U.S. Supreme Court to Hear an International Investment Treaty Arbitration Case

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The U.S. Supreme Court this week granted certiorari in its first-ever case involving arbitration requirements under an international investment treaty. The Court’s decision in this closely-watched case — Republic of Argentina v. BG Group PLC — may have significant impact on the authority of the arbitrators to determine whether arbitration prerequisites have been satisfied, and the courts’ role in the enforcement of international arbitral awards.

The case arose out of a long-standing dispute between BG Group, a United Kingdom company, and the Republic of Argentina regarding the impact of several emergency measures taken by Argentina in the aftermath of its 2001 economic crisis on the value of BG Group’s investment in MetroGas, an Argentine gas distribution company. BG Group initiated arbitration against Argentina under a bilateral investment treaty between the United Kingdom and Argentina. The treaty, which went into effect in 1993, is designed to promote reciprocal private investment between the two countries. According to the treaty, disputes arising thereunder must first be submitted to the courts of the respondent country; if such court does not issue a final decision within 18 months, or if the investor still wishes to pursue a claim after the decision, then the dispute may be submitted to international arbitration. BG Group did not comply with this requirement, and Argentina sought to dismiss the arbitration on that basis.

The arbitral tribunal, convened under the UN Commission on International Trade Law (UNCITRAL) rules, found that the treaty’s litigation requirement would constitute an “impediment to arbitration.” The tribunal further held that a variety of emergency measures enacted by Argentina in the aftermath of the 2001 crisis “interfered with the normal operation of its courts,” hindering recourse to its domestic courts. On that basis, the tribunal concluded that insisting on BG Group’s compliance with the litigation requirement would lead to an absurd and unreasonable result, contrary to the accepted international rules of treaty interpretation. The tribunal then awarded BG Group nearly US$185 million, in addition to interest, costs and attorneys’ fees.

Argentina challenged the award in U.S. federal courts, and the U.S. Court of Appeals for the District of Columbia Circuit agreed with that challenge and vacated the award. The Court of Appeals held that because BG Group had invoked the treaty’s arbitration clause without exhausting its remedies in the Argentine courts first, BG Group failed to satisfy the treaty’s “gateway” requirement to invoke arbitration. Republic of Argentina v. BG Group PLC, 665 F.3d 1363, 1370-71 (D.C. Cir. 2012). As a critical part of its holding, the D.C. Circuit concluded that the parties to the treaty — the United Kingdom and Argentina — would have expected a court, rather than an arbitral tribunal, to determine the effect of an investor’s noncompliance with the treaty’s litigation requirement. The Court of Appeals
then vacated the arbitral tribunal’s award on the ground that the tribunal never had jurisdiction to hear the dispute in the first instance.

BG Group sought certiorari from the U.S. Supreme Court, arguing that the D.C. Circuit’s decision contravened settled precedent on who decides a party’s compliance with preconditions to arbitration. Invoking the Supreme Court’s decisions in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), and *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 82 (2002), BG Group argued that an arbitral tribunal, and not a national court, determines issues of procedural arbitrability and, specifically, whether conditions precedent to an obligation to arbitrate have been satisfied. The petition garnered support from a number of arbitration-related associations and prominent international arbitration practitioners.

The Supreme Court originally deferred its decision on the petition, and instead invited the Solicitor General to submit his views on whether review should be granted. The Solicitor General recommended denying review, arguing that the D.C. Circuit’s analysis was specific to the U.K.-Argentina bilateral investment treaty, and that the decision was unlikely to have broad impact because the treaty’s litigation requirement was fairly uncommon in international treaty practice. Notably, however, the Solicitor General did not endorse the D.C. Circuit’s reasoning unreservedly, noting that the court may not have considered fully the impact of international law principles of treaty interpretation in its analysis. The Supreme Court nevertheless granted review.

While the Supreme Court has often considered various arbitration requirements, including the question of who decides the jurisdictional issue of arbitrability, this is the first time that the Court will address these issues in the context of an international investment treaty. The Court’s decision to grant review, notwithstanding the Government’s recommendation that the petition be denied, suggests that at least some members of the Court find the D.C. Circuit’s ruling and analysis to be problematic.

In deciding this case, the Supreme Court may adopt a broad rationale that transcends international investment treaties by using this case as an occasion to clarify what constitutes a “procedural arbitrability” question that is committed to an arbitrator’s determination. Alternatively, the Supreme Court could adopt a more narrow approach that speaks solely to whether compliance with certain preconditions to arbitration is for an arbitral tribunal — and not a national court — to decide. In reaching any decision, the Supreme Court will likely address (if only implicitly) whether the fact that this case arises under an international investment treaty materially differentiates the “who decides” question from those arising in a purely domestic or international commercial context. For example, the Court could very narrowly hold that the specific national court requirement contained in the U.K.-Argentina treaty differs from other preconditions to arbitration. Irrespective of which path the Court takes — or whether it includes some combination of the above — its decision will likely have important implications for the respective roles of U.S. courts and national and/or international arbitral tribunals.

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