The New Argentinian Legislation on Arbitration: Shift into First Gear or Reverse?

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Emmanuel Kaufman (Knoetzl Haugeneder Netal Rechtsanwaelte GmbH)

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Overview

On 1 August 2015, the new National Civil and Commercial Code (the "Code") entered into force in Argentina. Articles 1649 to 1665 of the Code incorporate the new regulations governing arbitration. Although not expressly stated, it may be understood that it applies to both domestic and international arbitration.

In accordance with the Argentinian federal system, whereas "substantive" matters are governed by national laws, "procedural" matters are governed by provincial laws. Prior to the Code, arbitration was considered a "procedural" matter and, thus, it was governed by the procedural code of each province and by the Federal Code of Civil and Commercial Procedure (applicable in the City of Buenos Aires and in all Federal courts).

Now, by qualifying arbitration as a "substantive" matter, it is regulated at a national level, in Chapter 29 of the Code dealing with the "Arbitration Contract". Regardless of the approval of the new Code, the local procedural codes remain in force and govern some procedural aspects of arbitration.

The positive sign of the reform is that Argentina has not only followed the trend of adopting national legislation on arbitration, but also that the Code expressly recognizes the most accepted pro-arbitration principles. However, the reform comes with a caveat. At least three provisions will likely cause major concerns and discussions: 1) Article 1649 on the non-arbitrability of certain disputes; 2) Article 1655 (last sentence) on the judicial review of interim relief; and 3) Article 1656 on the "challenge" of awards. Unless courts interpret these provisions in a pro-arbitration fashion, they might impact on the development of arbitration in Argentina and the development of Argentina as a seat for arbitration.

Arbitration Contract

Pursuant to Article 1649, an arbitration contract exists when the parties agree to submit all or certain disputes between them, which have already arisen or which might arise in connection with a certain legal relationship governed by private law (whether contractual or non-contractual) in which public policy is not compromised, to the decision of one or more arbitrators. Pursuant to Article 1650, such contract must be in writing, and it may be incorporated by reference.

The Express Recognition of Fundamental Accepted Arbitration Principles

The Code expressly incorporates major pro-arbitration principles, some of which were already incorporated into the Argentinian legal system by international treaties and case law:

1. Article 1653 recognizes the principle of severability of the arbitration agreement. The inclusion of this principle may be seen as redundant in view of the qualification of the agreement to arbitrate as a "contract". Nonetheless, its recognition may prevent potential disputes;

2. Article 1654 embodies the principle of "*Kompetenz-Kompetenz*". Although it allows the parties to exclude its application, the exclusion of this principle should be, in any event, interpreted restrictively and only recognized based on an express exclusion;

3. Paragraph 1 of Article 1656 recognizes that the arbitration agreement excludes the jurisdiction of the courts over disputes submitted to arbitration, unless the arbitral tribunal is not yet hearing the case and the arbitration agreement "seems manifestly" null or incapable of being performed; and

4. Paragraph 2 of Article 1656 also recognizes that any doubt as to the effectiveness of the arbitration agreement should be interpreted in its favor. This represents a major improvement because Argentinian courts have developed a consistent case law by which arbitration agreements are interpreted in a very restrictive manner.

Interim Relief

In line with the global trend, Article 1655 authorizes arbitrators to grant interim relief, although, of course, the enforcement of interim measures is to be conducted by state courts.

Unfortunately, the desired effect of this provision is overshadowed by the ability of state courts to conduct a broad review of interim measures granted by arbitral tribunals. Pursuant to paragraph 2 of Article 1665, the parties may challenge such measures if they "breach constitutional rights" or "are deemed to be unreasonable". A broad interpretation of this provision would permit the review of the substance underlying the interim relief, which is inconsistent with the most accepted global trend.

Arbitrability

Article 1651 provides that disputes relating to matrimony, capacity and family law, consumer law, standard form contracts, labor law and those in which the state is a party, cannot be submitted to arbitration. In addition, private law issues, in which public policy is compromised, are not arbitrable pursuant to Article 1649.

Since the system of exclusion provided by these provisions is too broad, it may increase jurisdictional objections. Particularly worrying is determining which are the situations where "public policy is compromised". This issue may also arise in connection with the enforcement of foreign arbitral awards in Argentina in view of Article V.2(a) of the New York Convention.

Court Review

Paragraph 3 of Article 1656, which was not originally included in the draft of the Code, is the most controversial provision.

The first part of that paragraph provides that arbitral awards may be reviewed before the competent state courts if a ground exists for a total or partial nullity in accordance with the provisions of the Code. However, the grounds for annulment of an arbitral award remain a mystery because the Code does not specify them. It will be interesting to see how the courts will shape this provision. The most practical solution would be to apply the grounds for annulment of arbitral awards contained in the

local procedural codes.

This provision will bring further controversy because it goes further and in its last sentence states that "[i]n the arbitration contract it is not possible to waive the judicial challenge of a final award which is contrary to the legal system" (the original reads *"[e]n el contrato de arbitraje no se puede renunciar a la impugnación judicial del laudo definitivo que fuera contrario al ordenamiento jurídico"*). The issues arising out of this sentence can be split into two parts.

Firstly, the meaning of "judicial challenge" is defined neither in the provision itself nor by reference to other provisions of the Code. Thus, it remains unclear whether it refers to the annulment procedure or to an appeal. It is to be hoped that this will not be interpreted as a "new" appeal mechanism. Should it be interpreted as an appeal or a new procedure, different to annulment, it could seriously affect the effectiveness of arbitration. Any dispute might end up before state courts with almost no limitation, when, in general, that is exactly what the parties intend to avoid. There are some arguments supporting the interpretation that it refers to the annulment. For instance, the term "challenge" ("*impugnación*") is used in several provisions of the Code for an annulment petition. We expect that state courts, scholars and arbitration practitioners will point out this fact in support of a reasonable interpretation of this provision.

Secondly, as to the grounds for requesting this "challenge", the provision refers to arbitral awards that are "contrary to the legal system". Due to its broad wording, it seems to go far beyond the grounds for a mere annulment, which are generally quite narrow. This wording adds a new obstacle to a reasonable interpretation of the provision.

The meaning of this provision is likely to be discussed before state courts and the final answer on the meaning of both "judicial challenge" and "contrary to the legal system" will, unfortunately, take some time.

Conclusion

Although it would have been better to pass a special arbitration law, the approach of the legislator to have one single regulation applicable to arbitration all across the country is definitely welcome. Similarly, the express recognition of some fundamental principles in favor of arbitration represents an important improvement for Argentina.

However, the stand taken by the legislator in connection with the issues of arbitrability, the review of interim relief and, particularly, the review of arbitral awards causes serious concerns. Because these issues relate to critical aspects of the arbitration proceedings, they might have a strong impact. For instance, commercial parties may be discouraged from submitting their disputes to arbitration. Likewise, they might try to avoid having the seat in Argentina.

All in all, it would have been more efficient to adopt clearer provisions instead of provisions raising so many questions as to their interpretation and application. In this scenario, the development of arbitration as an alternative dispute resolution mechanism will be hindered until a reasoned and strong case law sheds light on these provisions, interpreting them in a pro-arbitration fashion. Despite this apparently negative scenario, based on some judicial precedents, we are optimistic about the likelihood of a positive development in favor of commercial arbitration. The role of the arbitration community will be to support the courts in finding the most favorable interpretation of the unfortunate provisions of the Code.