School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

Academic Directors: Ignacio Torterola
*Loukas Mistelis**

DAIMLER FINANCIAL SERVICES AG
V.
ARGENTINE REPUBLIC
ICSID CASE NO. ARB/05/1
AWARD

Case Report by Cynthia Galvez**
Edited by Mona Davies ***

In a decision rendered on August 22, 2012, under the Treaty Between the Federal Republic of Germany and the Republic of Argentina for the Promotion and Reciprocal Protection of Investments, in accordance with the ICSID Convention and Arbitration Rules, the Tribunal determined that Claimant did not yet have standing to assert its claims under the bilateral investment treaty because Claimants had not yet satisfied Article 10 of the Treaty. Professor Janiero and Judge Brower (dissenting) issued separate opinions with respect to the Tribunal's interpretation of the effect of the Most Favored Nation clause.

Tribunal: Professor Pierre-Marie Dupuy, President; Judge Charles N. Brower; Professor Domingo Bello Janeiro

Claimant's counsel: Paul Doyle, KELLEY DRYE & WARREN LLP, New York

Respondent's counsel: Dra. Angelina Maria Esther Abbona, PROCURACIÓN DEL TESORO DE LA NACIÓN, Buenos Aires

* Directors can be reached by email at ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Cynthia Galvez is a third-year law student at Cornell University Law School specializing in International Legal Affairs. She can be reached at ccg56@cornell.edu.

*** Mona Davies is Assistant Director of International Arbitration Case Law (IACL).

Digest

1. *Facts of the Case*

1.1 The Contract

In the early 1990s, Argentina implemented a series of legal and policy reforms to stabilize its economy and encourage foreign investment.[1] Given Argentina's attractive financial environment, the Claimant, Daimler Financial Services, ("DFS") made a series of investments in 1995 in Argentina's commercial financing business sector.[2] The Claimant purchased virtually all of a local Argentine company owned by Mercedes-Benz Argentina.[3] After the purchase, the company became known as DaimlerChrysler Services, Argentina S.A. ("the Argentine Subsidiary"). The Argentine Subsidiary extended loans and leases to Argentine automobile dealers and purchasers.[4]

1.2 The Argentine Economic Crisis of 2001

Around 2001, Argentina experienced a currency crisis that prompted the government to take certain regulatory measures.[5] Among its actions, the Argentine government abandoned the currency exchange system and provided that certain dollar-denominated obligations would be "pesified" and settled by payments in Argentine Pesos.[6]

Following Argentina's regulatory actions, the Claimant experienced what it asserted as "unique and devastating" losses to its investment, which the Claimant attributed to Argentina's actions in response to the economic crisis.[7] The Claimant's losses brought its Argentine Subsidiary to the brink of bankruptcy.[8]

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[1] Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, ¶ 36.
[2] *Id.*, ¶ 38.
[3] *Id*.
[4] *Id*.
[5] *Id.*, ¶ 40.
[6] *Id.*, ¶ 41.
[7] *Id.*, ¶ 42.
[8] *Id.*

1.3 The Share Purchase Agreement

On June 12, 2002, the Claimant concluded a Share Purchase Agreement with its parent company, DaimlerChrysler AG Stuttgart ("DCAG Stuttgart"), in which it sold its shares in the Argentine Subsidiary.[9] The transaction, approved by the Argentine Central Bank, was set at a negative purchase price meant to represent the Argentine Subsidiary's fair market value.[10]

1.4 Request for Arbitration

On August 2, 2004, DFS filed its request for arbitration against the government of Argentina.[11] The Claimant asserted that Argentina's regulatory measures in response to its economic crisis had violated several provisions of the German-Argentine BIT, and that these violations warranted the Claimant compensation.[12]

2. *Legal Issues Discussed in the Award*

In the Award, the Tribunal made no findings on the merits of the case.[13] Instead, the Tribunal analyzed whether it had jurisdiction to hear the claims before it. The Tribunal discussed five objections to jurisdiction made by the Respondent.

2.1. Applicable Law

The Tribunal determined that the proper applicable law in determining its jurisdiction was the German-Argentine BIT, the ICSID Convention, and the general principles of international law.[14]

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[9] *Id.*, ¶ 44.
[10] *Id*.
[11] *Id.*, ¶ 44, 105.
[12] *Id.*, ¶ 42.
[13] *Id.*, ¶ 43.
[14] *Id.*, ¶ 50.

2.2. First Objection to Jurisdiction: The Claim Refers to Contractual Matters

The Tribunal rejected the Respondent's objection to jurisdiction that the claim referred to contractual matters subject to resolution before domestic Argentine courts according to the forum selection clauses of the leasing agreements between the Claimant and its customers.[15] The Tribunal found this objection groundless.[16] The forum selection clauses within the Claimant's leasing agreements were only relevant for disputes between the Claimant and its customers.[17] However, the Claimant's claims did not arise from these agreements, but from alleged violations of the German-Argentine BIT.[18] Therefore, the Tribunal determined that the forum selection clauses in the leasing contracts were irrelevant.[19]

Further, the Tribunal rejected Argentina's related argument that the Claimant was trying to bring contractual claims within the jurisdiction of the Tribunal through the BIT's umbrella clause.[20] The Tribunal emphasized that it was not evaluating the veracity of the Claimant's claims, but making a decision on jurisdiction based on whether the Claimant had raised a "legal dispute" according to the ICSID Convention.[21] Since the Claimant asserted that its umbrella clause claim arose from Argentina's actions under the BIT, the Tribunal recognized that there was a "legal dispute" and once again rejected the Respondent's objection.[22]

2.3. Second Objection: The Claimant, as Shareholder, Lacks *Ius Standi*

The Tribunal rejected the Respondent's objection that the Claimant, as a shareholder, lacked *ius standi* to bring an ICSID claim and could not claim damages on behalf of its Argentine Subsidiaries.[23] The Respondent posited that the sources of applicable law did not allow for "indirect" actions by

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[15] *Id.*, ¶ 55.
[16] *Id.*, ¶ 283.
[17] *Id.*, ¶ 61.
[18] *Id.*, ¶ 61-62.
[19] *Id.*, ¶ 61-62.
[20] *Id.*, ¶ 55.
[21] *Id.*, ¶ 62-64.
[22] *Id.*, ¶ 64.
[23] *Id.*, ¶ 65, 87.

shareholders.[24] In response, the Tribunal assessed the Claimant's standing under the German-Argentine BIT, Argentine laws, and international law, and ultimately rejected the Respondent's objection.

In its analysis, the Tribunal formulated the Respondent's objection as a question of whether the Claimant's dispute arose out of an "investment" under the German-Argentine BIT.[25] If the Claimant did not have an "investment" under the BIT, then the Claimant would have no standing to bring an ICSID claim. After an examination of Article 1(1) of the BIT and the Protocol, the Tribunal determined that the BIT did not limit the scope of "investment" to preclude the Claimant's particular claims.[26] The Tribunal emphasized the wide breadth of the BIT's investment protections and asserted that the BIT protected shareholdings, investment income, and indirect claims.[27] In addition, the Tribunal considered the Respondent's objections to the Claimant's standing under Argentine law and international law, and found these sources irrelevant to its analysis.[28]

2.4. Third Objection: The Claim Refers to Adoption of General Measures

With respect to the Respondent's third objection, that the Claimant's claims attack general governmental measures and therefore exceed the Tribunal's jurisdiction, the Tribunal asserted that it was not evaluating Argentina's general measures. Instead, the Tribunal stated that the issue that concerned it was the Respondent's obligation to observe its treaty commitments under the German-Argentine BIT.[29] This obligation and its impact on the Claimant's investment raised a treaty-based "legal dispute" that the Tribunal determined fell within its jurisdiction.[30] The Tribunal decided that the Claimant's claims satisfied the ICSID Convention's requirement of a legal dispute "arising directly out of an investment."[31]

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[24] *Id.*
[25] *Id.*, ¶ 82.
[26] *Id.*, ¶ 87.
[27] *Id.*, ¶ 83-86.
[28] *Id.*, ¶ 88-89.
[29] *Id.*, ¶ 100.
[30] *Id.*, ¶ 100-103.
[31] *Id.*, ¶ 104.

2.5. Fourth Objection: DFS No Longer Owns the Claim

The Tribunal rejected the Respondent's objection that the Claimant had sold its right to bring a claim under the BIT when it sold its shares in the Argentine Subsidiary.[32] Notably, this fourth objection concerned a novel question in ICSID jurisdictional practice.[33] In its analysis, the Tribunal first considered the timeliness of the Respondent's objection. Although the objection was discussed late in the proceedings, the Tribunal decided to consider the objection given the particular circumstances.[34]

The Tribunal assessed the impact of the Claimant's share transfer on the Tribunal's jurisdiction by reviewing international law and German law.[35] Argentine law became irrelevant to this analysis because it only governed the formalities of the share transfer, not the ownership of the ICSID claim.[36] Regardless, the Tribunal proceeded to evaluate the objection under international law and found that investor-state cases "have uniformly held that the subsequent sale of an investment does not deprive an investor-State tribunal of its jurisdiction to hear the claim."[37] In the absence of the Claimant relinquishing its ICSID claims, the Tribunal asserted that the Claimant had standing as a qualifying investor at the time Argentina took the measures.[38]

The Tribunal also examined whether the Claimant could have assigned its ICSID claim under German law. However, German law does not support the transfer of a right or claim against a third party by operation of law.[39] In addition, German law stresses the importance of the will and "true intention" of parties entering a contract.[40] As a result, the Tribunal examined the Claimant's evidence, which was submitted to support the contention that the SPA contracting parties did not intend to transfer the ICSID claim.[41] The Tribunal found the Claimant's evidence persuasive and

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[32] *Id.*, ¶ 153.
[33] *Id.*, ¶ 284.
[34] *Id.*, ¶ 109-110.
[35] *Id.*, ¶ 135.
[36] *Id.*, ¶ 137.
[37] *Id.*, ¶ 141.
[38] *Id.*, ¶ 145.
[39] *Id.*, ¶ 147-148.
[40] *Id.*
[41] *Id.*, ¶ 151.

found that the Claimant had not relinquished through the SPA its right to bring the ICSID claim.[42]

2.6. Fifth Objection: The Most-Favored Nation Clause Does Not Authorize the Claimant to Bypass the Requirements of Article 10 of the Treaty

The Tribunal found that it lacked jurisdiction because the Claimant had not submitted the dispute to the Argentine courts for a period of 18 months as required by the German-Argentine BIT, and the BIT's most-favored nation (MFN) clause did not operate to waive this requirement.[43]

The Tribunal began its analysis by examining the language of Article 10 of the BIT.[44] Article 10 set forth a dispute resolution process that began by requiring parties to try to settle disputes amicably.[45] If the settlement failed, Article 10 required parties to refer the dispute to "competent courts of the Contracting Party in whose territory the investment was made."[46] Then, Article 10 stated that a dispute could be submitted to an international arbitral tribunal if within 18 months the local court could not render a final decision or rendered a decision that did not end the dispute, or if both parties agreed on the submission.[47]

The Tribunal found that the dispute resolution process in Article 10 of the BIT was obligatory and constituted a condition precedent to Argentina's consent to arbitrate.[48] The Tribunal's line of reasoning rested upon (1) whether the dispute had been litigated in Argentine courts for 18 months, and (2) whether the requirement to do so would be futile for the Claimant under the circumstances.[49] After an examination of the evidence, the Tribunal found that the answer to both questions was negative.[50] In response to the Claimant's suggestion that the requirement was futile, the Tribunal emphasized that the purpose of the court requirement was not to

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[42] *Id.*, ¶ 153.
[43] *Id.*, ¶ 281.
[44] *Id.*, ¶ 179.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*, ¶ 180, 194.
[49] *Id.*, ¶ 190.
[50] *Id.*, ¶ 191.

guarantee a specific date for a final resolution, but to afford domestic courts an opportunity to effect a prompt resolution.[51]

Following the Tribunal's finding that the 18-month court requirement was a condition precedent to Argentina's consent to international arbitration, the Tribunal considered its jurisdiction over the Claimant's MFN claims.[52] The Tribunal determined that its authority to hear the Claimant's MFN claims also depended on the Claimant's fulfillment of the domestic courts requirement.[53] However, the Tribunal asserted that it might have jurisdiction on these claims if the MFN clauses themselves supplied the Tribunal with the necessary jurisdiction.[54]

The Tribunal found that the MFN clauses did not independently supply it with jurisdiction.[55] In analyzing the MFN clauses, the Tribunal made several textual inquires and applied several rules and interpretive approaches, including *ejusdem generis*,[56] examination of the ordinary meaning of language,[57] and the principle of contemporaneity.[58] As part of its textual analysis, the Tribunal found that all MFN clauses were territorially limited.[59] The Tribunal stated that "[w]here an MFN clause applies only to treatment in the territory of the Host State, the logical corollary is that treatment outside the territory of the Host State does not fall within the scope of the clause."[60] Thereafter, the Tribunal determined that the contracting parties to the German-Argentine BIT did not intend for extra-territorial dispute resolution to fall within the scope of the MFN clauses.[61]

In addition to determining that the MFN clauses were territorially limited, the Tribunal drew several other conclusions from a textual examination of the MFN clauses. First, the Tribunal found that none of the protections in

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[51] *Id.*
[52] *Id.*, ¶ 199.
[53] *Id.*, ¶ 200.
[54] *Id.*
[55] *Id.*, ¶ 231.
[56] *Id.*, ¶ 211-216.
[57] *Id.*, ¶ 217-224.
[58] *Id.*, ¶ 220-222.
[59] *Id.*, ¶ 225.
[60] *Id.*, ¶ 226.
[61] *Id.*, ¶ 231.

the MFN clauses, either to investors or their investments, were meant to encompass the international dispute resolution provisions.[62] Second, the Tribunal found that the MFN clauses failed to promise MFN treatment "in all matters subject to" the BIT, which meant that the BIT maintained a distinction between treatment of investments within a territory and the international settlement of disputes.[63] Third, the Tribunal determined that the exclusion of certain types of domestic substantive treatment from the MFN clauses did not imply the inclusion of extra-territorial dispute resolution procedures.[64] Fourth, the Tribunal found the BIT's treatment of a contracting party was not less favorable than that of a comparator treaty so as to require the MFN clauses to come into play.[65] Finally, the Tribunal examined the relationship between two MFN clauses in the BIT and determined that the relationship failed to reveal anything about whether these clauses encompassed the international dispute resolution provisions.[66]

In further support of its determination on the fifth objection, the Tribunal noted that Article 10 was not incompatible with the BIT's objects and purposes to protect and promote investment.[67] Article 10 was not objectively less favorable than dispute resolution provisions from another comparator treaty.[68] Indeed, the Tribunal noted that Argentina included the same 18-month domestic courts submission requirement in many subsequent bilateral investment treaties.[69] The Tribunal reasoned that if Argentina had intended for the MFN clauses to apply to the international dispute resolution provisions, it would have no reason to include the repeated requirements.[70]

Finally, the Tribunal referred to other evidence and comparator treaties to reinforce its finding that the contracting state parties did not intend to expand the protections of the MFN clauses.[71] The Tribunal noted that

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[62] *Id.*, ¶ 233.
[63] *Id.*, ¶ 236.
[64] *Id.*, ¶ 239.
[65] *Id.*, ¶ 250.
[66] *Id.*, ¶ 253.
[67] *Id.*, ¶ 260.
[68] *Id.*
[69] *Id.*, ¶ 263.
[70] *Id.*
[71] *Id.*, ¶ 278.

subsequent MFN clauses in German BITs have retained their territorial limitation.[72] The Tribunal also noted that the tribunal in *National Grid* declared that the Panama-Argentina BIT's MFN clause did not extend to dispute resolution clauses, which the tribunal emphasized was always the parties' intention.[73] In addition, the Tribunal indicated that Argentina, Panama, Colombia, the DR-CAFTA countries, Switzerland, and the EU Commission have all signaled that MFN clauses do not reach dispute resolution clauses.[74]

3. *Decision*

Although the Tribunal rejected four of the Respondent's objections to its jurisdiction, the Tribunal upheld the Respondent's fifth objection to jurisdiction, which maintained that the bilateral investment treaty's most-favored nation clause did not authorize the Claimant to bypass the requirements of Article 10 of the treaty.[75] The Claimant had not presented its claims to a domestic court in Argentina for a period of 18 months as required by Article 10, which meant that the Claimant had no standing to present its claims before the Tribunal. Further, the Tribunal found no support for the contention that the Claimant could circumvent the domestic court requirement through the MFN clause. Thus, the Tribunal determined that it lacked jurisdiction to consider any claims, and accordingly dismissed all claims in their entirety.[76] The Tribunal determined that all costs would be split evenly between the disputing parties.[77]

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[72] *Id.*, ¶ 271.
[73] *Id.*, ¶ 272.
[74] *Id.*, ¶ 272, 276.
[75] *Id.*, ¶ 286.
[76] *Id.*
[77] *Id.*