The Arbitration Review of the Americas 2019

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The Arbitration Review of the Americas 2019

A Global Arbitration Review Special Report

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Global Arbitration Review is delighted to publish *The Arbitration Review of the Americas 2019*, one of a series of special reports that deliver business-focus intelligence and analysis designed to help general counsel, arbitrators and private practitioners to avoid the pitfalls and seize the opportunities of international arbitration. Like its sister reports *The European Arbitration Review*, *The Middle Eastern and African Arbitration Review* and *The Asia-Pacific Arbitration Review* provides an unparalleled annual update – written by the experts – on key developments.

In preparing this report, **Global Arbitration Review** has worked exclusively with leading arbitrators and legal counsel. It is their wealth of experience and knowledge – enabling them not only to explain law and policy, but also to put theory into context – which makes the report of particular value to those conducting international business in the Americas today.

Global Arbitration Review would like to thank our contributors, who have made it possible to publish this timely regional report.

Although every effort has been made to provide insight into the current state of domestic and international arbitration across the Americas, international arbitration is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought.

Subscribers to **Global Arbitration Review** will receive regular updates on changes to law and practice throughout the year.

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Argentina

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

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

Domestic arbitration will continue 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 is promoting changes to the domestic arbitration regime. In early 2017, it submitted a bill to the Federal Congress, and it is currently working on a second bill, both with the purpose of improving the arbitration legal framework and promoting the country as a venue for arbitration.

International commercial arbitration

On 3 November 2016, the federal executive submitted a bill to the Federal 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, that did not reflect regular practice nor met 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 arbitrations 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 the Federal Congress on 4 July 2018. The enactment of the law entails the adoption of the UNCITRAL Model Law, as amended in 2006, with a few changes, as outlined below.

- The exclusion of the opt-in provision contained in article 1(3)(c) of the UNCITRAL Model Law, which sets forth that an 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. It also states that the term 'commercial' shall be widely interpreted and, in case of 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.
- A modification of the interpretation rule of article 2 of the UNCITRAL Model Law. 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, in the section dedicated to the receipt of written communications, which states that the parties may agree that services are made electronically.
- A 20-days' time limit to exercise the right to object to violations of the law or any requirement under the arbitration agreement, 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 specification of the courts with authority to perform certain functions of arbitration assistance and supervision, such as:
  - 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, jurisdiction of the arbitral tribunal, and setting aside of the arbitral award.
- The removal of the last sentence of article 7(3) of the UNCITRAL Model Law, which 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, 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, 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 these 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 said 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, such award will be null and void if the challenged is upheld.
- A modification to the provision that establishes the law applicable to the merits. 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 which 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 which it determines to be appropriate.
- The elimination of the possibility contained in article 31(2) of the UNCITRAL Model Law of agreeing that no reasons need to be expressed in the award. 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 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 reduction of the time-limit period on which the parties can file an application for setting aside an arbitral award. While the UNCITRAL Model Law establishes a three months period, the new law establishes a thirty days period.
- A change 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.
- The characterisation 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 with respect to the public policy ground to set aside awards.
- The UNCITRAL's recommendation regarding the interpretation of Article II of the New York Convention, recognising that the circumstances described therein are not exhaustive. 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 has not been included.

Domestic arbitration

The first bill

On 3 March 2017, the federal executive submitted a bill to the Federal Congress, proposing a partially amendment of the CCC provisions regarding the arbitration agreement, eliminating and modifying those provisions that received significant criticism from experts, and that were described in *The Arbitration Review of the Americas* 2016 edition.

The bill proposes five amendments.

Contract of arbitration

Article 1649 of the CCC defines the 'contract of arbitration' as an agreement whereby the parties undertake to submit, to one or more arbitrators, all or any disputes that have arisen or may arise between them in respect of a defined legal relationship of private law, whether contractual or not, in which public policy is not compromised.

The bill proposes to remove the words 'of private law' and 'in which public policy is not compromised'.

The limitation to relationships of private law appears to be related to the last paragraph of article 1651 of the CCC, whereby disputes with the federal or provincial states are not governed by the CCC rules that apply to the arbitration agreement. Given that, as explained below, the bill proposes to eliminate the restriction contained the last paragraph of article 1651, it is consistent to also eliminate the limitation contained in article 1649.

The limitation related to public policy can lead to controversy if it is not properly interpreted. 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 if this line of case law would be maintained due 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 directly eliminates the uncertainties that the current text of article 1649 may create by deleting the requirement that public policy should

be not compromised. Moreover, to avoid any doubt, the bill also proposes to incorporate into article 1651 a sentence stating that the arbitrability of a dispute is not affected by the fact that the applicable rules are public policy rules.

Arbitrability

Article 1651 of the CCC currently states that the following matters are 'excluded' from the arbitration agreement:

- civil status or capacity of persons;
- family issues;
- rights of users and consumers;
- adhesion contracts; and
- labour relations.

It also provides that the CCC provisions concerning the arbitration agreement do not apply to disputes with the federal or provincial states.

The current text of article 1651 is inconsistent with several rules that were not repealed by the CCC. For example, while article 1651 appears to exclude consumer disputes from arbitration, article 59 of Law 24,240 orders the enforcement authority to establish arbitral tribunals for consumer disputes. Furthermore, the federal executive, in compliance with that law, created the National System of Consumer Arbitration by Decree 299/89. Law 26,993 also created a system for the resolution of consumer disputes and established in article 72(38) thereof that one of the functions of the Ministry of Economy and Public Finance is to supervise the actions of arbitral tribunals for consumer disputes.

In an attempt to reconcile this set of rules and avoid contradictions, it has been argued that consumer disputes are excluded from the arbitration agreement regulated in the CCC because the arbitrability of those matters is governed by specific laws.[3] In this vein, it has also been interpreted that article 1651 of the CCC is actually seeking to prevent the consumer from being compulsively subject to arbitration through the application of an arbitration agreement unilaterally drafted by the supplier before the dispute, but it does not prevent the consumer from submitting a dispute to arbitration if he or she voluntarily agrees to do so with the supplier after the dispute has arisen.[4]

Despite these interpretations, recent rulings of the National Civil Appellate Court and the National Commercial Appellate Court concluded that, pursuant to article 1651 of the CCC, arbitration clauses related to consumer relationships are null and void or inapplicable, without analysing whether they are regulated by a different set of rules or if the arbitration clause was imposed by the supplier to the consumer.[5]

The bill proposes to replace the text of article 1656 entirely with a new text stating that matters that cannot be the subject of a settlement agreement cannot be submitted to arbitration, and that the arbitrability of a dispute is not affected by the fact that the rules applicable to the merits are public policy rules.

The proposal of the federal executive is positive, not only because of the public policy issues mentioned above, but also because it contains a general and broader definition of the matters that can be submitted to arbitration, and thus eliminates some of the inconsistencies that now exist between the CCC and other laws.

As explained above, the bill also eliminates the limitation that the arbitration rules contained in the CCC do not apply to disputes with the federal or provincial states.

Precautionary measures

Article 1655 of the CCC currently establishes, among other things, that, unless otherwise agreed, the arbitration agreement confers on arbitrators the power to adopt, at the request of any party, the precautionary measures they deem necessary regarding the subject of the dispute. The arbitrators may require adequate security from the applicant. Only courts have the authority to enforce those measures.

The bill proposes to remove the references to the power of the arbitrator to require security and the power of the courts to enforce the measure. The underlying reasons for this proposal are uncertain. It could have been considered redundant by the federal executive.

Article 1655 also states that the application of a party to a court for such measures shall not be deemed to constitute an infringement or a waiver of the arbitration agreement and shall not affect the authority reserved to the arbitrators. Further, preliminary measures adopted by the arbitrators may be challenged in court if they violate constitutional rights or are unreasonable.

The bill also proposes to remove the last sentence referring to the challenge of the measure in court. The reasons for this change are unknown. It probably aims at avoiding interferences of courts and the delays that those interferences may have in the arbitration proceeding.

Notwithstanding the above, it has been noted that article 1655 is dubiously constitutional because it refers to a procedural matter and the Federal Congress is not empowered to regulate such matters.[6]

Effects, interpretations and remedies

Article 1656 of the CCC currently contains three paragraphs. The first paragraph sets forth that the arbitration agreement obliges the parties to honour its terms and excludes the competence of the courts in disputes submitted to arbitration, unless the arbitral tribunal is not yet hearing the case and the arbitration agreement appears to be manifestly void or inapplicable.

The bill proposes to remove the last part of the paragraph. The reasons for this proposal are unknown.

The second paragraph states that, in case of doubt, the most favourable interpretation for the efficiency of the arbitration agreement should prevail. This provision tends to displace the case law in force prior to the CCC, which ordinarily concluded that arbitration agreements should be interpreted restrictively because arbitration constituted an exception to the jurisdiction of judicial courts.[7] The bill proposes to remove the paragraph. The underlying reasons for this change remain unknown.

The third paragraph states that final arbitral awards may be reviewed before the competent courts when grounds for total or partial annulment are invoked, pursuant to the provisions of 'this Code'. It also provides that the parties cannot waive their right to 'challenge' the final award that is 'contrary to law'. This paragraph presents at least three problems.

- First, it refers to grounds of annulment that are invoked pursuant to the provisions of 'this Code', when the CCC does not contemplate any grounds for annulment of arbitral awards. The intent was possibly to refer to the procedural codes that could apply to the case, which do establish specific grounds for annulment of awards.[8]
- Second, it refers to the inability of waiving the right to 'challenge' the final award, without specifying whether it refers to the inability to waive the right to appeal the award or the right to set aside the award. The procedural

codes generally authorise the parties to waive their right to appeal but not the right to set aside the award. Some international treaties ratified by Argentina establish that the only remedy against the award is the application for setting aside. Therefore, consistently with those procedural codes and international treaties, article 1656 may be interpreted to refer to the inability of waiving the right to set aside the award.[9]

- Third, article 1656 refers to the challenge of final awards that are 'contrary to law', which is a very broad concept. If, as explained above, the CCC were interpreted in the sense that it refers to the inability of waiving the right to set aside the award, instead of referring to the right to appeal the award, then it could be interpreted that the CCC refers to the procedural law that is applicable to the case, which would normally be that of the seat of the arbitration. In other words, the parties could not waive their right to set aside an award that is invalid because it does not meet the validity requirements established by the applicable procedural law, but they could waive their right to appeal the award.

The opposite interpretation (ie, that a final award may be challenged on grounds of its alleged inconsistency with any legal provision) would not only be inconsistent with international treaties and the sources of inspiration of the arbitration dispositions of the CCC, but, moreover, be inconsistent with the main purpose of arbitration to displace disputes from the competence of the judicial courts, except for the review of final awards based on specific grounds for annulment.

Since the enactment of the CCC, all the cases that have been published involving the last paragraph of article 1656 were decided in favour of arbitration. In those cases, the courts basically concluded that among the different interpretations of article 1656, the most suitable one for the purposes of arbitration, was the one whereby only applications for setting aside are unwaivable (ie, that the waiver of the right to appeal is valid).[10] Nevertheless, it is positive that the bill proposes the elimination of such a controversial paragraph.

Scholars have also stated that the last paragraph of article 1656, in addition to being defectively drafted, is dubiously constitutional because it refers to a procedural matter and the Federal Congress is not empowered to regulate such matters.[11] However, there is yet no case law on this point.

Optional clauses

Article 1658 of the CCC provides that parties can agree on:

- the seat of the arbitration;
- the language of the arbitration;
- the arbitration procedure – if there is no agreement, the arbitral tribunal may conduct the arbitration in the manner it deems appropriate;
- the time limit within which the award must be rendered – if there is no agreement, the time limit will be governed by the arbitration rules, and, in the absence of arbitration rules, by the law of the seat;
- the confidentiality of the arbitration; and
- the distribution of the arbitration costs.

The bill adds the possibility of agreeing on the waiver of recourses against the arbitral awards, to the extent permitted by local law. This proposal seems to have the dual objective of recognising, on the one hand, that some remedies may be waived, and on the other hand, that this matter is of a procedural nature and has to be regulated by local procedural codes.

The second bill

The Federal Executive is working on a second bill that has not yet been submitted to the Federal Congress and which aims at reforming the FPC, including its provisions on arbitration. The content of this project is unknown, but it is imperative that the old arbitration regulation contained in the FPC be modernised.

Notes

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José Martínez de Hoz is one of the founding partners of MHR | Martínez de Hoz & Rueda, one of the leading law firms in Argentina. He is listed as a leading practitioner in energy and arbitration by international and domestic publications.

He has a strong practice in energy and in both investment and commercial arbitration, leading the firm's arbitration group in numerous international arbitration hearings, both in English and Spanish, representing clients from a variety of sectors and working with different regulatory frameworks. He has represented investors in several International Centre for Settlement of Investment Disputes cases against Argentina arising from the measures taken since 2002 that abrogated various investment regulatory frameworks. He is also very active in International Chamber of Commerce (ICC) and other types of commercial arbitration, including complex multi-party, multi-contract cases arising out of cross-border transactions.

He is a member of the International Court of Arbitration of the ICC representing Argentina, and is listed as an arbitrator in several institutions, including the Energy Arbitrator's List of the International Centre for Dispute Resolution.

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MHR | Martínez de Hoz & Rueda is an Argentine, full-service law firm that is particularly recognised for its energy, M&A, capital markets, banking, finance, corporate, tax, regulatory, infrastructure and international arbitration and litigation practices. All its partners are constantly top-ranked by several legal publications.

MHR's clients include multinational corporations, international banks and financial institutions, as well as domestic companies and individuals in a wide range of industries and sectors. MHR also assists the public sector, multilateral institutions and NGOs in developing and improving legislation.

Investment arbitration and commercial arbitration, both domestic and international, are one of MHRs core activities.

MHR has an unparalleled practice in investment arbitration in disputes arising under investment treaties. Its partners initiated this practice with a successful defence of the Republic of Argentina in a case involving a water service concession during the late 1990s. Later, they developed their experience by handling a large number of cases brought by investors against Argentina as a result of the measures taken since 2002 that abrogated several investment regulatory frameworks.

MHR also has a very active practice in commercial arbitration, including complex multi-party and multi-contract cases arising out of cross-border transactions, under different rules, including International Chamber of Commerce, International Centre for Dispute Resolution and UNCITRAL. The commercial disputes it handles are mostly related to the energy, oil and gas, construction, finance, maritime and commerce industries.

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