The Arbitration Review of the Americas

2022

Argentina

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The Arbitration Review of the Americas 2022 covers Argentina, Bolivia, Canada, Ecuador, Mexico, Panama, Peru and the United States; and has eleven overviews, including two on arbitrability (one focused on Brazil in the context of allegations of corruption, the other on the relationship with competence-competence across the region). There's also a lucid guide to the interpretation of "concurrent delay" around the region, using five scenarios.

Other nuggets include:

• helpful statistics from Brazil's CAM-CCBC, showing just how often public entities form one side of an arbitration;
• an exegesis on the questions that US courts must still grapple with when it comes to enforcing intra-EU investor-state awards;
• a similarly helpful summary of recent Canadian court decisions;
• another on Mexican court decisions that showed a rather mixed year; and
• the discovery that the AmCham in Peru as of July 2021 now engages in ICC-style scrutiny of awards.

Argentina

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Summary

IN SUMMARY

This article outlines the latest legislative developments in Argentine arbitration law.

DISCUSSION POINTS

- The amendments introduced to the 2006 UNCITRAL Model Law on International Commercial Arbitration enacted in 2018
- The current status of the 2017 bill aimed at partially amending the Civil and Commercial Code provisions on arbitration agreements
- Some aspects of the 2019 bill aimed at amending the arbitration provisions contained in the Federal Code of Civil and Commercial Procedure

REFERENCED IN THIS ARTICLE

- International Commercial Arbitration Law
- Civil and Commercial Code
- Federal Code of Civil and Commercial Procedure

On 4 July 2018, Congress enacted the 2006 UNCITRAL Model Law on International Commercial Arbitration, with some adaptations. This federal law governs exclusively international commercial arbitration throughout the entire country, including both its substantive and procedural aspects, and reaffirms the favourable trend towards arbitration in recent years and the intention to position Argentina as a seat of arbitration in Latin America.

The bill approved by Congress was drafted by a commission coordinated by the Ministry of Justice and formed by arbitration practitioners, and members of the academy and of the judiciary, showing the support gained by arbitration as a dispute settlement mechanism over the past decade. Moreover, the bill was approved without opposing votes, which also suggests a favourable approach towards arbitration in the political community.

Domestic arbitration continues to be governed by a different set of rules: its contractual aspects are governed by the Civil and Commercial Code (CCC) enacted in 2015, and its procedural aspects are governed by procedural codes. Each of the 23 provinces of the country has its own procedural code that is applied in its respective territory by its own judges. At the federal level, there is a Federal Code of Civil and Commercial Procedure (FPC) that applies in the Autonomous City of Buenos Aires and is applied by federal judges throughout the country.

The executive branch has also promoted changes to the domestic arbitration regime. In 2017 and 2019, it submitted two bills to Congress with the purpose of amending the CCC and the FPC, respectively.

INTERNATIONAL COMMERCIAL ARBITRATION

On 3 November 2016, the federal executive submitted a bill to Congress, proposing the adoption of the UNCITRAL Model Law on International Commercial Arbitration.

The federal executive stated in the bill's fundamentals that the country's legislation on arbitration was set out in a fragmentary way in the CCC and the procedural codes, both designed for purely domestic arbitrations, which neither reflects regular practice nor meets the expectations of the parties in international arbitration. Therefore, the bill was aimed at equipping the country with a legal framework for international commercial arbitration that favours the election by the parties of the country as a seat for international arbitration and that is consistent with the modern conception of arbitration, in line with the laws of the region and much of the world.

This bill was passed by Congress on 4 July 2018. The enactment of the International Commercial Arbitration Law (ICAL) entails the adoption of the UNCITRAL Model Law, as amended in 2006, with a few changes, as outlined below:

- The opt-in provision contained in article 1(3)(c) of the UNCITRAL Model Law was excluded. The provision sets forth that arbitration is international when 'the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country'. Although the bill's fundamentals did not explain the underlying reason for this exclusion, it appears that the intention was to prevent the parties from a purely domestic transaction to avoid the provisions of domestic arbitration. This is supported by the fact that the Law includes a new article that states that its general provisions shall not preclude the application of article 2605 of the CCC, pursuant to which, only in 'monetary international matters', the parties are entitled to defer jurisdiction in favour of arbitrators outside of the country.
- A definition of 'commercial' arbitration as any legal relationship, contractual or non-contractual, of private law or governed predominantly by it under Argentine law was provided. It also states that the term 'commercial' shall be widely interpreted, and if in doubt, a legal relationship shall be deemed to be commercial. The Law does not specify which set of rules will govern international arbitrations that are non-commercial.
- The interpretation rule of article 2 of the UNCITRAL Model Law was modified. The new law states that its international origin, 'its special nature', the need to promote uniformity in its application and the observance of good faith must be taken into account for the interpretation 'and integration' of the Law.
- A new provision was introduced in the section dedicated to the receipt of written communications. It states that the parties may agree that services are made electronically.
- A 20-day time limit to exercise the right to object to violations of the Law or any requirement under the arbitration agreement was introduced in lieu of the obligation of a party to state its objection to such non-compliance 'without undue delay' to avoid the waiver presumption.
- The courts with authority to perform certain functions of arbitration assistance and supervision were specified:
    - the first instance commercial courts of the seat of the arbitration for the appointment of arbitrators; and
    - the commercial court of appeals of the seat of the arbitration for the challenge of arbitrators, the termination of the arbitrator's mandate, the jurisdiction of the arbitral tribunal and the setting-aside of the arbitral award.

- The last sentence of article 7(3) of the UNCITRAL Model Law was removed. The sentence specifies that an arbitration agreement is in writing if its content is recorded in any form, 'whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means'. The underlying reason for the removal of this sentence is unclear, since it appears to contain only examples of the forms in which the arbitration agreement can be concluded. To qualify as 'in writing', the consent must be recorded in any form, regardless of the way in which the arbitration agreement has been concluded.
- A new provision in the section devoted to the appointment of arbitrators was introduced, stating that any clause that grants a privilege to a party in the appointment of arbitrators shall be null and void.
- A new provision in the section on the grounds for the challenge of arbitrators was introduced, establishing that the intervention of the arbitrator or the members of the law firm, consultancy firm or equivalent organisation to which the arbitrator belongs, in another arbitral or judicial proceeding as attorney of one of the parties, regardless of the subject matter of the proceeding, or in another arbitral or judicial proceeding with the same object or cause of action, as attorney for a third party, constitutes a ground for challenge. In those cases, the provision makes an unrebutted presumption of lack of impartiality or independence. The problem with this provision is that it does not establish temporal limits to the intervention, so the courts will have to specify whether it refers to a simultaneous intervention or if it includes past interventions up to a specific point in time. The provision further states that if the arbitral tribunal rejects the challenge, and an award is issued while a recourse against such decision is pending before the courts, the award will be null and void if the challenged is upheld.
- The provision that establishes the law applicable to the merits was modified. The UNCITRAL Model Law establishes that if the parties fail to designate the rules of law applicable the substance of the dispute, the arbitral tribunal shall apply the law determined by the conflict of laws rules that it considers applicable. The new law, instead, establishes that if the parties fail to designate the law applicable to the merits, the arbitral tribunal shall apply the rules of law that it determines to be appropriate.
- The possibility contained in article 31(2) of the UNCITRAL Model Law of agreeing that no reasons need to be expressed in the award was eliminated. The underlying reason for this elimination is probably that, under Argentine law, failure to state reasons can be considered as a violation of due process and, therefore, as a ground to set aside the award or refuse its recognition and enforcement.
- A change was made to the grounds for setting aside the award or refusing its recognition and enforcement. Articles 34(2)(a)(i) and 36(1)(a)(i) of the UNCITRAL Model Law set forth that an award may be set aside and that the recognition or enforcement of an award may be refused if a party to the arbitration agreement was 'under some incapacity'. After that text, the Law adds 'or capacity restriction'.
- The time-limit period on which the parties can file an application for setting aside an arbitral award was reduced. While the UNCITRAL Model Law establishes a three-month period, the new law establishes a 30-day period.
- A change was made to one of the requirements for the recognition and enforcement of an arbitral award. Article 35(2) of the UNCITRAL Model Law sets forth that the party

relying on an award or applying for its enforcement shall supply the original award or a copy thereof. The new law specifies that the copy of the award must be a certified copy.

- A characterisation was made of the public policy ground to refuse the recognition and enforcement of a foreign award, as the 'international' public policy of the country. It is unclear why this characterisation was not also made in respect of the public policy ground to set aside awards.
- UNCITRAL's recommendation regarding the interpretation of article II of the New York Convention, recognising that the circumstances described therein are not exhaustive, were incorporated. It is unclear why the other recommendation made by UNCITRAL regarding the extension of the more favourable law provision contained in article VII of the New York Convention to arbitral agreements was not included.

DOMESTIC ARBITRATION

The First Bill

On 3 March 2017, the federal executive submitted a bill to Congress, proposing a partial amendment of the CCC provisions on the arbitration agreement, eliminating and modifying those provisions that had received significant criticism from experts. Those provisions and the amendment proposed in the bill were described in *The Arbitration Review of the Americas* 2016–2020 editions.

Unfortunately, the proposal was not driven in due time, and the bill lost parliamentary status in 2019. The reasons for this lack of interest are unknown, although it has been suggested that it was because those and other amendments will be or are being included in a broader and more comprehensive reform bill of the CCC, which some experts are working on. The bill also lost priority in the context of the presidential elections held in 2019.

The Second Bill

In 2019, the federal executive submitted to Congress a bill aimed at reforming the FPC, including its provisions on arbitration. An amendment of the FCP is imperative because it contains an old procedural regulation that needs to be modernised.

The bill improves the current domestic arbitration regime in some respects, but it also contains some unfortunate provisions that are not in line with other Argentine law rules or with modern practices in arbitration. It also fails to resolve inconsistencies between the FPC and the CCC.

Some of the proposed amendments are commented below.

Recognition And Enforcement Of Foreign Awards

Article 546 of the bill states that foreign awards can be enforced in Argentina provided that they comply with the following requirements:

- the award has res judicata authority in the jurisdiction in which it was issued;
- the award is rendered by a competent tribunal in accordance with Argentine rules of international jurisdiction;

- the award is the result of a personal legal action or an in rem legal action related to personal property moved to Argentine territory during or after the arbitral proceeding;
- the defendant was duly summoned and was able to present its case;
- the award meets the requirements to be considered as such in the place in which it was issued and complies with the authenticity conditions required by national laws;
- the award does not affect Argentine principles of public policy;
- Argentine courts do not have exclusive jurisdiction to resolve the dispute submitted to arbitration; and
- the award is not incompatible with a judgment issued before or simultaneously by an Argentine court.

The recognition and enforcement of arbitral awards issued in international commercial arbitration is currently governed by the ICAL; therefore, although article 546 of the bill does not say so, it would be reasonable to interpret that it would apply only to the recognition and enforcement of foreign awards issued in arbitration that does not qualify as 'international' and 'commercial' under the ICAL.

Before the ICAL, the recognition and enforcement of foreign arbitral awards, whether rendered in domestic or international arbitration, was governed by article 519-bis of the FCP. The latter was repealed when the ICAL entered into force.

Given that the ICAL governs international commercial arbitration exclusively, it was and still remains uncertain which would be the procedure applicable to the recognition and enforcement of foreign awards issued in arbitration that does not qualify as 'international' and 'commercial' under the ICAL. Article 546 of the bill seems to fill this gap created by the enactment of the ICAL.

Arbitrability And Public Policy

Article 628 of the bill sets forth that the fact that the arbitrators have to analyse or weigh public policy rules when settling the dispute does not prevent the dispute from being submitted to arbitration.

This provision seems to have the purpose of clarifying some doubts generated by article 1649 of the CCC, which states that a dispute can be submitted to arbitration, provided that public policy is not 'compromised'. Prior to the entry into force of the CCC, Argentine courts recognised that the fact that the merits of a dispute are governed by public policy rules does not mean that the matter is not arbitrable to the extent it relates to monetary rights of the parties.[1]

After the enactment of the CCC, it was unclear whether this line of case law would be maintained owing to the wording employed by article 1649. So far, Argentine courts have interpreted article 1649 in a favourable manner. In a recent case, it was held that when article 1649 determines the non-arbitrability of private law disputes in which public policy is compromised:

> it does so with the scope of establishing that the mere fact that the matter submitted to arbitration is regulated by public policy rules does not in itself exclude arbitrability, insofar as the rights involved are disposable by the parties. In other words, in the case of a dispute over disposable rights, even if the decision involves rules of public policy, arbitration will be possible. . . . When

> article 1649 in fine of the Civil and Commercial Code refers to a 'compromised' public policy, it must be understood that this occurs when the claim contained in the arbitration claim is perceived as 'contrary' to it, but not when it is directed to maintain it.[2]

Notwithstanding that Argentine courts have so far followed the same line of jurisprudence that existed prior to the entry into force of the CCC, the bill is positive in this aspect, as it seems to be aimed at eliminating the uncertainties that the current text of article 1649 may create.

However, this objective can only be partially achieved because, under Argentine constitutional law, a procedural law such as the FPC cannot modify a substantive law such as the CCC, and in any case, the FPC is applied only by federal judges throughout the country and by judges of the Autonomous City of Buenos Aires, while the CCC is applied by all Argentine judges.

Appointment Of Arbitrators

Article 633 of the bill states that the parties may freely agree on the procedure for the appointment of arbitrators. In the absence of such an agreement, the claimant must send a notice of arbitration to the defendant, in which it must nominate one arbitrator and propose the third arbitrator. Within 10 days, the defendant must appoint its arbitrator and propose the third arbitrator.

If any of the parties remains silent, it will be deemed to have accepted the other party's proposal. If a party fails to appoint its arbitrator or objects to the arbitrator proposed by the other party, the latter may request the courts to make the appointment.

This provision is unfortunate for at least two reasons. On the one hand, it assumes that the arbitral tribunal will be always composed of three arbitrators. It does not provide an appointment mechanism for the case in which the parties agree on having one arbitrator but do not agree on the appointment mechanism.

On the other hand, it establishes an appointment mechanism different to the one contained in the CCC, and there is no rule explaining the relation or interaction between the mechanisms contained in both sets of rules. Article 1659 of the CCC sets forth that, in the absence of an agreement regarding the appointment of the three arbitrators, each party shall appoint one arbitrator and the party-appointed arbitrators shall appoint the third arbitrator. If a party fails to appoint its arbitrator within 30 days of receiving the request from the other party to do so, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment must be made, upon request of any party, by the arbitral institution or, failing that, by the courts.

Duty To Disclose And Challenge Of Arbitrators

Article 635 of the draft provides that the arbitrators shall disclose any circumstance that could give rise to 'justifiable doubts' on the arbitrator's impartiality and independence. This standard seems to differ from the one contained in article 1662 of the CCC, which states that the arbitrators shall disclose any circumstance that 'might affect' his or her independence or impartiality, and there is no rule explaining the relation or interaction between those two standards.

Something similar happens with the challenge of arbitrators. Article 637 of the bill states that arbitrators may be challenged for the same reasons as the judges. Article 63 of the bill establishes the following grounds for challenge.

- The judge is a relative within the fourth degree of consanguinity or the second degree of affinity with any of the parties, their representatives or lawyers, or lives with any of them.
- The judge, or his or her relatives within the grades mentioned above, has interest in the case or in another similar case, or has a company or partnership with any of the parties or lawyers, unless the company is a corporation.
- The judge has a pending lawsuit with the challenger.
- The judge is a creditor, debtor or guarantor of any of the parties, with the exception of official banks.
- The judge has reported a crime or has filed a criminal action against the challenger; or the challenger has reported a crime or has filed a criminal action against the judge prior to the initiation of the lawsuit.
- The judge has been reported by the challenger under the impeachment law, provided that Argentine authorities decided to proceed with the impeachment.
- The judge has been the lawyer of any of the parties or has issued an opinion or made recommendations concerning the case, before or after its initiation.
- The judge has received important benefits from either party.
- The judge has a friendship, expressed by great familiarity or frequent treatment, with any of the parties.
- The judge holds enmity, hatred or resentment against the challenger, unless the attacks or offences against the judge were made after the judge commenced hearing the case.

There seems to be an inconsistency between articles 635 and 637 of the draft because the duty to disclose is broader than the grounds for challenge. It would have been expected that the grounds for challenge were as broad as the duty to disclose, as it happens, for example, in the ICAL.

The ICAL establishes in articles 27 and 28 that arbitrators shall disclose any circumstances likely to give rise to justifiable doubts on their impartiality or independence, and they may be challenged only if circumstances exist that give rise to justifiable doubts on their impartiality or independence, or if they do not possess qualifications agreed to by the parties.

Arbitration In Law Or Ex Aequo Et Bono

Article 654 of the draft establishes that disputes can be submitted to arbitration in law or arbitration ***ex aequo et bono***. If nothing is stipulated in the arbitration agreement, it is deemed that the arbitration is in law. This provision is in line with article 1652 of the CCC and inverts the default rule currently contained in article 766 of the FPC, under which, in the absence of an agreement, it is deemed that the arbitration is ***ex aequo et*** bono.

Endnotes

1 *Otondo, César AC Cortina Beruatto SA*, Cámara Nacional de Apelaciones en lo Comercial, Sala E, 11 June 2003, LL 2003-F-744. Back to section

2 *Francisco Ctibor SACI Y F c. Wall-Mart Argentina SRL*, Cámara Nacional de Apelaciones en lo Comercial, Sala D, 20 December 2016. Back to section

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