No. 12-138

IN THE
Supreme Court of the United States

BG GROUP PLC,
Petitioner,
v.
REPUBLIC OF ARGENTINA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE AMERICAN ARBITRATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

PAUL FRIEDLAND
HANSEL T. PHAM
DAMIEN NYER
TRINA NG
WHITE & CASE LLP
1155 Avenue of the Americas
New York, N.Y. 10036
(212) 819-8917

ERIC P. TUCHMANN
Counsel of Record
General Counsel
WILLIAM K. SLATE II
President and Chief Executive Officer
AMERICAN ARBITRATION ASSOCIATION
1633 Broadway 10th Floor
New York, N.Y. 10019
(212) 719-3937
TuchmannE@adr.org

Counsel for Amicus Curiae

August 27, 2012

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37(2)(b), the American Arbitration Association ("AAA") respectfully requests leave of the Court to file the accompanying brief as *amicus curiae* in support of petitioner, BG Group plc. Consent to file the accompanying brief was granted by petitioner and refused by respondent.

The petition for a writ of certiorari asks this Court to reverse the decision of the D.C. Circuit, which held that courts, not arbitrators, have the authority to decide *de novo* whether a precondition to arbitration has been complied with. The decision below invites increased judicial intervention into the arbitration process. The decision is therefore likely to have far-reaching implications for the practice of arbitration in the United States and the future of the United States as a place of arbitration.

The AAA has a direct and substantial interest in the petition. The AAA is the nation's leading provider of arbitration services domestically, and its international division, the International Centre for Dispute Resolution, is the world's largest provider of international arbitrations. Accordingly, the AAA seeks to ensure the continued development of arbitration law in a manner that supports the use of arbitration and that is consistent with the national policy favoring arbitration embodied in the Federal Arbitration Act.

The AAA also has a particular interest in making its views known in this case. The D.C. Circuit's decision limits the applicability of certain provisions of the UNCITRAL Arbitration Rules, whose language is similar to that used in the AAA's various arbitration

rules, and therefore threatens the efficacy of the AAA's arbitration rules.

For the foregoing reasons, the Court should grant the proposed *amicus* leave to file the accompanying *amicus curiae* brief.

Respectfully submitted.

PAUL FRIEDLAND
HANSEL T. PHAM
DAMIEN NYER
TRINA NG
WHITE & CASE LLP
1155 Avenue of the Americas
New York, N.Y. 10036
(212) 819-8917

ERIC P. TUCHMANN
Counsel of Record
General Counsel
WILLIAM K. SLATE II
President and Chief Executive Officer
AMERICAN ARBITRATION ASSOCIATION
1633 Broadway 10th Floor
New York, N.Y. 10019
(212) 719-3937
TuchmannE@adr.org

Counsel for Amicus Curiae

August 27, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

ARBITRAL AWARDS — Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*

The American Arbitration Association ("AAA"), as *amicus curiae*, respectfully submits this brief in support of the Petitioner.[1]

The AAA is the world's largest provider of alternative dispute resolution services. Since its founding in 1926, the AAA has administered approximately 3.7 million domestic and international disputes. The AAA has signed 64 cooperative agreements with arbitral institutions in approximately 44 countries and has offices throughout the United States, as well as in Singapore, Mexico, and Bahrain. The number of international arbitrations filed through its international division, the International Centre for Dispute Resolution ("ICDR"), continues to grow.

Because of its extensive experience administering arbitrations, the AAA is well positioned to provide insight into the practical impact of court decisions that have broad-ranging implications for arbitration.

The national policy favoring arbitration embodied in the Federal Arbitration Act ("FAA") and the increased use of arbitration in the United States can be undermined by unwarranted judicial interference, and the AAA counts as a key objective the development of arbitration law that promotes the effective

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. Consents to the filing of this *amici curiae* brief were sought from the parties, but only Petitioner consented.

use of arbitration as a means of resolving disputes. Toward that end, the AAA was at the forefront of organizations recommending that the United States accede to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3, 21 U.S.T. 2517, T.I.A.S. No. 6997 ("New York Convention"). The New York Convention, which was ratified by the United States in 1970, provides among other things for prompt and effective enforcement of voluntary international agreements to arbitrate. At the request of the State Department, the AAA convened a committee of international arbitration experts to draft proposed implementing legislation. The AAA's proposal formed the basis for what is now Chapter 2 of the United States Arbitration Act, 9 U.S.C. §§ 201-08 (1982).

Also at the request of the State Department, the AAA assisted the United Nations Commission on International Trade Law (UNCITRAL) in developing a draft Model Law on International Commercial Arbitration. The AAA's involvement in additional UNCITRAL-related initiatives has also included active participation as an invited non-governmental organization in the 2010 revisions to the UNCITRAL Arbitration Rules.

The AAA endeavors through its activities to ensure that the United States remains open and receptive to arbitration and at the forefront of global developments in arbitration. The AAA, and hence the United States, is believed to have the world's largest annual international arbitration caseload. That caseload, however, is sensitive to judicial attitudes to arbitration, attitudes reflected in U.S. judicial decisions that are keenly studied by the global arbitration community. Where those decisions deviate from

international arbitral norms supportive of arbitration, the United States' reputation as a venue with a legal framework that is supportive of arbitration can be seriously diminished.

In addition, the AAA seeks to ensure that parties who provide that disputes shall be resolved pursuant to the rules of the AAA can do so with the expectation that those rules will be enforced in a predictable manner. In that regard, the AAA is concerned by the D.C. Circuit's decision insofar as it limits the effectiveness of certain provisions of the UNCITRAL Arbitration Rules, which mirror certain core AAA arbitration rules and are drafted into thousands of agreements annually.

While the AAA has filed *amicus curiae* briefs in many of the major arbitration cases decided by the Supreme Court of the United States, the AAA only very rarely submits amicus briefs at the certiorari stage. The AAA has, however, decided to make an exception here, as this case involves issues of great concern to the development of arbitration law in the United States, the future of the United States as a place of arbitration, and the confidence of users that courts will interpret and enforce the AAA's various arbitration rules in a predictable manner.

INTRODUCTION AND SUMMARY

As this Court acknowledged in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), the FAA establishes an "emphatic federal policy in favor of arbitral dispute resolution," which "applies with special force in the field of international commerce." A key factor in giving effect to this federal policy is limiting judicial intervention into the arbitral process. "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010).

In an AAA study of over 250 corporate legal departments, 73% of respondents stated that one of their reasons for using arbitration was that arbitration "saves time," while 71% responded that arbitration "saves money." *See* AAA, DISPUTE-WISE BUSINESS MANAGEMENT: IMPROVING ECONOMIC AND NON-ECONOMIC OUTCOMES IN MANAGING BUSINESS CONFLICTS 25 (2006).[2] These cost and efficiency benefits of arbitration are undermined by judicial intrusion into the arbitral process that goes beyond the type of limited court review provided for by the Federal Arbitration Act.

---

[2] *Available at* www.adr.org/aaa/ShowPDF?doc=ADRSTG_004326.

The D.C. Circuit's decision to vacate the arbitral award rendered by three eminent international arbitrators under the Bilateral Investment Treaty signed by the United Kingdom and Argentina (the "BIT")[3] represents a dramatic and unprecedented instance of such judicial intrusion. In conflict with the precedent of this Court and other circuits, and despite the express provisions of the governing rules to submit questions of arbitrability to the arbitrators, the D.C. Circuit disregarded the thorough analysis and findings of the arbitrators regarding the satisfaction of a precondition to arbitration (the 18-month local litigation requirement in Article 8 of the BIT). *See* Pet. App. 161a-171a.

The D.C. Circuit's decision has negative implications for the practice of arbitration in the United States. Because clauses requiring disputing parties to submit to dispute resolution processes such as negotiation or mediation before resorting to arbitration are so common, the decision below introduces significant inefficiencies in the arbitration process and wide-ranging opportunities for delay and dilatory actions. This decision is all the more troubling as it suggests that courts are better placed than international arbitrators, who were mutually selected by the parties to the arbitration themselves, to interpret the provisions of a treaty entered into by two foreign States and governed by international law.

Further, the D.C. Circuit's decision imposes a novel temporal limitation on standard agreements to arbitrate questions of arbitrability found in many arbitration rules, including the rules of the AAA. This

---

[3] Agreement for the Promotion and Protection of Investments, Arg.-U.K., Dec. 11, 1990, 1765 U.N.T.S. 33.

has the potential to adversely affect the many parties relying on such rules by limiting their ability to submit issues of arbitrability to arbitration.

The decision below also has negative implications for the standing of the United States as a leading center for international arbitration, and threatens the efficacy of arbitration as an expeditious method of resolving disputes. The D.C. Circuit's decision to vacate an arbitral award rendered under an investment treaty between two foreign sovereigns is based on a rationale that is at odds with standards followed by other major international arbitration jurisdictions. The decision has already drawn sharp criticism, and jeopardizes the status of the United States as a leading seat of arbitration internationally. In addition, the expanded judicial review heralded by the D.C. Circuit may impact commercial arbitration within the United States. The petition for a writ of certiorari should be granted.

ARGUMENT

I. The D.C. Circuit's Decision Puts at Risk the Efficiency Benefits of Arbitration by Expanding the Scope of Judicial Review of Compliance with Conditions Precedent to Arbitration

In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), and *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), this Court held that the fulfillment of conditions precedent to arbitration is a procedural question for the arbitrator to decide. *Howsam* set out a bright-line rule, and in its wake courts have held that the satisfaction of mandatory contractual dispute resolution steps prior to arbitration, such as negotiation, mediation or third-party

review of claims, is a procedural question for the arbitrator to decide.[4]

This principle has been so widely accepted that the Revised Uniform Arbitration Act, which to date has been adopted by 14 states and the District of Columbia, expressly provides that "[an] arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled." *See* Revised Unif. Arbitration Act of 2000 § 6(c), 7 U.L.A. 13 (Supp. 2002).

In direct conflict with the decisions of this Court and other circuit courts, the D.C. Circuit held that satisfaction of a condition precedent, in the form of an 18-month local litigation requirement in the BIT, is a "question of arbitrability" to be decided by the courts. Pet. App. 13a.

The D.C. Circuit's decision could have widespread ramifications. Multi-tiered dispute resolution clauses requiring resort to other forms of dispute resolution prior to arbitration are prevalent in both commercial

---

[4] *See, e.g.*, *Dialysis Access Ctr., LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 375 (1st Cir. 2011) ("[T]he determination as to whether RMS complied with the Arbitration Clause's supposed 'good faith negotiations' pre-condition to arbitration is an issue presumptively for the arbitrator to decide . . . ."); *Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs., Inc.*, 623 F.3d 476, 481 (7th Cir. 2010) (Compliance with pre-arbitration notice and negotiation provisions was "a procedural question . . . for the arbitrator to address."); *Int'l Bhd. of Elec. Workers, Local Union No. 124 v. Smart Cabling Solutions, Inc.*, 476 F.3d 527, 530 (8th Cir. 2007) (considering that the "bona fide[s]" of pre-arbitral negotiations was a condition precedent and thus "a matter for the arbitrator to decide") (internal citations omitted); *El Dorado Sch. Dist. No. 15 v. Cont'l Cas. Co.*, 247 F.3d 843, 846 (8th Cir. 2001) (Compliance with a precondition to arbitration is "a question of procedural . . . arbitrability . . . 'that . . . should be left to the arbitrator to decide.'") (internal citation omitted).

contracts[5] and investment treaties,[6] such as the BIT at issue in the *BG Group v. Argentina* arbitration. According to a 2011 survey, approximately 51% of the U.S. companies and 60% of the U.K. companies surveyed had resolved disputes through contractually agreed staged processes involving negotiation, mediation and arbitration, and most companies (including 94% of the largest companies) believed that such staged processes had reduced costs.[7]

The D.C. Circuit opened the door for parties to delay or otherwise disrupt the many arbitral proceedings involving such clauses by litigating compliance with conditions precedent in court. Alternatively, the D.C. Circuit's decision allows parties to attempt to challenge an arbitral tribunal's determi-

---

[5] *See*, *e.g.*, INT'L BAR ASS'N, IBA GUIDELINES FOR DRAFTING INTERNATIONAL ARBITRATION CLAUSES 30 (2010) ("It is common for dispute resolution clauses in international contracts to provide for negotiation, mediation or some other form of alternative dispute resolution as preliminary steps before arbitration."); JAN PAULSSON ET AL., THE FRESHFIELDS GUIDE TO ARBITRATION AND ADR 114 (2d ed. 1999) ("It is increasingly common, especially in contracts involving long term projects or commercial relationships, for parties to agree upon varying forms of staged or intermediate dispute resolution procedures, such as expert adjudications or decisions by review boards, which must be followed prior to the commencement of arbitration proceedings.").

[6] *See*, *e.g.*, JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 358, 363 (2010) ("[N]early all investment treaties provide that in the event of a dispute the parties are to engage in consultations and negotiations, often for a specified period of time (six months in many cases), before another remedy is sought . . . . [Recourse to local courts] is required by some investment treaties prior to arbitration . . . .").

[7] FULBRIGHT & JAWORSKI LLP, SECOND ANNUAL LITIGATION TRENDS SURVEY FINDINGS 4 (2011), *available at* www.adr.org/aaa/ShowPDF?doc=ADRSTG_004354.

nations on whether or not a condition precedent to arbitration was satisfied. Expanding the bases on which a party is permitted to litigate whether it should arbitrate has the potential to threaten the efficacy of arbitration and increase the burden on the U.S. judiciary.

The decision is also troubling in that it expands the scope of judicial scrutiny of arbitration by assuming that courts, not international arbitrators, are better positioned to interpret the provisions of an investment treaty entered into by two sovereign states.

In *Howsam*, this Court held that arbitrators, and not courts, should determine compliance with a NASD rule that imposed a six-year time limit on bringing a claim, noting that "for the law to assume an expectation that aligns (1) decision-maker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy – a goal of arbitration systems and judicial systems alike." *Howsam*, 537 U.S. at 85.

In attempting to distinguish *Howsam*, the D.C. Circuit asserted that the arbitrators were not comparatively expert in interpreting the 18-month local litigation requirement because they did not promulgate the treaty provision at issue:

> The Supreme Court [in *Howsam*] reasoned that the NASD arbitrators were 'comparatively more expert about the meaning of their own rule, . . . [and thus] better able to interpret and apply it.' . . . Here, . . . the Treaty requirement to seek relief first in court was required by the contracting parties, not promulgated by the Arbitral Panel.

Pet. App. 18a n.6. By such reasoning, however, the court demonstrates a failure to understand that the NASD arbitrators did not promulgate the NASD rules at issue in *Howsam*. Instead, the NASD rules are drafted by a process in which proposals are generated from numerous sources, vetted by staff and committees, and then filed and approved by the Securities and Exchange Commission.[8] Nor did any court promulgate the provisions in the BIT at issue in the *BG* arbitration.

The Court of Appeals' reasoning also ignores the comparative expertise of most international arbitral tribunals in interpreting provisions of an investment treaty governed by international law. The Court's reasoning further disregards the fact that the parties to the arbitration are able, as they did in this case, to select arbitrators with expertise in the subject matter and law involved in the underlying dispute.

Given their expertise, particularly with respect to issues of international law, international arbitral tribunals are highly qualified to interpret investment treaty provisions. In fact, various arbitral tribunals have issued awards finding that investors did not need to submit their disputes to the local courts despite the 18-month local litigation requirement found in many bilateral investment treaties to which Argentina is party.[9]

---

[8] *See FINRA Rulemaking Process*, FINRA, *available at* www.finra.org/Industry/Regulation/FINRARules/RulemakingProcess/.

[9] *See, e.g.*, *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶ 64 (Jan. 25, 2000) (concluding that the investor did not need to submit the dispute to the local courts as prescribed by the 18-month local litigation requirement in the applicable BIT); *Siemens A.G. v. Arg. Republic*, ICSID Case No. ARB/02/8,

The tribunal in the *BG* arbitration was comprised of three eminent jurists with proven expertise in international law and treaty interpretation. The president of the arbitral tribunal, Guillermo Aguilar-Alvarez, teaches international investment law at Yale Law School. He served as Principal Legal Counsel to the Government of Mexico for the negotiation and implementation of the North American Free Trade Agreement and free trade agreements with Costa Rica, Bolivia, Colombia, and Venezuela. He has also acted as counsel or arbitrator in numerous cases involving investment treaty interpretation.[10]

His co-arbitrators are likewise recognized experts in the field. Albert Jan van den Berg teaches international law at Erasmus University in Rotterdam and at the University of Miami Law School. He has arbitrated numerous disputes involving the interpretation of investment treaties and other international law issues, and is a recognized authority on the interpretation of the 1958 New York Convention.

Decision on Jurisdiction, ¶¶ 32-110 (Aug. 3, 2004) (same); *Gas Natural v. Arg. Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction, ¶¶ 24-49 (June 17, 2005) (same); *Suez et al. v. Arg. Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, ¶¶ 52-66 (May 16, 2006) (same); *AWG Grp. Ltd. v. Arg. Republic*, UNCITRAL, Decision on Jurisdiction, ¶ 68 (Aug. 3, 2006) (same); *Nat'l Grid Plc v. Arg. Republic*, UNCITRAL, Decision on Jurisdiction ¶ 93 (June 20, 2006) (same); *TSA Spectrum v. Arg. Republic*, ICSID Case No. ARB/05/5, Award, ¶¶ 98-112 (Dec. 19, 2008) (same); *Impregilo S.p.A. v. Arg. Republic*, ICSID Case No. ARB/07/17, Award, ¶¶ 79-109 (June 21, 2011) (same).

[10] Guillermo Aguilar-Alvarez is also a member of the AAA's Board of Directors. However, he has not been consulted or in any manner involved in the drafting of this Brief, nor was he made part of the deliberations regarding the AAA's determination to file this Brief.

Alejandro M. Garro teaches international commercial law, comparative law, and Latin American legal systems at Columbia Law School. He has acted as arbitrator in investment treaty arbitrations and is a recognized expert on the interpretation of the Vienna Convention on Contracts for the International Sale of Goods.

That this tribunal was the "decisionmaker with comparative expertise" is underscored by the fact that it properly interpreted the treaty provisions in light of the Vienna Convention on the Law of Treaties (the "Vienna Convention")[11] as was required by principles of international law and Article 9 of the BIT. *See* Pet. App. 165a-171a. Conversely, the D.C. Circuit did not apply principles of international law or the Vienna Convention and instead relied on domestic caselaw.

The interpretation of the provisions of an international investment treaty between sovereign states falls squarely within the competence of most international arbitral tribunals, including the tribunal in this dispute. The D.C. Circuit nonetheless concluded, incorrectly, that the parties would have expected courts, instead of arbitrators, to interpret the 18-month litigation requirement in the BIT because the precondition itself involved resort to Argentinean

---

[11] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. Although the United States has not ratified the Vienna Convention, courts have found it to be authoritative with respect to the interpretation of international treaties. *See, e.g.*, *Mora v. New York*, 524 F.3d 183, 196 n.19 (2d Cir. 2008) ("[O]ur Court relies upon [the Vienna Convention] 'as an authoritative guide to the customary international law of treaties,' insofar as it reflects actual state practices.").

courts.[12] In so doing, the D.C. Circuit significantly expanded the scope of judicial review over the many disputes where the arbitration agreement refers to conditions precedent to arbitration, litigation requirements or exhaustion of local remedies. The decision below thus has the potential to create delay and uncertainty for numerous users of arbitration.

II. The Decision Below Creates Uncertainty for Arbitration Users and Institutions by Imposing New and Unsupported Limitations on the Applicability of Agreed-Upon Arbitral Rules

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), this Court held that courts must defer to an arbitrator's arbitrability decision where there is "clear and unmistakable" evidence of the parties' intention to submit such matters to the tribunal. *Id.* at 944. The BIT's incorporation of the UNCITRAL Arbitration Rules satisfied the *First Options* test. By imposing a new "temporal limitation" on the effectiveness of the UNCITRAL Rules, the D.C. Circuit exceeded the established boundary of judicial review over arbitrability decisions and

---

[12] Pet. App. 15a ("The Treaty provides a prime example of a situation where the 'parties would likely have expected a court' to decide arbitrability. It would be odd to assume that where the gateway provision *itself* is resort to a court, the parties would have been surprised to have a court, and not an arbitrator, decide whether the gateway provision should be followed.") (internal citations omitted). There is no logical basis to assume that, because the BIT provided for prior resort to Argentine courts, the parties would have assumed that a dispute about satisfaction of this treaty provision would be decided by any court anywhere rather than by an arbitral tribunal constituted under the BIT to resolve disputes thereunder.

created the potential for significant uncertainty among users of arbitration in the United States.

The UNCITRAL Arbitration Rules were adopted in 1976 by the General Assembly of the United Nations in an effort to provide a comprehensive set of procedural rules for the conduct of *ad hoc* arbitral proceedings.[13] Article 21(1) of the UNCITRAL Rules provides: "The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement." United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (1976), art. 21(1), G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976). Article 21(1) thus contains a broad and standard agreement to submit arbitrability issues to arbitration.

On the basis of Article 21(1), the Second Circuit held that an arbitration agreement's incorporation of the UNCITRAL Rules constitutes "clear and unmistakable" evidence of the parties' intent to empower the arbitrators to decide questions of arbitrability. *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 395 (2d Cir. 2011) (ruling that because the relevant BIT "incorporated by reference the UNCITRAL rule delegating questions of arbitrability to the arbitral panel . . . Ecuador cannot now 'disown its agreed-to obligation to arbitrate . . . the question[ ] of arbitrability'"); *Schneider v. Kingdom of Thailand*, No. 11-1458-cv, 2012 U.S. App. LEXIS 16508, at *10,

---

[13] The present dispute arose and is governed by the 1976 UNCITRAL Rules. While the UNCITRAL Arbitration Rules were subsequently revised in 2010, they continue to provide arbitrators with the power to rule on their own jurisdiction.

12-13 (2d Cir. Aug. 8, 2012) (holding that the parties' "adoption of the UNCITRAL rules . . . is clear and unmistakable evidence of their intent to arbitrate issues of arbitrability" and noting that "[f]ailing to give any deference to the tribunal's jurisdictional decision . . . would entail an enormous waste of resources contrary to the purposes of the New York Convention").[14]

The D.C. Circuit likewise accepted that "the Treaty's incorporation of the UNCITRAL Rules provides 'clear[] and unmistakabl[e] evidence' that the parties intended for the arbitrator to decide questions of arbitrability." Pet. App. 14a (citing *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011)). Under this Court's ruling in *First Options*, this finding should have been dispositive.

The D.C. Circuit, however, proceeded to impose an unprecedented and unsupported "temporal limitation" on when the parties' incorporation of the UNCITRAL Rules became effective by concluding that "the Rules are not triggered until after an investor has first, pursuant to Article 8(1) and (2), sought recourse, for eighteen months, in a court of the contracting party where the investment was made."

---

[14] *See also Thai-Lao Lignite Co. Ltd. v. Gov't of the Lao People's Democratic Republic*, No. 11-3536-cv, 2012 U.S. App. LEXIS 14340, at *2-3 (2d Cir. July 13, 2012) ("The [Agreement] specifically provides that any arbitration will be governed by UNCITRAL Rules . . . . There is no question, then, that the arbitral panel was free to decide the scope of its own jurisdiction . . . ."); *Wal-Mart Stores, Inc. v. PT Multipolar Corp.*, Nos. 98-16952, 98-17384, 1999 WL1079625, at *2 (9th Cir. Nov. 30, 1999) (holding that because the parties incorporated the UNCITRAL Rules into their agreements, the "arbitrator, rather than the district court, should decide whether the parties' disputes are arbitrable").

Pet. App. 14a. Because it found that a local litigation requirement had not been fulfilled, the D.C. Circuit refused to give effect to the parties' incorporation of the UNCITRAL Rules, which expressly delegate arbitrability determinations to the arbitrators. Given the popularity of the UNCITRAL Rules and multi-tiered dispute resolution clauses, this expansion of judicial scrutiny over arbitrability issues jeopardizes the benefits of arbitration as a cost- and time-effective alternative to litigation, and creates another opportunity for parties to use court intervention to delay or even derail the arbitral proceedings.

Of particular concern, the D.C. Circuit's decision may be used as a precedent to challenge the effectiveness of the incorporation of not only the UNCITRAL Rules, but also the rules of other major arbitral institutions.

More specifically, Article 21(1) of the UNCITRAL Rules served as the basis for Rule 7(a) of the AAA Commercial Arbitration Rules ("The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.") and Article 15(1) of the ICDR International Dispute Resolution Procedures ("The tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."). *See Republic of Ecuador v. Chevron*, 638 F.3d at 395 (noting that the language of Rule 7 of the AAA Commercial Arbitration Rules is "nearly identical" to the language of Article 21(1) of the UNCITRAL Rules). It is with this Court's decision in *First Options* in mind that the AAA amended its Commercial Arbitration Rules in 1999 to include what is currently Rule 7(a). *See*

AAA, *Commentary on the Revisions to the Commercial Arbitration Rules of the American Arbitration Association*, 3 ADR CURRENTS 6, 7 (Dec. 1998) (explaining that then Rule R-8(a) was adopted in the wake of *First Options* to "make more explicit" the parties' agreement to arbitrate issues of arbitrability). Much like the Second Circuit's treatment of the UNCITRAL Rules in *Republic of Ecuador v. Chevron*, circuit courts have overwhelmingly held that these AAA and ICDR provisions authorize arbitrators, and not courts, to decide issues of arbitrability. *See, e.g.*, *Contec Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205, 208-11 (2d Cir. 2005) (holding that a signatory's incorporation of the AAA Commercial Arbitration Rules was "clear and unmistakable evidence" that the signatory had agreed to delegate the question of arbitrability to the arbitrator).[15]

By imposing new restrictions on when the parties' adoption of the UNCITRAL Rules becomes effective, the D.C. Circuit calls into question similar language in the rules of other major arbitral institutions. As one commentator noted, "[a] number of arbitral institutions have either adopted the UNCITRAL Rules entirely or have substantially adopted those rules in fashioning institutional rules." GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION: CASES

---

[15] *See also Petrofac, Inc. v. DynMcDermott Petrol. Ops. Co.*, No. 11-20141, 2012 U.S. App. LEXIS 14610 (5th Cir. July 17, 2012); *Green v. Supershuttle Int'l, Inc.*, 653 F.3d 766 (8th Cir. 2011); *Fadal Machining Ctrs. LLC v. Compumachine, Inc.*, No. 10-57719, 2011 WL 6254979 (9th Cir. Dec 15, 2011); *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7 (1st Cir. 2009); *Fallo v. High-Tech Inst.*, 559 F.3d 874 (8th Cir. 2009): *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006); *Terminix Int'l Co., LP, v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327 (11th Cir. 2005).

AND MATERIALS 67 (2011). The decision below thus creates uncertainty for users of arbitration who have incorporated those rules into their arbitration agreements, trusting that such incorporation would reserve the determination of arbitrability issues to the arbitrators. *See* ICDR, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES: INCLUDING MEDIATION AND ARBITRATION RULES 9 (2009) (assuring potential arbitration users that "[b]y providing for arbitration under these [ICDR] Rules, parties can avoid the uncertainty of having to petition a local court to resolve procedural impasses").

III. The D.C. Circuit's Decision Puts the United States at Odds with the International Arbitration Community

The United States is a leading seat for international arbitration, alongside other centers such as England, France, Switzerland, Singapore, and Hong Kong. In cases administered by the ICDR, the United States is the most popular seat of arbitration. *See also* QUEEN MARY UNIV. OF LONDON, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 14 (2006) (ranking the United States as the fourth most popular seat of arbitration for corporate users, after England, Switzerland, and France).[16]

Because the selection of a seat of arbitration is a matter of choice for the parties, leading centers for arbitration compete to attract international arbitrations, and such competition extends to the legislative and regulatory field. *See*, *e.g.*, Christopher R.

---

[16] *Available at* www.arbitrationonline.org/docs/IAstudy_2006.pdf.

Drahozal, *Regulatory Competition and the Location of Arbitration Proceedings*, 24 INT'L REV. L. & ECON. 371, 371 (2004) (noting that "countries compete to attract international arbitration proceedings by enacting laws favorable to arbitration" and observing, on the basis of empirical research, that countries that adopted new or revised arbitration statutes from 1994 through 1999 witnessed "a statistically significant increase" in the number of international arbitration proceedings held in these countries). A key factor that parties consider when determining the desirability of a location as a seat of arbitration is the risk of judicial interference in the arbitral process. *See*, *e.g.*, GARY BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 64 (3d ed. 2010) ("Nations with interventionist or unreliable local courts should always be avoided as arbitral seats."); JAN PAULSSON ET AL., THE FRESHFIELDS GUIDE TO ARBITRATION CLAUSES IN INTERNATIONAL CONTRACTS 32 (3d ed. 2010) ("Legal systems allowing extensive judicial interference with arbitral awards should be avoided."); INT'L BAR ASS'N, IBA GUIDELINES FOR DRAFTING INTERNATIONAL ARBITRATION CLAUSES 13 (2010) ("As a general rule, the parties should set the place of arbitration in a jurisdiction . . . whose courts have a track record of issuing unbiased decisions that are supportive of the arbitral process."). Countries with interventionist courts are ordinarily avoided by international arbitration users. For example, India has developed a poor reputation because of the reportedly interventionist and anti-arbitration attitude of its judiciary.[17]

---

[17] *See*, *e.g.*, Fali Nariman, *Ten Steps to Salvage Arbitration in India*, 27 ARB. INT'L 115 (2011) (identifying the attitude of the Indian judiciary as a major challenge facing arbitration in

By contrast, countries seeking to attract international arbitrations have advertised the hands-off attitude of their judiciary. Singapore has in recent years launched a large-scale effort to promote itself as an international arbitration hub. In doing so, Law Minister K. Shanmugam emphasized the arbitration-friendly attitude of the Singapore judiciary: "An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore . . . . [T]he role of the court is now to support, and not to displace, the arbitral process."[18] Likewise, under its new arbitration law, and in an effort to attract foreign arbitration users, Bahrain went so far as to allow parties to exclude court intervention altogether. *See* generally John M. Townsend, *The New Bahrain Arbitration Law and the Bahrain "Free Arbitration Zone*", 65 DISP. RES. J. 74 (Feb. - Apr. 2010) (describing the new Bahrain law). *See also* N.Y. STATE BAR ASS'N, CHOOSE NEW YORK FOR INTERNATIONAL ARBITRATION: WHY CHOOSE NEW YORK? 1, 5 (undated) (promoting New York as a place of arbitration on the basis that "New York courts are . . . deferential to arbitration and the parties' agreed process").[19]

India); GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 168 (2009) ("Many users [of international arbitration] remain cautious about seating arbitrations in India, noting interventionist attitudes of Indian courts.").

[18] *See* Kasiviswanathan Shanmugam, Minister for Law and Second Minister for Home Affairs, Address at the Inaugural Singapore International Arbitration Forum (Jan. 21, 2010), *available at* www.news.gov.sg/public/sgpc/en/media_releases/agencies/minlaw/speech/S-20100121-2.html.

[19] *Available at* www.nysba.org/AM/Template.cfm?Section=Home&ContentID=52948&Template=/CM/ContentDisplay.cfm.

The D.C. Circuit's decision is likely to be viewed as hostile to arbitration and as allowing undue judicial interference with the arbitral process. In contrast to the D.C. Circuit's approach, courts in other major seats of arbitration generally consider that the fulfillment of conditions precedent to arbitration is for the arbitrators to decide. *See*, *e.g.*, GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 845-47 (2009) (concluding, on the basis of reported cases, that courts in other jurisdictions would likely adopt the *Howsam* approach and leave to the arbitrators the issue of whether preconditions to arbitration are satisfied).

The D.C. Circuit's decision has already begun to attract scrutiny of and skepticism about how U.S. courts treat international awards rendered in the United States. Carolyn B. Lamm & Eckhard R. Hellbeck, *US Court of Appeals Vacates BG Group's Investment Treaty Award Against Argentina for Failure to Litigate in Argentine Court for 18 Months Before Commencing Arbitration*, 15 INT'L ARB. L. REV. N-14, N-18 (2012) (observing that the decision "may significantly affect Washington, D.C.'s standing as a seat of international arbitration."); Sebastian Perry, *BG Group v Argentina – a Dallah for the US?*, GLOBAL ARB. REV. (Jan. 27, 2012) ("Gary Born . . . says the court's 'interpretation of the scope of the arbitral tribunal's competence is out of line with most international authority and a dangerous precedent for both investment and commercial arbitration.'").[20]

[20] *Available at* www.globalarbitrationreview.com/news/article/30124/bg-group-vargentina-8211-dallah-us/.

The D.C. Circuit's decision sets the United States unhappily apart from other major international arbitration centers. There is only one other reported instance worldwide of a domestic court vacating an investment treaty award. In 2001, a court in British Columbia vacated in part an award rendered against Mexico under the North American Free Trade Agreement. *See United Mexican States v. Metalclad Corporation*, 2001 B.C.S.C 664 (May 2, 2001). This decision not only drew sharp criticism from commentators,[21] but it also had a distinct impact on the attractiveness of Canada as a seat of international arbitration. Parties to international arbitral proceedings,[22] including the United States,[23] point to the

---

[21] *See*, *e.g.*, William Dodge, *Mexico v. Metalclad Corporation, 2001 B.C.S.C. 664 (Case Comment)*, 95 AM. J. INT'L L. 910, 916 (2001) ("[T]he case may lead one to wonder whether it is appropriate to allow national courts to review Chapter 11 awards."); Todd Weiler, *Metalclad v. Mexico: A Play in Three Parts*, 9 CTRE. OF ENERGY, PETROLEUM AND MIN. L. AND POL'Y INTERNET J. (2003) (criticizing the British Columbia judge for "decid[ing] that he knew better than an expert tribunal what the 'usual and ordinary meaning' of 'international law' must be" and "stepp[ing] beyond the bounds of his legislative mandate."); David Williams, *Challenging Investment Treaty Arbitration Awards—Issues Concerning the Forum Arising from the Metalclad Case*, 4 BUS. L. INT'L 156, 166 (May 2003) ("*Metalclad* may be presented as an example of why it is inappropriate for a national court to enter upon matters of international law when reviewing an international arbitral decision.").

[22] *See*, *e.g.*, *United Parcel Servs. v. Canada*, NAFTA (UNCITRAL), Order on the Place of Arbitration, ¶ 8 (Oct. 17, 2001), *available at* www.naftaclaims.org/disputes_canada_ups.htm; *Merrill & Ring Forestry L.P. v. Canada*, NAFTA (UNCITRAL), Decision of the Tribunal on the Place of Arbitration, ¶ 22 (Dec. 13, 2007), *available at* www.naftalaw.org/disputes_canada_merrill&ring.htm.

Metalclad decision and the arguments advanced by the Canadian government in these proceedings as reasons to resist the selection of Canada as seat of arbitration.

Like the *Metalclad* decision for Canada, the D.C. Circuit's decision jeopardizes the standing of the United States as a seat of arbitration and is likely to have a negative impact on the willingness of foreign parties to arbitrate in the United States.

CONCLUSION

For the foregoing reasons, *Amicus* AAA respectfully urges the Court to grant the petition for a writ of *certiorari*.

Respectfully submitted.

PAUL FRIEDLAND
HANSEL T. PHAM
DAMIEN NYER
TRINA NG
WHITE & CASE LLP
1155 Avenue of the Americas
New York, N.Y. 10036
(212) 819-8917

ERIC P. TUCHMANN
Counsel of Record
General Counsel
WILLIAM K. SLATE II
President and Chief Executive Officer
AMERICAN ARBITRATION ASSOCIATION
1633 Broadway 10th Floor
New York, N.Y. 10019
(212) 719-3937
TuchmannE@adr.org

Counsel for Amicus Curiae

August 27, 2012

---

[23] *See, e.g.*, *Canfor Corp. v. United States*, NAFTA (UNCITRAL), Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings, ¶ 24 (Jan. 23, 2004), *available at* www.naftalaw.org/disputes_us_can for.htm.