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Potential Issues With the Challenge of Arbitrators in the New Uruguayan Domestic Arbitration Law

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Law No. 20.257, enacted on April 25, 2024, amended the arbitration procedure in domestic arbitrations contained in the Uruguayan General Procedural Code ("GPC"). Pursuant to Law No. 19.636–Act on International Commercial Arbitration ("AICA"), the amendment of the General Procedural Code enhanced the domestic arbitration framework by providing greater flexibility. The new law eliminated the mandatory signature of an arbitral *compromis* with a notary public, granting the arbitration agreement complete enforceability, conceded the arbitral tribunal with the powers to order conservatory and interim measures, established that, unless agreed otherwise, the arbitration will be based on law, rather than *ex aequo et bono*; among other procedural modifications.

Although these changes are undoubtedly positive, potential deficiencies in challenging arbitrators still remain. We discuss such deficiencies below.

The 2024 Amendment

The new text of the rules for challenging an arbitrator appears to exclude facts that occurred prior to the appointment of an arbitrator as a basis for challenge, which is not only inconvenient but also inconsistent with the rules set in AICA and the reasons given in the legislative history of Law No. 20.257.

Article 485.2 of the GPC, as amended by Law No. 20.257, establishes:

> "**Arbitrators** can be challenged within ten days after notification of appointment or knowledge of subsequent facts giving rise to the challenge."

The previous version of Article 485.2 of the GPC provided:

> "**Arbitrators appointed by the court or by a third party** can be subject to challenge within ten days after notification of the appointment or knowledge of the

> subsequent facts giving rise to the challenge."

Analysis

As it seems from the wording of both versions of Article 485.2, the amendment made by Law No. 20.257 is partly positive, since the previous provision did not expressly include arbitrators appointed by the parties to the proceeding, which generated an unjustified difference in the treatment of challenges depending on who appointed the arbitrator. However, the second part of the provision continues to be problematic as it appears to exclude the possibility of challenging an arbitrator based on events that occurred prior to their appointment but known afterwards.

In other words, the rule in its two versions allows the challenge of an arbitrator in only two scenarios: (i) within "ten days after the notification of the appointment", which necessarily assumes that the party has knowledge of the grounds for requesting the challenge at the time of the appointment; and (ii) when the party becomes "aware of the **subsequent** facts giving rise to the challenge". The problem with this wording is that, at least in principle, it excludes the possibility of challenging an arbitrator for facts that occurred **prior** to his or her appointment, which were not known to the party at the time of appointment.

The *rationale* behind requiring a party to have **knowledge** of the facts giving rise to the challenge is to ensure that those parties who were unaware of a certain circumstance are not barred from challenging an arbitrator due to their lack of knowledge. Law No. 20.257 appears to exclude the possibility of challenging an arbitrator for facts that occurred prior to the appointment, regardless of whether the party had knowledge of said facts. A literal interpretation of this rule may prevent a party, unaware of certain facts at the time of appointment, from using those facts later to challenge the appointment.

We have not found any public case law addressing this issue in Uruguay. It may be possible to interpret "knowledge of **subsequent** facts" as meaning that the facts invoked by the party to support its challenge must have occurred after the appointment of the arbitrator. Under this *rationale*, if said provision had intended to include the facts known after the appointment–as Law No. 19.636 does,[1)] The wording would have to be "upon **subsequent** knowledge of the facts giving rise to the challenge".

This conclusion is reaffirmed by the text of Article 485.1 of the GPC, which also refers to "subsequent facts":

> "Arbitrators appointed by agreement of the parties may not be challenged, **except on the grounds of facts supervening such agreement**. Arbitrators must be impartial and independent and must remain so throughout the arbitration."

This, in addition to generating an unjustified inconsistency between the regulation of international commercial arbitration and domestic arbitration,[2)] is contrary to the *rationale* of the rule: if the provision requires the **knowledge** of the party for the challenge it is precisely to protect it from

situations where there are facts that could lead to said challenge, but these facts are unknown to the party at the time of the appointment. This is not uncommon in arbitral practice. The situation is particularly serious if it is considered that the purpose of the provisions providing for the challenge of a member of the arbitral tribunal is to ensure a fundamental right of the parties: to have their case heard by an impartial and independent tribunal.[3)] Under a literal interpretation of the current rules, a party may receive notice of an event occurring prior to the appointment that demonstrates the lack of impartiality or independence of an arbitrator, and the time limit for submitting the request for a challenge may have already elapsed. This, if crystallized, could generate problems in the enforcement and annulment of an award, since a biased tribunal is a textbook example of a violation of due process.

In addition, the wording of Articles 485.1 and 485.2 concerning "subsequent facts" does not conform to the principle set forth in the final sentence of Article 485.1 which states that "arbitrators shall be impartial and independent and must remain so throughout the arbitration". Following a literal interpretation of Article 485, it is possible that an arbitrator that does not comply with the impartiality or independence requirements due to facts that occurred prior to their appointment but known afterwards may not be able to be challenged.

The solution commonly found in most international arbitration rules regarding the challenge of an arbitrator, contemplates events occurring prior to the appointment. In addition to the UNCITRAL Model Law, the UNCITRAL Arbitration Rules and the Arbitration Rules of recognized arbitration centers such as the ICC Court, the LCIA, the HKIAC, the SIAC, the CAM and the SCC require that the knowledge of the facts in which a party bases its challenge must be acquired after the appointment of the arbitrator. In view of this, facts which occurred–but were not known–prior to the appointment, are qualified as grounds for challenge.

Conclusion

To conclude, we understand that there are no valid reasons to exclude facts that occurred prior to the appointment of an arbitrator, but unknown to a reasonably diligent party, from the grounds for challenge. Thus, Law No. 20.257 missed an opportunity to amend a deficiency that, if Uruguay prospers as a seat of arbitration, may generate problems in the interpretation of the rule, since the current rule of the GPC deviates from most arbitration rules and principles related to arbitrators' challenges. Parties wishing to avoid this issue may opt for the application of arbitration rules (such as the UNCITRAL Rules) which hold their own rules for the challenge of arbitrators, and which–by virtue of Article 485.5 of the GPC–make its rules merely supplementary.

It remains to be seen how Uruguayan courts will construe the interpretation of Article 485.2 and how they will attempt to reconcile this rule with the duty of impartiality and independence provided for in Article 485.1.

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References

?1 Law No. 19.636 is based on the UNCITRAL Model Law. See Article 12.2 of the UNCITRAL Model Law (2006).

?2 In the explanatory memorandum of the bill submitted by Representative Martín Lema in February 2021, which eventually resulted in Law No. 20.257, it was specified that "there is no reasonable cause to treat in a markedly unequal manner the litigants in a domestic arbitration and in an international one reached by the Uruguayan procedural legislation". See Folder No. 1141 of 2023, Report No. 889 of March 2024, Chamber of Senators of the Oriental Republic of Uruguay, p. 48.

?3 Article 485.1 of the GPC (as amended by Law No. 20.257) establishes that: "[t]he arbitrators appointed by agreement of the parties may not be challenged, except for facts supervening such agreement. Arbitrators must be impartial and independent and must remain so throughout the arbitration". Commentators on the UNCITRAL Model Law -substantially followed by our Law 19.636- even state that "[t]he requirement that an arbitration be impartial and independent […] is a mandatory one; the parties may not agree to have a partial or non-independent arbitrator". See A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary, Holtzmann and Neuhaus, Kluwer Law International, 1989, p. 409.

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