engaging in the transaction with Alfa or any other financial transactions.

Sonera sought leave to appeal to the US Supreme Court, which was denied on 30 June 2014.

The personal jurisdiction landscape

Lack of personal jurisdiction does not appear in the list of permitted defences to enforcement in the New York Convention, and commentators have argued that allowing the defence puts the US in violation of its treaty obligations. Nonetheless, Sonera demonstrates that, in the Second Circuit, personal jurisdiction is required even in New York Convention cases.14

The personal jurisdiction requirement is least problematic when parties have consented in their arbitration agreement to the jurisdiction of New York courts for confirmation and enforcement purposes. Such consent should be clear. Under Sonera, reference to ‘jurisdiction over the award’ is not sufficiently specific to waive a potential defence against enforcement of a New York Convention award based on lack of general personal jurisdiction over the award-debtor.

Following the Supreme Court’s ruling in Daimler, obtaining personal jurisdiction over a foreign corporation on the basis of local business dealings will be difficult if the corporation is not also ‘at home’ there. However, award-creditors should take comfort from the New York courts’ recognition of quasi in rem jurisdiction, whereby the presence of assets of the award-debtor in the forum state establishes the court’s jurisdiction over those assets in satisfaction of the award.15 Daimler does not alter the standard for establishing specific personal jurisdiction against foreign defendants in US courts.

Notes

1 Sonera Holding BV v Cukurova Holdings AS, No 12-4280-c, 25 April 2014 (2d Cir).
2 Frontera Res Azer Corp v State Oil Co of Azer Republic, 582 F 3d 395, 397 (2d Cir 2009).
3 Licci ex rel Licci v Lebanese Canadian Bank, SAL, 732 F 3d 161, 168 (2d Cir 2013).
4 Sonera Holding BV v Cukurova Holdings AS, 11 Civ 8909, Opinion and Order dated 10 September 2012 (SDNY) [Dkt 24].
5 Ibid, at 11.
6 Ibid, at 7.
7 Sonera Holding BV v Cukurova Holdings AS, 11 Civ 8909, Order dated 18 April 2013 (SDNY) [Dkt 97].
8 Sonera Holding BV v Cukurova Holdings AS, 11 Civ 8909, Opinion and Order dated 10 May 2013 (SDNY) at 6 [Dkt 151].
9 Daimler AG v Bauman, 134 S Ct 746 (2014).
10 Sonera Holding BV v Cukurova Holdings AS, No 12-4280-c, 25 April 2014 (2d Cir) at 11–12.
11 Ibid, at 10.
12 Ibid, at 12.
14 Frontera Res Azer Corp v State Oil Co of Azer Republic, 582 F 3d 393, 397 (2d Cir 2009) (‘Article V’s exclusivity [… ] does nothing to alter the fundamental requirement of jurisdiction over the party against whom enforcement is being sought’).

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BG Group v Argentina: US Supreme Court upholds arbitrators’ authority

On 5 March 2014, the United States Supreme Court (‘SCOTUS’) issued its decision in BG Group PLC v Republic of Argentina,2 reversing a decision of the US Court of Appeals for the District of Columbia Circuit that had vacated a US$185m arbitration award against Argentina. The arbitration had been conducted pursuant to the United Kingdom Argentina bilateral investment treaty (BIT)3 under the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules.

Argentina sought to set aside the award, arguing that the dispute was not arbitrable, as BG Group had failed to comply with the BIT’s requirement that claimants must litigate their
claims for 18 months in Argentine courts prior to commencing arbitral proceedings under the BIT. Although the award was rendered pursuant to a BIT, the SCOTUS analysis did not treat the award any differently from a commercial arbitration award. Instead, the SCOTUS relied on its developed (and still developing) jurisprudence on arbitrability to find that Argentina’s challenge to the arbitration was for the arbitrators – and not a court – to decide.

**Factual background**

The arbitration was one of many that came out of Argentina’s economic reforms of the early to mid-1990s and the financial crisis that began in 2001. In about 1993, around the same time that the BIT took effect, Argentina privatised its state-owned gas transportation and distribution company, breaking it into ten different companies. BG Group acquired a substantial direct and indirect interest in one of those companies, MetroGAS, which held a 35-year exclusive licence for natural gas distribution in Buenos Aires.4

In early 2002, Argentina implemented a series of emergency measures, including currency devaluation and contractual changes reducing MetroGAS’s value, as well as a mandatory renegotiation of public service contracts. In particular, under a policy of ‘pesification’, gas tariffs that had been calculated in US dollars were changed to pesos on a one-to-one basis, although the value of the peso relative to the dollar was closer to three-to-one. As the SCOTUS noted, with that change, ‘MetroGAS’ profits were quickly transformed into losses.’5

As part of the legislation implementing the emergency measures, Argentina barred companies that filed lawsuits in Argentine courts from the ‘renegotiation process’ (which would put them at even greater risk). From March to September 2002, Argentina also stayed compliance with injunctions and execution on final judgments in lawsuits related to its response to the financial crisis.6

**BG Group arbitrates**

In 2003, BG Group commenced arbitration. It claimed that Argentina’s actions breached the BIT’s requirement of ‘fair and equitable treatment’ of investors from the other country and constituted expropriation of its investments.7

The controversy over the timeliness of BG Group’s claim arose by virtue of Article 8(2) of the BIT that provides:

‘(a) if one of the Parties so requests, in any of the following circumstances:

(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision[…].’8

BG Group did not attempt to seek relief in the Argentine courts before commencing arbitration under the BIT. As a result, Argentina argued before the arbitrators that, among other things, the ‘failure by BG to bring its grievance to Argentine courts for 18 months renders its claims in this arbitration inadmissible.’9 However, in late 2007, the Tribunal found that Argentina’s acts, both in staying execution of local courts’ judgments and injunctions, and precluding litigating investors from participating in the renegotiation process, so hindered local litigation that the ‘Treaty implicitly excused compliance with the local litigation requirement.’10 The Tribunal also found that Argentina had denied BG Group fair and equal treatment, and rendered its award in favour of BG Group.11

**Argentina and BG Group fight over confirmation and vacatur**

BG Group moved to confirm the award as a judgment under chapter 2 of the Federal Arbitration Act (FAA). Argentina sought to vacate the award under section 10(a)(4) of the FAA.12 The District Court confirmed the award. The Court of Appeals, however, vacated it. The Court held that the litigation requirement was for the court to decide de novo, without deferring to the arbitrators, and that BG Group’s non-compliance with the pre-arbitration litigation requirement was sufficient grounds on which to set aside the award.13 BG Group sought leave for appeal before the SCOTUS, which was granted.

**The Supreme Court reverses**

The dispositive question before the SCOTUS was whether BG Group’s failure to litigate the claim in Argentine courts for 18 months vitiated the agreement to arbitrate under the BIT and whether BG Group’s conduct was a question of compliance with an existing arbitration agreement. If the question related
to the existence of an agreement to arbitrate, then the question would be for a court to decide. If the issue was a matter of compliance with the dispute resolution clause, then it would be left to the arbitrators (and thus subject only to very limited review).14

The Supreme Court initially reviewed the arbitration provisions of the BIT ‘as if it were an ordinary contract between private parties.’15 The Supreme Court began its review from the US law position that parties are presumed to intend to have courts decide issues of arbitrability, in the sense of whether the parties are bound by an arbitration clause or whether the clause applies to a particular controversy.16

‘On the other hand’, the Supreme Court noted, ‘courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration’.17 Issues such as waiver or delay, time limits, notice or other conditions precedent are typical of such preconditions.18

The Supreme Court found, in a seven-to-two decision by Justice Breyer (with Justice Sotomayor concurring and Justices Roberts and Kennedy dissenting) that Article 8(2) of the BIT raises an issue of compliance with the terms of the arbitration agreement. According to the majority, the requirement of pursuing arbitration after ‘a period of eighteen months has elapsed’ following submission of the dispute to the Argentine courts ‘determines when the contractual duty to arbitrate arises, not whether there is a contractual duty to arbitrate at all.’19 Notably, the BIT presumes no significance of the litigation itself. Thus, ‘[t]he litigation provision is consequently a purely procedural requirement – a claims-processing rule that governs when the arbitration may begin, but not whether it may occur or what its substantive outcome will be on the issues in dispute.’20 The Supreme Court compared the provision to time limits for notice or pre-arbitration grievance procedures that it had previously found to be procedural determinations for the arbitrator.

The Supreme Court interprets the treaty as a contract

Having evaluated the BIT in the manner of a contract, the Supreme Court considered whether its nature as a treaty made any difference to the analysis, and concluded that it did not. The US Solicitor General, representing the government, had argued that the pre-arbitration litigation provision could be a condition of Argentina’s consent to enter into an arbitration agreement. That is, the government argued that the arbitration agreement between Argentina and the investor did not form until after the litigation requirement was satisfied.21

The SCOTUS thoroughly rejected this argument. Treaties, the Supreme Court said, are to be interpreted as contracts, and treaty arbitrations are to be treated as other arbitrations under the New York Convention, which provides in Article V(1) (e) that awards are subject to review under the law of the seat of the arbitration.22 Moreover, the BIT does not state that the pre-arbitration litigation requirement is a condition of consent.

Going beyond the language of the treaty, the majority went so far as to say that even an express ‘condition of consent’ in a treaty would not necessarily rise to the level of a requirement for the formation of an agreement to arbitrate that would be subject to judicial review.23 The Supreme Court additionally noted that the incorporation of arbitral rules (such as the International Centre for Settlement of Investment Disputes (ICSID) or UNCITRAL) that give the arbitrators competence to determine their own jurisdiction is evidence that the contracting states intended to leave such issues to the arbitrators.24 The Supreme Court admitted that this discussion was dicta, however, ‘leav[ing] for another day’ the interpretation of such a treaty provision.

The Supreme Court’s focus on these issues may be a concerted effort to enforce the scope of arbitrators’ authority over matters not clearly related to the formation of the agreement to arbitrate.25 Indeed, Justice Sotomayor’s concurrence is directed solely at this issue.26 She argues that a condition of consent, even under the Supreme Court’s non-treaty precedent, might well be conclusive of whether the parties intended judicial resolution of the question. Because the BIT does not contain that language, the fact that an Argentine court looked at an investor’s claim should have no effect on the arbitration. Since Argentina participated throughout the arbitration, Justice Sotomayor agreed that compliance with the pre-arbitration litigation requirement was a matter for the arbitrators.

The chief justice dissents

Chief Justice Roberts, along with Justice Kennedy, dissented. His view (echoing the Court of Appeals and the Solicitor General)
is that investors are not themselves ‘parties’ to the BIT, only the UK and Argentina are. Rather, the treaty is a unilateral offer to arbitrate that must be accepted by the investor through compliance with its prerequisites. On this view, the issue is Argentina’s consent to arbitrate with any purportedly aggrieved investor, and the majority has conflated the state parties’ agreement to the BIT with their agreements to arbitrate with individual investors. The dissent notes that there are three routes to arbitration under the BIT: (1) after 18 months of unresolved litigation; (2) after an unsatisfactory judicial resolution; or (3) by agreement of Argentina and the investor. On the dissent’s view, absent agreement simpliciter, ‘an investor has no choice but to litigate in the Contracting Party’s courts for at least some period.’ Moreover, the dissent observes that the pre-arbitration litigation requirement is not similar to other requirements that the SCOTUS has found to be procedural (and thus for the arbitrators) such as matters regulating the timing of arbitration or non-judicial dispute resolution.

Conclusion

The SCOTUS has recently addressed arbitration in several cases, handing down at least 15 decisions since 2008. As it represents the first time that the SCOTUS has considered investment treaty arbitration, the BG Group decision is a significant assurance that the usual rules of arbitration apply to non-ICSID treaty arbitrations. Within the usual rules of arbitration, the decision can also be viewed as another step in a long line of decisions that parse the difficult line between arbitrability questions that are for the court versus arbitrability decisions that are left to the arbitrators. Although the distinction can be stated plainly, the appearance of simplicity is often, as here, deceptive. As the dissent notes: ‘The distinction between questions concerning consent to arbitrate and mere procedural requirements under an existing arbitration agreement can at times seem elusive. Even the most mundane procedural requirement can be recast as a condition on consent as a matter of technical logic.’

Notes
1 Celinda Metro, an associate at Seward & Kissel, assisted in the research and preparation of this article.
2 134 S Ct 1198 (2014).
3 Agreement for the Promotion and Protection of Investments, 11 December 1990, 1765 UNTS 38.
4 134 S Ct at 1204.
5 Ibid, at 1204.
6 See ibid, at 1205.
7 Ibid, at 1204.
8 Argentina-UK BIT Art 8(2)(a) [emphasis added].
9 134 S Ct at 1204.
10 Ibid, at 1205.
11 Ibid.
12 9 USC s 10(a)(4). Awards in international arbitration rendered in the US are subject to the defences both of the New York Convention and s 10 of the FAA. See, for example, Yusuf Ahmed Alghanim & Sons, WLL v Toys ‘R’ Us, Inc, 126 F 3d 15, 21 (2d Cir 1997).
13 134 S Ct at 1205. (citing Republic of Argentina v BG Group PLC, 665 F 3d 1363 (DC Cir 2012).
14 Ibid, at 1206.
15 Ibid.
16 Ibid.
17 Ibid, at 1207.
18 Ibid.
19 Ibid [emphasis in original].
20 Ibid.
21 Ibid, at 1208.
22 Ibid.
23 Ibid, at 1209.
24 Ibid, at 1210.
26 134 S Ct at 1213–15.
27 Ibid, at 1216.
28 Ibid, at 1217.
29 Ibid, at 1222.