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International Arbitration Case Law

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REPUBLIC OF ARGENTINA V. BG GROUP PLC, CASE NO. 11-702 (F. SUPP. 2D 21 (D.D.C. 2011)

Case Report by Gisela Paris**
Edited by Loukas Mistelis ***

On 17 January 2012 the United States Court of Appeals for the District of Columbia Circuit reverted the ruling of the United States District Court for the District of Columbia dating from 10 November 2011, which denied the Republic of Argentina's motion to vacate an award rendered by an arbitration panel on December 24, 2007, granting BG Group PLC's ("BG Group") cross-motion to confirm. The opinion of the U.S. Court of Appeals for the District of Columbia Circuit, a three-judge panel, was written by Circuit Judge Judith Rogers.

Tribunal: United States Court of Appeals for the District of Columbia Circuit. The opinion of Court was written by Circuit Judge Judith Rogers.

Petitioners: Republic of Argentina

Counsel: Gabriel Bottini, pro hac vice, argued the cause for the Republic of Argentina. On the briefs was John P. Gleason. Fernando O. Koatz entered an appearance.

Respondent: BG Group PLC.

Counsel: Alexander A. Yanos of Freshfields Bruckhaus Deringer LLP argued the cause for BG Group PLC. With him on the brief was Elliot Friedman. Paul L. Yde entered an appearance.

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1. Summary

On 17 January 2012 the United States Court of Appeals for the District of Columbia Circuit (the "Circuit Court" or the "Court") rendered a decision reversing the ruling of the United States District Court for the District of Columbia (the "District Court") dating from 10 November 2011,[1] which denied the Republic of Argentina's motion to vacate an award rendered by an arbitration panel (the "Arbitration Panel" or the "Panel") on December 24, 2007, granting BG Group PLC's ("BG Group") cross-motion to confirm.

The decision of the Circuit Court vacates an international investment arbitral award that awarded BG Group $185 million dollars ($238 million dollars, including attorneys fees and costs) against Argentina (the "Final Award"), on the basis that the investor had commenced an international arbitration against Argentina without first filing a claim in the Argentine domestic courts, as required by Article 8(2) of the Bilateral Investment Treaty between the United Kingdom of Great Britain and Northern Ireland and the Republic of Argentina (the "BIT"). The Circuit Court ruled that the Arbitral Panel had exceeded its authority by rendering a decision "*wholly based on outside legal sources and without regard to the contracting parties establishing a precondition to arbitration*", ignoring the terms of the parties' agreement in the BIT by disregarding BG Group's obligation to commence litigation before Argentine courts for 18 months prior to initiating international investment arbitration proceedings.

2. Background of the case

In 2003 BG Group, a British investor who had invested in a gas transportation and distribution company incorporated in Argentina, initiated arbitration proceedings

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[1] *Republic of Argentina v BG Group PLC*, 715 F.Supp.2d 108 (D.D.C.2010).

against the Republic of Argentina under UNCITRAL rules claiming expropriation of its investment and violation of the fair and equitable treatment standard of the BIT, stemming from the government measures taken in the context of the 2001-2002 economic crisis in Argentina, commonly known as "emergency laws", which, among other things, converted dollar-based tariffs into peso based tariffs at a pace of one peso to one U.S. dollar.

In the arbitration, BG Group had submitted a ministerial opinion appearing in an article by the former Argentina Attorney General and Minister of Justice, that estimated that it would take six years to resolve BG Group's claim in the Argentine courts. As a result, BG Group viewed the requirement of Article 8(2) of the BIT conditioning the timing of the submission of a dispute to international arbitration to "*after a period of eighteen months from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, [and] the said tribunal has not given its final decision*" as "*senseless*" and thus saw no reason to wait eighteen months before commencing arbitration proceedings. Alternatively, BG Group cited the Most Favored Nation Clause in Article 3 of the BIT claiming that it was not required to exhaust remedies in Argentina courts, since the United States-Argentina investment treaty did not include that requirement. BG also cited customary international law for the same purpose.

In its Final Award, the Arbitral Panel decided it had jurisdiction over the dispute, not based on the fact that international law did not require exhaustion of local remedies, but holding that Article 8(2) of the Treaty could not "*[a]s a matter of Treaty interpretation . . . be construed as an absolute impediment to arbitration*", basing its decision on general rules of interpretation found in the Vienna Convention which led the Panel to conclude that a literal reading of the BIT would produce an "*absurd and unreasonable result*" . The Arbitral Panel did not find it necessary to decide whether or not the most favored

nation clause applied in this case. On the merits, after finding that BG Group was an "*investor*" with an "*investment*" that had standing to bring its claim, the Panel rejected the claim of expropriation against Argentina under Article 5 of the BIT, but found that Argentina had breached Article 2 of the BIT by failing to provide fair and equitable treatment to investments, since its actions in the early 1990s led to BG Group's investment and due to the dismantling of the regulatory scheme that induced the investment. Furthermore, the Panel rejected Argentina's state-of-necessity defense under customary international law, concluding that the defense was "*limited to exceptional circumstances, such as where there is a 'serious and imminent threat and no means to avoid it*.'" The Panel awarded the investor $185,285,485.85 U.S. dollars, plus interest, costs, and attorneys' fees.

3. Proceedings before the Circuit Court

Argentina petitioned to vacate or modify the Final Award pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 10(a) & 11. BG Group filed an opposition and a cross-motion for recognition and enforcement of the Final Award, and for a prejudgment bond. Following further filings in opposition or reply, the District Court denied vacatur and granted enforcement. Then, Argentina appealed in front of the Circuit Court, for a review of clear error in the District Court's findings of fact and for a review de novo on questions of law.

The Circuit Court starts by analyzing the questions of arbitrability and the intention of both Argentina and the United Kingdom, as contracting parties, when they executed the BIT as to whether an investor under the BIT could seek arbitration without first fulfilling Article 8(1)'s requirement that recourse initially be sought in a court of the contracting party where the investment was made. To answer this question, the Circuit

Court asks a previous question; who did the contracting parties intend should provide that answer: a court or an arbitrator?

To answer the question of arbitrability, the Circuit Court quotes the U.S. Supreme Court holding that "*the intent of the contracting parties controls whether the answer to the question of arbitrability is to be provided by a court or an arbitrator*"[2]. The Circuit Court cites another U.S. Supreme Court decision, Howsam v. Dean Witter,[3] for guidance on the circumstances in which a court, rather than an arbitrator, is to decide a question of arbitrability: "*…where [the contracting parties] are not likely to have thought that they had agreed that an arbitrator would [have decided the gateway of the matter], and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate*". The Circuit Court concludes that where "*the parties did not agree to submit the arbitrability question itself to arbitration, then the district court should decide that question . . . independently*"[4], unless there is clear and unmistakable evidence that the parties intended for the arbitrator to decide the question of arbitrability, in which case the court's review of the arbitrator's decision on that matter should "*give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances*".[5]

The Circuit Court then analyzes how the District Court wrongly construed Argentina's concession that the BIT provided that the arbitrator would decide the question of arbitrability. The District Court had cited Argentina's counsel, saying that "[*Argentina*] *acknowledge[s] that the Arbitral Tribunal has the principal power to rule upon its jurisdiction*." According to the Circuit Court, Argentina's counsel statement was

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[2] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995). "*Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so*."

[3] 537 U.S. 79 (2002).

[4] *First Options, 514 U.S. at 943.*

[5] *Id.*

misconstrued and Argentina's concession was altogether different: once the BIT's arbitration provision was properly triggered, after eighteen months' recourse to an Argentine court, any question of arbitrability then would be decided by the arbitrator. To reach this conclusion, the Court analyzes further statements made by Argentina's counsel before the District Court, who also, and immediately after that stated "*we also understand that this Court has the right to and the duty to under the New York Convention to assess whether . . . Argentina's consent to arbitration [was] respected*", which qualified his previous saying, adding that "*Argentina's consent to arbitration had a very important condition. And that condition was that the dispute had to be submitted for 18 months to local courts to an Argentine judge*." Based on these statements, the Circuit Court concluded that the District Court erred in finding that Argentina had conceded that the arbitrator had the power to determine arbitrability under the circumstances.

The Court confirms this conclusion also from a temporal analysis. The possibility of recourse to arbitration and the application of UNCITRAL Rules (Article 8(3) of the BIT), which grant the arbitrator the power to determine issues of arbitrability, are not triggered until after an investor has first sought recourse for eighteen months in a court of the contracting party where the investment was made, pursuant to Article 8(1) and 8(2). In addition, the Circuit Court finds another argument to sustain that the parties did not intend the arbitrator to solve questions of arbitrability, by referring to Articles 9(2) and 9(5) of the BIT which clearly point to arbitration as the channel to solve disputes arising from Argentina and the United Kingdom. The Circuit Court concludes that, given that the BIT is silent on who decides arbitrability when the preconditions in Articles 8(1) and 8(2) are disregarded, the absence in Articles 8(1) and 8(2) of such clear language as would be found in Articles 9(2) and 9(5) suggests the parties did not intend to provide an arbitrator with the authority to determine the question of arbitrability in that case.

As a result, and applying the holding in *First Options*, the Court decides there is no clear and unmistakable evidence[6] that the contracting parties intended an arbitrator to decide the gateway decision.

The Circuit Court also decides that the question of arbitrability is an independent question of law for it to decide, and disregards the application of a U.S. Supreme Court decision, *John Wiley & Sons Inc. v. Livingston*, which, in the context of labor disputes, held that judicial inquiry under the Labor Management Relations Act must be strictly confined and doubts should be resolved in favor of arbitration.[7] The Court concludes that the case at hand is entirely different from *John Wiley* in that the former involves two sovereign states and it requires –due to the specific desire of the parties– judicial proceedings prior to arbitration. In addition, unlike in *John Wiley* –where the Union, not the arbitrator, questioned the preconditions to arbitration– in the case at hand the facts underlying the question of arbitrability did not "grow out of the dispute" between BG Group and Argentina, but instead were raised on their own accord by the Panel. According to the Court, "*[t]he question of arbitrabilty here precedes rather than grows out of the dispute*."

Due to the explicitness of the BIT provisions at issue, the Court decides not to apply the "*emphatic federal policy in favor of arbitral dispute resolution*" held in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[8] emphasizing instead the intent of the contracting parties, which the Court states, is the principle that led to a policy in favor of arbitral resolution of international trade disputes in the first place.

The Circuit Court finally decides that BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration

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[6] *First Options, 514 U.S. at 944.*

[7] *John Wiley & Sons Inc. v. Livingston*, 376 U.S. 543 (1964).

[8] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

pursuant to Article 8(3) of the BIT if the dispute remained, reverses the orders denying the motion to vacate and grants the cross-motion to confirm the Final Award, and vacates the Final Award.