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International Arbitration Case Law

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ICS INSPECTION AND CONTROL SERVICES LIMITED (UNITED KINGDOM) v. THE ARGENTINE REPUBLIC

Case Report by **Moin Ghani****
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In a decision on jurisdictional objections rendered on February 10, 2012, under the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, 1990 ("the Treaty), an UNCITRAL tribunal declined jurisdiction due to the failure of ICS Inspection and Control Services Limited ("ICS" or "Claimant") to comply with the mandatory 18-month litigation prerequisite in the Treaty and ruled that the most-favored nation ("MFN") clause in the Treaty did not apply in a manner to permit Claimant to avail itself of dispute resolution provisions of another BIT.

UNCITRAL Tribunal: Pierre-Marie Dupuy (presiding arbitrator), Santiago Torres Bernárdez, Marc Lalonde

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Digest

1. Introduction

1.1 The ICS v. Argentina decision contributes to the growing number of cases on the contentious issues of the mandatory requirement of 18-month litigation before national courts as a prerequisite to arbitration, and the applicability of MFN clause to dispute resolution provisions.

1.2 The question of whether requirements in bilateral investment treaties ("BITs") to litigate a dispute before national courts for at least 18-month has resulted in widely divergent views. The ICS v. Argentina decision sides with the decision in *Wintershall* and treats this requirement as a mandatory requirement. Similarly, in the controversy regarding the applicability of MFN clauses to dispute settlement provisions, the *ICS v. Argentina* decision sides with views expressed in the *Plama v Bulgaria* decision that MFN clauses cannot be applied in such a manner as to extend to dispute resolution matters unless expressly stated in the BIT.

1.3 The Tribunal declined jurisdiction over all of Claimant's claims due to Claimant's failure to comply with the mandatory 18-month litigation prerequisite in the Treaty. It also ruled that the MFN clause in the Treaty does not apply in a manner to permit Claimant to avail itself of dispute resolution provisions of the Argentina-Lithuania BIT. The Claimant's claim was dismissed in their entirety and Claimant was ordered to bear the costs of arbitration.

2. Facts and Allegations

2.1 The dispute arose from the treatment accorded to ICS, a company based in the United Kingdom, by Argentina in relation to a contract entered in 1998 for the provision of pre-shipment inspection services ("the Contract"). The Contract was formally terminated in December 2001 when certain payments dues to ICS were still pending.

2.2 In January 2002 Argentina introduced emergency legislation and brought to an end the parity between peso and dollar. The peso was permitted to float and, immediately dropped in value. All public and private contracts denominated in foreign currency were also forcibly converted to pesos. ICS alleged that this

emergency measure, taken after ICS had already provided and invoiced for its services, destroyed the economic framework on which ICS had relied.

2.3 ICS initiated arbitration by filing a notice of arbitration dated June 26, 2009 under Article 8 of the Treaty seeking over US$25 million plus interest for violation of Article 2(2) of the Treaty which guarantees fair and equitable treatment, protection and constant security, and protection from discriminatory measures to investments of investors.

2.4 Argentina challenged jurisdiction of the Tribunal. The Tribunal identified four principle issues raised by the parties in the jurisdictional phase:

(i) The first issue concerned the required 18-month period of recourse to local courts before resorting to international arbitration and whether the MFN clause permits ICS to circumvent this requirement by reference to other BITs that do not impose such a requirement.

(ii) The second issue concerned the scope of the umbrella clause invoked by ICS, and whether the ICS's claims arising from the Contract were covered by the BIT. Also at issue was whether ICS was under an obligation to submit its claims to the Argentine courts in accordance with the terms of the Contract.

(iii) The third issue concerned whether ICS had acquiesced to the measures it now complained of in its claim and whether its claim was prescribed.

(iv) The fourth issue concerned the assignment by ICS of its rights under the Contract to a third party and whether the Claimant had standing to pursue any claims in this arbitration due to that assignment.

2.5 The Tribunal began with considering the first issue. After a thorough analysis of the issues the Tribunal found that it had to decline jurisdiction over any and all of the ICS's claims without regard to their nature or basis. The Tribunal therefore did not need to consider Argentina's further objections to jurisdiction.

3. Issues

3.1 The Tribunal first considered the issue of the 18-month litigation prerequisite under Article 8 of the Treaty which states that an investor "shall", upon the arising of an investment dispute and the failure to reach an amicable settlement thereof, submit the dispute to the Argentine courts. Article 8 further states that the dispute "shall' be submitted to international arbitration where the Argentine court to which the dispute was submitted had not rendered a final decision within 18 months or rendered a final decision that did not resolve the dispute. The Tribunal determined that there was no ambiguity in the mandatory character of the phrase "shall be submitted… to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made."

3.2 The Tribunal considered the issue of whether the requirement of prior submission of the dispute to Argentine courts was a question of jurisdiction, admissibility, or procedure. The Tribunal noted the question was whether this requirement of prior submission to the Argentine courts falls with the conditions to which Argentina's consent to arbitration was subject (i.e. jurisdictional issue) or whether non-compliance nevertheless does not affect the underlying consent to arbitrate the dispute (issue of admissibility and procedure). The Tribunal noted that not only did Argentina specifically condition its consent to arbitration on a requirement not yet fulfilled, but the Contracting Parties to the Treaty had expressly required the prior submission of a dispute to the Argentine courts for at least 18 months, before recourse to international arbitration. It thus concluded that the failure to respect the precondition to the Respondent's consent to arbitrate could not but lead to a conclusion that the Tribunal lacks jurisdiction.

3.3 Regarding ICS's argument that the Tribunal was empowered to ignore the 18-month litigation prerequisite on the basis that it would be futile or inefficient, the Tribunal was not convinced that the present case was one of obvious futility where the relief sought was patently unavailable within Argentine legal system. Since ICS had manifestly not complied with the prerequisite of prior submission of the dispute to an Argentine court the Tribunal found no compelling reason to exempt ICS from its application on the basis of futility or otherwise.

3.4 Next the Tribunal considered the issue of whether the MFN clause in Article 3(2) of the Treaty applied to dispute settlement provisions.

3.5 The Tribunal referred to the *Renta 4* decision and agreed that "[t]he duty of the Tribunal is to discover and not to create meaning." The Tribunal proceeded to interpret Article 3 in accordance with the Vienna Convention on the Law of Treaties. It proceeded to analyze whether the term "treatment" encompassed jurisdictional as well as substantive treatment. Taking into account the principle of contemporaneity in treaty interpretation, the Tribunal noted that the term "treatment" in Article 3, in the absence of contrary stipulation, did not refer to settlement of dispute which was covered by a separate and specific treaty provision.

3.6 The formulation of Article 3(2) was also narrower in scope that clauses which provided MFN treatment in relation to "all matters" or "all issues" relating to the BIT, as was in the *Maffezini* case.

3.7 Article 3(2) stated that the MFN treatment be provided to activities taking place "in [the contracting State's] territory" The Tribunal noted that this territorial limitation meant that that treatment outside the territory of the host state, such as resorting to international arbitration, does not fall within the scope of the clause.

3.8 The Tribunal further commented that the exceptions to MFN treatment provided in Article 7 of the Treaty in connection with any customs union, any regional economic integration agreement, two specific concessional financing agreements concluded by Argentina, and any international taxation agreement, deal exclusively with the Contracting Parties' direct treatment of foreign investments and do not suggest any exclusion of matters relating to international dispute settlement.

3.9 The Tribunal was of the view that the doctrine of *effet utile* would be violated in light of treaties concluded by Argentina with the 18-month litigation prerequisite and an MFN clause, subsequent to the entry into force a treaties which did not include that requirement. In such cases the 18-month litigation prerequisite in the subsequent treaties would have been void *ab initio* – immediately superseded by means of those treaties' MFN clauses. This would make little sense and run counter to the principle of effectiveness ("*effet utile*") by which it is presumed that the provisions were intended to serve some purpose. The Tribunal thus

concluded that the terms of the MFN clause, should not be interpreted in a way that deprives the dispute resolution clause of any meaning without a clear intention to achieve that result.

3.10 Finally, the Tribunal concluded that the Argentina-Lithuania BIT, which did not contain the 18-month litigation prerequisite, does not necessarily mean that Lithuanian investors are accorded a more favourable treatment compared to UK investors in Argentina, who are required to litigate the dispute before the Argentine courts for 18 months or until a final decision is rendered, whichever is earlier.

4. Decision

4.1 The Tribunal concluded that Article 8 of the Treaty established a mandatory 18-month litigation prerequisite to international arbitration that Claimant had manifestly not complied with. The failure to comply with the prerequisite deprived the Tribunal of jurisdiction. The MFN clause at Article 3 of the Treaty did not extend to international dispute resolution matters; and even if the MFN clause extended to international dispute resolution matters, this requirement had not been shown to constitute "less favourable" treatment vis-à-vis other foreign investors.

4.2 In light of the above conclusions, the Tribunal found that it had to decline jurisdiction over any and all of the Claimant's claims without regard to their nature or basis. The Tribunal therefore did not need to consider the Respondent's further objections to jurisdiction.