

The International Comparative Legal Guide to:

International Arbitration 2008

A practical insight to cross-border International Arbitration work



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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of Argentina?

Since Argentina is a federal country, different procedural laws, enacted in federal and provincial jurisdictions govern arbitration proceedings. Such laws will regulate the arbitration proceeding unless the parties decide otherwise. As a principle, jurisdiction belongs to local courts but, in patrimonial matters, jurisdiction can be freely extended in favour of arbitrators. The extension of jurisdiction in favour of arbitrators acting outside Argentina is only admitted for deciding matters of international nature (National Civil and Commercial Procedural Code “NCCPC” Section 1). Local procedural laws require, in addition to an agreement to arbitrate (*cláusula compromisoria*) before a dispute arises, the execution of a special commitment (*the Compromiso Arbitral*) to arbitrate at the time the dispute arises. If such special commitment to arbitrate the dispute is not agreed-upon, any of the parties to the arbitration agreement may judicially request the appointment of arbitrators (NCCPC section 742) and the precise determination of the issues to be decided by them. Under Argentine law, the *compromiso arbitral* is mandatory and supplements the *clausula compromisoria*. Generally speaking, the arbitration clause or “*cláusula compromisoria*” is an agreement aimed at: i) excluding national court jurisdiction with respect to disputes relating to a contract that the parties have agreed to settle by arbitration; and ii) binding the parties to execute the *compromiso arbitral* once the dispute has arisen.

The *compromiso arbitral* shall contain: (i) date of execution of the *compromiso arbitral* and names and addresses of the parties; (ii) name and addresses of the arbitrators, unless they are appointed by other arbitrators, judges or any designating authority; (iii) matters submitted to arbitration with expression of its circumstances; and (iv) stipulation of a penalty that shall be paid by one party to the other party, should the former fail to comply with the acts that are indispensable to execute the *compromiso arbitral*. Failure to comply with any of these requirements renders the *compromiso arbitral* void.

1.2 Are there any special requirements or formalities required if an individual person is a party to a commercial transaction which includes an arbitration agreement?

With respect to individual persons, Section 738 of the NCCPC applies, which provides that any persons who cannot settle, cannot be subject to arbitration and, when so required, a specific authorisation should be obtained (the cases are generally of individuals that have their power to dispose of their property restricted by law - minors, insane etc.).

1.3 What other elements ought to be incorporated in an arbitration agreement?

The arbitration agreement has to make reference to the powers conferred upon the Tribunal. Argentine law sets out three types of arbitration: (1) expert arbitration; (2) *amiable compositeur* arbitration; and (3) *de iure* or regular arbitration. Unlike regular arbitration awards, the *amiable compositeur*'s award is not based on law. The *amiable compositeur* decides the dispute *ex aequo et bono*. If the parties do not expressly indicate that they would like to refer their dispute to regular arbitration, *amiable compositeur* arbitration would apply by default.

1.4 What has been the approach of the national courts to the enforcement of arbitration agreements?

National courts have a positive approach to enforce arbitration agreements. However, in some cases, national courts retained jurisdiction to settle disputes concerning the interpretation of the *compromiso arbitral*, notwithstanding the existence of an arbitration clause. In *Compañía Naviera Pérez Companc vs. Ecofisa, CNCOM, Panel B, LL 1994-A, 139*, invoked public order as a limit to arbitrators' powers. This was also the case in *Entidad Binacional Yacyreta vs. Eriday* (September 27 2004), in which an Argentine lower court stayed an international ICC arbitration sited in Buenos Aires and opened the door to extensive litigation. The court found that it had jurisdiction to decide on whether the Terms of Reference included all the necessary points of the dispute, and whether the ICC had properly ruled on the respondent's challenges against the three members of the tribunal. See as well CSN, 1/6/04, “José Cartellone Construcciones Civiles SA c. Hidroeléctrica Norpatagónica o Hidronor SA”, LA LEY, 2004-E, 266, and *Akzo Nobel Coating v. Cámara Argentina de Comercio*, Panel C of the Appeals Court in Commercial Matters, March 11, 2003, where an interim stay of the arbitral procedure was granted.

1.5 What has been the approach of the national courts to the enforcement of ADR agreements?

The court approach to the enforcements of ADR agreements has been favourable. Apart from the ADR systems conventionally agreed, Argentine law is increasing the quantity and types of ADR systems. Law No. 24, 573 in most cases requires the parties to any dispute to enter into a stage of negotiation prior to submitting their dispute to a court.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration agreements in Argentina?

NCCPC governs the enforcement of arbitration agreements (Sections 736 to 773 NCCPC), domestic awards (Sections 499 to 516), and the recognition and enforcement of foreign awards in federal territories (Sections 517 to 519 *bis*). Likewise, provincial procedural codes govern the recognition and enforcement of awards in the provinces.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do the laws differ?

Argentine Procedural Laws set forth a different treatment for international and domestic arbitration, since the former has to be the result of a valid arbitration clause in contracts dealing with matters of an international nature, and foreign arbitral awards are to be acknowledged and enforced through an exequatur procedure which admits a limited review (mainly on due process of law or local public order rules violations), a treatment similar to the one afforded to foreign court judgements, whilst domestic awards can be directly enforced without need of prior acknowledgement and are only subject to a limited recourse, of annulment, if appeal recourses are waived in the arbitration clause.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the governing law and the Model Law?

The Argentine arbitration regime is not based on, and differs from, the UNCITRAL Model Law. For example, unlike the Model Law, under the Argentine law: i) the parties must enter into a mandatory submission agreement (*compromiso arbitral*) in writing and signed by the parties, notwithstanding the existence of an arbitration clause; ii) unless waived (which cannot include the waiver of annulment recourses), appeal remedy is available, whilst UNCITRAL awards are only subject to an annulment recourse; (iii) there is no specific provision that arbitrators have jurisdiction to rule over their own jurisdiction (however it is worth stressing that Argentine case law upholds such principle); and iv) arbitrators cannot order any interim measures or relief by themselves (Section 753, NCCPC), but they may request the courts to grant them, and courts shall assist the arbitral proceedings etc.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of Argentina? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The parties may refer any kind of matter to arbitration, except public interest matters (i.e., Civil Law Code sections 21, 844 and 953; Bankruptcy law public order provisions), disputes concerning criminal law, and family law such as divorce, paternity, or eventual hereditary rights (Civil Code sections 848 and 1175) (see Section 737 NCCPC).

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

NCCPC does not specifically govern this issue. Notwithstanding the foregoing, Argentine courts have upheld the principle that arbitrators have jurisdiction to rule on their own jurisdiction (*Kompetenz-Kompetenz*).

3.3 What is the approach of the national courts in Argentina towards a party who commences court proceedings in apparent breach of an arbitration agreement?

In the case a party commences court proceedings in breach of an arbitration agreement and the other party objects to the court's jurisdiction, Argentine courts usually refer the dispute to arbitration. This was the case, among others, in *Porcelli, Daniel y otro c/ ABN AMRO Asset Management Arg. SG y otro s/ordinario* (December, 16 2005). On the contrary, if the court's jurisdiction is not objected to, the right to arbitrate the dispute will be deemed waived (Section 7 NCCPC).

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal?

The court may address the issue of national arbitral tribunal's jurisdiction if: (i) there is not a valid arbitration agreement; (ii) the dispute refers to aspects that are not "arbitrable" under Argentine Law (Section, 752 NCCPC); or (iii) the dispute has not been accurately described in the *compromiso arbitral*. (see *'Nidera Argentina S.A. c/Rodríguez Alvarez de Canale, Elena G.'* Federal Supreme Court, Fallos:311:2300).

A party may either object to the arbitral tribunal's jurisdiction in the arbitral proceedings themselves, requesting the same to decline their jurisdiction or refer the dispute to a court (Sections 7 to 13, NCCPC) for such court to assume jurisdiction on the dispute and communicate it to the Arbitrators. In the case of dissent, the common superior Tribunal shall decide. This procedure, by which arbitral jurisdiction can be judicially challenged, will not be available in international arbitration cases, (see SC *"Pan American Energy LLC (sucursal Argentina) c. Forestal Santa Bárbara S.R.L. y otros"* 28/07/2005 and CNCOM *"Reef Exploration Inc. c. Compañía General de Combustibles S.A."*).

3.5 Under what, if any, circumstances does the national law of Argentina allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Under Argentine law, there are no grounds for extending arbitration to parties that have not given their express consent to it. Only in exceptional cases do arbitrators have mandatory jurisdiction over certain matters. For example: i) when the parties failed to agree upon a price regarding services provided under a works agreement, as long as it relates to the contractor's profession or job (Section 1627, Civil Code); ii) when the parties' disagreements arise as to the interpretation of any letter of credit or recommendation or as to the obligations emerging therefrom (Section 491, Commercial Code); and iii) in the proceedings for foreclosure of final judgments, in the case referred to in Section 516, NCCPC (complex computation of amounts involved, for example).

4 Selection of Arbitral Tribunal

4.1 Are there any limits to the parties' autonomy to select arbitrators?

Argentine law does not limit the parties' autonomy to appoint arbitrators. Nevertheless, arbitrators shall meet some few requirements to be eligible: arbitrators shall be over 21, in full exercise of their civil rights (Section 743 NCCPC), and may not be judges or employees of the judiciary (unless the Government is a party to the dispute).

4.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

If the parties' chosen method for selecting arbitrators fails, the court having jurisdiction to settle the dispute will appoint the arbitrators (Sections 742 and 743 NCCPC).

4.3 Can a court intervene in the selection of arbitrators? If so, how?

Yes, see question 4.2.

4.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality?

Arbitrators shall be independent, neutral and impartial. If a conflict of interest arises, the parties may challenge them on the same grounds as judges are challenged (Sections 17 and 746 NCCPC).

5 Procedural Rules

5.1 Are there laws or rules governing the procedure of arbitration in Argentina? If so, do those laws or rules apply to all arbitral proceedings sited in Argentina?

NCCPC governs all arbitration proceedings sited in federal jurisdiction. In the provinces, provincial procedural codes apply. Moreover, the recognition and enforcement of foreign awards is governed by the 1958 New York Convention. Argentina is also a party to the 1975 Panama Convention containing rules regarding the recognition and enforcement of foreign arbitral awards, and the validity of the arbitration agreements.

5.2 In arbitration proceedings conducted in Argentina, are there any particular procedural steps that are required by law?

Unless the parties agree otherwise, rules governing judicial proceedings apply to arbitration (NCCPC 751). Notwithstanding this, in institutional arbitration, such as ICC, the NCCPC would supplement the institutional rules where they are silent and only if the parties expressly agree on, or - should they fail to do so - the Tribunal decides its application.

Unlike arbitrators, *amiable compositeurs* are not subject to any particular procedural steps or rules (Section 769 NCCPC).

5.3 Are there any rules that govern the conduct of an arbitration hearing?

The NCCPC rules governing judicial hearings will apply to arbitration hearings unless the parties have agreed other rules of procedure.

5.4 What powers and duties does the national law of Argentina impose upon arbitrators?

Arbitrators must act impartially and render the award within the time limit fixed in the *compromiso*, if any. Moreover, since arbitrators lack *imperium* to enforce any injunctive relief, courts should assist them to enforce their orders (Section 753 CPCCN).

Should arbitrators fail to comply with their duties, they may be found liable for damages (Section 745 NCCPC). One of the members of the tribunal may act as chairman. The Tribunal may conduct the proceedings in such manner it considers appropriate. Procedural orders may be issued by the Chairman, acting singly.

5.5 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Yes, Courts have jurisdiction to deal with some procedural issues such as: (i) ruling on the arbitral tribunal's jurisdiction upon respondent's request for the judicial court to assume jurisdiction (NCCPC Sections 7 to 13); (ii) appointing any member of the arbitral tribunal and designate the chairman should the parties fail to agree on its constitution; (iii) forcing the defaulting party to execute the *compromiso arbitral*; (iv) granting injunctions or interim measures at the request of the parties or the tribunal or to assist the tribunal during the hearings; (v) ruling on the challenge of arbitrators; and (vi) enforcing awards, ruling on the parties' appeal (unless waived) or petition to vacate an award as a result of an annulment recourse.

5.6 Are there any special considerations for conducting multiparty arbitrations in Argentina (including in the appointment of arbitrators)? Under what circumstances, if any, can multiple arbitrations (either arising under the same agreement or different agreements) be consolidated in one proceeding? Under what circumstances, if any, can third parties intervene in or join an arbitration proceeding?

Argentine law neither does rule multiparty arbitration, nor does it rule the appointment of arbitrators in multiparty arbitrations. In such a case, the parties may either agree on the method to appoint arbitrators or refer the issue to domestic courts.

The NCCPC does not provide for consolidation of multiple arbitrations. Rules on consolidation of court proceedings could be eventually applied to arbitration proceedings.

Third parties may intervene in the arbitration proceedings, only if all the parties involved in the proceedings consent to their intervention.

5.7 What is the approach of the national courts in Argentina towards *ex parte* procedures in the context of international arbitration?

National courts will usually allow *ex-parte* procedures (such as injunctions or judicial orders in connection with evidence, etc.) in the context of international arbitration, only if the requirements set forth in the procedural law are met.

6 Preliminary Relief and Interim Measures

6.1 Under the governing law, is an arbitrator permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

Arbitrators cannot order preliminary measures or interim relief

(Section 753, NCCPC). However, they, as well as any of the parties, may request the courts to order such measures.

- 6.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?**

At the request of one party or the arbitral tribunal, courts may grant preliminary or interim relief. The burden of proof shall be upon the requesting party to show that it is entitled to seek relief and that it will suffer losses awaiting the final award. The application of a party to a court requesting such measures neither breaches nor implies a waiver of the arbitral jurisdiction.

- 6.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?**

The courts address these requests as if they were made in judicial proceedings. Accordingly, if the necessary requirements (mentioned in question 6.2) are met, courts will favourably react to the concession of these remedies.

- 6.4 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?**

Yes, Argentine law allows national courts to order security for costs for an amount to be discretionally determined by such court.

7 Evidentiary Matters

- 7.1 What rules of evidence (if any) apply to arbitral proceedings in Argentina?**

Argentine Procedural Rules do not set out any special rules of evidence applicable to arbitral proceedings. Unless the parties have agreed differently, the rules of evidence governing judicial proceedings will also apply to arbitration, (Section 751 NCCPC). Under the NCCPC rules of judicial evidence, the parties will have to submit with their initial pleadings (complaint and its reply) all the documentary evidence under their own possession and expressly indicate any other means of evidence that they would like to produce during the course of the arbitral proceeding. As a general principle, it will not be admitted the production of any other evidence that was not offered in the initial pleadings.

- 7.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure of discovery (including third party disclosure)?**

Arbitrators may request the courts to order compulsory disclosure of documents (NCCPC Sections 753 and 326). Its rejection is not subject to appeal. The arbitral tribunal may draw negative inferences if the party does not collaborate in the production of evidence (NCCPC Section 388). Third parties may oppose to submit documents by declaring that its submission might cause prejudice to them.

- 7.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?**

When a party believes that during the arbitral proceedings the

production of some evidence may become impossible or very difficult, its production can be requested to a national court before filing the arbitral lawsuit. Once the arbitral proceeding has begun, courts can only intervene at the arbitral tribunal's request (see question 7.2).

- 7.4 What is the general practice for disclosure/discovery in international arbitration proceedings?**

See question 7.2.

- 7.5 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal? Is cross-examination allowed?**

Under Argentine law witnesses will declare under oath to tell the truth (Section 440 NCCPC). Witnesses are obliged to render their testimonies (NCCPC Section 426); however, they can refuse to answer when their testimony: i) could expose them to a criminal process or involve their personal honour; or ii) could imply the release of professional, military, scientific, artistic or industrial secrets. The Tribunal can interrogate witnesses directly and then, the party who offered them has to interrogate them. Cross-examination is made after this procedure is completed (NCCPC section 442). Written testimonies are allowed only by certain government officials. Expert opinions are admissible if a special or particular knowledge, art, industry or technical activity is required (NCCPC Sections 557 and 751).

- 7.6 Under what circumstances does the law of Argentina treat documents in an arbitral proceeding as being subject to privilege? In what circumstances is privilege deemed to have been waived?**

There are specific sections in the Criminal Code (Section 156), in some specific Laws and in some Ethics Codes from Professional Bar Associations which develop the institutes, known as "professional secrets", "confidential information" (Law 24.766) and "data protection" (Law 25.326) which limit (in several aspects) the boundaries of the disclosure that might take place in an arbitral proceeding.

8 Making an Award

- 8.1 What, if any, are the legal requirements of an arbitral award?**

Domestic awards, shall comply with all requirements applicable to domestic judgments. The award shall decide all the matters submitted to the arbitrators, and may not include matters which were not included in the *compromiso*. The award shall state the reasons upon which it is based and deal with ancillary matters like costs and fees. The Tribunal must render the award within the time limit fixed in the *compromiso arbitral*, if any. Being the tribunal composed of more than one arbitrator, the award shall be given by the majority decision.

9 Appeal of an Award

- 9.1 On what bases, if any, are parties entitled to appeal an arbitral award?**

If no special set of procedural rules has been agreed, the grounds to

file recourse of appeal (if was not resigned by the parties) will be the same as the ones set forth for judicial proceedings (Section 751 and 758 NCCPC), and require an evidence of the prejudice caused otherwise. Unless otherwise provided for, the appeal can be filed to challenge: 1) final judgments; 2) interlocutory decisions; and 3) simple rulings that give rise to a burden that cannot be cured by the final judgment.

9.2 Can parties agree to exclude any basis of appeal or challenge against an arbitral award that would otherwise apply as a matter of law?

The parties can waive their right of appeal. Argentine courts have not always upheld parties' agreements waiving the right to appeal. In 2004, the Argentine Supreme Court in the *Cartellone Construcciones Civiles S.A. c/ Hidroeléctrica Nordpatagónica S.A.* o "*Hidronor S.A.*" ("*Cartellone*") held that such agreements do not prevent courts from reviewing arbitral awards rendered in breach of public order. Notwithstanding the *Cartellone* decision, later in 2006 the Supreme Court confirmed that it is valid to waive the right to appeal an arbitral award (see *Cacchione, Ricardo C. v. Urbaser Argentina S.A.* recently confirmed in 2008 see, *CSJN Fallos 329:3399, 24 August 2006 and 11 March 2008*).

According to the above mentioned doctrine the recourse of appeal could be totally or partially waived while the recourse to vacate an award (on nullity grounds) can not be waived.

9.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

There is no legal provision that forbids the parties from expanding the scope of appeal of an arbitral award beyond the grounds available under Argentine law.

9.4 What is the procedure for appealing an arbitral award in Argentina?

The parties have to submit before the arbitral tribunal their recourse within 5 days as of the service of the appealed resolution. The recourse will be decided by the judicial chamber of appeals (Section 759 NCCPC). The prejudiced party can file a direct recourse before the chamber of appeals if the Arbitrators Tribunal fails to send the recourse to the latter.

10 Enforcement of an Award

10.1 Has Argentina signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The New York Convention (NYC) of 1958 was ratified, by law 23619 with the following reservations: (a) reciprocity; (b) disputes have to be of a commercial nature; (c) the terms of the Convention will be construed in accordance with the National Constitution provisions.

10.2 Has Argentina signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Montevideo Treaties (1889 and 1940); Panama Convention of 1975; Montevideo 1979; Mercosur Treaty and relevant Protocol; and the ICSID Convention.

10.3 What is the approach of the national courts in Argentina towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

If no treaty is involved, Argentine courts would acknowledge and enforce foreign awards only if they: (i) were a final decision issued by a competent foreign court pursuant to the international jurisdiction rules acknowledged by Argentina; (ii) comply with the due process rules; (iii) meet all requirements to be valid and enforceable in its original jurisdiction, and all the authentication requirements under Argentine laws; (iv) abide by Argentine public order; or (v) are not incompatible with a prior or simultaneous Argentine court award on the matter.

10.4 What is the effect of an arbitration award in terms of *res judicata* in Argentina? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Arbitration awards acknowledged in Argentina will have *res iudicata* effects in the whole country and national courts are precluded from re-hearing the same issues under any circumstances.

11 Confidentiality

11.1 Are arbitral proceedings sited in Argentina confidential? What, if any, law governs confidentiality?

Under Argentine law arbitration proceedings are not expressly protected by confidentiality. As a matter of fact, since the arbitration procedures may be preceded by a court procedure to order the constitution of the Arbitrators Tribunal, or to determine the *Compromiso*'s terms, access to such court files is public unless the parties agree otherwise or the court orders the file to be reserved. Notwithstanding this, the parties may agree - as they usually do - that arbitration proceedings will be conducted on a confidential basis.

11.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

To the extent the parties have not submitted themselves to confidentiality obligations, they may refer to such precedent in subsequent proceedings. However, the use of documentation and filings in procedures involving other parties should be carefully examined as the party that is not involved in the subsequent proceeding may consider it has proprietary rights on documentation forwarded thereof as evidence. Confidentiality duties may result from other relationship or contracts. The use of information or evidence produced in a specific court or arbitration, in other proceedings regarding third parties may have limited effect. Only evidence admitted to such proceedings (following due process of law rules and after having the chance to be challenged by the other party in the proceedings) may be the grounds for an arbitrator's or court award.

11.3 In what circumstances, if any, are proceedings not protected by confidentiality?

See questions 11.1 and 11.2.

12 Remedies / Interests / Costs

12.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Argentine law does not provide for any particular type of remedies applicable to arbitration proceedings. The rules for damages indemnification under substantive Argentine law correspond to the continental, civil law approach, of *restitutio ad integrum*, where evidence of actual damage has to be produced. Special principles may apply to reduce fines or penalties contractually agreed, notwithstanding the fact they were agreed to by the parties.

12.2 What, if any, interest is available?

Argentine law does not provide for any particular interest to be applicable in arbitration. As a general rule, interests should be comparable with those applicable in short term bank loans, depending on the kind of business involved.

12.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Section 772 NCCPC states that arbitrators may award fees and costs in the manner stipulated by Section 68 NCCPC. The general rule is that the losing party shall pay them, but they may be shared in specific circumstances (novelty of the legal dispute involved, the behaviour of any or both parties, special agreements, etc.).

12.4 Is an award subject to tax? If so, in what circumstances and on what basis?

If an appeal is filed against the award or one of the parties brings an action to set it aside or vacate it, a 3% court tax must be paid upon bringing such legal actions or filing such appeal. The same court tax applies upon the filing of a request for exequatur in connection with a foreign award, to the extent the request is destined to obtain the enforcement of the award, with a certain economic content.

13 Investor State Arbitrations

13.1 Has Argentina signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)?

Argentina ratified the ICSID Convention in 1994.

13.2 Is Argentina party to a significant number of Bilateral Investment Treaties (BITs) or Multilateral Investment treaties (such as the Energy Charter Treaty) that allow for recourse to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes ('ICSID')?

Argentina is party to at least 57 bilateral investment treaties ("BITs"). Most of them allow investors to refer investment disputes to ICSID arbitration.

13.3 Does Argentina have standard terms or model language that it uses in its investment treaties and, if so, what is the intended significance of that language?

Argentina does not have, nor does it use standard terms or model language in its BITs. However, the basic protections regarding fair and equitable treatment, not less favourable treatment than nationals, creeping expropriation or measures tantamount to expropriation, definition of nationals of the country involved in the relevant Treaty, the nature of the investment, most favoured nation clauses, etc., are all issues that have, with some differences between them, specific provisions in all these Treaties. Some have fork-in-the-road clauses separating domestic and international litigation on the same issues, whilst others require a prior domestic litigation for a limited amount of time before having access to international arbitration.

13.4 In practice, have disputes involving Argentina been resolved by means of ICSID arbitration and, if so, what has the approach of national courts in Argentina been to the enforcement of ICSID awards?

As per the ICSID Convention, the Host countries have an obligation to comply with final ICSID arbitration awards as if they would be local judgments, final and binding. The lack of performance under this duty constitutes in itself a new international breach. The Host countries as well have a separate duty to admit the enforcement of such ICSID arbitration awards under the domestic rules applicable to the enforcement of domestic judgments. The question concerning the enforcement of ICSID awards has still not been submitted to any Argentine court. Since 1996 multinational companies have filed 40 claims against Argentina with ICSID. CMS is the only ICSID Award against Argentina that has become final after the Annulment Committee rejected Argentina's request to annul it. There are no legal grounds to support that Argentine domestic courts have jurisdiction to annul or to refuse to enforce ICSID awards or even to further review them. The authors have referred to the international responsibility resulting from a lack of enforcement of an international arbitration award under a Treaty, and the Federal Supreme Court has affirmed it in a number of cases. Argentina has declared to ICSID it will comply with the Ad-Hoc Committees awards once these resolve the annulment recourses filed.

As far as international arbitration with the Sovereign is involved, however, there are some remarks by Government officers indicating that the enforcement of awards would be subject to a wider scrutiny, and would require court enforcement procedures. There are at the domestic law level legislation referencing emergency powers that subject claims based on former causes of action to a number of obstacles and delays to obtain satisfaction.

13.5 What is the approach of the national courts in Argentina towards the defence of state immunity regarding jurisdiction and execution?

Argentine courts: (a) cannot attach public domain property; (b) interim measures are usually restricted because of the legal assumption of the State's solvency; and (c) the fulfilment of Public purpose actions and services by the State may not be hindered. Immunity of jurisdiction has been waived in the Bilateral Investment Protection Treaties, not so the immunity from Execution.

No requests have up to now involved the enforcement by Argentine Courts of an ICSID award against Argentina.

14 General

14.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in Argentina? Are certain disputes commonly being referred to arbitration?

Even if no official statistics are kept, over the last years the inclusion of arbitration clauses into international commercial agreements has increased significantly. Among other disputes, large business projects involving infrastructure or construction, and joint venture agreements rely on arbitration clauses in general.

14.2 Are there any other noteworthy current issues affecting the use of arbitration in Argentina?

Despite the requirement in the Procedural Laws to, eventually, a

prior court decision for the constitution of the Arbitral Tribunal, and for the determination of the issues under dispute, this prior stage is seldom adopted. There is also a general compliance by the Judiciary to the enforcement of the awards in the relatively few cases where they are not voluntarily complied with.

The issues regarding Sovereign default, regulatory interventions and their effects should be instead the matter of special conclusions and prognosis.

Acknowledgment

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Author of articles on environmental, insurance, banking, investment treaty arbitration and oil & gas law and corporate structures. Member of the Council and Vice chair of the Oil & Gas Committee of the Section of Energy and Natural Resources Law's Council of the International Bar Association. Assistant Professor of Constitutional Law, School of Law and Social Sciences, University of Buenos Aires (1976-1987).

Counsel in investment treaty arbitration claims under ICSID Rules regarding: natural gas and power production; natural gas transportation; and, for Vivendi on a successful resubmitted award in 2007 after a previously obtained annulment of a former one. Local counsel for another large multinational energy company in international litigation regarding arbitration and parallel multiparty suits on different countries.

Counsel to parties or ICC appointed arbitrator in several international arbitrations under ICC Rules. He has also extensively represented clients in mediation and arbitration proceedings under local arbitration rules.



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Born in Buenos Aires, Argentina, December 22, 1966; Lawyer, 1993. Postgraduate Studies: Buenos Aires Bar Association, Training Plan for Young Lawyers (FORES), 1994; Austral University "Premaster" in Corporate Law (Course in Corporate Law), 1995; Southern Methodist University (Dallas, Texas, USA) LLM (International & Comparative), 2000. Author of several articles related to creditors' right protection. He has an active participation in domestic and multijurisdictional litigation. Moreover he has participated in international and domestic arbitrations (representing oil and gas and Broadcasting companies) including ICC Arbitration Rules, Arbitral Rules of the Buenos Aires Stock Exchange and UNCITRAL Rules. He has participated in domestic mediations and in judicial procedures ancillary to arbitration proceedings where it was requested injunctive or interim relieves.



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Abeledo Gottheil Abogados was established in 1963, and it is nowadays one of the leading, full-service, large law firms in Argentina, with 65 lawyers, 45 paralegal and back up staff, and with important experience in inter-jurisdictional lawsuits and in extensive international arbitration. Such experience includes providing legal counselling and representation to major companies (such as Vivendi, Total, Shell, Fluor Daniel Inc., Baker Hughes, Key Energy, Global Santa Fe, Du Pont, Toyota, PepsiCo, Klabin S.A., Searle Ltd - a Pfizer sister company - PricewaterhouseCoopers, among others): i) in several disputes or affairs regarding different Bilateral Investment Protection Treaties (amongst which, obtained an annulment award by an ICSID tribunal - the fourth in ICSID's 35 years of existence - followed by a successful award); ii) in ICC international arbitration; iii) in commercial arbitrations under UNCITRAL rules; and iv) in commercial arbitrations under the Arbitral Rules Buenos Aires Stock Exchange. Additionally the firm has participated in judicial procedures ancillary to arbitration proceedings whereby injunctive or interim relief was obtained.

Its members have been appointed by ICC as sole arbitrator or co-arbitrator including multi party arbitration. The firm is a founding party of the Mediation and Arbitration Business Centre (CEMA) institution created by the most relevant firms of Argentina in order to provide Alternative Dispute Resolution.