Argentina’s Arbitration Legal Reform: Steps in the Right Direction?

Kluwer Arbitration Blog
November 1, 2017

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Please refer tot his post as: Nicolás Costabile, ‘Argentina’s Arbitration Legal Reform: Steps in the Right Direction?’, Kluwer Arbitration Blog, November 1 2017, http://arbitrationblog.kluwerarbitration.com/2017/11/01/booked-argentinas-arbitration-legal-reform-steps-right-direction/

Argentina’s Arbitration Legal Reform: Steps in the Right Direction?

Argentina is arguably one of the countries with the most untapped economic potential worldwide. Argentina’s government, led by President Mauricio Macri, is trying to change that. Together with undertaking economic and political reforms aiming at stimulating private investment, the Argentine government is pushing for an exhaustive legal reform. This reform includes revising its outdated arbitration legal framework as, it is often said that, an arbitration-friendly regime is regarded as crucial for foreign investors.

In the past couple of years, Argentina has enacted a new Civil and Commercial Code (“CCC”) including substantive provisions on arbitration, passed a law on Public-Private Partnership Contracts (“PPPC”) expressly providing for arbitration clauses in such contracts, and this year, the government introduced two bills into Parliament: (1) an international commercial arbitration law, based on the 2006 UNCITRAL Model Law, and (2) a reform to Section 29 (Contract of Arbitration) of the CCC.

A. Argentina’s Current Arbitration Legal Framework: A Need for Reform.

Argentina’s arbitration legal framework is fragmented and outdated. As opposed to other Latin American countries, in Argentina there is no unified international or domestic arbitration statute. Arbitration legislation is divided into federal (nationwide) legislation and provincial (local) legislation. While at the federal level, arbitration is regulated in at least two different statutes, most of the 23 Argentine provinces have arbitration-specific provisions in their provincial procedural codes. Arbitrations seated in the city of Buenos Aires are governed by federal legislation.

The two main federal (nationwide) statutes are the CCC and the Civil and Commercial Procedural Code (“CCPC”). The CCC, which was enacted in August 2015, introduced a set of substantive provisions under its Section 29 (Contract of Arbitration) in an attempt to modernise the substantive legal framework for arbitration at the federal level. Although not entirely based on the Model Law, the CCC was a step in the right direction as it adopts many of its core principles.

On the other hand, Section VI of the CCPC governs the arbitration procedure. This section has remained almost unchanged since the CCPC entered into force in 1967. Many of its provisions are therefore outdated. For example, there is no express provisions on separability and kompetez-kompetenz; if the parties’ agreement to arbitrate is in a separate document to the contract, it must have the formalities of a public or private instrument or be approved by the court (Art. 739); and if the

parties have failed to agree upon a specific procedure, the arbitral tribunal must follow the procedure for court proceedings (Art. 751).

Although these two codes appear to regulate different facets of arbitration, i.e., substantive issues (the CCC) and procedural issues (the CCPC), there is in fact some overlap and contradiction between the two. For example: (1) under the CCPC, when it is not clear whether the tribunal should act as *amiable compositeurs* or resolve the dispute based on the law, it has to be the former (Art. 766), whereas under the CCC (Art. 1652) it has to be decided based on the law; (2) while under the CPCC (Arts. 746-747) the challenge to an arbitrator shall always be decided by the court, under the CCC (Art. 1663), it shall be decided by the institution that administers the arbitration or, in the absence thereof, by the court; and (3) while under the CCC (Art. 1656), parties have the right to review final awards by way of appeal before national courts, under the CPCC (Arts. 758-760), this right can be waived. The right to set aside the award cannot be waived under either code.

Some of the uncertainty created by these contradictions have been clarified by the courts. For example, on whether awards should always be subject to appeal, as provided by Article 1656 of the CCC, courts have held consistently that the wording in Article 1656 regarding the possibility to appeal the arbitral award should be interpreted as the setting aside of the award and the only available recourse against final awards.

Other relevant arbitration provisions are included in the recent PPPC law enacted in November 2016. This law governs contracts between bodies and entities comprising the national public sector and private or public individuals or entities, as contractors. It applies to projects in the infrastructure, housing, services, production, applied research and technological innovation sectors. The main arbitration-related provisions included in the PPPC law are Articles 25 and 26 which essentially provide that: (i) the parties may choose arbitration as a means of dispute resolution. If so, an arbitration clause, which must be approved by the Executive Branch of the government and communicated to the Argentine Congress, shall be included in the contract, and (ii) arbitral awards rendered in Argentina can only be reviewed by the setting aside procedure or be subject to clarification of any of the terms of the award, as provided by law. These reviews cannot include a reconsideration of the facts of the case or the application of the provisions of the applicable law.

Unlike other countries, in Argentina there is no clear guidance as to what constitutes “international” arbitration. The same set of scattered provisions govern both domestic and international arbitrations. The distinction between domestic and international arbitrations is relevant because international (or “foreign”) arbitration awards are enforceable in more than 157 countries through the New York Convention. In contrast, parties to domestic arbitrations cannot avail themselves of the New York Convention mechanism to enforce domestic awards. With no clear rules as to whether arbitrations seated in Argentina are considered “international”, there is thus no certainty as to whether such awards will be enforced, if needed, via the New York Convention.

In sum, as it currently stands, Argentina’s arbitration legal regime is dispersed across different statutes, sometimes overlapping in crucial issues and providing contradicting solutions. Parties to international arbitrations seated in Buenos Aires, for example, do not have an easy task where Argentine law governs and Buenos Aires’ courts may need to assist in such arbitrations. As the Argentine Government has reasoned, a reform is therefore necessary.

B. Argentina’s Proposed Arbitration Legal Reform

As part of a wider legal reform of the Argentine justice system, two bills have been introduced into parliament to modernise its arbitration framework: (1) an international commercial arbitration law, based on the Model Law, and (2) a reform to Section 29 (Contract of Arbitration) of the CCC.

1. Proposed International Commercial Arbitration Law

On 7 September 2017, the Argentine Senate approved the proposed International Commercial Law bill which is now pending approval from the Representatives Chamber before it comes into force. The new law will govern international commercial arbitrations seated in Argentina.

The new law mirrors the Model Law almost entirely except for a few substantive differences. Under the proposed bill: (1) parties cannot agree that the subject matter of the arbitration agreement relates to more than one country, as one of the possibilities for an arbitration to be considered "international" as provided under the Model law (proposed Art. 4), (2) the "in writing" requirement of arbitration agreements cannot be recorded "orally, by conduct, or by other means" as provided by the Model Law (proposed Art. 15), (3) all awards have to be reasoned, as parties cannot agree otherwise as under the Model Law (proposed Art. 87), and (4) the time frame for setting aside an award is reduced substantially from three months under the Model Law, to thirty days in the proposed bill (proposed Art. 100).

2. Proposed Amendment to the CCC

Although the CCC has come into force fairly recently (in August 2015), an amendment of its arbitration section (Section 29) has been sent to Parliament in March 2017. Its discussion by Parliament has yet to start, but the reform is aimed at unifying the Argentine arbitration regime by modifying (or removing entirely) certain provisions that are considered problematic and contrary to key provisions of the proposed international commercial arbitration law. Among the proposed amendments, three are the most significant.

First, Art. 1651, which expressly excludes the "national or provincial state", consumer, labour, and family disputes from being capable of settlement by arbitration, is changed entirely. Its proposed wording broadens the scope of arbitrable issues considerably as it only excludes from arbitration "issues that are not capable of being settled". The proposed amendment also provides that an arbitration agreement may not be opposed on the ground that the rules applicable to the settlement of the dispute are public policy rules.

Second, the last sentence of Art. 1655, that provides that interim measures may be challenged before state courts if they 'violate constitutional rights' or if the courts 'deemed them unreasonable', is eliminated. This is to avoid giving courts broad discretion to invalidate measures adopted by arbitral tribunals as "unreasonable".

Third, the last sentence of Article 1656 is cut out, as it provides that parties cannot waive the right to judicial review of final awards by way of appeal. The proposed amendment also clarifies that when parties have agreed to submit their disputes to arbitration, courts should deny jurisdiction unless they find that the arbitration agreement is "null, ineffective or inapplicable"

C. Are these Reforms the Best Move Forward?

The proposed reforms are certainly a big step in the right direction. The arbitration community as a whole, but particularly investors, should welcome these measures as they are aimed at making Argentina more arbitration-friendly. These measures will simplify the Argentine arbitration legal framework by eliminating outdated provisions and including modern arbitration provisions in line with other countries in the region. This will increase Buenos Aires's attractiveness as a seat of arbitration.

Having said that, there is still room for improvement. Assuming that both reforms are approved by Parliament, there would be two different legal regimes for international and domestic arbitrations. While international commercial arbitrations would be governed by the new arbitration law, domestic

arbitrations would be governed by a combination of the CCC and the CCPC. To prevent the inconsistencies discussed above between these two codes, one way forward would be to also amend the CCPC. This, however, may take too long. A better option would be to extend the scope of application of the new arbitration law to domestic arbitrations as well, as other countries in the region (such as Peru, Paraguay and Colombia) have done.