

SUPREME COURT: ARBITRATORS, NOT COURTS, DECIDE WHETHER A SUIT MAY PROCEED TO ARBITRATION

Insights

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On March 5, 2014, the U.S. Supreme Court upheld an arbitration panel's award and broadened arbitrators' authority to determine preliminary issues in arbitration agreements. Although the case concerned a treaty dispute between a corporation and a sovereign nation, the Court's decision reframed the issue as an arbitration dispute and continued to follow well-established precedent that favors arbitration while limiting judicial intervention of such agreements. This ruling is good news for employers. *BG Group v. Republic of Argentina*

Facts Of The Case

BG Group, PLC, a British firm, invested millions of dollars into an Argentine company pursuant to an investment treaty entered into between the United Kingdom and the Republic of Argentina. In late 2001, the Argentine economy collapsed, leading the country to enact a series of emergency decrees, including laws that altered Argentina's currency and tariff rates from U.S. dollars to pesos. These measures led to significant losses for foreign investment corporations, including BG Group. BG Group believed that these changes violated the treaty, and sued the country of Argentina.

The treaty provided that disputes between parties should be resolved through arbitration, but only under certain conditions: the complaining party must first litigate its grievance in the local courts (in this case, Argentine courts) for a minimum of 18 months, or both parties must agree to bypass the litigation requirement. BG Group opted not to litigate in the Argentine local courts, and filed its claim with a United States arbitration panel, without Argentina's consent. Argentina disputed the arbitrators' jurisdiction, arguing that the arbitrators could not decide the dispute because BG failed to bring its grievance initially to Argentine courts. The arbitration panel disagreed and awarded over \$185 million in favor of BG Group.

Argentina appealed to the U.S. Court of Appeals for the D.C. Circuit, which reversed the arbitration panel's award because BG Group failed to first file its claim with the Argentine court as spelled out in the arbitration agreement. The issue presented before the Supreme Court was whether a court or the arbitrator should determine if a precondition to arbitration has been satisfied in disputes involving a multi-staged dispute-resolution process.

Procedural Arbitration Issues Decided By Arbitrators

In a 7-2 decision, the Supreme Court held that arbitrators should decide whether a precondition to arbitration has been satisfied, and courts should only review the arbitration's determination with considerable deference. In reaching this conclusion, the majority interpreted the treaty as if it were an ordinary contract: in other words, if the language of the contract is silent, courts must decide the parties' intentions.

In two previous decisions, *John Wiley & Sons v. Livingston* (1964) and *Howsam v. Dean Witter Reynolds, Inc.* (2002), the Supreme Court articulated the framework for determining parties' intent in deciding threshold questions on the issue of arbitrability. Courts are to presume that parties intend for procedural issues regarding the arbitration to be decided by the arbitrator. On the other hand, courts are to presume that parties intend for substantive issues to be decided by the courts. For example, while a procedural issue such as whether a party submitted the proper paperwork is an issue for the arbitrator, the question whether a valid, enforceable contract exists is a substantive issue ripe for the courts.

The Court identified the local litigation requirement in the treaty as a procedural provision that should be handled by the arbitrator. The majority reached this decision by analyzing the language and structure of the provision which stated that disputes would be submitted to arbitration so long as one of the three preconditions occurred. The Court interpreted this language as determining *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all. Because the local litigation requirement was deemed procedural, the Court held that the presumption outlined in *Howsam* and *Livingston* applies, and deciding whether these pre-conditions have been satisfied is left primarily to the arbitrator.

The Supreme Court also admonished lower courts to review arbitrators' interpretations of procedural issues with considerable deference, letting them know they should give substantial weight to an arbitrator's interpretation because the arbitrator is better equipped to interpret the intent of the parties.

How This Dispute Impacts Employers

One of the most frequently raised issues in employment litigation involves the validity and scope of arbitration agreements. This decision provides further evidence of the Supreme Court's intent to strengthen the federal policy favoring arbitration embodied in the Federal Arbitration Act, following up on several other decisions from

recent Court terms (2010 – *AnimalFeeds v. Stolt-Nielsen*; 2011 – *AT&T v. Concepcion*; 2013 – *Oxford Health Plans LLC v. Sutter* and *American Express Co. v. Italian Colors Rest.*). This is encouraging for employers seeking to enforce arbitration agreements and avoid unwarranted judicial interference. An employer may rely on this case to support its argument that arbitrators' jurisdiction over procedural issues is broad.

Although the *BG Group* falls in line with federal policy favoring arbitration, the Supreme Court clearly stated that courts still have the authority to interpret an arbitration agreement to determine substantive issues. Therefore as a preliminary matter, employers who have entered into arbitration agreements with their employees should work with counsel to ensure that their arbitration agreement is compliant with federal and state laws. For more information, contact your regular Fisher Phillips attorney.

This Supreme Court Alert provides information about a specific case. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.