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International Arbitration Report

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New York

A commentary article reprinted from the May 2014 issue of Mealey's International Arbitration Report

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Commentary

BG Group PLC v. Republic Of Argentina: The Supreme Court Applies Domestic And Commercial Arbitration Principles To The Review Of Investment Treaty Arbitration Awards

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Arbitration is a matter of contract and, in order to ensure that the arbitral forum the parties have chosen is an efficient alternative to litigation, courts review awards issued by arbitrators with significant deference. Nevertheless, a party cannot be forced to arbitrate when it did not agree to do so, and courts review *de novo* certain gateway issues that implicate whether the parties agreed to arbitrate in the first place. The Supreme Court developed these and related principles in a rich case law arising out of commercial arbitrations and arbitrations under collective bargaining agreements. But, until this term, it was not clear whether the Supreme Court's arbitrability precedents in the domestic arbitration arena would apply with equal force to investment treaty arbitration—that is, arbitration conducted between nations and foreign investors operating in those nations pursuant to treaties that grant certain protections to foreign investors. (Bilateral investment treaties, or "BITs" are a common example of such treaties.) In *BG Group PLC v. Republic of Argentina*, __ U.S. __, 134 S. Ct. 1198, decided March 5, 2014, the Supreme Court addressed this issue for the first time, evaluating the appropriate standard a federal court should apply in reviewing an investment treaty arbitration award.

The decision signals the expansion of domestic arbitration precedents to the context of investment treaty arbitration.[1] In its analysis, the Supreme Court first determined what the result would be under its domestic arbitration case law, then asked whether the fact that the arbitration award before it arose from an investment treaty between two sovereign nations should make any difference. And the Court held it should not. Given that there are some differences in the structure of investment treaty arbitration—the investor who typically initiates the process, for example, is not itself a party to the treaty containing the agreement to arbitrate—and the significance of the involvement of a sovereign state, this result was not a foregone conclusion. Moreover, in importing into the world of investment treaty arbitration the case law on arbitrability disputes in domestic arbitration, the Court also imported the uncertainties latent in that case law. In particular, the degree to which courts should resolve arbitrability disputes with reference to ordinary contract law or by referring to presumptions about the parties' intent, developed as a matter of federal law specific to arbitration, remains an open question, even after *BG Group*.

The Supreme Court's Decision In *BG Group*

Factual Background

In the early 1990s, a British firm called BG Group plc did business in Argentina. Specifically, it belonged to a consortium that successfully bid for a controlling interest in MetroGAS, an Argentine gas distribution company created when Argentina privatized its state-owned gas utility. At the time, Argentine law required

that its regulators calculate gas tariffs (i.e., the revenues gas distribution companies would receive) in U.S. dollars, and that those tariffs be set at levels sufficient to assure gas distribution companies like MetroGAS a reasonable return. Several years later, in the early 2000s, Argentina faced a severe economic crisis. It enacted new statutes that changed the currency for calculating gas tariffs from dollars to Argentine pesos. The laws converted the tariffs into pesos at a rate of one peso per dollar, though the exchange rate at the time was about three pesos per dollar. "The result was that MetroGAS's profits were quickly transformed into losses."[2]

BG Group sought arbitration under the bilateral investment treaty between the United Kingdom and Argentina ("Treaty" or "U.K.-Argentina BIT").[3] It claimed that Argentina's actions amounted to expropriation and a denial of fair and equitable treatment.[4] In addition to defending itself on the merits, Argentina objected to the arbitration on multiple threshold grounds. One of those grounds was that BG Group had failed to comply with the so-called local litigation requirement of Article 8 of the Treaty, which meant that the arbitration was not properly commenced and the arbitrators lacked jurisdiction to hear the dispute.

Article 8 of the Treaty governs the resolution of disputes between one of the "Contracting Parties" (i.e., the U.K. or Argentina) and an investor of the other Contracting Party. It requires that disputes that "have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made."[5] However, a dispute may be subject to arbitration under the Treaty either if the investor and the State have agreed to do so (Art. 8(2)(b)) or if one of the parties to the dispute so requests and one of the following is true:

> [(i)] 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; [or]
>
> [(ii)] the final decision of the aforementioned tribunal has been made but the Parties are still in dispute.[6]

In this case, BG Group did not file litigation in Argentina's courts. According to Argentina, that decision violated the Treaty's arbitration triggering mechanism and, at the outset, barred the arbitral tribunal from hearing the dispute.

In December of 2007, the arbitral tribunal issued a final decision. In addition to ruling for BG Group on its fair-and-equitable-treatment claim (and awarding it $185 million in damages), the tribunal concluded that Argentina's own conduct excused BG Group's failure to comply with the local litigation requirement of Article 8. As the Supreme Court described the arbitral tribunal's holding, "[t]he panel pointed out that in 2002, the President of Argentina had issued a decree staying for 180 days the execution of its courts' final judgments (and injunctions) in suits claiming harm as a result of the new economic measures."[7] Moreover, "Argentina had established a 'renegotiation process' for public service contracts, such as its contract with MetroGAS, to alleviate the negative impact of [those measures]" but "barred from participation in that 'process' firms that were litigating against Argentina in court or in arbitration."[8] The arbitral tribunal concluded that those actions "hindered recourse to the domestic judiciary to the point where the Treaty implicitly excused compliance with the local litigation requirement."[9]

Both sides filed petitions for review in the District Court for the District of Columbia. (The arbitration had been sited in Washington, D.C.) BG Group sought to confirm the award under the New York Convention and the Federal Arbitration Act.[10] Argentina sought to vacate the award for lack of jurisdiction.[11] The District Court confirmed the award, rejecting Argentina's objections.[12] The Court of Appeals for the D.C. Circuit, however, reversed. It first held that the question whether Article 8 of the Treaty precluded BG Group from seeking arbitration in the first place was a matter for the courts to decide *de novo*—meaning without deference to the conclusion of the arbitral panel. It then held that BG Group had indeed failed to meet the requirement.[13] The Supreme Court granted BG Group's petition for certiorari.

The Court's Opinion

In an opinion by Associate Justice Stephen G. Breyer, the Supreme Court reversed. In the principal part of

the opinion, the Court held that a federal court must review an arbitral tribunal's interpretation and application of the local litigation requirement with the deference that courts typically show to the decisions of arbitrators.[14] Applying that deferential standard of review, the Court had little trouble upholding the decision of the tribunal that Argentina's conduct excused BG Group's compliance with the local litigation requirement.[15]

The significance of *BG Group* lies in the Supreme Court's first holding—that a court reviewing an arbitral award under the UK-Argentina BIT must apply a deferential standard of review to an arbitral tribunal's resolution of whether prerequisites to arbitration, like the local litigation requirement, have been met. The Court reached that result by applying, more or less directly, the decisional law it has developed in domestic arbitration cases. A brief review of that case law puts *BG Group* in context.

Several times the Supreme Court has addressed the question who—court or arbitrator—has the primary responsibility to determine gateway issues or prerequisites to arbitration. The issue first came up in cases where one party initiated arbitration proceedings and the other party sought court intervention to stay or enjoin those proceedings.[16] Depending on the nature of the objection to arbitration, either the court itself must resolve the objection to determine whether the dispute is arbitrable or it must let the arbitrators have a first crack at the issue. The Supreme Court has articulated several governing principles in this area, some of which were highlighted in Justice Breyer's opinion in *BG Group*. The starting point is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[17] It follows from that principle that, "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."[18] Thus, what matters is whether the gateway issue is one of "arbitrability"—meaning there is a question whether a valid agreement to arbitrate exists, binds the parties, or covers the dispute—or not.[19]

Gateway issues can also come up on the back end—that is, when arbitration has already been completed, and the parties seek court review to either confirm or vacate the award (although, on the back end, the "gateway" label seems inapt). This was, of course, the situation in *BG Group* itself, and the question in this context becomes what standard of review the court should apply to the arbitrator's resolution of the gateway issue. In two decisions authored by Justice Breyer, the Supreme Court has emphasized that what standard of review applies is a question about "*who* (primarily) should decide arbitrability," which is different from "*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement."[20] If a gateway question is primarily for an arbitrator, then a court should review its resolution of that question with deference; if the question is primarily for a court, then a court should reach its own decision—i.e., review *de novo*.[21] Justice Breyer's opinion in *BG Group* reiterated this approach.[22]

Determining who is supposed to have the primary authority to decide a gateway issue, the Court has explained, reflects the consent-based principles, discussed above, on which arbitration is founded. Thus, "questions of arbitrability" are issues for "judicial determination unless the parties clearly and unmistakably provide otherwise."[23] But the scope of such questions is "narrow"; they are limited to "circumstances where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, 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."[24] Thus, "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide."[25] By contrast, "procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide."[26] Such questions include "whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met."[27]

In *BG Group*, the Supreme Court largely adopts these precedents in the context of the review of investment treaty arbitration awards. Justice Breyer's opinion

begins by "treat[ing] the document before [the Court] as if it were an ordinary contract between private parties" and then "ask[ing] whether the fact that the document in question is a treaty makes a critical difference."[28] Under commercial arbitration case law, the Court concluded, the local litigation requirement of Treaty Article 8 "determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all."[29] The Court read Article 8 to require the submission of a dispute to arbitration "if one of the Parties [to the dispute] so requests" as long as "a period of eighteen months has elapsed" since the submission of the dispute to a local tribunal.[30] The local litigation requirement is thus "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 issues in dispute."[31] And the Court found the local litigation requirement "highly analogous to procedural provisions" that it has found are primarily for arbitrators to apply.[32]

The question remained whether the fact that Article 8 appears in a treaty between the United Kingdom and Argentina, as opposed to an ordinary commercial contract, requires a different result. The Court emphatically answered, "no." Treaties are contracts between sovereign nations, the Court pointed out, and they are construed, just like contracts are, to give effect to the parties' intent.[33] Appearing as an *amicus curiae*, the Solicitor-General had argued that certain provisions in investment treaties, like the local litigation provision in the UK-Argentina BIT, should be treated as "conditions of consent" that, unlike other procedural preconditions to arbitration, are primarily for courts rather than arbitrators to apply. The Court rejected that proposition. For one thing, the UK-Argentina BIT did not explicitly designate the local litigation requirement as a term of "consent." And the Court did not see any other indicia in the Treaty itself to suggest that the local litigation requirement was a condition of Argentina's consent to arbitration.[34] Therefore, the local litigation requirement is a procedural gateway issue, not a true question of arbitrability, and the arbitral tribunal's ruling that the requirement was excused in this case should have been reviewed deferentially, not *de novo*.

Interestingly, although there was no explicit "consent" label in the UK-Argentina BIT, so that the Court did not need to decide whether it would make any difference if there were such a label, the Court nonetheless issued some dicta on that question. The Court stated that it could not "find any other authority or precedent [i.e., other than the Solicitor-General's brief] suggesting that the use of the 'consent' label in a treaty should make a critical difference in discerning the parties' intent about whether courts or arbitrators should interpret and apply the relevant provision."[35] Despite the Court's suggestive remarks, of course, this issue remains open (as Justice Sotomayor pointed out in her concurrence, discussed below).

The Chief Justice's Dissent

The Chief Justice dissented, joined by Justice Kennedy. The dissent zeroed in on what it regarded as a critical difference between the structure of investment treaty arbitrations and commercial arbitrations—namely, that "[n]o investor is a party to the agreement" contained in the treaty.[36] The UK-Argentina BIT, for example, is a treaty between those two countries only; no other party has signed it. For the dissent, that meant the Treaty "by itself cannot constitute an agreement to arbitrate with an investor," so that "[s]omething else must happen to *create* an agreement where there was none before."[37] And, absent an express agreement between the investor and the host country, the local litigation requirement "makes clear what that something is: An investor must submit his dispute to the courts of the host country. After 18 months, or an unsatisfactory decision, the investor may then request arbitration."[38] Put into the terms of contract law, in the dissent's view Article 8 of the Treaty "constitutes in effect a unilateral *offer* to arbitrate, which an investor may accept by complying with its terms."[39] The dissent added that the significance to a sovereign of having its governmental acts reviewed by a panel of arbitrators bolstered its conclusion.

Therefore, according to the dissent, "[g]iven that the Treaty's local litigation requirement is a condition on consent to arbitrate, it follows that whether an investor has complied with that requirement is a question a court must decide *de novo*."[40] This is because "the arbitrator should not as a rule be able to decide for himself

whether the parties have in fact consented. Where the consent of the parties is in question, '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.' "[41]

Justice Sotomayor's Concurrence

Writing for herself only, Justice Sotomayor concurred in part with the Court's opinion. She agreed that the arbitral tribunal's decision that the local litigation requirement did not preclude arbitration should have been reviewed deferentially, not *de novo*. However, she took exception to the Court's dictum suggesting that the result would be the same even if the treaty in question explicitly designated a prerequisite to arbitration a "condition of consent." For the concurrence, it was "far from clear that a treaty's express use of the term 'consent' to describe a precondition to arbitration should not be conclusive in the analysis."[42] Echoing the dissent, the concurrence found "[c]onsent [to be] especially salient in the context of a bilateral investment treaty, where the treaty is not an already agreed-upon arbitration provision between known parties, but rather a nation state's standing offer to arbitrate with an amorphous class of private investors."[43] Nonetheless, because the local litigation requirement was not expressly denominated a condition of consent, and based on the evidence of intent the majority relied on, as well as other evidence, the concurrence concluded that the United Kingdom and Argentina did not intend that requirement to be a condition on their consent to arbitrate with investors.[44]

Implications Of The Opinions In *BG Group*: Applying Domestic And Commercial Arbitration Precedents To Investment Treaty Arbitration, Warts And All

The primary significance of *BG Group* is that it refused to apply different rules to investment treaty arbitrations than the Court has applied to domestic and commercial arbitrations, at least in the circumstances before the Court. The Solicitor-General had argued that the presumption that procedural perquisites are for the arbitrators to resolve should not apply to proceedings to set aside investment treaty awards. The Supreme Court rejected that invitation. The Court's holding thus indicates that U.S. court review of such awards will generally be deferential, and that result will likely encourage investors to choose the United States as the site for investment treaty arbitrations.

Having said that, the application of the law on review of domestic arbitration awards does not mean difficult questions cannot arise. Whether a gateway issue is a question of arbitrability can be complex, and the Court's decisions even in domestic arbitration cases admit of different approaches. In *BG Group* itself, the dissent and the majority agree that the principles of contractual interpretation developed in domestic arbitration cases should apply, but seemed to talk past one another in analyzing how to apply those principles. For the majority, what seemed to matter most was the *procedural* nature of the local litigation requirement.[45] By contrast, for the dissent the essential issue was that a dispute cannot be submitted to arbitration unless both parties consent to do so, and whether they did so consent must be measured using ordinary contract principles.[46] Thus, the dissent employed traditional contract-law categories to analyze the local litigation requirement in the UK-Argentina BIT.[47]

The differing approaches of the majority and the dissent each find support in the Supreme Court's domestic arbitration case law. The majority's use of a presumption that parties intend procedural issues to be resolved by an arbitrator comes from the Supreme Court's opinion in *Howsam*, which essentially fashioned it as a matter of federal arbitration law.[48] *Howsam*, in that sense, is related to a long line of cases in which the Supreme Court has developed special interpretive principles for arbitration contracts.[49]

On the other hand, the Court has stated in the past that, "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."[50] And indeed the Federal Arbitration Act is designed to "place[] arbitration agreements on an *equal* footing with other contracts."[51] Thus, the dissent had some basis for its emphasis on traditional contract-law categories, in particular its categorization of the local litigation requirement in the UK-Argentina BIT as a unilateral offer to arbitrate rather than a condition precedent on the performance of an existing agreement to arbitrate.

Moreover, in other contexts the Court has insisted that "a court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce."[52]

In short, *BG Group* imports domestic arbitration case law into the review of investment treaty arbitration awards. But in doing so, the decision also imports the uncertainties latent in that case law. Thus, although the *BG Group* majority focused on the procedural nature of the prerequisite to arbitration at issue in that case rather than referring to background contract principles, which approach the Court will take in the future may depend on a closer reading of the domestic arbitration case law than the Court attempted in *BG Group*.

Endnotes

1. To be precise, the Supreme Court's prior precedents address both domestic arbitration (arising from commercial and labor contracts) and international *commercial* arbitration—as opposed to investment treaty arbitration that involves sovereigns For simplicity's sake, I refer to the pre-*BG Group* case law as concerning "domestic" or "commercial" arbitration, using the terms interchangeably to refer to the whole.

2. 134 S. Ct. at 1204.

3. *See* Agreement for the Promotion and Protection of Investments, Dec. 11, 1990, 1765 U.N.T.S. 38.

4. *See id.*, Art. 2(2) (requiring that a host State provide investors of the other State-Party to the Treaty fair and equitable treatment) & Art. 5 (prohibiting expropriation).

5. *Id.* Art. 8(1).

6. *Id.* Art. 8(2)(a).

7. 134 S. Ct. at 1205.

8. *Id.*

9. *Id.* (quotation marks omitted).

10. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. IV, June 10, 1958, 21 U.S.T. 2519, T.I.A.S. No. 6997; 9 U.S.C. §§ 204, 207.

11. *See* 9 U.S.C. § 10(a)(4).

12. *See generally* 764 F. Supp. 2d 21 (D.D.C. 2011).

13. *See generally* 665 F. 3d 1363 (2012).

14. *See* 134 S. Ct. at 1206–12; *see also, e.g.*, *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 588 (2008) (The FAA permits "just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway.").

15. *See* 134 S. Ct. at 1212–13.

16. *See, e.g.*, *Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

17. *AT&T Tech. v. Comm'c'ns Workers*, 475 U.S. 643, 648 (1986) (quotation marks omitted); *see also BG Group*, 134 S. Ct. at 1206 (quoting same language).

18. *AT&T Tech.*, 475 U.S. 649 (quoted in *BG Group*, 134 S. Ct. at 1207).

19. Commentators have debated the proper use of terms like "arbitrability" and "gateway issues." I do not take a position on these debates, but for purposes of this article refer to any threshold issue or potential prerequisite to arbitration as a "gateway issue" and questions of whether a valid arbitration agreement exists, binds the parties, and covers the dispute as questions of "arbitrability." Readers interested in the terminological questions may start by consulting George A. Berman, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INTL. L. 1, 7–13 (2012); Laurence Shore, *Defining Arbitrability*, N.Y.L.J. (June 15, 2009).

20. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944–45 (1995).

21. *See id.* at 942.

22. *See* 134 S. Ct. 1206 ("[T]he question before us is who—court or arbitrator—bears primary responsibility for interpreting and applying Article 8's local court litigation provision.").

23. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *AT&T Tech.*, 475 U.S. at 649).

24. *Id.* at 83–84.

25. *Id.* at 84.

26. *Id.* (quotation marks omitted).

27. *Id.* at 85 (quotation marks omitted).

28. 134 S. Ct. at 1206.

29. *Id.* at 1207.

30. *Id.*

31. *Id.*

32. *Id.* (citing, among others, *Howsam*, 537 U.S. at 85 (time limit), & *John Wiley & Sons*, 376 U.S. at 555–57 (mandatory grievance procedure)).

33. *See* 134 S. Ct. at 1208 (collecting cases).

34. *See id.* at 1209–10.

35. *Id.* at 1209; *see also id.* ("While we leave the matter open for future argument, we do not now see why the presence of the term 'consent' in a treaty warrants abandoning, or increasing the complexity of, our ordinary intent-determining framework.").

36. *Id.* at 1215 (Roberts, C.J., dissenting).

37. *Id.* at 1216.

38. *Id.*

39. *Id.*; *see also id.* at 1217–18 (quoting *Eliason v. Henshaw*, 4 Wheat. 225, 228 (1819) (It is an "undeniable principle of the law of contracts, that an offer . . . by one person to another, imposes no obligation upon the former, until it is accepted by the latter, *according to the terms in which the offer was made*. Any qualification of, or departure from, those terms, invalidates the offer.")).

40. *Id.* at 1221.

41. *Id.* at 1221.

42. *Id.* at 1213 (Sotomayor, J., concurring in part).

43. *Id.* at 1213.

44. *See id.* at 1214–15.

45. *See* 134 S. Ct. at 1207 ("The provision before us is of the . . . procedural variety" and "operates as a procedural condition precedent to arbitration. . . . Neither does this language or other language in Article 8 give substantive weight to the local court's determination. . . .").

46. *Id.* at 1216 ("The majority nowhere explains when and how Argentina agreed *with BG Group* to submit to arbitration.").

47. *See id.* at 1219 ("The majority seems to regard the local litigation requirement as a condition precedent to performance of the contract, rather than a condition precedent to formation of the contract. But that cannot be.") (citations omitted).

48. *See* 537 U.S. at 86 ("Parties to an arbitration contract would normally expect a forum-based decisionmaker to decide forum-specific procedural gateway matters.") (quoted in *BG Group*, 134 S. Ct. at 1207).

49. *See, e.g.*, *Prima Paint Corp. v. Flood & Conkling Mfg. Co.*, 388 U.S. 395 (1967) (holding that a challenge to the validity of the entire contract, as opposed to a challenge directed specifically at an arbitration agreement within it, must be resolved by an arbitrator, not a court); *AT&T Tech.*, 475 U.S. at 650 ("[T]here is a presumption of arbitrability in the sense that an order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an

interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.") (quotation marks and alteration omitted).

50. *First Options*, 514 U.S. at 944.

51. *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) (citing 9 U.S.C. § 2) (emphasis added).

52. *Granite Rock Co. v. Intl. Bhd. of Teamsters*, 130 S. Ct. 2847, 2856 (2010). ■

MEALEY'S: INTERNATIONAL ARBITRATION REPORT
edited by Lisa Schaeffer
The Report is produced monthly by

1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1089-2397