

International Arbitration and the U.S. Federal Courts: The “Pro-Arbitration Campaign” and the UNCITRAL Rules

In the United States at least, judicial decisions deferring competence to arbitrators seem to be on the rise—if not in number, at least in profile. International Arbitration is no exception. Last week, the United States Court of Appeals for the Ninth Circuit held that both the 1976 and 2010 versions of the UNCITRAL Arbitration Rules authorize the arbitral panel to determine its own jurisdiction and arbitrability. In *Oracle America, Inc. v. Myriad Group, A.G.* (9th Circ. Docket No. 11-17186, July 26, 2013), the Court of Appeals concluded that “incorporation of the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules into an arbitration provision in a commercial contract constitutes clear and unmistakable evidence that the parties to the contract intended to delegate questions of arbitrability to the arbitrator.”

The complete facts of the case including the parties’ arbitration clause is set out in the text of the judicial decision. In brief, Oracle and Myriad signed a Source License agreement which provided that “[a]ny dispute arising out of or relating to this License shall be finally settled by arbitration [before the AAA and under the UNCITRAL rules],” with certain specified exclusions. When a dispute developed between the parties, Oracle filed suit in the U.S. District Court for the Northern District of California and sought an injunction preventing Myriad, a Swiss company, from proceeding with arbitration. Myriad responded with a motion to compel arbitration. The District Court granted the injunction and denied the motion to compel arbitration, concluding that the incorporation of the UNCITRAL arbitration rules did not constitute clear and unmistakable evidence that the parties intended to delegate questions of arbitrability to the arbitrator. The district court reasoned that the relevant provision of the 2010 UNCITRAL rules states only that the arbitrator has authority, but not exclusive authority, to decide its own jurisdiction.

The Ninth Circuit rejected that holding. First, the appellate panel resolved a

threshold dispute as to whether the 1976 or 2010 versions of the UNCITRAL Rules applied, and ultimately held that there was no substantive difference between the two versions in this regard. With this said, the real issue was whether the incorporation of the UNCITRAL Rules “constitutes clear and unmistakable evidence that the parties intended to arbitrate arbitrability.” The Ninth Circuit followed the DC Circuit and the Second Circuit and answered in the affirmative. Indeed, “[v]irtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association’s (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. *** The AAA rules contain a jurisdictional provision similar to Article 21(1) of the 1976 UNCITRAL rules and almost identical to Article 23(1) of the 2010 UNCITRAL rules.”

This decision (and those it relies on) may form the international component of a nationwide trend for federal courts to fall in line with the U.S. Supreme Court’s “pro-arbitration campaign.” Naturally, though, we must juxtapose this decision with *BG Group v. Republic of Argentina*, which the Supreme Court will hear and decide in its upcoming term (indeed, the D.C. Circuit case favorably cited by the Ninth Circuit in *Oracle* was the decision under review in *BG Group*!). *BG Group* involves an investment treaty arbitration conducted in the UNCITRAL rules between a British company and Argentina. The tribunal had held that it had jurisdiction to decide the dispute, notwithstanding *BG Group*’s failure to proceed first in Argentina’s own courts which the treaty required as a prerequisite to arbitration. While the tribunal would surely have power to decide on arbitrability challenges after the agreement to arbitrate became effective (at least in the Ninth, Second and D.C. Circuits), what about decisions on threshold contract defenses before the agreement to arbitrate is even triggered? The district court confirmed the award, holding that the arbitrators had power to decide such questions, but the DC Circuit reversed. As the parties and amici begin to file their briefs before the Court, the how far the “pro-arbitration” policies of the FAA and the New York Convention extend is very much in play.