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Argentina

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A. Legislation and rules

A.1 Civil and Commercial Code

Argentina enacted a joint Civil and Commercial Code (CCC) in August 2015 to replace the existing Civil Code and Commercial Code. The new code includes a specific chapter regulating what the CCC calls the “arbitration contract” (Articles 1649 to 1665). The CCC will apply to and govern all issues related to arbitration, save from those where the *Acuerdo de Arbitraje Comercial del Mercosur* (Mercosur Accord on International Commercial Arbitration, or the “Buenos Aires Convention”), applies (for example, if the seat of arbitration is in Argentina, and the dispute has a point of contact with other member states of the Buenos Aires Convention). It is clear that the latter will govern all issues contemplated therein, when the CCC is silent on such matters. It is less clear what might happen if an issue is regulated both by the CCC and the Buenos Aires Convention (for example, in cases of precautionary measures or judiciary control over arbitration awards).

In any event, Argentina’s civil and commercial procedure codes contain arbitration regulations that will apply to all procedural issues not regulated by the substantive legislation referred to above. Because

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Argentina is a federal country, each province has its own civil and commercial procedure code. The National Code of Civil and Commercial Procedure (CPCCN) applies to the Autonomous City of Buenos Aires, and to federal courts.³ Because 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

This treaty was issued in Buenos Aires on 23 July 1998.⁴ The Buenos Aires Convention applies to disputes between parties that, at the time of the execution of their agreement: (i) have their domiciles in signatory countries to the convention (Section 3, paragraph a); (ii) have contact with at least one signatory party of the convention; or (iii) have chosen the seat of the arbitration in one signatory party to the convention, and the dispute has a point of contact in a member state of the convention (Section 3, paragraph c).

Contrary to the CPCCN, the Buenos Aires Convention's treatment of international arbitration is in line with most of the relevant international arbitration statutes (such as the UNCITRAL Model Law). Among the issues contemplated therein, the Buenos Aires Convention explicitly allows — and mandates — a court to assist an international arbitration tribunal in the course of such proceedings (for example, by issuing interim measures).

A.3 The Panama Convention

Argentina is also a signatory to the *Convención Interamericana sobre Arbitraje Comercial Internacional* or Panama Convention. This convention is relevant because it stresses the court's powers (and

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

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



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 that the local courts assist international arbitration tribunals.

A.4 The New York Convention

Argentina is also a signatory to the New York Convention, issued in New York in 1958 and adopted by Law No. 23.619. 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.

B. Cases

B.1 Jurisdiction of Argentine courts to issue injunctions in the context of an arbitration being conducted in New York

In the case of *Methanex Chile Limited* (“Methanex”) v. *Petrobras Energía S.A.*⁵ (“Petrobras”), the Argentine courts found that they had international jurisdiction to issue an injunction, although the seat of the arbitration was in New York.

In October 2013, the arbitration was initiated and the tribunal was constituted in December of the same year. Because of a series of events and circumstances that took place in 2014, Methanex argued that Petrobras was purportedly aiming to get rid of a substantial amount of assets located in Argentina. and that there was a real danger that this could eventually lead to insolvency proceedings. As a consequence, Methanex appeared before the Argentine courts and requested an injunction (*anotación de litis*) ordering the Secretary of

⁵ *Cámara Nacional de Apelaciones en lo Comercial* (National Court of Appeals on Commercial Matters), Chamber “D”, 4/9/15, *Methanex Chile Limited v. Petrobras Energía S.A. (ARGENTINA) s/ Medida Precautoria*, Exp., N° 36715/2014.

Energy to take note in their public registries, and consequently inform third parties, of the fact that certain permits and energy concessions granted to Petrobras were subject to the result of the arbitration being conducted in New York.

The Chamber “D” of the Buenos Aires Commercial Court of Appeals (the “Court of Appeals”) found that it had international jurisdiction to hear the interim measure request. It first noted that according to Article 28 of the ICC Rules, the parties had the right to request interim measures from any competent judicial authority. Then it stressed that while the rule is that only the courts of the seat have jurisdiction to issue interim measures when an arbitration proceeding is in place, the courts of the domicile of one of the parties could, exceptionally, also exercise such jurisdiction.

Nonetheless, such analysis should be carefully conducted on a case-by-case basis, since concurrent jurisdiction may lead to abuse by parties, through requesting the same measures in different places at the same time. Moreover, it would be reasonable for an Argentine court to allow a request such as the one made by Methanex, given that its aim was to order an Argentine state entity to take note of certain litigation in its public records that may involve energy concession permits issued under Argentine soil.

Notwithstanding the above, the Court stressed that: (i) its intervention did not mean that it would have jurisdiction to allow any future recourse against an eventual award; (ii) its ruling in relation to the granting – or not – of the measure requested did not involve making any judgment as to the merits of the case; and (iii) its ruling could be decided differently by the arbitral tribunal if it so considered. In the end, the court finally rejected the measure requested because it found that there was no real and urgent danger if the measure was not granted and, even if it was, the measure requested would not adequately protect Methanex in light of the circumstances of the case.



B.2 Local enforcement of an ICSID award

On 18 August 2015, chamber “A” of the Court of Appeals ruled on the case involving *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 so, because despite Argentina being the state that has received the highest number of ICSID claims (51 out of 543 registered cases), no decision concerning the enforcement of ICSID awards against Argentina was ever rendered in its own territory.

On 2 February 2010, Convia! Callao S.A. (“Convia!”) and CCI (both, the “Claimants”) filed a request for arbitration before the ICSID Centre 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 violated certain legal standards in the Argentina - Peru BIT, which granted the Claimants specific legal protection for their investments.

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

⁶ *Cámara Nacional de Apelaciones en lo Comercial* (National Court of Appeals on Commercial Matters), Chamber “A”, 8/18/15, *CCI - Compañía de Concesiones de Infraestructura S.A. s/ Pedido de Quiebra (por República de Perú)*, Exp., N° 8030/2015. See the Peru chapter of this publication for an analysis of the underlying arbitration from the Peruvian perspective.

Relying on the provisions of the CPCCN, the Judge concluded that foreign awards are not exempted from going through the *exequatur* enforcement proceedings and that the ICSID Convention does not provide for any direct enforcement mechanism that would justify avoiding these *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 while 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 of Argentine public policy, especially when it comes to issues of due process, which forms part of Argentine international public policy.

B.3 Arbitrability of issues related to a company facing insolvency proceedings

On 30 August 2016, in the case of *Guz-Mar Technology S.A.* (“Guz-Mar”) v. *ADT Security Services S.A.*⁷ (“ADT”), Chamber “D” of the Court of Appeals found that commercial courts had no jurisdiction to hear a dispute arising from a commercial contract that involves a bankrupt corporation, despite the fact that Argentinian insolvency law states that arbitration agreements are not applicable when bankruptcy is declared.

⁷ *Cámara Nacional de Apelaciones en lo Comercial* (National Court of Appeals on Commercial Matters), Chamber “D”, 8/30/15, *Guz-Mar Technology S.A. v. ADT Security Services S.A. s/ ordinario*, Exp., N° 24053/2012.



Guz-Mar sued ADT before the commercial courts, claiming damages arising from a wrongful termination allegedly committed by ADT. The defendant alleged that the courts were not competent to resolve the dispute, since both parties had agreed on arbitration before the Buenos Aires Stock Exchange Arbitral Tribunal. Thus, it filed a preliminary exemption in that regard.

The court of first instance rejected the defendant's claim, based on Article 134 of the Argentinian Insolvency Law, which states that the bankruptcy declaration renders arbitration agreements inapplicable, unless the arbitral tribunal had been constituted before the declaration of bankruptcy. The defendant appealed the decision.

The Court of Appeals upheld the defendant's position, stating that Article 134 was not applicable, since the Buenos Aires Stock Exchange Arbitral Tribunal is a permanent one, that is, the arbitrators have already been chosen. Therefore, the Court of Appeals ruled that the arbitral tribunal had already been chosen and constituted, and it was competent to hear the dispute. Consequently, it referred the parties to arbitration.

C. Trends and observations

C.1 Existing provisions and their interpretation

As stated in section A above, Argentina has very recently enacted the CCC, which regulates arbitration. Although arbitration will therefore be regulated as a specific type of contract, without taking into account its jurisdictional characteristics, the new code will at last provide some substantive federal legislation on arbitration, which should be construed applicable, along with the provisions of the CPCCN or any other local procedural code.

The new code incorporates several well-known and useful arbitration principles favorable to the development of arbitration in Argentina. The most relevant provisions include: (i) the principle of *kompetenz-komptenz*; (ii) severability of arbitration agreements; (iii) the tribunal's power to render interim measures; (iv) exclusion of court jurisdiction

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

However, the new code also includes other potentially problematic provisions. Particularly, the vague and ambiguous wording of the provisions providing: (i) for the non-arbitrability of disputes where public policy is compromised (Article 1649); and (ii) that parties cannot waive their right to challenge an award in court (*impugnación judicial*) (Article 1656), provide cause for some concern.

As to the former, in our view, the provision should be interpreted to uphold the arbitrability of private disputes featuring issues of public policy, as otherwise a party may too easily challenge the tribunal's jurisdiction by contending that the dispute is not arbitrable because it touches upon public policy. This view is supported by the legislative explanation for the new code, which indicates that this provision aims to prevent the state or any state entity from arbitrating disputes.

As to the latter provision, precluding parties from waiving their right to “appeal” awards would run counter to: (i) the CPCCN, which does not allow parties to waive the right to request the annulment of the award, but does allow parties to waive their right to appeal it; and (ii) the international principle of finality of arbitral awards. 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 a right to appeal the merits of the award.

In this sense, chamber “E” of the Court of Appeals interpreted Article 1656 as not granting a right to have local courts review the merits of the award. In the case of *Olam Argentina S.A.* (“Olam”) v. *Cubero*,



Alberto Martín and other (“Cubero”)⁸, the plaintiff appealed before the Court of Appeals a decision of the Buenos Aires Stock Exchange Arbitral Tribunal that denied a request for nullification of an award. This decision was upheld by the Court of Appeals, since 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 proceedings 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, if Article 1656 expressly provides that awards can be revised by means of nullity proceedings, it is implicitly recognizing that the ability 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 proceedings and allows parties to waive the ability to appeal.

C.2 Legislative projects

In recent years, there have been several failed attempts to enact specific arbitration legislation, typically sponsoring the adoption of the UNCITRAL model law or portions thereof. However, on 1 November 2016, the Argentinian government filed a new project to be discussed within the congress, attempting to adopt a regime substantially based on the UNCITRAL model law for international commercial arbitration.

This proposal is placed within the framework of “*Justicia 2020*,” a project promoted by the Department of Justice, which seeks to strengthen the judicial system and create a quicker and more independent dispute-solving mechanism.

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

In this sense, the Argentinian government intends to adopt a legal framework for international commercial arbitration that favors the election of Argentina as a seat of international arbitrations and that reflects the regional legal framework.

There has been no relevant progress in the treatment of the proposal, but the government is confident that it will be approved.