

Arbitration - USA

Supreme Court clarifies competence-competence principle

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Introduction

In a highly anticipated decision, the US Supreme Court recently confirmed a \$185 million award against Argentina in *BG Group Plc v Republic of Argentina*.⁽¹⁾ The *BG Group* decision is significant for international arbitration practitioners because it not only clarifies the respective roles that courts and arbitrators should play when deciding threshold issues of arbitrability or jurisdiction under international arbitration agreements, but also reinforces the US Supreme Court's pro-arbitration outlook.

Facts

The underlying dispute in *BG Group* arose out of the Argentine financial crisis of 2001 and the resulting 2002 emergency measures that unpegged the Argentine peso from the US dollar and changed the manner in which certain public utility tariffs were calculated.

BG Group Plc was an English company that invested in a privatised Argentine gas distribution company in the early 1990s. At the time BG Group invested, Argentine law provided that gas tariffs would be calculated in US dollars and that tariffs would also be set at levels that would permit the distributor to achieve reasonable rates of return.

The 2002 emergency measures severely affected the distributor's profitability by unpegging the Argentine peso from the US dollar (which drastically devalued the peso) and redenominating tariffs in pesos. In response, BG Group commenced an arbitration against Argentina under the Argentina-UK bilateral investment treaty (BIT) pursuant to the United Nations Commission on International Trade Law Arbitration Rules, asserting claims for expropriation and violation of the fair and equitable treatment standard.

The parties agreed to seat the arbitration in Washington DC and a tribunal was appointed in 2004. At the outset, Argentina raised jurisdictional objections, including an objection that BG Group's claims were not admissible because BG Group had failed to comply with a provision of the Argentina-UK BIT that required investors to submit disputes to the local courts of the host country for 18 months before commencing arbitration.

In 2007 the tribunal issued a final award that rejected Argentina's jurisdictional objections on the grounds that Argentina's own actions had excused BG Group from complying with the local litigation requirement set forth in the BIT. The tribunal also awarded BG Group \$185 million on its fair and equitable treatment claim.

Argentina petitions US court to vacate award

In 2008, Argentina petitioned a US federal trial court to vacate the award. In relevant part, Argentina argued that the arbitrators had exceeded their powers within the meaning of Section 10(a)(4) of the Federal Arbitration Act by disregarding the 18-month local litigation requirement set forth in the Argentina-UK BIT. The trial court rejected that application and instead granted BG Group's cross-petition to confirm the award.

Argentina appeals trial court decision

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Argentina subsequently appealed the trial court's confirmation to the US Court of Appeals for the District of Columbia. On appeal, the federal appellate court concluded that Argentina's petition to vacate the award raised a "gateway" or "antecedent" issue of arbitrability, and that under US law, only a court could decide that question.⁽²⁾ The federal appellate court therefore decided to consider the trial court's denial of Argentina's jurisdictional objection itself *de novo*.

After conducting that *de novo* review, the federal appellate court not only reversed the trial court's decision to confirm the award, but also vacated the final award in its entirety on the grounds that the tribunal lacked jurisdiction to hear BG Group's claims without first submitting them to the Argentine courts for at least 18 months.

After losing the appeal, BG Group petitioned the US Supreme Court to review the matter.

Supreme Court decision and delegation of competence to decide arbitrability

The Supreme Court framed the issue before it as one of who – the courts or arbitrators – was competent to interpret the local litigation requirement found in the Argentina-UK BIT when the BIT was silent on that issue.⁽³⁾

The Supreme Court labelled the question as one of arbitrability or jurisdiction and, to answer it, first approached the Argentina-UK BIT as if it were an ordinary contract between private parties. The Supreme Court recognised that in ordinary contracts, parties are free to decide whether courts or arbitrators will determine threshold issues of arbitrability and can express their intent in the arbitration agreement itself.⁽⁴⁾

The Supreme Court next implicitly concluded that the Argentina-UK BIT did not expressly state any choice about the delegation of arbitrability. The court therefore turned to the presumptions it had established in *Howsam v Dean Witter Reynolds, Inc* ⁽⁵⁾ to determine whether courts or arbitrators should decide questions of arbitrability. Applying those presumptions, the court held that:

- courts decide issues of substantive arbitrability, such as "whether the parties are bound by a given arbitration clause", or whether an arbitration clause extends to a "particular type of controversy";⁽⁶⁾ and
- arbitrators decide matters of procedural arbitrability, such as waiver, delay, time limits, notice "and "other conditions precedent to an obligation to arbitrate".⁽⁷⁾

The Supreme Court concluded that the 18-month local litigation requirement found in the Argentina-UK BIT was a procedural requirement that arbitrators should resolve, because "[i]t determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all".⁽⁸⁾

After analysing the Argentine-UK BIT as a private contract, the Supreme Court considered whether its analysis should change because a BIT was at issue. The Supreme Court determined that it should not, because "[a]s a general matter, a treaty is a contract, though between nations".⁽⁹⁾

Finally, the Supreme Court considered the merits of Argentina's application to vacate the underlying award and found that the arbitrators had not exceeded their powers under Section 10(a)(4) of the Federal Arbitration Act by ruling on their own jurisdiction. The Supreme Court therefore reversed the appellate court and reinstated the award.

Comment

BG Group is significant for several reasons – beyond the mere fact that a BIT was at issue – because it clarifies how a gateway issue that frequently arises in arbitration should be decided.

First, the decision explains how the authority to address threshold questions of arbitrability should be allocated between courts and arbitrators when an arbitration agreement is silent on the issue. In the absence of an express choice by the parties, arbitrators will decide issues of procedural arbitrability, while questions of substantive arbitrability will be left to courts to resolve.

Second, the decision implicitly reinforces that when parties do expressly delegate questions of arbitrability to arbitrators to decide, courts should review those determinations in only limited circumstances or at the enforcement stage.⁽¹⁰⁾ Notably, the Supreme Court suggested that incorporating arbitral rules that enshrine the doctrine of competence-competence are relevant to that determination.⁽¹¹⁾

Third, the court relied heavily on international authorities to reach its holding and recognised that international arbitrators enjoy special expertise in the area of international arbitration, which signals a judicial acceptance that international arbitration is a unique field with unique requirements.⁽¹²⁾

Consequently, while questions about the respective roles between courts and

arbitrators on issues of jurisdiction will continue to arise, the *BG Group* decision significantly clarifies how US courts should approach those questions. Moreover, the deference given to both the underlying award and the doctrine of competence-competence provides further evidence of the pro-arbitration stance that the US Supreme Court has adopted in recent years.

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Endnotes

(1) 572 US (2014).

(2) *Republic of Argentina v BG Group Plc*, 665 F3d 1363, 1369 (DC Cir 2012).

(3) *BG Group PLC v Republic of Argentina*, 572 US (2014) ("The question is whether the parties intended to give courts or arbitrators primary authority to interpret an apply a threshold provision in an arbitration contract-when the contract is silent as to the delegation of authority").

(4) Under Supreme Court precedent, where parties clearly and unmistakably express that arbitrators should decide threshold questions of arbitrability, courts are bound to respect that decision and to cede those questions to arbitrators. See *Rent-A-Center, West, Inc v Jackson*, 130 S Ct 2772, 2276-79 (2010) (stating that "[w]e have recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy" and enforcing an agreement that delegated issues of arbitrability to the arbitrator to decide).

(5) 537 US 79 (2002).

(6) *BG Group PLC*, 572 US at __ (quoting *Howsam*, 537 US at 84).

(7) *Id.*, at __ (setting forth matters of procedural arbitrability under *Howsam*).

(8) *Id.*, at __.

(9) *Id.*, at __.

(10) Compare *id.*, at __ ("If the contract is silent on the matter of who primarily is to decide 'threshold' questions about arbitration, courts determine the parties intent with the help of presumptions") (emphasis added); with *Rent-A-Center, West, Inc*, 130 S Ct at 2276-79 (stating that "[w]e have recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy" and enforcing an agreement that delegated issues of arbitrability to the arbitrator to decide).

(11) *BG Group PLC*, 572 US at __ (citing Article 41(1) of the ICSID Rules and Article 23(1) of the UNCITRAL Rules as evidence that arbitrators should decide issues of admissibility or jurisdiction).

(12) *Id.* at __ (noting that "[i]nternational arbitrators are likely more familiar than are judges with the expectations of foreign investor and recipient nations" with regard to the BITs).

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