ARGENTINA

LAW & PRACTICE: p.15

Contributed by Beretta Godoy

The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

DOING BUSINESS IN ARGENTINA: p.23

Chambers & Partners employ a large team of full-time researchers (over 140) in their London office who interview thousands of clients each year. This section is based on these interviews.

Law & Practice

Contributed by Beretta Godoy

CONTENTS

1. General **p.16**
- 1.1 Prevalence of Arbitration p.16
- 1.2 Trends p.16
- 1.3 Key Industries p.17
- 1.4 Arbitral Institutions p.17

2. Governing Law **p.17**
- 2.1 International Legislation p.17
- 2.2 Changes to National Law p.17

3. The Arbitration Agreement **p.17**
- 3.1 Enforceability p.17
- 3.2 Approach of National Courts p.17
- 3.3 Validity of Arbitral Clause p.18

4. The Arbitral Tribunal **p.18**
- 4.1 Selecting an Arbitrator p.18
- 4.2 Challenging or Removing an Arbitrator p.18
- 4.3 Independence, Impartiality and Conflicts of Interest p.18

5. Jurisdiction **p.18**
- 5.1 Matters Excluded from Arbitration p.18
- 5.2 Challenges to Jurisidiction p.18
- 5.3 Timing of Challenge p.18
- 5.4 Standard of Judicial Review for Jurisdiction/Admissibility p.19
- 5.5 Breach of Arbitration Agreement p.19
- 5.6 Right of Tribunal to Assume Jurisdiction p.19

6. Preliminary and Interim Relief **p.19**
- 6.1 Types of Relief p.19
- 6.2 Role of Courts p.19
- 6.3 Security for Costs p.19

7. Procedure **p.19**
- 7.1 Governing Rules p.19
- 7.2 Procedural Steps p.19
- 7.3 Legal Representatives p.19

8. Evidence **p.20**
- 8.1 Collection and Submission of Evidence p.20
- 8.2 Rules of Evidence p.20
- 8.3 Powers of Compulsion p.20

9. Confidentiality **p.20**

10. The Award **p.20**
- 10.1 Legal Requirements p.20
- 10.2 Types of Remedies p.20
- 10.3 Recovering Interest and Legal Costs p.20

11. Review of an Award **p.20**
- 11.1 Grounds for Appeal p.20
- 11.2 Excluding/Expanding the Scope of Appeal p.20
- 11.3 Standard of Judicial Review p.20

12. Enforcement of an Award **p.21**
- 12.1 New York Convention p.21
- 12.2 Enforcement Procedure p.21
- 12.3 Approach of the Courts p.22

Contributed by Beretta Godoy **Author** Federico Godoy

Beretta Godoy represents clients before judicial, administrative and arbitration courts and tribunals. Lawyers actively participate in trials, arbitral proceedings, ADRs, and have litigated at all judicial levels, both administrative and arbitral, including the Federal Supreme Court of Justice and the Supreme Court Argentine provinces. Areas of specialisation include protection of foreign investments under bilateral investment treaties, international commercial arbitration and mediation, domestic commercial arbitration and complex commercial litigation.

Authors

Managing partner **Federico Godoy** leads the arbitration department. He specialises in international arbitration, dispute resolution and energy and natural resources. Godoy is a member of numerous arbitration institutions and regularly advises international clients. He has had published a range of arbitration-related articles and regularly speaks on the subject at events.

1. General

1.1 Prevalence of Arbitration

Argentina has a long-standing history of supporting arbitration that dates back to the 19th century. The Argentine Supreme Court has recognised the traditional arbitral principles such as kompetenz-kompetenz and the separability principle. The oldest precedent in this sense was issued in 1922 in *Otto Franke v Provincia de Buenos Aires*. Lower courts recognised this principle as early as 1926. More recently, in *Enrique Welbers S.A. v Extraktionstechink* (1988) and *Camuzzi v Sodigas* (1999), the Commercial Court of Appeals of the City of Buenos Aires stated that the arbitral clause is an autonomous agreement and recognised the jurisdiction of arbitral tribunals to decide on their own jurisdiction.

Argentina is a party to both the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1975 Inter-American Convention on International Commercial Arbitration. In addition, Argentina has entered into regional conventions that cover matters related to arbitration, such as the 1889 and 1940 Montevideo Treaties on Civil Procedure, the 1979 Inter-American Convention on the Extraterritorial Efficacy of Foreign Judgments and Arbitral Awards, and the 1998 Mercosur International Commercial Arbitration Convention, among others. According to Article 31 of the Argentine Constitution, international treaties have supremacy over domestic legislation. This is highly important for both international arbitration proceedings seated in Argentina and for the enforcement of foreign awards. This principle has also been recognised by the Supreme Court in the cases *Fibraca Constructora S.C.A. v Comisión Técnica Mixta de Salto Grande* (1989) and *Chiorzo, Juan v Comisión Técnica Mixta de Salto Grande* (1997).

As many of the biggest companies operating in Argentina are multinational enterprises or belong to foreign investors, it is customary for arbitration to be used for the resolution of commercial disputes. Save for occasional exceptions, Argentine courts have traditionally enforced arbitration agreements and provided support to arbitration by enforcing preliminary and evidentiary measures ordered by arbitral tribunals, and enforced domestic and foreign arbitral awards over commercial disputes.

1.2 Trends

The key development in Argentina is the formal adoption of the UNCITRAL Model Law. Last year, the Argentine National Congress passed a new Civil and Commercial Code that will enter into force on August 1, 2015 and will introduce a new regulatory framework for arbitration in Argentina. Although Argentine courts have already adopted key provisions of the UNCITRAL Model Law such as the

principle of kompetenz-kompetenz, precautionary measures, and the autonomy of the arbitration agreement, these principles will now be expressly included in the new Civil and Commercial Code. The Code will also set aside one of the most traditional requirements of Argentine legal framework: the 'submission agreement'.

1.3 Key Industries

International arbitration has been most commonly used in Argentina by companies in the oil and gas, mining, shipping, insurance, international construction, infrastructure and energy industries. That said, the tendency has been to adopt arbitration as a dispute resolution mechanism for any complex commercial matter or contracts involving material amounts. This trend is expected to be maintained and further developed over 2015 due to Argentina's promising future in natural resources and infrastructure projects.

1.4 Arbitral Institutions

Official statistics in respect of the most used arbitral institutions are not published in Argentina. However it may be noted that the most popular institutions are, at an international level, the International Chamber of Commerce (ICC) and the International Centre for Dispute Resolution (AAA), and at a local level, the Arbitral Tribunal of the Buenos Aires Stock Exchange, the Arbitral Chamber of the Buenos Aires Grain Stock Exchange, and the Argentine Chamber of Commerce. It must also be noted that, due to the increasing importance of Chinese investment in Latin America, Asian arbitration institutions such as CEAC have targeted their efforts towards the Latin American market. The preferred choice of Chinese SOE investors is normally the China International Economic and Trade Arbitration Commission (CIETAC) or the Beijing Arbitration Commission (BAC), but there is a growing tendency towards greater flexibility, such as agreeing to Singapore International Arbitration Centre (SIAC) or Hong Kong International Arbitration Centre (HKIAC) arbitration as a middle ground, or even the London Court of International Arbitration (LCIA) or Europe-based ICC arbitration.

2. Governing Law

2.1 International Legislation

There is no specific legislation governing international arbitration. Arbitration is governed by the National Civil and Commercial Procedural Code and by the pertinent procedural codes issued by each Argentine province.

Argentina's current arbitration framework is not based on the UNCITRAL Model Law. However, on August 1, 2015 a new Civil and Commercial Code will come into force introducing most of the provisions contained in the Model Law.

2.2 Changes to National Law

The key legislative change is the new Civil and Commercial Code, which will enter into force in August 1, 2015 and will introduce fundamental changes to the Argentine arbitration framework.

The new Code will incorporate modern legal provisions of the UNCITRAL Model Law such as the principle of competence-competence, precautionary measures, the autonomy of the arbitration agreement, and it will set aside one of the most traditional requirements of Argentine legal framework: the arbitral 'compromis' or submission agreement. This requirement compels parties to enter into an agreement containing the names of the arbitrators and clearly identifying the matters submitted to them. This is notwithstanding that the parties may have previously entered into an arbitration agreement.

3. The Arbitration Agreement

3.1 Enforceability

The arbitration agreement must be in writing. The dispute must be over matters of an economic nature and be capable of being privately settled.

3.2 Approach of National Courts

Argentine national courts recognise that the arbitration agreement precludes judges from resolving the conflicts that the parties have agreed to submit to arbitration. This approach can be evidenced, for instance, in the case *Fe S.A. v Telefónica Móviles Argentina S.A.* In this case, a Court of Appeals in Buenos Aires confirmed the validity of the arbitration clause contained in an agency agreement, on the basis that the claim referred to matters related to the

performance of the agency agreement, which were, in turn, covered by the arbitration clause. The Court of Appeals ruled that the plaintiff had to honour the arbitration clause.

3.3 Validity of Arbitral Clause

Arbitral clauses can be considered valid, even if the rest of the contract is not. Since the beginning of the 20th century, the Argentine Supreme Court has recognised the separability principle. The oldest relevant decision was handed down in 1922 by the Argentine Supreme Court in the *Otto Frank v Provincia de Buenos Aires* case. Additionally, lower courts have recognised this principle as early as 1926. More recently, in *Enrique Welbers S.A. v Extraktionstechink* and *Camuzzi v Sodigas*, the Commercial Court of Appeals of the City of Buenos Aires has stated that the arbitral clause is an autonomous agreement and recognised the jurisdiction of arbitral tribunals to decide on their own jurisdiction.

4. The Arbitral Tribunal

4.1 Selecting an Arbitrator

There is no express rule in the National Code of Civil and Commercial Procedure that limits the parties' autonomy to select arbitrators other than the requirement of enjoying full exercise of their civil rights. However, in practice arbitration at law requires arbitrators to be lawyers.

4.2 Challenging or Removing an Arbitrator

Pursuant to the National Civil and Commercial Procedural Code, a party can challenge an arbitrator on the same grounds as judges, namely: the arbitrator having a familial relationship with one of the parties; the arbitrator or a next-of-kin having an interest in the dispute or in a similar dispute; the arbitrator's partnership, association or community of interest with one of the parties or their counsels; the arbitrator's pending litigation against one of the parties, as the creditor or debtor of one of the parties, having filed a criminal accusation against one of the parties, or one of the parties' having filed an accusation against the arbitrator; the arbitrator having acted as counsel to one of the parties or rendered an opinion on the case before or after its commencement, having received material benefits from one of the parties, being a friend or competitor of, or showing hatred or resentment against one of the parties.

A court may intervene in the selection of an arbitrator. As a general principle parties are free to determine the number and procedure to appoint arbitrators. In the absence of a procedure or in case a vacancy arises, a party may request a judge to appoint the missing members.

4.3 Independence, Impartiality and Conflicts of Interest

Arbitrators must be impartial and independent. A party can challenge an arbitrator on the same grounds as judges.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

Under Argentine law, for a dispute to be arbitrable, it must be over matters of economic content and capable of a private settlement. Within those limits, an arbitral tribunal has jurisdiction to hear all matters related to a dispute submitted to it, including constitutional matters.

While matters of public law, such as antitrust, tax, criminal or administrative law can be analysed by an arbitral tribunal if they are relevant to the resolution of a private dispute (for example, if a particular construction of a contract would be contrary to tax law), it would not be possible to submit to arbitration administrative, tax, criminal or any other claims governed by public law. Governmental entities (including state enterprises) must be authorised by law to submit disputes to arbitration.

5.2 Challenges to Jurisidiction

An arbitral tribunal may rule on a party's challenge to the tribunal's own jurisdiction. Moreover, in general terms, courts are respectful of the parties' agreement to arbitrate and declare their lack of jurisdiction. However, if the arbitration agreement is considered invalid, a court may address issues of jurisdiction.

5.3 Timing of Challenge

Parties have the right to go to court to challenge the jurisdiction of the arbitral tribunal as soon as a case has been filed.

5.4 Standard of Judicial Review for Jurisdiction/Admissibility
Issues of admissibility and jurisdiction are reviewed *de novo*.

5.5 Breach of Arbitration Agreement
Argentine national courts have recognised that the arbitration agreement precludes judges from resolving the conflicts that the parties have agreed to submit to arbitration.

5.6 Right of Tribunal to Assume Jurisdiction
As a general rule, an arbitral tribunal cannot assume jurisdiction over individuals or entities that are not parties to an arbitration agreement or signatories of the contract that contains it. There are instances in which the law mandatorily states that certain disputes must be resolved by arbitration, such as in certain consumer cases.

6. Preliminary and Interim Relief

6.1 Types of Relief
While there are no express legal provisions on this matter, there is a consistent line of precedents setting forth that arbitrators are empowered to grant interim relief. If the enforcement of the interim measure requires any kind of compulsory action, or to be recorded in public registries, arbitrators will require the assistance of a judicial court to enforce the interim measure.

6.2 Role of Courts
Courts play an important role in preliminary relief in arbitration proceedings. Specifically, arbitrators are empowered to order the production of evidence or injunctions, but in order to enforce such order (compel it), to record it in public registries or to compel a third party witness to appear before the arbitral tribunal, a tribunal would require the assistance of judicial courts.

6.3 Security for Costs
The National Code of Civil and Commercial Procedure does not contain any legal provisions regarding the power to order security for costs. However, the rules of arbitral institutions generally allow it and it is a common practice.

7. Procedure

7.1 Governing Rules
The National Code of Civil and Commercial Procedure provides for rules governing the procedure of arbitration in federal courts and in courts in the City of Buenos Aires. Provincial procedural codes also contain arbitration rules.

7.2 Procedural Steps
Current laws require that, even when there is a previous arbitration clause, the parties execute an 'arbitral compromis' (submission agreement), which must contain, at least: the date on which it is executed, the name, the domicile of the parties, the name and domicile of the arbitrators, the issues to be determined by the arbitral tribunal, and the penalty if one party fails to perform indispensable acts for the conduct of arbitration. If the parties do not agree on the issues to be determined by the arbitral tribunal this question and, as applicable, the rules of the arbitral institution administering the arbitration do not provide another remedy, the matter must be referred to a court which will fill in the missing point of the submission agreement. That said, in the case *Compañia Naviera Pérez Companc y otros v Ecofisa y otros* (1990) (also known as the *Bridas* case), a domestic ICC arbitration, Chamber B of the Commercial Court of Appeals of the City of Buenos Aires ruled that it was empowered to review and set the terms of reference determined by the arbitral tribunal. Similarly, in *Entidad Binacional Yacyreta v Eriday* (2004), a court stayed an international ICC arbitration proceeding while it reviewed challenges made by one of the parties to the terms of reference and to members of the arbitration tribunal.

However, the submission agreement requirement will be removed after the entry into force of the new Civil and Commercial Code on August 1, 2015.

7.3 Legal Representatives
Practising law in Argentina requires holding a valid degree from an Argentine university or validated by an Argentine university, and to be admitted to the Bar of the jurisdiction where the lawyer has his/her practice. This requirement, however, does not apply to international arbitration.

8. Evidence

8.1 Collection and Submission of Evidence

Discovery and disclosure of evidence are not part of the Argentine legal system and therefore are not expected to be present in domestic disputes (and in practice they are also rare in international arbitrations with a seat in Argentina). That said, a party can request the other party to produce specific documents it has in its possession, and the court can direct the parties to provide information requested by expert witnesses of either party in order to produce their reports.

Under Argentine judicial procedure, witnesses (even hostile ones) cannot be asked leading questions at cross-examination. While arbitral tribunals enjoy ample discretion to govern witness hearings, a few traditional arbitration centres may choose to abide by these restrictions. That said, in the majority of cases the parties would be allowed to freely examine and cross-examine witnesses.

8.2 Rules of Evidence

Arbitral tribunals have discretion to organise the proceedings (including the production of evidence) within the limits of the principle of due process.

8.3 Powers of Compulsion

National courts may grant assistance to arbitrators by ordering a party to provide evidence or documents, or require the attendance of a witness.

9. Confidentiality

Argentine law does not provide for the confidentiality of arbitration proceedings. Confidentiality should be agreed upon by the parties or (as is generally the case) be provided for in the rules of arbitral institutions.

10. The Award

10.1 Legal Requirements

Arbitral tribunals must render their awards in writing and must provide reasons for their decisions. The final award must adequately address all issues submitted to arbitration, including ancillary matters, and must be issued within the established term.

10.2 Types of Remedies

Under Argentine law, punitive damages are not allowed.

10.3 Recovering Interest and Legal Costs

As a general rule, the losing party in judicial cases must bear the costs of the proceedings and this is also followed in the arbitration practice. The parties are also entitled to recover interest if they so requested in the complaint.

11. Review of an Award

11.1 Grounds for Appeal

Under Argentine Law, arbitration at law is subject to all recourses available against a judgment rendered by a court of first instance. However, in practice parties generally waive the right of appeal. In that case, the only recourse to challenge an arbitral award is to request its annulment.

According to National Civil and Commercial Procedural Code an arbitral award may be challenged if: (i) there is an essential procedural error; (ii) the award was granted by arbitrators after the deadline or on the basis of matters exceeding the tribunal's jurisdiction; or (iii) if it contains contradictory provisions within the award.

The annulment motion must be submitted to the arbitral tribunal who rendered the award. If the arbitral tribunal deems that the claim has been filed correctly, it shall deliver the case to the Court of Appeals. On the contrary, if the arbitral tribunal rules that the petition is inadmissible, the interested party may file a complaint with the Court of Appeal.

Equity arbitration awards cannot be appealed, and can only be annulled through a judicial action if they are rendered outside the agreed time frames, or the decision covers matters not submitted to arbitration.

11.2 Excluding/Expanding the Scope of Appeal

Parties may waive the right to appeal to state courts. However, the right to seek the annulment of an arbitral award cannot be waived.

11.3 Standard of Judicial Review

If parties have not waived their right to appeal, the standard of judicial review shall be *de novo*. In the

alternative, judicial review will be limited to annulment and such review will be narrowed to the facts listed in **10.1** above.

12. Enforcement of an Award

12.1 New York Convention

Argentina is a party to the New York Convention and the Panama Convention. Argentina is also a party to the Inter-American Convention on the extraterritorial effectiveness of foreign judgments and awards (Montevideo, 1979) and the Treaty of Montevideo of 1940 on international procedural law (which contains provisions on the enforcement of foreign arbitral awards). Within the MERCOSUR framework, Argentina is a party to the MERCOSUR Agreement on international commercial arbitration and to the Las Leñas Protocol on Cooperation and Judicial Assistance in Civil, Commercial, Labour and Administrative Matters (which also includes rules on the enforcement of foreign arbitral awards).

12.2 Enforcement Procedure

The party seeking to enforce an award in Argentine courts must file an application with a court of first instance. The award must comply with certain requirements such as: (i) being legalised and translated into Spanish; (ii) *res judicata;* (iii) decided upon by a tribunal vested with jurisdiction in the matter; (iv) the party against whom the award is rendered must have been served with notice of the arbitration and must have had the opportunity to defend itself; (v) the award must not be incompatible with another award or judgment issued before or simultaneously in Argentina; and (vi) it must not affect Argentina's international public policy.

Two relevant cases on the enforcement of arbitral awards in Argentina are *Reef Exploration v Compañía general de Combustibles*, and *Armada Holland B.V. Schiedam Denmark v Inter Fruit S.A.*

In the first case, Reef Exploration ("Reef") and Compañia General de Combustibles S.A. ("CGC") were parties to a stock purchase agreement which included an arbitral clause. Reef Exploration started an AAA arbitral proceeding against CGC to obtain compensation for the breach of the provisions of this agreement. The tribunal was seated in Texas, United States. In the meantime, CGC filed a petition with Argentine courts to request a declaration that the arbitral tribunal lacked jurisdiction to hear the case.

Chamber B of the Buenos Aires Commercial Court of Appeals issued an injunction to stay the arbitral proceeding in the United States and asked a Texas court to enforce the measure. However, the Texas court refused to enforce the injunction. The arbitral tribunal disregarded the injunction and continued with the arbitral proceeding until rendering an award in favour of Reef. Then, Reef sought to enforce the award in Argentina. The court of first instance denied the enforcement. However, Chamber D of the Commercial Court of Appeals reversed the court of first instance's decision and ordered the enforcement of the award based on the *competence-competence* principle. Regarding the prior judgment issued by Chamber B of the Court of Appeals, it was decided that such decision was ineffective *vis à vis* Reef, because it was issued *ex parte*.

In *Armada Holland B.V. Schiedam Denmark v Inter Fruit S.A.* (2007), the Argentine Federal Civil and Commercial Court of Appeals denied the enforcement of a foreign arbitration award on the grounds that the arbitration agreement had not been entered into "in writing" pursuant to Article II(2) of the 1958 New York Convention. The parties had agreed to a charter-party agreement for the transportation of fruit in the "Ice Sea" vessel from the Argentine port of San Antonio Este to St. Petersburg, which set forth that any controversies arising out of the agreement would be subject to arbitration in London. Afterwards, claimant Armada Holland sent a fax to the respondent Inter Fruit S.A., informing them that the vessel to supply the transport was changed to "MV Ice Fern or substitute". The claimant alleged that the deal was closed by a phone conversation. Later on, the claimant decided that the "Pearl Reeffer" vessel would perform the transportation. A dispute arose between the parties and the claimant submitted it to arbitration in London. The case was decided by a sole arbitrator, in favour of the claimant.

When the claimant sought to enforce the award in Argentina, the defendant argued that the agreement containing the arbitration clause was never entered into, because the claimant decided that a different vessel than the one set forth in the first exchange of faxes would transport the fruits. The court of first instance accepted the defences raised by Inter Fruit

S.A., found that the charter-party agreement never came into existence and that the arbitration clause was thus inapplicable; therefore, it denied the enforcement of the award in Argentina. The judgment was appealed with the Argentine Federal Civil and Commercial Court of Appeals, which confirmed that the only "agreement in writing" under which the parties agreed to submit to arbitration the controversies was referred to the "Ice Sea" vessel, and that it could not expand its effects to an agreement over a different vessel. Thus the Court of Appeals confirmed the denial to enforce the award.

12.3 Approach of the Courts

The National Procedural Code provides as a general rule that all matters relating to disposable patrimonial rights can be subject to arbitration. Public policy matters have been defined by case law and secondary materials as fundamental principles of Argentine law.

In this regard, it is necessary to establish a difference between domestic public policy rules and international public policy. The latter refers to a set of fundamental principles and not to specific laws or rules.

On the one hand – in the domestic field – "public policy" refers to laws of mandatory application that cannot be contracted out of by the parties. On the other hand, international public policy operates as a "reservation" in favour of domestic law. This means that Argentine courts cannot apply foreign laws, judgments or awards that are contrary to such fundamental principles (for example, polygamous marriages, etc.).

The one case where an Argentine court refused to enforce an award on the grounds of public policy was *Ogden Entertainment Services Inc. v Eijo, Nestor* (2004), which was rendered with the Buenos Aires Commercial Court of Appeals. Ogden Entertainment Services Inc. ("Ogden") commenced an ICC arbitral claim in Paris against Nestor E. Eijo and Mario R. Eijo ("Eijo"). The arbitral tribunal rendered an award in favour of Ogden, then the respondents filed a request to have the award rendered ineffective. The arbitral tribunal denied the respondent's request. Next, the arbitral tribunal rendered a supplementary award ordering respondents to pay Ogden USD 307,731 for compensation and USD 533,014 for the costs of the proceedings. Ogden sought the enforcement of the award with Argentine courts. The Court of Appeals found that the costs of the proceedings grossly exceeded the total amount of the compensation granted in the award, and that this affected the right of access to justice. Therefore, the Court of Appeals denied the enforcement of the award because it deemed it contrary to Argentine international public policy.

Beretta Godoy
Sarmiento 580, 4th Floor, Buenos Aires
Capital Federal
C1041 AAL
Argentina
Tel +54 11 43267386
Fax +54 11 4326 7396
Email info@berettagodoy.com
Web www.berettagodoy.com
BERETTA GODOY