LATINLAWYER

LATINLAWYER Reference – ARBITRATION 2009

LATINLAWYER would like to thank contributing editor José Astigarraga of Astigarraga Davis for his invaluable assistance in devising the questionnaire for this section, and for writing its introduction.

ARGENTINA

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I. Legislation

1. Which legislation governs the enforcement of international commercial arbitration awards and arbitral agreements in international business contracts, and international commercial arbitration proceedings?

There is no all-encompassing national legislation governing arbitration. As Argentina is a federal republic, the power to regulate procedural law lies with the provinces. Both the National Civil and Commercial Procedural Code (Código Procesal Civil y Comercial de la Nación) (NPC), and provincial procedural codes govern arbitration in Argentina. The NPC is applicable in the City of Buenos Aires and by federal courts all over the country when the cases fall under their jurisdiction *ex ratione materiae* or *ex ratione personae* while the provincial codes – similar in many aspects to the NPC regulation – are applicable in the relevant province by provincial courts.

The relevant NPC provisions govern: the conduct of arbitration proceedings (Book VI, sections 736-773); the recognition and enforcement of foreign arbitration awards (sections 517-519, in conjunction with the provisions of the various multilateral or bilateral treaties and conventions ratified by Argentina); and *prorogatio fori* in favour of arbitral tribunals sitting outside of Argentina, which is possible provided that the situation is international, Argentine courts have no exclusive jurisdiction and that it is not specifically prohibited by law (section 1).

The aforementioned NPC provisions neither distinguish between domestic and international arbitration nor define the concept of international commercial or foreign arbitration award. However, in accordance with section 519 bis and section 1 NPC, awards rendered by foreign arbitral tribunals can be enforced provided that the conditions set forth under section 517 (regarding essentially due process and public policy) were met; the *prorogatio fori* comply with the requirements of section 1; and the matter can be decided by arbitration according to section 737 NPC (which requires that the matter can be the subject of a compromise).

Although the NPC provisions contain three types of arbitration (*de iure*, amiable composition and arbitral expertise) we will refer to I arbitration unless otherwise is stated.

2. Has the UNCITRAL model arbitration law been adopted in your jurisdiction?

The UNCITRAL model arbitration law has not been adopted in Argentina. A proposal, in 2004, to do so was not successful.

II. Conventions

3. Is your jurisdiction a party to both the New York Convention and the Panama Convention? Is it a party to any other conventions or treaties governing international commercial arbitration agreements, awards or proceedings?

Argentina is a party to both the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, ratified by Law 23,619 (the NYC), and the 1975 Inter-American Convention on International Commercial Arbitration, ratified by Law 24,322 (the Panama Convention). In addition, Argentina is a party to the following international treaties and conventions governing international arbitration:

- 1889 Montevideo Treaty of Civil Procedure, ratified by Law 3,192;
- 1940 Montevideo Treaty of Civil Procedure, ratified by Decree-Law 7,771;

- 1979 Inter-American Convention on the Extraterritorial Efficacy of Foreign Judgments and Arbitral Awards (Montevideo Convention), ratified by Law 22, 921;
- 1992 Mercosur Protocol on International Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor and Administrative Law Matters (Las Leñas Protocol), ratified by Law 24,578;
- 1998 Mercosur International Commercial Arbitration Agreement, ratified by Law 25,223 (the Mercosur Arbitration Agreement).

4. Is your jurisdiction a party to the ICSID Convention? Have steps been taken to renounce the Convention or withdraw from the ICSID?

Argentina is a party to the ICSID Convention; the Convention came into force on 18 November 1994, following ratification by Law 24,353. In addition, Argentina is a party to over 50 bilateral treaties concerning the reciprocal protection of investments. Despite Argentina's recent criticisms of the ICSID regime (regarding the prolonged duration of the process, the existence of contradictory awards and objections on jurisdiction), no steps to renounce the Convention or to withdraw from the ICSID have been taken.

5. Has your jurisdiction refused to honour an international arbitral award issued against it?

Currently, there are two awards rendered against Argentina whose ruling has been confirmed by the Ad-hoc Committees (CMS and Azurix). In respect of the $133.2 million ICSID arbitral award rendered in favour of CMS Gas Transmission Co, Argentina, citing ICSID Convention that obliges award-creditors to present their awards to a local body for enforcement and recognition, maintains that it is not in breach of its international obligations as the award has not been brought to an Argentine court for recognition and enforcement. Consequently, the company has transferred the award to a Bank of America Corp subsidiary specialising in distressed debts.

The counter argument is that the ICSID Convention obliges the country-parties to comply with final ICSID arbitration awards as if they were final and binding local judgments and that failure to do so constitutes a new international breach. Proponents of this position maintain that there are no legal grounds to support the jurisdiction of the Argentine courts to annul, refuse to enforce or review ICSID awards.

The Argentine government has yet to reveal its position in relation to the award in Azurix, the award being only recently rendered.

Finally, with respect to Sempra and Vivendi awards, Argentina has challenged them before the Ad-hoc Committees.

III. Commercial arbitral agreements and arbitrability

6. Is a pre-dispute clause or separate agreement to resolve international commercial disputes by arbitration enforceable?

Under the NPC a pre-dispute clause (*clausula compromisoria*) to resolve a dispute by arbitration is not, by itself, enforceable. The parties must enter a mandatory agreement (*compromiso arbitral*) regarding a dispute that has already arisen, meeting the requirements of section 739, submitting the dispute to arbitration, notwithstanding the existence of an arbitration clause. However, if a valid pre-dispute clause exists and one of contracting parties refuses to execute the compromiso arbitral and, consequently, opposes the request for the formation of the arbitral tribunal, the other party can request that a judge do so on behalf of the defaulting party. The court that would have been competent to decide the dispute in the absence of a prior agreement to arbitrate will execute the compromiso – with the elements required by section 740 – provided that the opposition is unfounded (section 742). In consequence, the difference between an arbitration clause and a *compromiso arbitral* has little practical significance.

Obviously, this regime is valid if the parties agreed an ad hoc arbitration under the NCP. In case of an institutional arbitration (eg, ICC, LCIA, AAA) or ad hoc arbitration governed by other rules, the *compromiso* requirement shall be subjected to the rules chosen by the parties.

Furthermore, in respect of arbitral agreements within the scope of the NYC, the agreement will be enforceable, whether executed before or after the dispute has arisen, in accordance with article II(1)(2) of this convention.

7. What (are the requirements for an enforceable arbitral agreement?

The special compromiso must meet the formal requirement of sSection 739 NPC, namely it shall be made under the form of a public deed, a private instrument or a deed executed before the judge who would have had jurisdiction if no arbitration had been agreed upon.

Furthermore, the *compromiso* shall encompass the elements set forth by section 740 NPC: it shall contain, under sanction of nullity: date of execution; name and domicile of the parties and the arbitrators; the matters submitted to arbitration with expression of its circumstances; and the penalty agreed by the parties to be paid by the party failing to comply with the indispensable actions regarding the effectiveness of the *compromiso*.

It is worth noting that with respect to arbitral agreements within the scope of the NYC, it is only required that the agreement (*clausula compromisoria* or *compromiso arbitral*) be in writing, signed by the parties or contained in an exchange of letters or telegrams (article II(2)) (see *Armada Holland* case, Federal Civil and Commercial Court of Appeals, 8 May 2007).

8. Is there subject matter that is not legally subject to arbitration in the context of an international business transaction?

In accordance with sections 736 and 737 NPC, parties may submit to arbitration any matter capable of resolution by way of a compromise or settlement (sections 21, 842-849 Civil Code). Public policy matters, criminal and family law disputes and those concerning goods extra-commercium may not be legally subject to arbitration. According to some case law, the interpretation of the laws enacted by the Argentine government during the 2002 economic crisis, cannot be decided by arbitration. Nevertheless, this position has been disputed by most legal scholars.

9. Does the law specify whether an arbitration will be in equity or under law if the parties do not expressly specify the nature of the arbitration in the agreement?

Section 766 NPC provides that, if the nature of the arbitration is not specified by the parties in the *compromiso*, the arbitration will be in equity.

10. How does the law limit party-autonomy with respect to the terms of an arbitral agreement?

The parties enjoy almost complete autonomy with respect to the terms of the arbitration agreement since the procedural rules provided by legislation are very broad and leave room for specific rules agreed by the parties. Consequently, the parties are free to elect the set of rules (eg, ICC rules or LCIA rules) that will govern the arbitral proceedings.

Regarding the selection of arbitrators, Argentine law does not restrict the autonomy of the parties. Under NPC, arbitrators shall be selected by the parties or by the competent court if the parties can not reach an agreement on the issue. Arbitrators must be over 21 and in full exercise of their civil rights and may not be judges or judicial employees (unless the country or a province is a party of the arbitration (sections 743 and 765 NPC)).

11. In what circumstances does the law allow a non-signatory to an arbitral agreement to pursue a claim in an international arbitration against a party that signed the arbitral agreement and vice versa?

The general rule (sections 1195 and 1199 Civil Code) is that a contract is unenforceable by, or against, third parties. In respect of groups of companies, there is no rule that permits the imputation of the rights and obligations of contract concluded by one group member to another group member solely on account of their membership of the same group. The only exception to this general principle arises in the case of abuse of an entity's separate legal personality. Consequently, under Argentine law, the subjective scope of the arbitration agreement can only be extended by parties´ express consent.

IV. Arbitral institutions and arbitrators

12. Are foreign arbitral institutions authorised to administer arbitrations in your jurisdiction?

Foreign arbitral institutions are authorised to administer arbitrations in Argentina and there is no requirement that such institutions be licensed under local law. An arbitral award issued in an arbitration seated in Argentina under the auspices of a foreign institution (such as the ICC or the LCIA) is open to challenge on the same grounds as any other arbitral award (section 758 NPC).

13. Does the law require that arbitrators in international arbitrations be citizens or residents of your jurisdiction? Does your law require that arbitrators in international cases be lawyers? Are the fees of foreign arbitrators serving in an arbitration seated in your jurisdiction subject to taxation?

In respect of international arbitration seated in Argentina, Argentine law provides that anyone can be appointed as an arbitrator on condition that they are capable of exercising their civil rights. Since foreigners enjoy the same civil rights as Argentine nationals (section 20 Argentine Constitution), there is no bar to the appointment of foreigners as arbitrators and no requirement that arbitrators be Argentine citizens or residents.

In light of the fact that the NPC contains no explicit provision, it is generally accepted that there is no requirement that an arbitrator be a lawyer, although a small minority of legal scholars would dispute this. As a consequence, if the arbitrator is a lawyer, there is no requirement that he be admitted to practise in Argentina.

The Argentine-source fees of non-resident foreign arbitrators in an arbitration seated in Argentina, taking into account that the award is considered to be rendered in Argentina, shall be subject to local taxation, although special conditions might apply under the relevant Double Taxation Treaty.

14. Must arbitrators in international arbitrations be independent and impartial? What is the legal standard governing conflicts of interest and disclosure by arbitrators in international arbitrations?

Although the NPC contains no explicit requirement that the arbitrators to be, and remain, independent of the parties, it is accepted that this requirement is implicit considering that section 746 provides that arbitrators may be challenged by the parties on the same grounds as judges, such as the existence of a personal or business relationship between the arbitrator and one of the parties or their lawyer; the existence of an interest, on the part of the arbitrator, in the outcome of the dispute; the expression, by the arbitrator, of a prior opinion or recommendation on issues regarding the dispute; and the receipt, by the arbitrator, of an important benefit from one of the parties (section 17). Arbitrators appointed by common agreement of the parties can only be challenged for reasons that occurred after their appointment.

In respect of conflict of interest and disclosure by arbitrators in international arbitrations, it is worth noting that not only the IBA Guidelines on Conflict of Interest in International Arbitrations but also the ICC Rules have strongly influenced the arbitrators´ practice.

15. Will courts entertain requests to disqualify an arbitrator during an arbitration?

Under the NPC, the challenge of an arbitrator should be filed before the arbitral tribunal and the decision shall be made by the court which would have been competent if there had been no *compromiso*.

Nevertheless, should the parties have agreed a special set of arbitration rules, the arbitrator challenge procedure shall be determined by these provisions, with no judicial interference.

The decision of the Argentine court in the *Yacyreta* case (27 September 2004) represents an exception to this general principle. In this case – an international arbitration under ICC Rules – the court entertained an unfounded request, made by one of the parties (a binational entity), to remove the members of the arbitral tribunal (see infra question number 25) . However, it is worth noting the absence of a similar decision in case law regarding international commercial arbitrations where no state-controlled party is involved.

V. Arbitral proceedings

16. Does the law require that arbitral proceedings be held in a specific language?

There is no express provision in the NPC governing the language of arbitration proceedings. Thus, in principle, the proceedings may be conducted in a foreign language. However, were one of the parties to raise a challenge to the award on nullity grounds, it would be necessary to translate all proceedings and documents into Spanish so as to comply with section 115 NPC ('The national language shall be used in all proceedings') and section 123 NPC ('When a foreign language document is presented, it must be accompanied by an official translation').

17. Can foreign lawyers serve as advocates in arbitral proceedings in your jurisdiction? If so, can they do so alone or must a local lawyer serve as co-counsel? Are their fees subject to local taxation?

With respect to an ad-hoc arbitration under the NPC provisions, seated in Buenos Aires, it is worth noting that notwithstanding the silence of the NPC regarding the arbitration proceedings, in accordance with sections 56 and 57 NPC all pleadings must be signed by a lawyer admitted to practice in Argentina.

On the other hand, in international commercial arbitrations under the auspices of international institutions such ICC or LCIA, as long as there is no need for judicial support, there is no obstacle to a foreign lawyer serving as an advocate although it would be advisable to engage a local lawyer as co-counsel. The Argentine-source fees of non-resident foreign lawyers are subject to local taxation, although special provisions may apply under the relevant Double Taxation Treaty.

18. In what circumstances, if any, does your law allow the consolidation of multiple arbitral proceedings?

The NPC does not provide for consolidation of multiple arbitrations. Rules on consolidation of court proceedings could be eventually applied to arbitration proceedings, unless the arbitral proceedings are governed by other specific arbitral rules (eg, ICC rules) in which case these rules will determine the issue.

19. Please describe common practice and usage in international arbitrations seated in your jurisdiction with respect to a party's right to require an opposing party to produce documents pertinent to the dispute.

Arbitrators may request the courts to order compulsory disclosure of specific documents in the possession of one the parties, in accordance with sections 753 and 326 NPC. Lack of collaboration, on the part of the requested party, could give rise to a negative presumption against it (section 388 NPC).

Regarding international arbitrations, the request filed before the arbitral tribunal for limited disclosure of documents in possession of the counterparty is governed by the rules of international institutions (eg, section 20(5) ICC Rules). The party requesting discovery bears the burden of proving prima facie the relevance of the document to the action and shall identify the specific documents required to avoid the 'fishing expedition'. The opposition of the requested party to the disclosure of the documents could give rise a negative conclusion according to the IBA Rules on the Taking of Evidence (section 9(4)) or pose the need to request judicial support in light of the arbitrators' lack of imperium.

VI. Court support for arbitration

20. Is the principle of 'Kompentenz-Kompetenz' followed in the courts, and do the courts follow the principle of the independence and separability of the arbitration clause?

Neither the NPC nor the provincial codes contain any provision governing the capacity of arbitrators to determine their own jurisdiction. Nonetheless, this principle has been incorporated in the Mercosur Arbitration Agreement (sections 8 & 18) and indirectly in the Panama Convention (article 3 applies the Inter-American Commission of Commercial Arbitration Rules; see article 21(1)).

Argentine courts have followed the principle of ´Kompentenz-Kompentenz´, ruling that arbitrators have jurisdiction to rule on their own jurisdiction.

The autonomy of the arbitral agreement has been established in the 1980 Vienna Convention (article 81.1), ratified by Argentina by Law 22,765, the Mercosur Arbitration Agreement (article 7), and the NYC (article II(3)). The Supreme Court first recognised the principle of autonomy in the *Otto Franke* case (19 December 1918) and, despite some unfavourable decisions in the intervening years, has subsequently reaffirmed this principle (see *Bear Service* case (5 April 2005) where the Supreme Court upheld the ruling of the Commercial Court of Appeal regarding the autonomy of an ICC arbitration clause notwithstanding the termination of the contract).

21. If a party files a lawsuit in violation of agreement to arbitrate, will a petition by the defendant to remit the lawsuit to arbitration be granted by the courts under normal circumstances? If so, will that petition be treated as a threshold matter or will it be rolled into the merits of the litigation such that the defendant will also need to defend the merits of the lawsuit in court?

Under normal circumstances, provided that neither party is state-controlled and that no public policy issue is involved, the courts usually decline jurisdiction over a claim that falls within the scope of an arbitration agreement, in accordance with article II(3) NYC. A petition to remit the lawsuit to arbitration will be dealt with by the court as a threshold matter,

as was the case in, for example, *Porcelli, Daniel* (16 December 2005). Should the defendant not oppose the court's jurisdiction, the competence of the arbitrators shall be deemed waived (section 7 NPC).

22. Are arbitral tribunals empowered to grant interim relief? If so, how is that relief enforced in the courts?

On one hand, section 753 NPC provides that arbitral tribunals are not empowered to grant interim relief and that they must request the court to do so. On the other hand, some legal scholars maintain that the arbitral tribunal may be empowered to grant interim relief, as would be the case if the arbitral rules selected by the parties or the terms of the arbitral agreement were to authorizse such. In either case, the arbitral tribunal is not empowered to enforce interim relief and thus must seek the assistance of the court in this matter.

23. Can arbitrators issue subpoenas or use other legal processes to compel the production of evidence by a third party or compel a third-party witness to appear before them? If so, will a court lend its aid in enforcing such an order against a recalcitrant third party?

In accordance with the NPC and the arbitrators' lack of imperium, arbitral tribunals are not empowered to enforce compulsory measures. The court, at the request of the arbitral tribunal, may:

(i) order the discovery of a specific document in the possession of a third party. However, section 389 provides that the third party may oppose the submission of the requested document if it is in his exclusive possession and its presentation would be prejudicial to his interests. If such opposition is made, the third party can not be forced to produce the document;

(ii) issue a subpoena requiring a third-party witness to appear before the arbitral tribunal.

The court shall provide assistance within its jurisdiction so that the process is carried out rapidly and effectively (section 753).

24. Can a party in an international commercial arbitration seek interim or provisional relief from a court without first seeking relief from the arbitral tribunal?

The NPC and provincial procedural codes do not expressly contemplate the grant of interim relief by arbitral tribunals. However section 19 of the Mercosur Arbitration Agreement provides that interim relief may be granted by the arbitral tribunal or competent judicial authority and that a request to latter by one of the parties for such is not incompatible with the arbitral agreement, nor does it imply a renunciation of the arbitration. This criterion has been applied by Argentine courts following similar institutional arbitration rules. In the *Searle* case (22 September 2005) – concerning an arbitration governed by ICC Rules – the Argentine Commercial Court of Appeals confirmed the validity of the grant of an interim measure by the first instance judge in favour of the claimant in an international arbitration which had not yet been initiated. A similar ruling was rendered in the *Don Won SA* case (16 December 2005) by applying the Buenos Aires Stock Exchange Arbitration Rules.

25. Have the courts issued injunctions enjoining arbitral proceedings from going forward (The Copel issue)? (If so, please briefly describe the circumstances and standards that the courts will follow in doing so.)

The Argentine courts have on two previous occasions issued injunctions enjoining arbitral proceedings from going forward. In 2004, Entidad Nacional Yacyreta obtained an order from a Lower Federal Court in Administrative Matters (27 September 2004) enjoining the ICC arbitration proceedings until the challenge against the arbitrators was finally settled and the Terms of Reference approved. This order was granted on the basis of the alleged failure of the ICC arbitral tribunal to take the party's interest into account and the fact that the ICC International Court of Arbitration's decision to reject the arbitrators' challenge was made without revealing the grounds considered by the ICC Court. It is worth noting that the requesting party was a binational entity and this request was an unfounded excuse to escape from arbitration. In accordance with the principle of the autonomy of arbitral proceedings (which dictates that, once the arbitral proceedings have begun, the court may only intervene at the request of the arbitrator, see *Telearte* case, 19 December 2005), this ruling has been greatly criticised by most Argentine legal scholars. However, in respect of the *National Grid Transco* case – an ICSID arbitration governed by the UNCITRAL Rules (the ICC being the appointing authority) – the Argentine government requested to set aside the ICC Court ruling refusing the challenge of an arbitrator on similar grounds to

those expressed in *Yacyreta*; and to stay the arbitration proceedings until this issue is decided. Although the federal court ordered the stay of the arbitration (3 July 2007), the order has had little influence in the arbitration proceedings as the arbitration seat was Washington DC. Except for these two cases (characterised by the presence of the Argentine government as a party), no similar ruling has appeared in Argentine case law in respect of international commercial arbitrations where no state-controlled party is involved.

VII. Awards – content

26. Does the law provide that post-award interest accrues on an unpaid arbitral award?

There is no specific legislative provision governing the accrual of post-award interest on an unpaid arbitral award. However, post-award interest could be considered an accessory matter within the meaning of sections 754 and 772 NPC and thus may be granted by the arbitral tribunal provided that such is within the terms of the arbitral agreement and it has been requested by the party. Alternatively, in respect of arbitral awards brought before the court for enforcement, a party could request that the court apply a rate of interest to any unpaid amount (in general, the rate will be similar to the current market rate applicable to short term bank loans).

27. Is an arbitral tribunal empowered to award attorneys' fees to the prevailing party or is that power reserved to the courts?

In accordance with sections 754(2) and 772 NPC, an arbitral tribunal is empowered to determine how the costs are allocated between the parties, in the absence of a prior agreement between the parties governing this issue. Consequently, the arbitral tribunal may be empowered to award attorneys' fees to the prevailing party in an ad hoc arbitration under the NPC provisions or provided that such is within the scope of the arbitration rules agreed by the parties.

VIII. Awards – challenges and vacatur

28. What are the grounds for challenging an international award issued in an arbitration seated there and what is the period of time a party has to challenge that award?

In accordance with section 758 NPC, an arbitral award may be challenged by the same recourses as a judicial sentence, unless such recourses have been waived in the arbitral agreement. However, Sections 760(1) and 761 provide that, notwithstanding any waiver, an arbitral award may be challenged in order to set aside the award (in addition to a request for clarification) on the following grounds:

- essential error of procedure;
- award granted by arbitrators after the deadline or on the basis of matters exceeding the tribunal's jurisdiction; or
- contradictory provisions within the award.

The parties have five days following the receipt of the award in which to submit an application to set it aside (section 759 NPC).

29. Please describe the standard used by the courts in deciding whether to vacate an international arbitral award. Is 'lack of reasonableness' of an international award grounds to vacate it? To what degree have international awards rendered in your jurisdiction been vacated on the grounds of 'public order'?

In general, the courts will limit their review to the grounds set out in sections 760(1) and 761 NPC in deciding whether to vacate an international arbitral award (see *Hasbro* case, 19 December 2002). However in an isolated decision, *Cartellone* (1 June 2004), the Supreme Court held that the parties´ agreement to waive the right to appeal does not prevent courts from reviewing awards in the event of a breach of public policy. Consequently, the revision of an award on its merits shall be admissible on the basis that the award is unconstitutional, illegal or unreasonable. It is worth mentioning that this decision concerned a domestic arbitral award before the Public Works Arbitral Tribunal and one of the parties to the arbitration was state controlled (see also the *Eaca* case, 12 June 2007). Nevertheless, the decision has been the subject of much criticism by legal scholars in Argentina, considering that the revision of the award on its merits could only be applied in cases before this specific arbitral tribunal because of its administrative nature. No similar ruling has appeared in the subsequent jurisprudence of the courts (see *Pestarino* and *Cacchione* cases, 12 March 2008).

30. Please describe any recent significant experiences or cases that illustrate the attitude of your courts toward the vacatur of international awards.

The traditional position of the Argentine courts, in respect of the vacatur of international arbitration awards, has been in favor of a limited revision and the validity of the awards. For example in the *Reef Exploration* case (5 November 2000), the Commercial Court of Appeal accepted the claimant's appeal against the lower court decision which repealed an exequatur proceeding and dismissed the defendant's claim for vacatur. The only recent significant case in which the courts have set aside an arbitral award was the *Techint* case (8 May 2007). The award was set aside by the Supreme Court on the basis that there was no arbitration agreement between the parties and thus the arbitral tribunal had no jurisdiction to decide the dispute.

31. Do the courts consider themselves empowered to vacate an arbitral award rendered in another jurisdiction?

Argentine courts only consider themselves empowered to vacate an arbitration award rendered in Argentina. In respect of arbitration awards rendered in other jurisdictions, the Argentine courts adhere to the terms of the NYC.

IX. Awards enforcement

32. Please describe the process for enforcing an arbitral award rendered in another jurisdiction.

Assuming that the award is covered by the NYC, the party seeking the recognition and enforcement of an arbitral award issued in another jurisdiction must present, with the petition to obtain the exequatur:

- the original award, duly authenticated, or a copy of the original which meets the required conditions for authenticity; and
- the original arbitral agreement or a copy of the original which meets the required conditions for authenticity.

If these documents are not in Spanish, a duly certified Spanish translation must be presented (article IV). In addition, the application should be made to the first instance court with jurisdiction (see section 518 NPC applicable to the enforcement of foreign awards outside the scope of the NYC).

It is worth noting that the grounds to refuse the recognition and enforcement of foreign awards contemplated in article V of the NYC are limited; the defendant has the burden of proving such grounds; and there is no review of the merits of the awards.

33. Assuming that the award emanates from a jurisdiction that is a party to a Convention enforceable in your jurisdiction, how long does it take to obtain an order of enforcement in the first instance and a final order of enforcement in the last instance?

The length of time it takes to obtain an order of enforcement varies in accordance with the complexity of the award and the position of the counter-party with respect to the enforcement proceedings. In general, an order of enforcement will be obtained within six months – two years of it first being sought.

34. How long does it take to confirm an arbitral award rendered abroad compared with obtaining a judgment in the courts of your jurisdiction in a similar commercial dispute?

Under normal circumstances, arbitration proceedings are of a shorter duration than judicial proceedings. On average and in respect of a similar commercial dispute, a local judgment takes at least four or five years including the appeals, while an ICC arbitration would take two or three years to issue an award and at most two more years to enforce it.

In terms of the domestication of a foreign arbitral award as compared to a foreign judgment, the former benefits from the efficacy of process provided by the NYC and thus tends to take less time than the latter.

35. Please describe some significant recent experiences with the enforcement of foreign arbitral awards.

The recent jurisprudence of the Argentine courts has upheld the principles incorporated in the NYC. In the *Cacchione* decision (24 August 2006) the Supreme Court confirmed the validity of waivers to challenge arbitral awards.

On the other hand, the courts have not enforced any arbitral award that has been vacated by the courts of the jurisdiction in which it was issued.

36. To what degree has 'public order' been a ground to refuse enforcement of an international award rendered abroad?

With respect to 'public order' as a basis for the refusal to enforce a foreign arbitration award, a distinction between internal public order and international public order has been made by the scholars. A violation of the latter, but not the former, is a sufficient basis for a refusal to enforce. In the *Ogden Entertainment* case (20 September 2004) the Argentine Commercial Court of Appeal recognised that the concept of international public order includes a guarantee of due process. Thus, the court refused the enforcement of the foreign arbitral award that it held to be arbitrary on the basis that the costs awarded against the winning party exceeded the amount of the award.

37. Can a foreign arbitral award be enforced if the award has been set aside by the courts at the seat of the arbitration?

Article V(1)(e) NYC provides that the enforcement of a foreign arbitration award can be refused on the basis that the award was set aside by a competent authority in the country in which it was issued. In light of the differing interpretations of this provision by scholars and the courts in other jurisdictions, particularly France and the US, it remains unclear whether an Argentine court, asked to enforce such an award, will decline to do so automatically or will consider the circumstances of the case in determining whether of not to grant enforcement. As of yet, no case involving this issue has come before the Argentine courts. However, in the *Compagnie Belge de la West* case, the Commercial Court of Appeals upheld the lower court decision by stating that the filing of a request to set aside the award does not stay its enforcement (31 October 2005).

X. The outlook

38. What is your view of the future of international arbitration and is the trend positive? What advice do you have with respect to dispute resolution for a foreign lawyer advising a foreign client contemplating entering into a business deal with a company from your jurisdiction?

There are numerous factors which bode well for the continued growth of, and receptiveness to, international arbitration in Argentina. These factors include the current positive trend in relation to international arbitration in Latin America as a whole (Peru and the Dominican Republic have recently adopted modern arbitration laws based on the UNCITRAL Model Law), the presence of a large number of foreign companies in Argentina and the considerable back-log of cases before the courts.

In terms of advice to a foreign client in relation to dispute-resolution, it would be recommended that the arbitration agreement provide that the arbitration shall be administered by a prestigious international institution (such as the ICC, LCIA, or AAA). In addition, it is always advisable to obtain local legal advice.

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