

BRIEFLY NOTED

U.S. Supreme Court: Arbitrators Should Interpret Local Litigation Clause in Bilateral Investment Treaty

By David W. Kiefer, Jonathan S. Jemison, and Samina Kapadia

On March 5, 2014, in a 7–2 decision, the U.S. Supreme Court reinstated a \$185.3 million arbitration award for British firm BG Group PLC against the Republic of Argentina. In *BG Group v. Argentina*, Case No. 12-138, 572 U. S. ____ (2014), the Supreme Court upheld the arbitrators' decision about the meaning and application of a local litigation clause in a bilateral investment treaty between the United Kingdom and Argentina.

David W. Kiefer (david.kiefer@dentons.com), a partner in Dentons' Litigation and Arbitration Department, represents clients before international and domestic arbitration tribunals and state and federal courts. He focuses on complex commercial disputes arising from the energy, construction, and manufacturing sectors. **Jonathan S. Jemison** (jonathan.jemison@dentons.com), counsel in Dentons' Litigation and Dispute Resolution practice, litigates a wide variety of complex commercial disputes primarily in state and federal courts in New Jersey and New York, as well as before domestic and international arbitration panels. **Samina Kapadia** (samina.kapadia@dentons.com), an associate in Dentons' Litigation and Dispute Resolution practice, is a member of the SIL, National Immigrant Justice Center's Junior Leadership Board, and International Centre for Dispute Resolution's Young & International program.

The main issue before the court was whether that decision should be reviewed *de novo* or with the deference normally afforded arbitration decisions. Resolution turned on whether the local litigation requirement was a substantive question of arbitrability (i.e., a condition of consent to arbitrate) within the province of the courts or a procedural condition precedent the parties had agreed would be decided in arbitration. The Court's decision established a norm that bilateral investment treaties should be interpreted like contracts and local litigation requirements are presumptively procedural questions that are appropriate for arbitrators to resolve and are, thus, entitled to deference.

The underlying dispute concerned BG Group's investments in Argentina's natural gas industry. BG Group's investment interests were initially protected under the bilateral investment treaty between the U.K. and Argentina. However, during an economic crisis in 2002, the Argentinian government enacted new regulatory measures that made it difficult for investors to see a return on their investments. Argentina then issued a decree staying for 180 days the execution of injunctions and final judgments in suits claiming harm due to the economic measures. It also barred certain entities, like the one BG Group had invested in, from participating in a "renegotiation process" intended to alleviate the impact of those economic measures if they were involved in litigating against Argentina. As a result, even though the treaty required that an investor first attempt to resolve disputes in a "competent" Argentinian tribunal for at least 18 months, BG Group avoided the local courts and went straight to UNCITRAL arbitration.

In December 2007, the arbitral tribunal excused the local litigation precondition to arbitration, finding that the laws enacted by Argentina "hindered" "recourse to the domestic judiciary" and that, under the circumstances, it would be "absurd and unreasonable" to require BG Group to resort to litigation in the Argentinean courts before proceeding to arbitration. Argentina appealed the panel's decision in the U.S. District Court for the District of Columbia, alleging that the panel lacked jurisdiction since BG Group had not yet satisfied the local litigation requirement. The D.C. District Court upheld the arbitration award, but the U.S. Circuit Court of Appeals for the District of Columbia reversed, finding that a court should decide whether a dispute under the treaty could be submitted directly for arbitration.

The Supreme Court disagreed with the D.C. Circuit's application of a *de novo* standard of review because the local litigation clause did not state that local litigation was a "condition of consent" to arbitration. Rather, the Supreme Court construed it as a procedural condition precedent because it "determines when the contractual duty to arbitrate arises, not whether there is a contractual duty to arbitrate at all." Thus, it adhered to the presumptions that parties want arbitrators to decide procedural questions and that arbitrators' rulings are to be afforded deference by the court. Applying that standard of review, the Court found no reason to disturb the arbitrators' decision. It left unanswered how to interpret treaties "that refer to 'conditions of consent' explicitly." ♦