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# Arbitration in Argentina

Felipe Eduardo Zabalza  
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# LATIN AMERICAN

## Law & Business Report



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## Arbitration in Argentina

By Martín Torres Girotti and Felipe Eduardo Zabalza (M. & M. Bomchil)

The following is an analysis of arbitration law and procedures in Argentina, as well as recent decisions by the Courts.

### Background and Applicable Law for Arbitration

Argentina is a contracting state to: (i) the Montevideo treaties on International Procedural Law of 1889 and 1940, (ii) the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; (iii) the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, and (iv) the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards.

Arbitration in Argentina is governed by the Argentine National Civil and Commercial Procedural Code (hereinafter "NCCPC") which is not based on the UNCITRAL Model Law. Nevertheless, certain private institutional arbitration proceedings, such as the Enterprise Center for Mediation & Arbitration (Centro de Mediación y Arbitraje), follow the UNCITRAL Model Law.

The NCCPC governs proceedings to be heard before federal courts while the provincial codes govern arbitration in the country's provinces. Despite this discrepancy, most provincial codes of civil procedure mirror the national code and contain many of the principles described in this paper. Under the NCCPC, parties may agree on proceeding with arbitration as opposed to going to court.

The main advantages of Argentinean arbitration tribunals are that they specialize in the solution of many disputes and that they have more flexible and efficient procedures than ordinary judicial courts. Specifically, arbitration tribunals provide the advantages of choice

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and continuity of tribunal, a neutral forum. flexibility of procedures, confidentiality and finality. Additionally, the expenses and taxes that one may incur in an arbitration setting are lower than those charged by the Argentinean judicial courts.

In the case of commercial arbitration, there is an increasing importance for international trade and support from international institutions. For instance, the Inter American Development Bank (IADB), which has developed a very interesting program for ADR Centers, has raised several initiatives to make sure new national legislation is consistent with generally accepted international standards<sup>1</sup>.

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Furthermore, the most important arbitration tribunals in Argentina are: (i) the Arbitral Tribunal of the Buenos Aires Stock Exchange, which is generally composed by former commercial court of appeal judges; (ii) the Arbitral Tribunal of the Argentine Chamber of Commerce; (iii) the Buenos Aires Grain Exchange Arbitration Chamber and (iv) the Centro Empresarial de Mediación y Arbitraje, a non-profit organization formed by the most prominent law firms and auditing firms in Argentina.

Likewise, the NCCPC foresees ad hoc arbitration courts, which may be appointed in order to settle several matters between parties.

### The Role of Arbitration Agreements

The arbitration agreement by the parties dictates the procedures the arbitration court will follow and the matters the court will settle. Also through the agreement, the parties may, and usually do, appoint the arbitrators or waive the right to appeal the award. In essence, an arbitration clause plays a dual role: it is both a civil convention, because it is an agreement of parties, and a procedural pact, because of its goal to dictate procedural effects, such as the derogation of national jurisdiction and the submission to a particular way of settling a dispute.

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## Arbitration in Argentina (from page 7)

The parties may agree to a cláusula compromisoria, to appoint potential disputes to arbitration, or an arbitration compromise (compromiso arbitral), to settle existing conflict to arbitration. The main difference between the agreements is the timing concerning when the dispute is appointed to arbitration: before or after bringing a lawsuit before judicial courts.

The arbitration agreement must be in writing and contain a clear statement accepting submission of disputes to arbitration. With respect to the compromiso arbitral, Argentine legislation requires that it must take the form of a public deed, a private instrument, or a minute executed before the [acting or arbitration] judge or a judge that would have jurisdiction had the parties not agreed to arbitration (Article 739 of the NCCPC).

Under the above mentioned code, parties shall agree to one of the two types of arbitration: arbitration de jure, in which arbitrators have to strictly abide by written legal rules as to substance and arbitral procedure (articles 736 to 765 of the NCCPC) or amiable composition (ex aequo et bono arbitral adjudication), in which arbitrators are entitled to render the award "according to their best knowledge and understanding" (articles 766 to 722 of the NCCPC). Article 766 of the NCCPC, in its second paragraph, states that if the cláusula compromisoria or the compromise arbitral does not specify the type of arbitration the parties have agreed to, it is understood that the arbitrators shall decide as amiables compositeurs.

It is also important to point out a major positive and negative effect of an arbitration agreement. The major benefit of the agreement is that it extends jurisdiction to the arbitrators and limits the powers of the arbitrators. A drawback is that it implies the incompetency of the national judges to decide on the settlement of those disputes submitted to arbitration<sup>2</sup> Nevertheless, the negative implication of an arbitration clause, the incompetency of the ordinary courts, is readily apparent.

As a consequence of the principle pacta sunt servanda ("agreements must be carried out") and the aforementioned positive and negative implications, the primary purpose of the "arbitration clause is translated into actions and exceptions aiming at executing the arbitration agreement"<sup>3</sup>. Argentinean Law states that if one of the parties refuses to execute the arbitration agreement, the other is lawfully entitled to seek its compulsory execution (section 742 CPCCN). On the other hand, acknowledgement of the arbitration clause's mandatory nature can be sought pre-emptively if the petition is filed before the national courts. In that case, the defendant may cite the incompetence exception due to lack of jurisdiction of the ordinary courts.

The usage of arbitration clauses in international commercial agreements is increasing rapidly.

### Recent Decisions Regarding Arbitration Agreements

On February 28, 2008, Chamber D of the National Commercial Appeals Court upheld the decision of the lower court in the case "Rivadeneira, Hugo vs. ABN AMRO Bank N.A. et al on ordinary proceedings"<sup>4</sup>. The case denied the exception of incompetence opposed by the defendant before the existence of an arbitration clause incorporated in a Management Regulation of a Common Investment Fund that bound him to the plaintiff. In rendering such a decision, the National Commercial Appeals Court invoked that "the arbitration clauses that imply a resignation to the general principle of submitting disputes to ordinary judges shall be interpreted restrictively", both regarding the matter on which the arbitrators shall decide and what the parties have or might have truthfully interpreted at the moment of subscribing said arbitration clause".

Therefore, Chamber D has decided that the acceptance of the arbitration clause is limited to the interpretation of clauses from the agreement or the verification of matters that are true and certain, "excluding those hypotheses that deal with law matters or with the application of the law whose knowledge is restricted exclusively to the judges".

Although the decision of the Chamber acknowledged that the arbitration clause is a contractual convention to which the parties shall submit like they do in relation to the law, it nevertheless stated that said clause shall be interpreted according to the provisions of section 1198 of the Argentinean Civil Code.

The Chamber deemed that the "unusual economic catastrophe that took place after the execution of the agreement" (the agreement was executed in 1999 and the serious economic crisis that Argentina suffered was in 2001) "makes it unreasonable to think that it was the will of the parties to submit the interpretation of laws and other economic emergency rules, as well as the setting of alleged damages, to the decision of arbitrators, within an arbitration clause".

Therefore, the Chamber felt that "there were not enough elements to lead the Court to assertively, categorically and firmly state that the parties freely submitted to the consideration of arbitrators a completely new matter that shook the foundations of the economic structure of the agreement".

It is important to highlight that this doctrine is contrary to the one set forth in numerous precedents of the National Commercial Appeals Court and of the Supreme Court itself<sup>5</sup>.

In our opinion, and in accordance with the most relevant doctrine and jurisprudence, the true intention of the parties should prevail. In deciding the contrary, the will of the parties has been undermined, as said parties had decided that any dispute should be submitted to arbitration and not to national courts.

In this sense, the Paris Appeals Court (Tribunal de Grande Instance - Paris) has decided that, as long

as the international public order is respected, the will of the parties shall be expressed according to, among others, the following general rules: (i) the good faith interpretation principle, which does not allow a party to evade the compromise freely agreed but awkwardly expressed; (ii) the effectiveness principle, according to which if the parties include an arbitration clause in an agreement, it is presumed that their intention was to establish an effective procedure for settling disputes; and (iii) the contra profitemur principle (Paris Appeals Court, February 7, 2002, Rev. Arb. 2002, p.413, with comments of Ph. Fouchard)<sup>6</sup>.

The National Supreme Court and a few of the Chambers of the National Commercial Appeals Court have expressed, more than once, the doctrine that respects the arbitration compromises of the parties, thus supporting fundamental principles, such as free will, validity of arbitration clauses, matters that can be submitted to arbitration, the scope of the free will and the competence of the arbitration tribunal. It is now necessary to wait for opinions from the rest of the Chambers of the National Commercial Appeals Court on new cases that come to their knowledge. Meanwhile, the decisions of the National Commercial Courts providing a different solution than the one set forth by the National Supreme Court, even in relation to precedents objected by that jurisdiction, may be challenged before the Supreme Court through an extraordinary appeal.

In light of arbitration developing as an alternate and successful way to settle disputes, it is reasonable to expect that the National Commercial Appeals Court will unanimously unify the interpretation criteria of the different chambers or the National Supreme Court will issue a concrete statement on this matter.

### **Judicial Court's Review on Arbitration Awards**

No statutory provision contemplates the power of the courts to restrain any party or arbitral tribunal from proceeding with the arbitration. If a valid arbitration agreement is invoked by any of the parties before a court, the court may decline to exercise jurisdiction<sup>7</sup>. Argentine law does not require filing, registration, deposit, or confirmation of awards<sup>8</sup>.

If the parties do not waive their right to appeal the award, they can appeal it for the same reasons and bases as judicial judgments within five (5) judicial days of its issuance. The procedural provisions governing appeals from court decisions apply to recourses against arbitral awards (article 758 of the NCCPC).

Certain institutional arbitration rules establish that the awards are not suitable for appeal (Article 64 of the Organic Regulations of the Arbitral Tribunal of the Buenos Aires Stock Exchange, BOLSA DE CEREALES, CEMA, among others). Nevertheless, the parties are free to agree on their own terms and frequently do so.

Usually the parties provide that the award shall be definitive and not suitable for appeal. Notwithstanding

the foregoing, an award might be challenged by means of a nullity action or recourse on the basis of limited grounds set down by the Law (article 760 and 771 of the NCCPC).

If the arbitration procedure is heard as amiable compositeur, the award must be challenged through a complaint of nullity while the recourse of nullity must be used vis a vis awards handed down in procedures heard as laws.

The award can be nullified on the following grounds:

1. Violation of due process in law principle;
2. The award was rendered after the time-limit to issue it;
3. The award contains contradictory rulings;
4. The award decides "extra petita" (beyond the terms of dispute).

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**It is reasonable to expect that the National Commercial Appeals Court will unify the interpretation criteria of the different chambers or the National Supreme Court will issue a concrete statement on this matter.**

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This recourse shall be filed within five (5) judicial days from the notification of the award, before the Court of Appeals of the court that would have decided the dispute if it had not been submitted to arbitration. Notice of this recourse shall be served upon the counterparty, who shall respond to it within five (5) days. After this deadline, the Court of Appeals shall rule on the validity or nullity of the award (articles 243 to 246 of the NCCPC).

If it is an arbitration heard as amiable compositeurs, no appeal is possible against the award and the unsatisfied party is entitled to a nullity action only when the award has been rendered beyond the set term or on matters that were not included in the terms of dispute (Article 771 of the NCCPC).

### **Recent Decisions Regarding the Waiver of the Right to Appeal and the Recourse of Nullity**

The original doctrine of the Argentine Federal Supreme Court in re 'Cartellone'<sup>9</sup> stated that even if the right to appeal has been renounced by the parties, awards by the Public Works Arbitration Panel may be challenged before the courts not only when they are null in terms of the NCCPC, but also when they are unconstitutional, illegal or unreasonable

At first sight, this decision was interpreted as having a negative effect on arbitration awards. However, we will point out below, the latest decisions recognized that it

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only referred to a special arbitration procedure stated in the Public Works Law Nbr. 13,064.

Therefore, the principles arising from 'Cartellone' are applicable only to awards rendered by the Public Works Arbitration Panel under the Public Works Law.

But, as we will see, those principles implicitly applied only to awards issued by the Arbitration Tribunal, created by Law No. 13,064 and have not been considered in other cases.

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#### **The precedents and conclusions that we draw in this article intend to demonstrate the positive attitude of the Argentinean courts and the favourable environment for arbitration in Argentina.**

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The decision in re "Decathlon España S.A. vs. Bertone, Luis", handed down by the National Court of Appeals on Commercial Matters, Chamber D, stated that "the higher or lesser amount of said control depends on the same will which gave rise to arbitration: it will be of a maximum extension if the parties hold the appeal for not having waived it, or it will be limited to certain formal fields in the case the contracting parties have waived such appeal and only hold the nullity appeal in relation to the award"<sup>10</sup>.

According to the Court in the quoted case, "even if the Law provides for the challenge of the award through the nullity recourse, such appeal does not entitle the parties to request a revision of said award in relation to the law of the decision, but the judge shall only decide in relation to the existence of the specifically established causes, affecting the validity of the award, i.e., to control the effective performance of the requirements the legislation has considered as essential for a proper administration of justice".

Besides, the Court pointed out that "in order to solve the nullity of an award, the arguments leading to prove its injustice lack any validity, since the procedural aim of the judicial jurisdiction is completely different from that entailed by the appeal. The ordinary judges are only entitled to revise the award in relation to its justice when an appeal which opens the general jurisdiction is filed with space specifically for that. But when a question related to validity is exclusively submitted, it is not entitled to consider the manner in which the disputes have been solved, since that would mean the opening of an unexpected appeal, thereby granting the judges an unexpected jurisdictional power".

In the case "Construcnor S.A. vs. Pilkington

Automotive Arg. S.A. vs. CEMA – Centro Empresarial Mediación y Arbitraje" the Chamber K of the National Civil Appeals Court, stated that "in relation to the requested nullity (...) and being the provisions on nullity set forth by the Code consequently applicable (...) it is appropriate to state that the lack of consent by the appellant in relation to the action supposedly null stands as an admissibility condition of the nullity claim. In the case under analysis, and though it had been served noticed, the claimant did not object in due time the deferral to issue an award set forth by the tribunal. This circumstance, therefore, entailed (...) the consent to an extension in the term to issue an award, due to which the intended appeal -aimed at elliptically objecting the decision that sets forth said extension in the issuance lapse- becomes untimely". The Chamber also stated that "it is not possible, through the chosen way, to replace the appeal that was voluntarily resigned"<sup>11</sup>.

Thus, the National Civil Appeals Court, on the basis of the theory of the waiver or estoppel, reaffirmed the validity of the arbitrators' decisions and the arbitration rules to which the parties have voluntarily submitted.

Within this, in re "Cacchione, Ricardo Constantino vs. Urbaser Argentina S.A.", the Argentine Federal Supreme Court rejected an extraordinary appeal against the decision of the Arbitral Tribunal of the Buenos Aires Stock Exchange<sup>12</sup>.

While overruling the claim, the Court declared that when the parties have expressly waived the right to file judicial recourses, the intervention of judges should become admissible only through the nullity recourse.

Thus, the decision in re "Cacchione" confirmed the validity of the waivers to challenge arbitral awards, which is consistent with current Argentine doctrine.

#### **Brief Comparison Between Argentine and United States Arbitration Laws**

There are many commonalities between arbitration in Argentina and in the United States. The usage of arbitration is not as common in Argentina as it is in the U.S. but, in both countries, arbitration has become a useful tool for alternative dispute resolution. Accordingly, both countries have recently witnessed an increased use of arbitration and for the most part, welcomed its arrival.

The categories of arbitration that exist in the respective countries are the same. Both the U.S. and Argentina consider two main types of arbitration, contractual and compulsory. Contractual arbitration refers to a situation where parties voluntarily agree, by contract, to arbitrate a matter rather than litigate it in court. Failing to abide by a voluntary agreed arbitration contract constitutes a breach of the agreement. Compulsory obligation, on the other hand, is a result of express statute or regulation that requires arbitration of certain matters, for instance labor disputes in the U.S and compensation for services rendered disputes in Argentina. In either country, compulsory arbitration is not as common as the contractual form.

Another notable commonality amongst the arbitration rules in both countries is the idea of “arbitrability”. Arbitrability is the term that describes subject matter that falls within the scope of the parties’ agreement prior to the dispute. When there is a dispute after arbitration is agreed to, the laws in Argentina and the U.S. only require arbitration if the agreement covers the subject matter of the dispute at hand.

## Conclusions

The extended use of arbitration procedures as alternative means for resolving commercial disputes has significantly increased in Argentina in the last few years. This is mostly because of the delays involved in local judicial courts proceedings. Further, arbitration has proven to be an effective way to improve the framework of litigation in Argentina.

For this growth to be sustainable, we deem it important to respect commercial arbitration principles: the protection of the arbitration agreement, the preservation of the free will among the parties, and the effectiveness of the award. Otherwise, arbitration as a way of settling disputes will become useless.

Based on the foregoing, the Argentinean Courts have settled on certain principles. They put special attention to the particularities of the arbitration procedures specifically stating that courts will set aside the award if essential procedural errors were committed or the award was rendered after the time-limit for making the award elapsed.

It is important to underline that appeal abuse is a common practice. Due to this, we consider that the final and mandatory character of the award shall be given more importance, and for this purpose the courts, shall limit the judicial analysis to exceptional circumstances, with restrictive interpretation.

But within this framework, the judge is obliged to respect the waivers of the parties without approving later revocations after an adverse decision, which would alter the institution of arbitration by depriving it from one of its most important benefits<sup>13</sup>.

Based on the foregoing, the Argentine Federal Supreme Court has settled on a line of reasoning stating that it shall not hold jurisdiction to hear appeals with the sole view of modifying the criteria of the arbitrators or the fairness of their decisions, as the parties have decided by themselves to waive the authority of the judiciary courts.

Thus, Argentine courts, not considering the pitfalls in re “Rivadeneira” (which might be corrected), have begun to respect the will of the parties reflected in the arbitration clause added to the agreement and the decisions of the local and international arbitration courts, avoiding the temptation of breaking the principles that sustain arbitration as an effective way of settling disputes.

The precedents and conclusions that we draw in this article intend to demonstrate the positive attitude of the

Argentinean courts and the favourable environment to arbitration in Argentina. Unfortunately, arbitration in Argentina needs to continue evolving. Despite the strides that arbitration law has made in Argentina, we continue to lag behind countries such as the United States in the enforcement of arbitration agreements.

We are confident that arbitration in our country will continue to advance and we expect to be involved in the new era of arbitration in Argentina, where the City of Buenos Aires could be considered a potential venue for arbitration issues. □

1 Tawil, Guido Santiago, “Arbitration in Latin America: current trends and recent developments”. Senior partner of M. & M. Bomchil. The article is partially based on the paper presented by the author in the RMLF’s seminar in International Energy and Minerals Arbitration that took place in Houston, Texas in February, 2002.

2 Caivano, Roque J., Arbitraje, Updated Second Edition, Ad-Hoc, 2000, p. 115.

3 Roque J. Caivano, arbitraje, segunda edición actualizada y ampliada, ad-hoc, 2000. Página 115.

4 National Commercial Appeals Court, Chamber D, “Rivadeneira, Hugo Germán vs. ABN AMRO Bank N.A. et al”, 02/28/2008, published in [www.eldial.com](http://www.eldial.com), 04/30/2008.

5 National Commercial Appeals Court, Chamber B, 12/16/2005, “Porcelli, Daniel vs. ABN Asset Management Arg. SG”; National Commercial Appeals Court, Chamber C, 08/23/2006, “Llanos, Miguel vs. Santander Investment Soc. Gerente; Argentine Federal Supreme Court, 05/11/2004, “BASF Argentina S.A. vs. Capdevielle Key y Cía S.A.” In the Porcelli case, related to the precedent of the National Supreme Court in re BASF Argentina, it was stated that the obligation contained in the arbitration clause implies a resignation of the general principle of submitting disputes to the jurisdiction of ordinary judges, and therefore, the scope of said clause shall be interpreted restrictively; in this case the arbitration agreement is autonomous enough and it is clear that the intention of the parties has been to extend jurisdiction to a certain arbitration tribunal to settle disputes that may arise.

6 Yves Derains, Cláusulas compromisorias patológicas y combinadas, El contrato de Arbitraje, Eduardo Silva Romero, Legis, 2005, p. 197.

7 Garro, Alejandro M., Latin American Law – Arbitration Law & Practice, JurisNet, LLC, USA, 2001, page ARG C-5.

8 Garro, Alejandro M., Latin American Law – Arbitration Law & Practice, JurisNet, LLC, USA, 2001, page ARG C-5.

9 Argentine Federal Supreme Court, 06/04/2004, José Cartellone Construcciones Civiles S.A. vs. Hidroeléctrica Norpatagónica S.A. (Hidronor) S.A., in “La Ley”, v. 2004-E, p. 266

10 National Commercial Appeals Court, Chamber D, “Decathlon España S.A. c/ Bertone, Luis et al on arbitral proceeding”, 10/25/2006, El Derecho, Buenos Aires, Argentina, N° 11.745 – 04/25/2007, page 5.

11 National Civil Appeals Court, Chamber K, “Construcnor S.A. c/Pilkington Automotive Arg. S.A. vs. CEMA -Centro Empresarial Mediación y Arbitraje-”, 11/30/2007

12 National Supreme Court, in re “Cacchione, Ricardo Constantino vs. Urbaser Argentina S.A.”, 03/11/2008, C. 2388, XLII.

13 National Supreme Court, in re “Color S.A. vs. Max Factor Sucursal Argentina”, 11/17/94, Rev. ED 161-514, vote of Mr. Boggiano.