

The International Comparative Legal Guide to:

International Arbitration 2005

A practical insight to cross-border International Arbitration work



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Argentina

M & M Bomchil

Guido Santiago Tawil



Rafael Mariano Manóvil



1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your country?

Under the Argentine National Civil and Commercial Procedural Code (hereinafter “NCCPC”) a distinction should be made between the agreement to submit future and eventual disputes to arbitration (*cláusula compromisoria*) and the agreement to submit to arbitration a conflict that already exists (*compromiso arbitral*). As regards the former, a clause should be introduced in the contract clearly stating that every dispute related therewith will be submitted to arbitration. With respect to the *compromiso arbitral*, Argentine legislation requires that it must take the form of a public deed or private instrument, or of a minute executed before the judge already acting or before the judge who would have jurisdiction had arbitration not been agreed upon (Article 739 of NCCPC).

1.2 What other elements ought to be incorporated in an arbitration agreement?

The agreement should include the date, name and address of the parties and of the arbitrators –with exception of those cases in which they are appointed by other arbitrators, judge or designating authority–; a statement of the issues submitted to arbitration, together with their relevant facts; and the fine that shall be paid by the party who does not comply with the acts necessary for the fulfilment of the arbitration agreement. Further issues – such as procedural rules, place of arbitration, arbitration institution, number of arbitrators, language of the arbitration and, whether arbitration is *de iure* or *amiable compositeurs* – may also be included.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Argentine courts usually rule enforcing the voluntary submission by the parties to arbitration proceedings, provided basic formal and substantial conditions are met (e.g. the subject matter being subject to compromise settlement, the parties having capacity to settle).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration agreements in your country?

Articles 736 to 773 of the NCCPC govern enforcement of arbitration agreements and the procedure thereof. Likewise, provincial procedural codes also include provisions regulating the arbitration procedure. Argentina is a federal country, so the NCCPC governs proceedings in federal courts and provincial codes, in the provinces.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do the laws differ?

There is not a special law regulating international arbitration. The enforcement of awards decided by foreign arbitration tribunals is regulated in the NCCPC, which generally requires the recognition of the foreign award by a local court prior to enforcement, the so-called “*exequatur*”. Where international arbitration is governed by treaties executed by Argentina – such as the New York and Panama conventions, such treaties will prevail.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the governing law and the Model Law?

Argentine arbitration law is not based on the UNCITRAL Model Law. Certain private institutional arbitration proceedings follow that model. There is currently an arbitration bill based on it, though with certain differences.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your country? What is the general approach used in determining whether or not a dispute is “arbitrable”?

The NCCPC provides under its Article 737 that matters not subject to settlement cannot be submitted to arbitration. This comprises –among others– certain family law and public order matters.

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

Although no specific provisions of the NCCPC govern this matter, Argentine courts have generally allowed

arbitrators to rule on their own jurisdiction. It is advisable to refer to this question specifically in the arbitration clause.

3.3 Under what circumstances can a court address the issue of the jurisdiction and competence of the arbitral tribunal?

When a court is requested to decide on any matter related to an arbitration proceeding, it will consider whether (i) there is a valid arbitration agreement, (ii) the subject-matter of the dispute is arbitrable (Article 752 NCCPC), and (iii) the dispute has been sufficiently defined in the *compromiso*. (See, e.g., “Nidera Argentina S.A. c/Rodriguez Alvarez de Canale, Elena G.” (Supreme Court, *Fallos*: 311:2300); “Otondo, César A. C/Cortina Beruatto S.A.” (National Commercial Court of Appeals, Court Room E). If there are affirmative answers to these issues, the court will not interfere in the arbitration.

4 Selection of Arbitral Tribunal

4.1 Are there any limits to the parties' autonomy to select arbitrators?

There are no limits to the selection of arbitrators. However, arbitrators have to comply with some general requisites such as being over 21 years of age and enjoy full exercise of civil rights (Article 743 NCCPC), not being a judge or employee of the judiciary (except in cases when the State is a party), and being a lawyer when the arbitration is *de iure*.

4.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

The court which would have had jurisdiction, had there not been an arbitral agreement, is competent to appoint the arbitrators if the parties fail to designate the panel themselves (Articles 742 and 743 NCCPC).

Other particular arbitration procedures widely used in Argentina have specific dispositions on the subject (e.g. the arbitration rules of the Arbitration Tribunal of the Economic Science Professional Council, Article 8.4., provides for a tribunal of three arbitrators chosen by drawing lots; the Buenos Aires Stock Exchange rules, Articles 4 and 8, provide that the tribunal is formed by three permanent judges that may be replaced by one of the fifteen deputy arbitrators appointed on an annual basis by the Stock Exchange, if one or more of the permanent arbitrators is challenged or absent).

4.3 Can a court intervene in the selection of arbitrators? If so, how?

A court may intervene in the selection of arbitrators, as described in 4.2 above.

4.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality?

Arbitrators must be independent, neutral and impartial. They may be challenged by the parties on the same grounds as judges (Articles 17 and 746 NCCPC), when there is a conflict of interests. Among others, these grounds include having a close or business relationship with one of the parties or their lawyer, an interest in the outcome of the dispute, having given an opinion or issued

recommendations regarding the dispute or received an important benefit from one of the parties.

In the case of *amiables compositeurs*, the grounds due to which they may be challenged after their appointment (Article 768 NCCPC) are more limited (a close or business relationship with one of the parties or their lawyer, and an interest in the outcome of the dispute, among others).

5 Procedural Rules

5.1 Are there laws or rules governing the procedure of arbitration in your country? If so, do those laws or rules apply to all arbitral proceeding sited in your country?

Articles 736-773 of the NCCPC govern the arbitration procedure when developed under federal jurisdiction. In the provinces, provincial procedural codes will apply. There are other arbitration rules established by local arbitration institutions, such as those of the Buenos Aires Stock Exchange (www.bcba.sba.com.ar) and the Argentine Chamber of Commerce (www.cac.com.ar). Provisions of the procedural codes apply only subsidiarily with respect to the arbitration rules agreed by the parties.

5.2 In arbitration proceedings conducted in your country, are there any particular procedural steps that are required by law?

In *de iure* arbitration, under Article 751 of the NCCPC, the judicial procedure will be applicable unless the parties have agreed otherwise. In the case of *amiables compositeurs*, in accordance with Article 769 of the NCCPC, arbitrators must conduct the proceeding without respecting any particular procedural steps.

However, as these provisions are only subsidiary, they are not applied when parties have agreed on the application of particular rules or the rules of an arbitration institution.

5.3 Are there any rules that govern the conduct of an arbitration hearing?

Except for those cases under institutional arbitration rules –to which the corresponding rules apply– there are no mandatory rules. Thus, those provided by the NCCPC for judicial hearings are applicable.

5.4 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

In principle, no. Courts do not intervene in arbitration proceedings, except in some exceptional situations such as when an arbitrator is challenged, or when an arbitration decision must be compulsorily enforced, or once the award has been issued when a party challenges it as null.

The rule is that the parties are entitled to challenge the award before the courts based on the fact that the arbitration proceeding was not properly observed, only after the issuance of the award. Exceptionally courts have intervened during the arbitration proceeding at the request of one of the parties (e.g., “*S. R., A. A. v. Prime Argentina S.A. (Holdings)*”, National Commercial Court of Appeals, Court Room C (10/29/2002)).

Recently, a provisional measure suspending an ICC arbitration proceeding has been admitted while the court hears an action brought by one of the parties requesting the national courts to decide on (i) the definitive content

of the document defining the Terms of Reference, already agreed during the arbitration proceeding, but contradicted by the claimant because of having excluded some issues it required, and (ii) the challenge of all the arbitrators for having prejudged (previously refused by the International Chamber of Commerce), precisely because of having excluded those issues (“*Entidad Binacional Yacretá c/ Eriday y otros s/ proceso de conocimiento*”, Federal Administrative Court N° 3, 09/27/2004).

6 Preliminary Relief and Interim Measures

6.1 Under the governing law, is an arbitrator permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

Under the NCCDC, arbitrators are empowered to dictate preliminary and provisional measures. However, due to their lack of *imperium*, only courts can order their compliance if the party affected refuses to do so. Any type of relief accepted in judiciary proceedings may be dictated.

The empowerment to award preliminary relieves is provided in many institutional arbitral procedures –e.g. Buenos Aires Stock Exchange rules (Article 33).

6.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party’s request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

A court may order preliminary or interim relief in proceedings subject to arbitration if the request meets the basic judicial requirements set by local legislation: i) there is an urgency to take the measure requested; ii) there is *prima facie* certainty on the right of the requesting party; and, iii) a bond is posted to cover eventual damage. The relief should not match the requested outcome of the dispute (it should merely guarantee the prospective enforcement of the award).

The party’s request and the granting of the interim relief has no effect on the jurisdiction of the arbitration tribunal.

6.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The courts approach these requests as they would in a judicial setting, but are more reluctant to dictate the relief. Not many precedents exist.

7 Evidentiary Matters

7.1 What rules of evidence (if any) apply to arbitral proceedings in your country?

There are no mandatory provisions regarding evidence. If the arbitration agreement or institution rules do not provide for regulations, the *de iure* arbitral proceedings must follow the NCCPC (Article 751 NCCPC). *Amiable compositeurs* may elect the rules of their choice (Article 769 NCCPC).

7.2 Are there limits to the scope of an arbitrator’s authority to order the disclosure of documents and other disclosure of discovery (including third party disclosure)?

As stated above, arbitrators lack *imperium* to order the compliance of the measures they issue. Thus, they must rely on the courts to obtain compulsory disclosure of documents (Article 753 NCCPC) and, therefore, if courts do not support them, the party will not be able to enforce the measure. The discovery proceeding as understood in common law is not foreseen in Argentine legislation.

7.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

When confronted with a request from an arbitrator the courts may authorize disclosure of documents in accordance with Argentine law (Article 753 NCCPC).

7.4 What is the general practice for disclosure/discovery in international arbitration proceedings?

As stated above, discovery is not recognized under Argentine law. With regard to disclosure of documents, it appears that arbitrators will weight the need for a document before turning to the courts for support.

7.5 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal? Is cross-examination allowed?

As stated above, there are no mandatory arbitral procedural rules in Argentina. However, if no agreement on the arbitral proceedings has been reached, the rules of the procedural codes are applied.

Under the NCCPC, witnesses must take an oath to tell the truth (Article 440 NCCPC). Questions to the witness are put forward by the arbitrator after having been written and filed in advance by the parties or added by them during the hearing. Cross examination is made following this procedure. According to rules dictated by the Supreme Court, written testimonies are allowed in the case of certain functionaries.

Expert opinions are admissible if a special or particular knowledge in science, art, industry or technical activity is needed (Articles 751 and 457 NCCPC).

8 Making an Award

8.1 What, if any, are the legal requirements of an arbitral award?

Awards must be in writing and the decision reached must be properly justified in facts and law. It must deal with all the issues submitted to arbitration as well as with ancillary matters such as costs and fees of the proceedings, and be issued within the agreed delay. An award must be signed by the majority of the arbitrators in those cases where the tribunal is composed by several arbitrators.

9 Appeal of an Award

9.1 On what bases, if any, are parties entitled to appeal an arbitral award?

If the right of appeal has not been waived, the award may be appealed for the same reasons and bases as judicial

judgements. While the parties can waive the right of appeal before a judicial court, such waiver does not include annulment appeal due to failure to observe the established procedure; to rendering the award out of time or beyond compromised points. Notably, where the award is contrary to public order principles or patently illegal or against the Constitution, the Supreme Court has held that the courts have the power to revoke the arbitral decision even in case of waiver of the right of appeal.

De iure awards are usually appealed to the court of appeal that would have understood if the procedure had been judiciary. A second instance arbitral tribunal may intervene if provided in the arbitral agreement (Article 763). As regards awards rendered in *amiable composition*, no appeal is possible against them (Article 771 NCCPC).

10 Enforcement of an Award

10.1 Has your country signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? What is the relevant national legislation?

Argentina has ratified the New York Convention of 1958 and the Panama Convention of 1975.

Relevant provisions concerning the execution of arbitral awards are found under Articles 517, 518, 519 and 519(bis) of the NCCPC. The general rule is that the enforceability of foreign awards will depend on the treaties signed with the country where they originate. Otherwise the award will have to be recognized by a local court before its enforcement. The local courts will recognize and enforce the foreign award if it is a final decision issued by a competent tribunal, the right of defence has been respected, it does not affect public order principles and is not contradictory with another judgement dictated previously by an Argentine tribunal.

10.2 What is the approach of the national courts in your country towards the enforcement of arbitration awards in practice?

Argentine courts will enforce arbitral awards.

11 Confidentiality

11.1 Are arbitral proceedings sited in your country confidential? What, if any, law governs confidentiality?

There is no specific confidentiality requirement under Argentine law. Nevertheless, the parties are free to agree on their own terms in this regard, and frequently do so. In addition, certain institutional arbitration rules establish the confidentiality of the proceeding (Buenos Aires Stock Exchange rules, Article 24, Buenos Aires Bar Association arbitral rules, Article 25, arbitral rules of the Arbitral Tribunal of the Economic Science Professional Council, Article 1.4., among others).

Some rules (such as Arbitral Tribunal of the Economic Science Professional Council) provide for the option of publishing the award without naming the parties.

11.2 Can information disclosed in arbitral proceedings be referred to and/or relied upon in subsequent proceedings?

The general rule is that information is not confidential, thus, it may be subsequently referred to. However, a confidentiality agreement may restrict such use.

11.3 In what circumstances, if any, are proceedings not protected by confidentiality?

Arbitration proceedings are not confidential by law, but in practice, the parties usually agree to conduct the arbitration on a confidential basis.

12 Damages/interests/costs

12.1 Are there limits on the types of damages that are available in arbitration (E.g., punitive damages)?

There are no particular limits with regard to damages applicable to arbitration proceedings. The general law on damages will be applicable.

12.2 What, if any, interest is available?

Argentine law does not provide any particular restriction on interest in arbitration proceedings.

12.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Pursuant to Article 772 NCCPC, arbitrators may award fees and costs following the general rules of Argentine law, as found in Article 68 NCCPC. The general principle is that the winning party is entitled to recover its fees and costs as regulated in the law, which basically provides for fees as a percentage of the award.

12.4 Is an award subject to tax? If so, in what circumstances and on what basis?

An award is not subject to court tax, unless recourse is made to a court for its enforcement, in which case a 3% court tax must be paid upon filing the proceedings.

13 General

13.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in your country? Are certain types of disputes commonly being referred to arbitration?

Although no official statistics are kept, there has been a trend during the last 15 years favouring the incorporation of arbitration clauses into international commercial agreements. In particular, insurance, joint venture, turn-key contracts, share purchase agreements, public works, oil and gas, and international sales contracts are now likely to contain an arbitration clause. With regard to domestic arbitration, arbitration clauses are increasingly found in construction, purchase of shares, and civil engineering contracts.

The arbitration tribunal of the Buenos Aires Stock Exchange is widely used because of its high reputation and the quality of its judges.

13.2 Are there any other noteworthy current issues affecting the use of arbitration in your country?

Recently, several lower courts and Supreme Court judgements overruling awards against the State or

interfering in arbitration proceedings in which the State was the defendant, have put seriously in doubt the convenience and viability of arbitration proceedings when the State is a party.

**Guido Santiago Tawil**

M. & M. Bomchil
Suipacha 268, piso 12
C1008AAF Buenos Aires, Argentina
Tel: +54 11 4321 7506
Fax: +54 11 4321 7555
Email: guido.tawil@bomchil.com
URL: www.bomchil.com

Dr. Guido S. Tawil obtained his law degree in 1983, a master degree in Administrative Law and Public Administration in 1986 and a Ph.D. in Administrative Law in 1991, all of them from the University of Buenos Aires School of Law. He has been awarded the University of Buenos Aires School of Law Award for the best doctoral dissertation (1991) and the Alejandro E. Shaw Award for contribution in commercial and administrative law (1991) by the Buenos Aires Bar.

He is a partner of M. & M. Bomchil since 1993 and head of the Economic Regulation, Administrative Law and International Arbitration areas of the firm. He is professor of law at several universities, prolific writer and lecturer. He is author of five books and more than 100 articles in his field of practice. He is the vice chairman of the ALA (*Asociacion Latinoamericana de Arbitraje*).

He usually acts as counsel, expert or arbitrator under the ICSID ICC or LCIA rules.

**Rafael Mariano Manóvil**

M. & M. Bomchil
Suipacha 268, piso 12
C1008AAF Buenos Aires, Argentina
Tel: +54 11 4321 7500
Fax: +54 11 4321 7555
Email: rafael.manovil@bomchil.com
URL: www.bomchil.com

Dr. Rafael Mariano Manóvil graduated from the School of Law of the *Universidad de Buenos Aires* in 1966 where he obtained the degrees of Lawyer specialized in Business Law, German Public Translator and Doctor of Law. He also attended Public International Law at the University College of the University of London, U.K. and was granted a fellowship at the Max Planck Institute of Foreign and International Private Law (Hamburg).

At present, he holds a chair in commercial law at the University of Buenos Aires and lectures at several postgraduate programs at different law schools. He is the author of several books and papers. He is often invited to lecture and hold conferences in Argentina and abroad.

Partner of M. & M. Bomchil and one of the heads of the Department of Commercial, Company and Bankruptcy Law, his experience as a lawyer started in 1967. Some years later he was a founding partner of Zaldívar, Manóvil & Asociados, a law firm highly specialized in corporate matters and conflicts, bankruptcy law and local and international arbitration which merged into M. & M. Bomchil in January 2003. He participated in many of the corporate disputes which turned out as leading cases in Argentina.

M & M Bomchil

M. & M. Bomchil was founded in 1923. It is one of the major law firms in the Argentine Republic, providing comprehensive legal services to local and foreign clients in the different branches of law, with specialization in commercial, financial, tax, anti-trust, administrative and regulatory law. Its lawyers actively act in arbitration, both local and international, as attorneys and arbitrators.

The firm has assisted foreign and national companies, representing investors in gas, electricity, telecommunications, drinking water and technology sectors, at many international arbitration proceedings before the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), the London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC), among others.

The firm's clientele, mainly formed by multinational companies that invest in Argentina and by medium and large local companies, is involved in diverse sectors of the economy: commercial and industrial companies, public utilities, banks and financial institutions, insurance companies, entertainment enterprises (cable and conventional television, content providers) and service companies, as well as foreign governments and embassies, foundations and non-profit organizations.

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