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Argentina



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Luis Dates¹ and Juan Ignacio Gonzalez Mayer²

A. Legislation and rules

A.1 Legislation

Argentina enacted the joint Civil and Commercial Code in August 2015, which includes a specific chapter regulating what it calls the “arbitration contract” (Articles 1649 to 1665). The CCC applies to and governs all issues related to arbitration, except those where the Buenos Aires Convention applies. For example, if the seat of arbitration is in Argentina and the dispute has a point of contact with another member state of the Buenos Aires Convention, the latter will govern all issues contemplated therein, where the CCC is silent on such matters. However, it is not clear what might happen if an issue is regulated both under the CCC and the Buenos Aires Convention (for example, precautionary measures or judiciary control over arbitration awards).

The CCC incorporates several well-known arbitration principles favorable to the development of arbitration in Argentina. The most relevant provisions include: (i) the principle of *kompetenz-kompetenz*; (ii) severability of arbitration agreements; (iii) a tribunal’s power to render interim measures; (iv) exclusion of court jurisdiction when an arbitration agreement exists; (v) presumption in favor of the efficacy

¹ Luis Dates is a partner in Baker McKenzie’s Buenos Aires office, where he practices public law, litigation, alternative dispute resolution and international and domestic arbitration. Luis has represented and continues to represent several clients in ad hoc arbitral proceedings, as well as in proceedings administered by local arbitral institutions, such as the Buenos Aires Stock Exchange Market Arbitral Tribunal, the Buenos Aires Grain Market Arbitral Tribunal and the Private Center for Mediation and Arbitration.

² Juan Ignacio Gonzalez Mayer was part of the team of the University of Buenos Aires that won the XXIII Willem C. Vis International Commercial Arbitration Moot. Juan focuses on litigation, alternative dispute resolution and international and domestic arbitration within Baker McKenzie’s Buenos Aires office.

of the arbitration agreement in case of doubt; and (vi) an obligation of arbitrators to be available and to disclose any matter that might affect their impartiality. Several of these principles were already applied by Argentine courts, but their express inclusion into the domestic legal system is a very positive development.

In this way, the CCC provides some substantive federal legislation on arbitration, which should be construed along with the provisions of any applicable local procedural code. As Argentina is a federal country, each province has enacted its own civil and commercial procedural code. The National Code of Civil and Commercial Procedure applies in the City of Buenos Aires and in federal courts.³ As the provincial codes tend to be consistent with the CPCCN as to arbitration regulation, this report covers only the CPCCN along with the new CCC. In any case, we will briefly describe the existence of other important treaties that are part of Argentine law related to arbitration.

A.2 The Buenos Aires Convention

The Buenos Aires Convention⁴ applies to disputes between parties that, at the time of the execution of their agreement: (i) are domiciled in countries that are parties to the Convention; (ii) have contact with at least one party to the Convention; or (iii) have chosen the seat of the arbitration as one party to the Convention and the dispute has a point of contact in a member state of the Convention.

The Buenos Aires Convention treatment of international arbitration is in line with most relevant international arbitration statutes, eg, the UNCITRAL Model Law. Among the issues covered, the Buenos Aires Convention explicitly allows — and mandates — courts to assist an international arbitration tribunal in the course of such proceedings, eg, by issuing interim measures.

³ National Code of Civil and Commercial Procedure (*Código Procesal Civil y Comercial de la Nación*), Law No. 17.454, 20 September 1967, as restated in Decree 1042/1981, 18 August 1981, *et seq.*

⁴ Incorporated into domestic Argentine law by Law No. 25.223.

A.3 The Panama Convention

Argentina is also a signatory to the Panama Convention. This Convention is relevant because it stresses the court's powers (and obligations) to enforce international arbitration clauses, provided that such disputes are of a commercial nature and a written arbitration agreement exists. This is also in line with the provision set forth in Section 1656 of the CCC. As a result, when this arbitrability threshold is met, the Convention also mandates local courts to assist international arbitration tribunals.

A.4 The New York Convention

Argentina is also a signatory to the New York Convention.⁵ Argentina made two reservations to this convention that affect whether an Argentine court will recognize and enforce a foreign arbitral award: (i) that the award be issued in a country that is a signatory to the Convention; and (ii) that the underlying dispute be considered of a commercial nature under Argentine law.

A.5 Legislative projects

On 3 November 2016, the Executive Branch submitted a bill to the National Senate proposing the adoption of the UNCITRAL Model Law.

This proposal was placed within the framework of "Justicia 2020," a project promoted by the National Department of Justice, which seeks to strengthen the judiciary system and allow a quicker and independent dispute solving mechanism.

On 7 September 2017, the National Senate voted in favor of the adoption of the UNCITRAL Model Law, thus clearing the path for the Chamber of Representatives to finally approve it, which is expected to occur soon.

⁵ Adopted by Law No. 23.619.

The project to adopt the UNCITRAL Model Law is aimed to cover international arbitration issues only, and will not affect Argentina’s internal legal framework. However, there is another bill under consideration, related to the modification of certain heavily criticized articles of the CCC, that would indeed impact domestic arbitration as well.

B. Cases

B.1 Local enforcement of an ICSID award

On 18 August 2015, Chamber A of the Commercial Court of Appeals decided the case of *CCI - Compañía de Concesiones de Infraestructura S.A.* (“CCI”) *v. the Republic of Peru*⁶ in a groundbreaking decision that represents the first judicial precedent regarding the enforcement of ICSID awards in Argentina. This is because no decision concerning the enforcement of ICSID awards against Argentina was rendered in its own territory.

On 2 February 2010, Convia Callao S.A. (“Convia”) and CCI (the “Claimants”) filed a request for arbitration before ICSID against the Republic of Peru. The Claimants, highway construction companies, had concluded a concession contract with the Municipalidad Provincial del Callao and argued that through its illegal acts, Peru was liable for violating certain legal standards contained in the Argentina-Peru BIT, which granted the Claimants specific legal protections for their investments.

On 15 May 2013, having concluded that it had jurisdiction, the tribunal found that Peru had not violated any legal standard of the BIT and that it should not therefore be held liable. In this context, while the Claimants should in principle bear the costs of the proceedings as the losing party, the Claimants would only have to pay for half of the

⁶ National Court of Appeals on Commercial Matters (*Cámara Nacional de Apelaciones en lo Comercial*), Chamber A, 18/8/15, *CCI - Compañía de Concesiones de Infraestructura S.A. s/ Pedido de Quiebra (por República de Perú)*, Exp. No. 8030/2015.

costs incurred by Peru. After several unsuccessful attempts to collect payment of the costs awarded, Peru decided to enforce the Award in Argentina against CCI and on 4 April 2015, initiated enforcement proceedings before a first instance commercial court in Buenos Aires.

Relying on the provisions of the CPCCN, the Judge concluded that foreign awards are not exempted from going through *exequatur* enforcement proceedings and that the ICSID Convention does not provide for any direct enforcement mechanism that would justify avoiding *exequatur* proceedings. Peru appealed this decision on the ground that *exequatur* proceedings were not necessary in light of the self-contained enforcement mechanism provided by Articles 53 and 54 of the ICSID Convention.

The Court of Appeals started by stressing the binding nature of ICSID awards arising out the provisions of Articles 53 and 54 of the ICSID Convention. In addition, it stated that ICSID awards are not technically “foreign” awards but rather “international” awards. In this vein, the Court found that *exequatur* proceedings were not required for the enforcement of the Award. Irrespective of the above, the Court of Appeals made some interesting remarks as to the control that may be (and should be) exercised by local courts when enforcing ICSID awards. In this sense, it noted that every judge should proceed carefully and cautiously while exercising its jurisdiction in order to identify possible violations to Argentine public policy, especially when it comes to issues of due process, which forms part of Argentine international public policy.

B.2 Interpretation of the notion of “public order” under the CCC

Besides regulating arbitration as a contract for the first time, the CCC includes several potentially problematic provisions. One example is the vague and ambiguous wording of Article 1649, which provides for the non-arbitrability of disputes where public policy is compromised.

In *Francisco Ctibor S.A.C.I.y F. (“Ctibor”) v. Wal-Mart Argentina S.R.L. s/ ordinario (“Wal-Mart”)*,⁷ Chamber D of the Commercial Court of Appeals dealt with this issue, limiting the scope of Article 1649 and clarifying that the core question is not whether public policy legislation is involved, but whether the underlying rights can be disposed of by the parties.

On 5 December 2014, Ctibor filed a claim against Wal-Mart before the commercial courts of the City of Buenos Aires. It requested the court to order Wal-Mart to appoint an arbitrator based on an ad-hoc arbitral clause present in the contract as a dispute had arisen.

The dispute was related to a rental agreement between the parties, which was agreed as follows: first, the parties would conclude a usufruct contract that would last for 20 years. Second, when said period elapsed, the parties would execute a lease agreement for a period of 10 years. This mechanism would be repeated sequentially until 30 June 2050.

However, Ctibor argued that since the Argentinian Civil Code in force at that time prohibited — as a matter of public policy — the grant of usufruct of a property to a legal entity for more than 20 years, the contract was not valid after the first period of 20 years had elapsed.

Due to that same reason, Wal-Mart argued that, under Article 1649 of the CCC, issues where public policy was compromised could not be arbitrated. Therefore, while denying any violation to public policy through the execution of the rental agreement, Wal-Mart contended that, in any event, any claim where such provisions were at stake should be resolved by the competent courts.

After the first instance court issued its ruling, the case was sent on appeal before Chamber D of the Commercial Court of Appeals, which confirmed the previous decision and ordered the parties to constitute

⁷ National Court of Appeals on Commercial Matters (*Cámara Nacional de Apelaciones en lo Comercial*), Chamber D, 20/12/16, *Francisco Ctibor S.A.C.I. y F. v. Wal-Mart Argentina SRL s/ ordinario*, Exp., No. 85399/2014.

an arbitral tribunal. In so doing, the Commercial Court of Appeals found that arbitration was possible because the claims were related to purely private issues and thus capable of being arbitrated.

It further clarified that Article 1649 of the CCC determines that controversies where public policy is compromised are not arbitrable only to the extent that the underlying rights are not of a private, waivable nature. It does not entail that the mere fact that laws dealing with public policy are compromised precludes arbitration at all.

Thus, the Argentine courts established and delimited the scope of Article 1649 of the CCC, providing a higher degree of predictability in commercial relationships and clarifying a highly criticized provision.

B.3 Extent of a valid waiver of recourse against an arbitral award under the CCC

Article 1656 of the CCC has also been heavily criticized because it provides that parties cannot validly waive their right to challenge an award which is “contrary to Argentine law” (*contrario a derecho*) in court.

Since this statement is included in Article 1656, which deals expressly with a court’s power to revise awards when called upon to decide their validity, it should be interpreted as referring only to parties’ rights to challenge the validity of awards, or request clarification concerning awards, rather than the right to appeal the merits of the award.

For similar reasons, Chamber E of the Court of Appeals interpreted Article 1656 as not granting the right to have local courts review the merits of the award. In *Olam Argentina S.A. (“Olam”) v. Cubero, Alberto Martín and other (“Cubero”)*,⁸ Olam appealed before the Commercial Court of Appeals a decision of the Buenos Aires Stock Exchange Arbitral Tribunal that denied a nullity recourse against an

⁸ National Court of Appeals on Commercial Matters (*Cámara Nacional de Apelaciones en lo Comercial*), Chamber D, 12/22/15, *Olam Argentina S.A. c. Cubero, Alberto Martín y otro s/ recurso de queja*, Exp., N° 31941/2015.

award. The Commercial Court of Appeals upheld the tribunal's decision, as there were no legal grounds to demand nullity of the award.

Olam also argued that pursuant to Article 1656 CCC, the Court of Appeals had discretion to review the award. However, the Court of Appeals stated that the most suitable interpretation for Article 1656 was to consider it only applicable to nullity actions, and not to appeals. To arrive at this conclusion, it analyzed the first part of the provision, which expresses as a general rule the binding nature of the arbitration agreement and the exclusion of the competence of local courts. Under that view, as Article 1656 expressly provides that awards can be revised by means of the nullity action, it implicitly recognizes that recourse to appeal can be waived by the parties. Thus, according to the Court of Appeals, the rule set out in Article 1656 refers only to nullity actions, and allows parties to waive ordinary appeals.

C. Funding in international arbitration

Although a current hot topic in arbitration, third-party funding in arbitration has not received any legal treatment in Argentina.

As a result, in the context of international arbitration, under Argentine law, funding would be permitted and there would be no obligation to disclose funding, nor any limitations on its quantity, quality or providers. In fact, the assignment of claims is permitted by Argentine law if made with the intervention of a public notary. Therefore, funders could be assigned a claim and its outcome — or part of it — in exchange for their funding.

However, the CCC does contain a provision that could have an impact on funding issues, insofar as its Article 1662(a) mandates arbitrators to disclose any circumstance that — at any time — could affect their independence or impartiality. Therefore, arbitrators must disclose any connections they may have with funders if such connection could affect their independence or impartiality.

Considering funding in a broader sense, and regarding the ability of a party to comply with an award or to pay the arbitration costs, the Argentine courts have recently dealt with a case⁹ where a bankrupt company was allowed to have a dispute settled through arbitration, despite the fact that the bankruptcy law prohibits such action, thus potentially affecting the validity of the arbitration and the enforcement of an eventual award.

⁹ National Court of Appeals on Commercial Matters (*Cámara Nacional de Apelaciones en lo Comercial*), Chamber D, 30/08/15, *Guz-Mar Technology S.A. v. ADT Security Services S.A. s/ordinario*, Exp., No. 24053/2012.