamsters*, 561 U.S. 287 (2010), and whether a contract is enforceable is a question for arbitrators, *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

[7] *Id*. at 14.

[8] *Id.*

[9] *Id*. at 6.

[10] *Id.* at 5 (Roberts, C. J. dissenting) (emphasis original).

[11] The D.C. Circuit in fact took this approach, which would normally obviate the need for remand, but Justice Roberts nonetheless wanted them to reconsider the issue since the analysis below was "perfunctory." *Id.* at 16-17 (Roberts, C. J. dissenting).

"arbitrability" and "procedure." Unless parties explicitly indicate whether they want an issue to be decided by an arbitrator or by a court, the accompanying presumptions (courts for "arbitrability;" arbitrators for "procedure") will likely be determinative.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; or John Schuster at 212.701.3323 or jschuster@cahill.com.