

CLIENT ALERT

U.S. Supreme Court Confirms Arbitrators' Authority to Determine Jurisdiction in BIT Disputes

Mar.06.2014

In a 7-2 decision, the U.S. Supreme Court on Wednesday upheld the \$185 million award of an UNCITRAL tribunal in a dispute brought by BG Group under the UK-Argentina Bilateral Investment Treaty (BIT). The decision reversed a unanimous decision of the D.C. Circuit that had vacated the 2007 arbitral award under Section 10(a) of the Federal Arbitration Act, citing BG Group's failure to observe the treaty's requirement to pursue remedies in Argentine courts for a period of 18 months before bringing a BIT claim.

The Court's decision in *BG Group PLC v. Republic of Argentina* tied bilateral investment treaty arbitration to the Court's prior jurisprudence in commercial arbitration cases, under which arbitral tribunals enjoy broad discretion to determine whether contractual preconditions to arbitration have been satisfied. Specifically, the Court noted that a treaty is a contract "between nations" and that, as a result, arbitral tribunals interpreting procedural provisions in treaties should be afforded the same level of deference as arbitral tribunals interpreting procedural provisions in contracts. Notably, the Court chose not to adopt the position advanced by the U.S. Solicitor General's office, an *amicus* in the case, which had argued that the Court should establish a higher standard of review in international treaty cases where there is a "consent-based" objection to arbitration. Instead, the Court held that the tribunal's determination that the treaty's local litigation provision did not preclude BG Group's claim was one that lay "well within" the tribunal's interpretive authority. In a dissenting opinion, Chief Justice Roberts emphasized that the BIT is an agreement between nations, not between the host nation and the foreign investor, and argued that the local litigation requirement is thus a pre-condition to the host nation's consent to arbitrate with the investor that should accordingly be interpreted by the courts, not the arbitrators.

Though the parties to the arbitral dispute were both foreign, the site of the arbitration was Washington, D.C., and each had sought review under the New York Convention and the Federal Arbitration Act to either confirm or vacate the award. The Court's decision stands as a reminder that for international arbitrations sited in the U.S., arbitrators will be given substantial deference even on basic jurisdictional matters.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

George D. Ruttinger

Partner – Washington, D.C.

Phone: +1 202.624.2670

Email: gruttinger@crowell.com

Alan W. H. Gourley

Partner – Washington, D.C.

Phone: +1 202.624.2561

Email: agourley@crowell.com

Arlen Pyenson

Counsel – New York

Phone: +1 212.803.4057

Email: apyenson@crowell.com