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Argentina

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A. Legislation and rules

A.1 Civil and Commercial Code

Argentina has enacted a joint Civil and Commercial Code ("CCC") in August 2015, which includes a specific chapter regulating the "arbitration contract" (sections 1649 to 1665). The CCC applies and governs all issues related to domestic arbitration.

The CCC incorporated several well-known arbitration principles favorable to the development of arbitration in Argentina. The most relevant provisions include: (i) the principle of *kompetenz-komptenz*; (ii) the severability of arbitration agreements; (iii) the tribunal's power to render interim measures; (iv) the exclusion of court jurisdiction when there is an arbitration agreement; (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. Many of these principles were already applied by Argentine courts, but their express inclusion into the domestic legal system was a very positive development.

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As such, the CCC now provides 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 ("CPCCN") applies in the City of Buenos Aires and in federal courts. As the provincial codes tend to be consistent with the CPCCN as to the arbitration regulation, this report covers only the CPCCN along with the new CCC. Below, we will briefly describe other important treaties and legislation related to arbitration that are part of Argentine law.

A.2 Law on International Commercial Arbitration

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 frame of "Justicia 2020," a project propelled by the National Department of Justice, which seeks to strengthen the judiciary system and allow a quicker and independent dispute resolution 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 House of Representatives to finally approve it.

Finally, Law No. 27,449 on International Commercial Arbitration, ("LACI") was passed by Congress on 4 July 2018 and signed into law by the Executive Branch on 25 July 2018. On 26 July 2018 the LACI was published in the Official Gazette.

The LACI introduced some changes regarding both the Arbitration Contract set forth in the Argentine Civil and Commercial Code and the original text of the UNCITRAL Model Law.

The LACI rules govern all international commercial arbitrations, without prejudice to any international treaty applicable in Argentina,

and incorporates important changes to the previous legislation through the text of the UNCITRAL Model Law.

It is established that an arbitration is international whenever (i) the parties to an arbitration have their places of business in different states or (ii) the place of arbitration or the place where a substantial part of the obligations of the commercial relationship is to be performed are situated outside the state in which the parties have their places of business.

Under Argentine law, any relationship, whether contractual or not, governed solely or mainly by private law is considered to be commercial. In turn, the interpretation is wide and in case of doubt, the relationship shall be deemed as commercial.

An arbitration agreement shall be in writing and evidence of its content shall be recorded in any form. This requirement is accepted as having been met even when the arbitration agreement arises from electronic communication.

The parties are free to determine the number of arbitrators. If they fail to agree, the number of arbitrators shall be three. There are additional procedures for the composition of the arbitral tribunal provided the parties had not reached an agreement in this regard.

Unless otherwise agreed by the parties, the arbitral tribunal may grant interim measures, as well as any preliminary orders, to ensure compliance with these. A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court, differing from an interim measure, which is to be enforced upon application to the competent court, irrespective of the country in which it was issued and provided there are no grounds for refusing its recognition or enforcement.

Recourse to a court against an arbitral award may be made only by an application for setting aside before the Commercial Court of Appeals

of the place of arbitration, pursuant to the grounds expressly established in the LACI.

Section 519 *bis* of the CPCCN regarding the recognition or enforcement of awards was left without effect and the system shared by the UNCITRAL Model Law and the New York Convention was adopted also for domestic arbitration.

The LACI introduces a few modifications to the text of the UNCITRAL Model Law. For instance, the LACI does not contain a provision allowing the parties to agree that the subject matter of the arbitration agreement relates to more than one country. Moreover, the LACI sets aside the provision that allowed the parties to agree that the awards could not state the reasons upon which it is based, leaving such a possibility only in cases of settlement.

Although there are other few minor modifications introduced by the LACI that differ from the UNCITRAL Model Law, such changes are only meant to effectively transpose the UNCITRAL Model Law into the Argentine legal framework and do not entail substantive modifications.

The adoption of the UNCITRAL Model Law is aimed at covering international arbitration issues only, and will not affect Argentina's legal framework for domestic arbitration. However, there is another bill under consideration, related to the modification of certain heavily criticized sections of the CCC, that would indeed impact domestic arbitration as well.

A.3 Buenos Aires Convention

The Buenos Aires Convention, which was incorporated into domestic Argentine law by Law No. 25,223, applies to disputes between parties that, at the time of the execution of their agreement: (i) have their domiciles in countries parties to the convention; (ii) have contact with at least one party to the convention; or (iii) have chosen the seat of the arbitration in one party to the convention and the dispute has a point of contact in a member state of the Convention.

The Buenos Aires Convention's treatment of international arbitration is in line with most of the relevant international arbitration statutes (e.g., the UNCITRAL Model Law). For instance, the Buenos Aires Convention explicitly mandates courts to assist an international arbitration tribunal in the course of such proceedings, such as by issuing interim measures.

A.4 Panama Convention

Argentina is a signatory to the "Convención Interamericana sobre Arbitraje Comercial Internacional," which was incorporated into domestic Argentine law by Law No. 24,322. This convention stresses the courts' 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 threshold is met, the convention also mandates local courts to assist international arbitration tribunals.

A.5 New York Convention

Argentina is a signatory to the New York Convention, which was incorporated into domestic Argentine law 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 must be issued in a country that is a signatory to the convention; and (ii) that the underlying dispute must be considered to be of a commercial nature under Argentine law.

B. Cases

B.1 Interpretation of the notion of "Public Order" under the CCC

Besides regulating for the first time arbitration as a contract, the CCC included several potentially problematic provisions. The vague and ambiguous wording of section 1649, which provides for the non-

arbitrability of disputes where public policy is compromised, is an example.

In *Francisco Ctibor S.A.C.I.y F.* ("Ctibor") *v. Wal-Mart Argentina S.R.L.* ("Wal-Mart") *s/ ordinario,*[3] the chamber "D" of the Commercial Court of Appeals dealt with such issue, limiting the scope of section 1649 and clarifying that the core question is not of whether public policy legislation is involved, but rather of 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 stated that (i) the parties would conclude a usufruct contract that would last for 20 years, and (ii) 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 Argentine Civil Code in force at that time prohibited, as a matter of public policy, to grant *usufruct* of a property to a legal entity for more than 20 years, the contract was not valid from the first period of 20 years onwards.

Due to that very same reason, Wal-Mart argued that, under section 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 types of provisions were at stake should be resolved by the competent courts.

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

The chamber "D" of the Commercial Court of Appeals confirmed the previous decision issued at the first instance level and ordered the parties to constitute an arbitral tribunal. In so doing, the Commercial Court of Appeals found that arbitration was possible because the claims were related to purely private, patrimonial issues and thus were capable of being arbitrated.

It further clarified that section 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. The mere fact that laws dealing with public policy are compromised does not automatically preclude the use of arbitration.

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

B.2 Extent of an annulment recourse against an arbitral award

On 6 November 2018, the Argentine National Supreme Court ("Supreme Court") ruled on a case regarding the annulment of a domestic arbitration award. The Supreme Court found that the award was not subject to annulment because it had complied with the requirements of sections 760 and 761 of the CPCCN and it did not affect public policy.

The case of "EN - Procuración del Tesoro Nacional c/ (nulidad del laudo del 20-111-09) s/ recurso directo"[4] related to a contract executed between the National State ("National State") and a joint venture of small companies ("Propyme," and together with the National State, the "Parties") in 1999, related to an economic support

[4] Corte Suprema de Justicia de la Nación (Argentine National Supreme Court), 06/11/18, "EN - Procuración del Tesoro Nacional c/ (nulidad del laudo del 20-111-09) s/ recurso directo, Exp., No. 12732/2009/CS1."

program for small companies. The contract contained an arbitration agreement and the law that established the economic support program stated that any dispute had to be resolved through arbitration. National State terminated the contract in December 2000. In 2001, Propyme filed a claim for alleged damages related to the termination of the contract.

The Parties entered into an arbitration with a sole arbitrator. The award ordered National State to pay approximately USD 121,000 to Propyme. Against this, National State filed an annulment claim before the Federal Court of Appeals alleging that (i) the award was based neither on the contract nor on the applicable law, (ii) the evidence had not been assessed properly and (iii) the arbitrator omitted to apply public policy laws on currency exchange and consolidation. The court granted the annulment, but only on the grounds of the failure to apply public policy laws on currency exchange and consolidation and dismissed the annulment on the basis of applicable law and evidence assessment, since such points exceed the annulment recourse and would revise the merits of the award, which is not allowed by the CPCCN.

National State appealed the decision before the Supreme Court stating that an arbitral award can be revised in the merits when there are reasons of public policy, as it happened in this case. The Supreme Court used two standards to analyze the annulment claim. First, it analyzed if the award fell within the grounds of annulment contained on sections 760 and 761 of the CPCCN. Second, it analyzed if there were reasons of public policy to revise the merits of the case.

Regarding the first question, Supreme Court stated that judicial revision of arbitral awards is restricted, and cannot encompass the revision of the merits of the dispute, but only the compliance with the grounds of sections 760 and 761 of the CPCCN. In this sense, the courts shall only review that (i) the award does not have essential flaws of procedure, (ii) it was not rendered out of term or (iii) it decides disputes that were not submitted to arbitration. Since National

State did not prove any of these grounds, but rather stated reasons of applicable law and evidence assessment, the award was not subject to annulment by the grounds of the CPCCN. Regarding the second question, the Supreme Court understood that National State did not prove any affectation of the public policy, but only a discrepancy with the outcome of the award. For this, the Supreme Court took into account that National State voluntarily agreed to arbitrate, and waived the right to appeal the award.

This decision shows the support of the Supreme Court for arbitration, since it limits the possibilities of annulment, and therefore, gives legal certainty to arbitral awards. Moreover, this is in line with the recent enactment of the LACI, which repeats verbatim the UNCITRAL Model Law, and contains grounds for annulment fairly similar to those upheld by the Supreme Court and contained in the CPCCN.

B.3 Arbitration on consumers matters

Section 1651 of the CCC outlines certain matters that cannot be subject to arbitration, such as disputes involving consumers.

In the case *Altalef, Hugo Victor c/ Hope Funds S.A. s/ordinario*,[5] the Chamber "C" of the Commercial Court of Appeals dealt with this issue, stating that even when there is a presumption of a consumer relationship, any arbitration agreement should be set aside.

In this case, the First Instance Court declared itself incompetent to decide on the claim of Mr. Altalef, since there was an arbitration agreement in the contract signed with the defendant. However, the Court of Appeals found that the contract was of a consumer nature, and therefore, under section 1651 of the CCC, the arbitration agreement contained in the contract was inapplicable.

[5] Cámara Nacional de Apelaciones en lo Comercial (National Court of Appeals on Commercial Matters), Chamber "C," 22/04/18, *Altalef, Hugo Victor c/ Hope Funds S.A. s/ordinario*, Exp., 21706/2017/CA1

Therefore, the Court of Appeals upheld a restricted interpretation of section 1561 of the CCC, understanding that the limits of arbitrability contained in it are not subject to the will and agreement of the parties.