

# The new Argentinian arbitration law: a train in an unknown direction?

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## ABSTRACT

After much debate and many failed attempts, Argentina has fortunately adopted a new regulation on arbitration, embodied in the new Federal Civil and Commercial Code. The present work describes and analyses most significant aspects of this regulation. Although, to a great extent, it is in line with most accepted global trends, some of its norms present, at least, certain potential to create practical inconveniences that could substantially affect the use of arbitration as a dispute resolution mechanism in Argentina. In other words, although on the one hand it must be acknowledged that it incorporates important advances in many aspects, on the other hand, it is important to note the concern arising out of the treatment given to certain matters. As to the latter, the present work offers some ideas that should be considered in order to mitigate the negative effects of the new regulation.

## 1. INTRODUCTION: THE ADOPTION OF A CLAIMED UPDATE

During the last decades, almost all Latin American countries have updated their regulation on arbitration.<sup>1</sup> Although in past years Argentina has seen some well-intentioned attempts to do the same,<sup>2</sup> unfortunately, none of them received enough support to become a reality and, therefore, the country remained outside the updating wave.<sup>3</sup>

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1 17 Latin American States have modernized their arbitral law in the last two decades. More than half of them have done so following the 1985 UNCITRAL Model Law on International Commercial Arbitration, some also incorporating the amendments approved in 2006 (hereinafter ‘Model Law’). See Diego P Fernández Arroyo, ‘La evolución del arbitraje en América Latina: de la supuesta hostilidad a la evidente aceptación (una evaluación a mediados de 2014)’ in *Arbitraje Comercial Internacional* (OEA, Doc OEA/Ser.D/XIX.15) 345–80. Argentina is the 18th country in the region to take the initiative of updating its regulation on arbitration.

2 Including one trying to adopt the Model Law.

3 At the international level, Argentina is a State Party to the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards (hereinafter ‘New York Convention’), approved by Law 23.619; the 1975 Inter-American Convention on international commercial arbitration (hereinafter ‘Inter-American Convention’); and the 1998 Mercosur Agreement on international commercial arbitration (hereinafter ‘Mercosur Agreement’) approved by Law. The latter was mirrored in the 1998 Agreement on

At the same time, even more efforts were being made in order to unify the federal commercial and civil codes, also with some failed attempts,<sup>4</sup> until the 2012 Project gained the necessary acceptance for the much awaited unification to materialise. Thus, in late 2014, the Federal Congress passed the new Federal civil and commercial code,<sup>5</sup> in force as of August 2015,<sup>6</sup> which, after much time, debate, and failed attempts, has also updated the legislation on arbitration. With the adoption of this new regulatory framework, Argentina has now joined its fellow Latin American states in the update wave.<sup>7</sup>

In order to carry out the codification, a drafting commission was designated,<sup>8</sup> which, in turn, entrusted the first drafting of the provisions of each specific field to renowned specialists. It is fair to highlight that the team in charge of drafting the arbitration chapter did an excellent job, mainly following the French law,<sup>9</sup> the Quebec Civil Code (1994), and the Model Law.<sup>10</sup> Unfortunately, this draft was later partially obscured by some modifications made during the last steps of the legislative process. As a result, in general terms, the Code represents important progress in various aspects, although, at the same time, it has created serious doubts regarding some others. Therefore, although we welcome the decision to pass this new regulation, we believe that the final product deserves some considerations, which are discussed throughout this article.

After the adoption of new rules, there is always a transition period to work on the most adequate interpretation and application of them. In this vein, the objective of this work is to make a humble contribution on the new legal framework that will ideally be useful for its comprehension, interpretation, and further application. In order to do so, we will present, explain, and analyse its most relevant aspects, sometimes through comparisons with the regime of the Federal Civil and Commercial Procedural Code<sup>11</sup> as well as foreign legislations. Likewise, we will raise some questions and warn about certain potentially problematic provisions. As to the latter, although it may be too early to be assured that this the best solution, we will at least propose some ideas aiming at facing the challenges that they present. Lastly, we will yield some general conclusions.

## 2. AN ANTIQUE DEBATE: CONTRACT VS PROCESS

Originally, arbitration in Argentina was separately regulated by each province in their respective procedural codes and, in the federal territory, by the Federal procedural

international commercial arbitration between the Mercosur, Bolivia, and Chile, which never entered into force since neither Bolivia nor Chile has ratified.

4 Among others, the projects prepared by Juan A Biliboni (1926) and Jorge J Llambías (1954) could be mentioned.

5 Hereinafter the 'Code' or 'new Code.'

6 Approved by Law 26.994 and promulgated according to Decree 1.795/14. In force as of 1 August 2015, pursuant to Law 27.077.

7 Therefore, only Haiti and Uruguay would remain pending to renew their legislation on arbitration. Haiti made a reform of its arbitral law in the 2006 Civil procedural code, but it cannot be regarded as a 'modernizing' reform.

8 Composed by Ricardo L Lorenzetti, Elena Highton de Nolasco, and Aída Kemelmajer de Carlucci.

9 Civil procedural code in accordance with Decree 2011-48 of 2011 (hereinafter 'French Law').

10 Official text of the basis of the draft of the Federal Civil and Commercial Code, s VI (3rd Book, Title IV).

11 Hereinafter the 'Federal procedural code.'

code. Although most of those codes coincide in most respects, it is evident that the legislation was far from being uniform throughout the country. Besides, over time, those norms have become obsolete, since they have not accompanied the fast evolution of commerce and its consequent need to resolve disputes more efficiently, especially at the international level.<sup>12</sup> For those reasons, for a long time, there was a unanimous call for a regulatory update, but there was no unanimity as to the way this task should be carried out.<sup>13</sup>

The main discussion on how to carry out the so-claimed update was linked to the legal nature of arbitration and, consequently, with the venue where its norms should be contained. This was because, according to the federal system in Argentina, the substantive codes fall within the legislative jurisdiction of the Federal Congress, whereas procedural law falls within the legislative jurisdiction of each province.<sup>14</sup> Therefore, the positions were—or are still—divided<sup>15</sup> into two basic groups.

On the one side are those who argue that arbitration is an institution of ‘procedural’ nature, based on the fact that it is a ‘process’ to resolve disputes that lacks any substance whatsoever. Hence, they deny the existence of an ‘arbitral law’, stating that there would merely be an arbitral ‘procedure’, just as there exist other procedures (eg executive or ordinary procedures). Therefore, given the Argentinean constitutional context, this group considers that provincial law should govern arbitration, with the exception of those aspects related to federal matters.

On the other side, there are those who point out the ‘contractual’ (ie substantive) nature of arbitration. This group focuses on the origin of arbitration, which arises out of the agreement of the parties (ie contractually). For the members of this group, the relation of arbitration with rules and procedural criteria does not eliminate the substantive essence of the rights and duties arising out of it. The vernacular consequence of this position is that arbitration must be included in the substantive legislation (within the Federal law-making power). Likewise, they consider that arbitration is intrinsically linked with commerce, given that it is an especially useful method to resolve commercial disputes, and commerce is a matter within the federal legislative jurisdiction.<sup>16</sup>

Despite acknowledging the effort of distinguished colleagues in trying to argue in favour of one or the other position, we consider that there is no real need to label

12 A solid explanation of this can be found in Roque J Caivano, ‘La obsolescencia de la legislación argentina sobre arbitraje es cada vez más evidente’ (2010) 70(1) *Revista del Colegio de Abogados de la Ciudad de Buenos Aires* 63.

13 The only exception is the Civil procedural code of the province of San Juan. See Julio César Rivera, ‘Alentadora reforma del Código procesal de la provincia de San Juan (Argentina) en materia de arbitraje’ (2012) 20 *Revista de Derecho comparado* 217.

14 Federal Constitution, arts 75(12), 121, 126.

15 Strictly speaking, the debate still continues and it is not surprising that it has been revitalized due to the enactment of the new Code. Thus, once again there is a confrontation between a ‘privatist’ explanation (very clearly expressed in Julio César Rivera, ‘El arbitraje en el Proyecto de Código sancionado por el Senado: prejuicios y errores’, LL 013-F-1069, ss II.2–II.4) and the traditional ‘procedural’ explanation (see eg Jorge A Rojas, ‘La renuncia a la impugnación del laudo arbitral’ *RCCyC* 2015 (agosto) (17 August 2015) 63).

16 Federal Constitution, art 75(13). Julio César Rivera and Víctor G Parodi, ‘Contrato de arbitraje: posibilidad de incorporarlo al Código civil’, LL 2012-D-837, 2. This is the line followed by the US Federal Arbitration Act (1925).

arbitration as one thing or the other. First, the distinction between substantive and procedural norms is not always sufficiently clear, despite the instrument where they are contained.<sup>17</sup> Secondly, the truth is that arbitration arises out of a contract,<sup>18</sup> which may then trigger a procedure. The underlying relationship regarding to which such contract is concluded is not necessarily contractual (although in general it is). Thirdly, both groups admit the undeniable contractual and procedural features of arbitration, despite each of them attaching more relevance to one or the other of those. Thus, it seems sound to conclude that arbitration is some sort of an autonomous institution<sup>19</sup> with a mixed nature.<sup>20</sup>

The point is that, on the occasion of drafting the new Code, there arose the possibility of including a regulation on arbitration and, by including a chapter on the 'arbitration contract', the legislator seems to have taken a position. It must be mentioned, however, that the provinces still keep their prerogatives to regulate 'purely' procedural issues related to arbitration (eg the judicial constitution of the arbitral tribunal, the procedure to challenge an arbitrator). Although the original draft of the Code was extremely careful in not invading such field, the norms on the judicial review of arbitral awards that were added later during the legislative process are highly questionable and could open the door for discussions on their constitutional validity. In this sense, given that the provincial procedural codes are still in force, it will be interesting to see how contradictions between them and the new Code will be conciliated (see Section 7).

In our understanding, given that the legislator has considered that arbitration was a subject capable of being regulated at a national level, it would have been more satisfactory to pass a special law, as many other countries have done.<sup>21</sup> In fact, with the exception of Mexico (where legislation on arbitration is contained in the Commercial code), all Latin American states that have modernized their arbitral law have done it through a special act. Nevertheless, this would have surely demanded greater efforts and debates with uncertain outcomes, so it should be regarded as positive that the legislator has taken advantage of the enactment of the new Code to take a step in the right direction. Hopefully, this will not eliminate the possibility of eventually passing a special law, though this is not likely to happen in the near future.

Finally, it is worth mentioning that, although one can refrain from supporting either the 'contractual' or the 'procedural' position regarding the nature of arbitration,

17 María A Gelli, *Constitución de la Nación Argentina: comentada y concordada* (3rd edn, La Ley 2008) 671. For example, the Federal Constitution mandates the National Congress to pass the bankruptcy act, but Law 24.522 on insolvency proceedings also contains procedural aspects, since both the call for creditors and the bankruptcy are 'procedures'.

18 Arbitration always has a consensual origin. Therefore, speak of 'mandatory arbitration' means to commit an oxymoron. Unfortunately, many legislators have used such name to designate settlement procedures that are compulsory imposed, what creates confusion.

19 Just to give a simple example, pursuant to Law 19.550 on company law, the commercial company arises from the so-called 'constitutive contract', but what it creates is a 'person' (see arts 4, 5, 6), and it is treated as an autonomous institution.

20 Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 216–17.

21 See Carlos I Guaia, 'El arbitraje en el Proyecto de unificación legislativa' (2012) 72(1) *Revista del Colegio de Abogados de la Ciudad de Buenos Aires* 27.

it cannot be denied that as a legal discipline it does not belong to the procedural law. This is because arbitration ontologically constitutes an autonomous discipline that certainly contains procedural elements. Actually, the 'process', which is the object of procedural law and which is contained in the procedural codes, could not be more different to arbitration. This is even more evident when it comes to international arbitration. In fact, it is not by chance that the modernization of arbitration in Latin America has come along with the abandonment of those procedural codes as the legislative recipient for arbitration.<sup>22</sup>

### 3. THE BIRTH OF THE 'ARBITRATION CONTRACT'

#### 3.1 Definition

The new Code devotes a whole chapter to the 'arbitration contract'.<sup>23</sup> The first consequence of this inclusion is that the fundamental aspects of arbitration are no longer regulated by different legal instruments along the territory, but by one single unified instrument.<sup>24</sup> The first article of the chapter, Article 1649, provides the definition of the 'arbitration contract' in the following terms:

There is an arbitration contract when the parties decide to submit to the decision of one or more arbitrators all or some of the disputes, which have arisen or might arise between them, with respect to a certain legal relationship of private law (contractual or not), in which public policy is not at stake.

The definition transcribed is quite clear and does not require further explanation, except for its last part as it limits its extent<sup>25</sup> (ie public policy), which will be analysed below.<sup>26</sup> It is noteworthy that the new Code does not specify whether it governs only domestic arbitration or also international arbitration. The Code contains a special section on private international law,<sup>27</sup> which does not make reference to the chapter on arbitration, but it does mention the institution of arbitration. Therefore, given the lack of an express prohibition, it can well be understood that it applies to both kinds of arbitration.<sup>28</sup> Regarding international arbitration, the lack of specific

22 The same has happened in many countries. The case of France, a country which is well known due to its *avant garde* features on the topic despite keeping its arbitral regulation in the Civil procedural code, is not an exception: the French conception of procedural law is, as it is known, eminently 'privatist'. Thus, in the exams for law professors, which have a national character, procedural law is part of the call for professors on 'private law and criminal sciences' (the other category is 'public law'). The only Latin American countries where arbitration is still a prisoner of the procedural *corpus* are Haiti and Uruguay. However, in Uruguay, the norms of the General code of process only apply (save a few exemptions) to domestic arbitration and there is a draft law on international commercial arbitration based on the Model Law.

23 Third Book ('Personal rights'), Title IV ('Contracts in particular'), ch 29, arts 1649–65.

24 This, with the exception of procedural norms that are still in force.

25 In concrete, the text after the last comma did not exist in the original draft. It was included in the last phase of the legislative process.

26 See Section 5.5.6.

27 Book VI, Title IV (arts 2594–671).

28 In fact, strictly speaking, that is also the situation under the Federal procedural code, which is applicable in both types of arbitration. Article 1 allows the extension of jurisdiction in favour of foreign arbitral

norms will require integration with other rules of the Argentinian legal system. Thus, for instance, in the absence of any prescription on the law applicable to the merits of a dispute, it will be preferable (and closer in terms of analogy) to apply the vague (and therefore flexible) Article 10 of the Mercosur Agreement than the tortuous Article 2651 of the Code. Of course, this solution will only be useful by default since in general, the question will be answered by the arbitration rules chosen by the parties.

### 3.2 Forms

Regarding the forms of the arbitration contract, Article 1650 of the Code states that it can be contained in an arbitration clause within another contract, in an independent agreement, or even in the by-law of a legal entity. The same Article establishes that the arbitration contract must be in writing, which is in line with the wording of the New York Convention (Article II) and the Panama Convention (Article 1). However, given the technological developments and the need of commerce to rely on those developments in many different areas, nowadays contracts are sometimes concluded by means other than writing. Therefore, in order to construe the terminology 'in writing' it would be convenient to follow the same rule set forth by the UNCITRAL recommendation on the interpretation of Article II of the New York Convention,<sup>29</sup> which reflects the current general trend.

Article 1650 also allows entering into the arbitration contract by reference. In this sense, it states that the reference made in a contract to a document containing an arbitration clause constitutes an arbitration contract, provided that the main contract is in writing and the reference implies that such clause is a part of it. Although the general rules on contract law would probably lead to the same conclusion, it is convenient that the Code has expressly clarified it, in order to avoid conflicts. In practice, this solution becomes relevant when it comes to complex commercial relationships with various instruments interrelated. In those cases, for instance, in order to profit from the advantages of consolidation and multi-party arbitration (offered by some modern institutional rules), it is necessary that the arbitration agreements involved are at least compatible.<sup>30</sup> In this sense, the incorporation by reference makes it easy for all the contracts involved in a particular project to incorporate the same arbitration clause contained in one of them or to incorporate a master arbitration agreement, avoiding inconsistencies.

Last, but certainly not least, it is worth highlighting that the Code does not include the classic and absurd requirement to formalize the *compromis* after the dispute

tribunals (like art 2605 of the new Code) and then the norms on arbitration (arts 736ff) do not distinguish between domestic and international arbitration (just as the arbitration chapter in the new Code).

29 Published in the official records of the General Assembly, 61st sessions, Supplement No 17 (A/61/17), Annex II. Said recommendation came motivated by the inclusion of two options for the definition and form of the arbitration agreement in the 2006 review of the Model (art 7). One of those options eliminates the written requirement.

30 For example, Arbitration Rules of the International Chamber of Commerce (hereinafter 'ICC Rules'), arts 10(c) and 6.4(ii); Arbitration Rules of the London Court of International Arbitration (hereinafter 'LCIA Rules'), art 22.1(x); Arbitration Rules of the International Centre for Dispute Resolution (hereinafter 'ICDR Rules'), art 8.1(c).

has arisen,<sup>31</sup> thus departing from the Federal procedural code, which considers that the arbitration clause is a mere promise to then submit disputes to arbitration.<sup>32</sup>

#### 4. A CLEAR SAMPLE OF CONSISTENCY WITH GLOBAL TRENDS

The great progress that must be acknowledged is that the new Code adopts various international principles that are paramount for the correct functioning of arbitration as a dispute resolution mechanism. Although some of these principles were already included in international treaties to which Argentina is a contracting party and were also recognized by case law, they were not expressly present in its internal positive law. Therefore, the inclusion of a set of provisions supporting such principles is more than welcomed.

##### 4.1 Separability and *kompetenz-kompetenz*

As with most of the legislations,<sup>33</sup> Article 1653 of the Code adopts the separability principle (or autonomy) of the arbitration contract. Although this principle was not expressly included in the internal legislation, at the international level it was included in the Mercosur Agreement (Article 5) and was also admitted by case law.<sup>34</sup> By establishing that the agreement to submit disputes to arbitration constitutes a ‘contract’ (Article 1649), it goes without saying that it will be different from the main contract in which it is contained. Nevertheless, this incorporation is positive in order to strengthen the idea.

In turn, Article 1654 incorporates the *kompetenz-kompetenz* principle, which although has some differences,<sup>35</sup> is present in most legislations<sup>36</sup> and arbitration

31 See, Roque J Caivano, ‘El compromiso arbitral: una institución inconveniente’, LL 1997-F-1177.

32 Federal procedural code, arts 739–42.

33 Just as examples in Latin America, the following can be mentioned: Bolivia (Law 708 of 2015, art 44), Brazil (Law 9.307 of 1996, art 8), Cuba (Decree-Law 250 of 2007, art 13), Colombia (Law 1.563 of 2012, art 5), Costa Rica (Law 8.937 of 2011, art 6), Chile (Law 19.971, art 16.1), Ecuador (Law 2.006-014 de 2006, art 5), El Salvador (Decree 914/2002, art 30), Guatemala (Decree 67 of 1995, art 21.1), Honduras (Decree 161 of 2000, art 37), Mexico (Commercial code, art 1.432), Nicaragua (Law 540, art 42), Paraguay (Law 1.879 of 2002, art 19), Peru (Decree 1.071 of 2008, art 41.2), Dominican Republic (Law 489 of 2008, art 11), and Venezuela (Law on commercial arbitration of 1998, art 7).

34 National Court of appeals in commercial matters, Chamber E, *Wlbers S.S., Enrique C. v Extraktionstechnik Gesellschaft Fur Anlagenbau M.B.M.*, 26/09/88, LL 1989-E-302; National Court of appeals in civil and commercial federal matters, Chamber I, *Smit International Argentina SA v Puerto Mariel SA*, 01/03/11, LL 2011-D-645.

35 Some differences can be found regarding the opportunity when the arbitrators’ decision can be reviewed by the State courts and the standard to be applied when conducting such revision. For a detailed analysis of this principle in different jurisdictions, see William W Park, ‘The Arbitrator’s Jurisdiction to Determine Jurisdiction, II: the Basics’ in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?* ICCA Congress Series, vol 13 (Kluwer Law International 2006) 58–90.

36 Model Law, art 16(1). Just as examples of Latin America, the following can be mentioned: Bolivia (Law 708 of 2015, art 80.II), Brazil (Law 9.307 of 1996, art 8), Cuba (Decree-law 250 of 2007, art 13), Colombia (Law 1.563 of 2012, art 29), Costa Rica (Law 8.937 of 2011, art 16), Chile (Law 19.971, art 16.1), Ecuador (Law 2006-014 of 2006, art 22), El Salvador (Decree 914/2002, art 51), Guatemala (Decree 67 of 1995, art 21), Honduras (Decree 161 of 2000, art 60), Mexico (Commercial code, art 1.432), Nicaragua (Law 540, art 42), Panama (Decree-law 5 of 1999, art 17), Paraguay (Law 1.879 of 2002, art 19.1), Peru (Decree 1.071 of 2008, art 41), Dominican Republic (Law 489 of 2008, art 20), and Venezuela (Law on commercial arbitration of 1998, art 7). In the case of Uruguay, it was clearly accepted by case law in the decision of the Appellate Tribunal on civil matters, third division, *Polamar S.A. v*

rules.<sup>37</sup> Although this principle was not expressly contained in the internal legislation, it was already present in international treaties<sup>38</sup> and was also admitted by case law.<sup>39</sup> Therefore, its incorporation comes to confirm the existent practice.

#### 4.2 The priority rule

The first part of Article 1656 establishes the ‘negative effect’ of the *kompetenz-kompetenz* principle<sup>40</sup> by stating that the arbitration contract excludes the competence of State courts. In order to make this principle operative, it works along with the so-called ‘priority rule’, included in the New York Convention (Article II.3) as well as in most legislations,<sup>41</sup> according to which the arbitrators enjoy some sort of temporal priority decided on their own jurisdiction. The cited Article follows the same line as the French law (Article 1448) and the Model Law (Article 8.1).<sup>42</sup>

The said priority does not apply when: (i) the arbitral tribunal is not yet entertaining the dispute and (ii) the arbitration agreement seems manifestly null or incapable of being performed. It is worth highlighting that, in accordance with the wording of the provision, these requirements are cumulative.

Regarding the first requirement, it should be understood that it refers to the situation where the arbitral tribunal is not yet constituted. Regarding the second requirement, its two elements must be distinguished. The term ‘null’ refers to a legal situation (ie the validity of the arbitration contract under the relevant law), whereas the phrase ‘incapable of being performed’ refers to a factual situation.<sup>43</sup> The latter should be construed in accordance with the interpretation generally given to the

*Compañía de Medios de Procesamiento S.A. (Visanet Uruguay)*, No 262/09i (11 November 2009). Besides, as it is known, the New York Convention is in force in all Latin American countries.

37 For example, ICC Rules, art 6(3); UNCITRAL Arbitration Rules, art 23(1); LCIA Rules, art 23; ICDR Rules, art 19; Arbitration Rules of the Singapore International Arbitration Center (hereinafter ‘SIAC Rules’), art 25(2).

38 Including the Mercosur Agreement, art 8. It is generally considered that the Inter-American Convention indirectly incorporates it through its remission to the Arbitration Rules of the Inter-American commission on commercial arbitration. Although the New York Convention does not specify the application of this principle, it does is not neutral neither. Its arts II.3 and V.1 open the door for arbitrators to decide on their own competence; likewise, arts V.1(a) and V.1(c) could be applied even when the arbitral tribunal had rendered an award despite the existence of objections to its jurisdiction. In this sense, see *ICCA’S Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (ICCA 2011) 39–40 <[www.arbitration-icca.org](http://www.arbitration-icca.org)>.

39 Federal Supreme Court, *Bear Service S.A. v Cervecería Modelo S.A.*, 05/04/05, LL 2005-D-158..

40 Emmanuel Gaillard, ‘Convention d’arbitrage’ in *Juris Classeur: Droit International* (1994, Fasc. 586-5) ¶¶ 49–50.

41 As examples in Latin America, the following can be mentioned: Chile (Law 19.971, arts 1.2 and 8.1), Cuba (Decree-law 250 of 2007, art 15), Ecuador (Law 2006-014 of 2006, art 7), El Salvador (Decree 914/2002, art 31), Guatemala (Decree 67-95, art 11.1), Honduras (Decree 161-2000, art 40.a), Nicaragua (Law 540, art 28), Panama (Decree-law 5 of 1999, art 11), Paraguay (Law 1.879 of 2002, arts 1.2.2 and 11.1), Peru (Decree 1071 of 2008 art 3), and Dominican Republic (Law 489 of 2008, art 12).

42 Regarding the current status of the priority rule in Latin America, see Yas Banifatemi, ‘La regla de prioridad: ¿una prioridad en América Latina?’ in Emmanuel Gaillard and Diego P Fernández Arroyo (dirs), *Cuestiones claves del arbitraje internacional* (UR/CEDEP 2013) 81–109.

43 For instance, Stefan Kröll, ‘The “incapable of being performed” exception in article II(3) of the New York Convention’ in Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2008) 353.

New York Convention, which employs the same terminology. Thus, it would include cases where the arbitration contract is valid, but there is a concrete impossibility to make it function because it is unclear or intelligible (eg pathological clause) or it lacks the necessary requirements for its enforcement (eg the sole arbitrator designated in the arbitration agreement has passed away).<sup>44</sup>

On top of this, it must be noted that for the exception to apply, the fulfilment of the requirements must be 'manifest'. Therefore, State courts should not conduct a deep assessment of the arbitration contract and must only accept to entertain a case if the defects of the arbitration contract are evident. In this way, the legislator has set a high bar in order to prevent exorbitant intervention of State courts. This rule is quite positive, but in order to work properly, both grounds requirements of the exception must be interpreted in a restrictive fashion.

Of course, said priority must not be confused with exclusivity. Arbitrators may be the first to decide but not necessarily the only ones since their decision could be reviewed in future proceedings to either set aside or enforce the arbitral award.

### 4.3 Goodbye to the restrictive criterion?

The priority rule is complemented by some sort of *favor arbitrandum* principle, contained in another paragraph of the same Article 1656, which states that the arbitration contract should always be interpreted in such a way as to ensure its effectiveness. Put simply, in case of doubt as to whether the arbitration contract is manifestly null or incapable of being performed, it must be considered that it is not. We believe that this rule should not be limited to the case where the dispute is brought to State courts at the very outset but should also apply in any further stage. Thus, it should be equally applied by the arbitral tribunal (when the Code is the applicable law) as well as by the State courts, for example, in a proceeding to set aside or enforce the arbitral award.

Historically, Argentinian judges have construed the arbitration agreement in light of an extremely restrictive criterion,<sup>45</sup> unless the intention of the parties to arbitrate is crystal clear.<sup>46</sup> Only a few precedents can be found mitigating such trend<sup>47</sup> and

44 ICCA Guide (n 38) 53.

45 See, for instance, National Court of Appeals in Commercial Matters, Chamber F, *Supermarkets Norte Investments B.V. v Carrefour S.A.* (27 November 2014) <www.cij.gov.ar>. For an analysis of the restrictive criterion, see Diego P Fernández Arroyo and Ezequiel H Vetulli, 'Dogmas frente a sentido común e interpretación correcta de las normas en vigor: una oposición decisiva para la evolución deseable del arbitraje internacional' *Revista de derecho comercial y de las obligaciones* 274, 1516.

46 National Court of Appeals in Commercial Matters, Chamber B, *Villarreal Club de Fútbol S.A.D. v Club Atlético River Plate*, 17/09/14, el Dial AA8B36.

47 See eg National Court of appeals in commercial matters, Chamber D, *Reef Exploration Inc. v Compañía General de Combustibles*, 05/11/02, LL 2003-E-937. In this case, during a procedure for the recognition and enforcement of a foreign arbitral award, the Court of Appeals held that the arbitrators had jurisdiction to entertain claims based on circumstances prior to the conclusion of the contract, due to their direct or indirect link with the former. See also National Court of appeals in commercial matters, Chamber E, *Vaccari, Julio Eduardo v Compagnie Générale de Particip. Indu. et Financière S.A.S.*, 28/08/06, LL AR/JUR/6390/2006, where the Court of Appeals did not apply the restrictive criterion invoked by the General Attorney before the Court of Appeals and confirmed the lack of jurisdiction and upheld the defense on lack of jurisdiction of State courts.

only exceptionally courts have applied a broader criterion<sup>48</sup> or have held that in case of doubt the question should be decided in favour of arbitration.<sup>49</sup>

The main argument invoked in support of said restrictive interpretation rule is that arbitration constitutes an exception to the judicial jurisdiction (considered as 'natural'). In other words, the attitude of the courts is based in some sort of fundamental right to the natural judge, identified with the 'State judge'. However, the legal justification for this identification remains a real mystery.<sup>50</sup> In reality, there is no doubt that the fundamental right at stake (except in criminal cases, where the notion refers to the pre-established authority) is not to have a natural judge but the right to access justice, which can obviously be provided either by a 'State judge' or an 'arbitral judge'.<sup>51</sup> In effect, this is acknowledged by several Latin American constitutions.<sup>52</sup>

On top of the fact that the restrictive criterion has no real basis in the Argentinian positive law, it is also inconsistent with the reality or philosophy of arbitration. Nowadays, in many jurisdictions the arbitration agreement is construed with more favourable rules and the antique and prejudiced restrictive criterion has been left behind.<sup>53</sup> Thus, such criterion is currently rejected<sup>54</sup> and the trend is to accept a broader interpretation of the arbitral agreement.<sup>55</sup> For instance, the restrictive criterion was previously followed in some Latin American countries,<sup>56</sup> but over time it has been forgotten and there are now many decisions following this principle in the region.<sup>57</sup>

48 National Court of appeals in civil matters, Chamber G, *Vázquez Torrielli, E. N. v Vázquez de Castro*, 14/08/90, LL 1990-E-147. See also National Court of appeals in commercial matters, Chamber C, *Atuel Fideicomisos S.A. v Fondo Solidario para Empleados Asociación Civil*, 16/08/02, LL 203-A-577, where the arbitral clause contained in a trustee was extended to the subsequent contracts related to the performance of the former. Also, with respect to the validity of the arbitration agreement, in some opportunities, the provisions on the interpretation of commercial contracts have been applied, including the *favor validitatis* of art 218(3) of the Commercial code; see Jan Kleinheisterkamp, *International Commercial Arbitration in Latin America* (Oceana 2005) 134–35.

49 National Court of first instance in commercial matters No 4, *Camuzzi Argentina S.A. v Sodigas Sur, S.A.*, 08/03/99, ED 185-125. Here, it was decided that, in case of doubt as to whether the subject matter of the dispute fell within the scope of the agreement to arbitrate or not, it should be decided in the affirmative. The ruling was then upheld in the second instance, National Court of appeals in commercial matters, Chamber A, *Camuzzi Argentina S.A. v Sodigas Sur S.A.*, 27/08/99, ED 185-125.

50 Arroyo (n 1).

51 *ibid*; see also, Diego P Fernández Arroyo, 'La perspectiva argentina y sudamericana' in Julio César Rivera and Diego P Fernández Arroyo (dirs), *Contratos y arbitraje en la era global* (CEDEP 2012) 187–99, 193. In this sense, it must be noted that art 736 of the Federal procedural code expressly mentions the 'arbitral judges' (*jueces árbitros*).

52 For example, the Constitution of Panama, art 202; the Constitution of Peru, art 139; the Constitution of Venezuela, art 253.

53 Gary B Born, *International Arbitration: Law and Practice* (Wolters Kluwer 2012) 88. For example, in Chile, arbitrators may entertain questions that were not expressly submitted to arbitration, but are linked with those expressly submitted (Law 19.971, art 16.1).

54 Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 260.

55 Gary B Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (4<sup>118</sup> edn, Kluwer Law International 2013) 146.

56 Kleinheisterkamp (n 48) 226.

57 Diego P Fernández Arroyo, 'Rapport de synthèse: la perspective sud-américaine' in Bénédicte Fauvarque-Cosson, Diego P Fernández Arroyo and Joël Monéger (eds), *Codification du droit privé et évolution du droit de l'arbitrage*, (Société de législation comparée 2014) 207–19, 208.

The *favor arbitrandum* is one of the international principles created to enhance arbitration,<sup>58</sup> which is based on a solid doctrinal, judicial, and normative trend in favour of arbitration. Basically, it states that, in case of doubt, an interpretation favouring arbitration should prevail, and this would apply to the validity and extent of the arbitration agreement.

All in all, in contrast to previous practice, the rule in favour of arbitration offered by the new Code is consistent with the current trends, leaving behind—at least in theory—the famous restrictive criterion.<sup>59</sup> Although even prior to the enactment of the new Code there were no reasons justifying its application, a proper application of the new norms would fatally terminate such an unjustified and counterproductive trend.

#### 4.4 The type of arbitration

With regard to the type of arbitration, Article 1652 of the new Code provides that the arbitration shall be in law, unless the parties expressly agree that the tribunal should act as *amicable compositeur*. This provision follows the international trend<sup>60</sup> and departures from the so-criticized rule in the Federal procedural code (Article 766), which provides the opposite solution. The fact is that, in practice, the parties generally expect their disputes to be resolved within a legal framework, but this is not always duly mentioned. Sometimes when concluding contracts, the parties are focused on their commercial objective and since in the first moment they are not confronted with each other, they do not devote enough time to draft the clauses related to potential disputes. Therefore, the new default solution adopted by the Code is accurate in light of fulfilling the real objective of the parties.

#### 5. THE LIMITS TO ARBITRABILITY: A QUESTIONABLE LIST

Like any other right, party autonomy has limits, both generally and specifically in the field of arbitration.<sup>61</sup> Among those limits, the clearest one is the arbitrability, that is, the one drawing the line between those questions that can be submitted to the decision of arbitrators and those that cannot. Arbitrability limits have several implications. They are not only relevant at the time of entering into a contract, but at the international level, they are also relevant in the enforcement stage, since pursuant to the New York Convention, the court before which enforcement is sought may refuse enforcement if the subject matter of the arbitration in which the award was rendered is not arbitrable under its own law (Article V.2.a).

On this aspect, the Federal procedural code, as a rule, allows submitting to arbitration any dispute, except for those that cannot be disposed by the parties (Articles 736–737). Conversely, instead of establishing a general rule, Article 1651 of the new Code sets forth a list of those matters that cannot be submitted to arbitration.

58 Franz T Schwarz and Christian W Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer Law International 2009) 204–07.

59 Víctor G Parodi, 'Comentario al artículo 1656' in Julio César Rivera and Graciela Medina (eds), *Código Civil y Comercial de la Nación Comentado, vol IV* (La Ley 2014) 869.

60 Model Law, art 28(3), ICC Rules, art 21(3).

61 Giuditta Cordero Moss, 'Limitations on Party Autonomy in International Commercial Arbitration' (2014) 372 *Recueil des cours* 129.

Basically, Article 1651 excludes the possibility of arbitrating the following: (i) questions on civil status or capacity and family matters,<sup>62</sup> (ii) consumer matters, (iii) adhesion contracts whatever their object, and (iv) matters arising out of labour relationships. Furthermore, it indicates that the chapter on arbitration (v) does not apply to controversies in which the State (either national or local) is a party. Finally, it must be recalled, the exclusion mentioned in Article 1649 *in fine*, (vi) relating to disputes where public policy is at stake. These exclusions deserve some considerations that will be made in the following sections.

### 5.1 Family matters

The exclusion of family matters is a traditional exclusion in comparative law. Although the analysis of this issue would exceed the scope of this work, it is inevitable to wonder what is the rationale for keeping this exclusion in today's context, considering the substantial modifications that have taken place in the field of family law.<sup>63</sup> The question would be particularly pertinent when it comes to certain family matters that are merely patrimonial (eg matrimonial property regime). With regard to the latter, the appropriateness of the prohibition to submit them to arbitration is at least debatable. In this aspect, it is worth mentioning that the original draft of the new Code used to make this distinction, but, unfortunately, in the end it was eliminated. We agree with those who consider that such elimination was unnecessary<sup>64</sup> since there are no real problems in freely submitting strictly patrimonial family matters to the decision of arbitrators. In any case, it is clear that the legislator has legitimately supported one of the positions, although it is regrettable that he has followed the traditional solution without assessing its coherence in the current social and legal context.

### 5.2 Consumer matters

There are no doubts that, in some circumstances, the judicial procedure is not sufficiently suitable to satisfy the needs of consumers<sup>65</sup> due to the formal strictness, cumbersome rules, and costs, which discourage their claims.<sup>66</sup> Therefore, the exclusion of consumer matters seems to be too extreme. It is true that consumer relationships present various particularities, basically because of the vulnerability in which the consumer is generally found. Nevertheless, this does not mean that there is a need to exclude the possibility of resolving these disputes through arbitration; in any case, it would be more appropriate to establish particular rules for particular situations. In fact, this is the solution found in comparative law, allowing consumer arbitration, though under certain special rules.<sup>67</sup>

62 In the original draft of the Code, art 1651 also used a rule of material exclusion, but in a more concrete and limited way: 'controversies over civil status, non patrimonial family and capacity matters cannot be submitted to arbitration. This chapter does not apply to consumer and labor relationships'.

63 See eg Frederik Swennen (ed), *Contractualisation of Family Law—Global Perspectives* (Springer 2015).

64 Parodi (n 59) 858.

65 Carlos J Colombo and Claudio M Kiper, *Código procesal civil y comercial de la Nación: anotado y comentado*, vol VI (2<sup>119</sup> edn, La Ley 2006) 390.

66 Juan M Farina, *Defensa del consumidor y del usuario* (Astrea 1995) 463.

67 See Diego P Fernández Arroyo (ed), *Consumer Protection in International Private Relationships* (ASADIP/CEDEP 2010).

In the same line, Argentine positive law has opened the doors to consumer arbitration. Prior to the new Code, there were no norms prohibiting consumer arbitration.<sup>68</sup> On the contrary, following the general rules on consumer law, it seemed that consumer arbitration was possible, provided that certain conditions were fulfilled; basically, the inclusion of arbitral clauses in consumer contracts were clear, comprehensible, and not abusive.<sup>69</sup> In other words, the fundamental rule was that arbitration was really accepted by the consumer and not imposed on him.<sup>70</sup> Besides, it is worth highlighting that under Argentine law, legal entities may also act as consumers,<sup>71</sup> which implies that the consumer will not always be an extremely weak party in the relationship. Overall, the point is that sometimes the consumer may legitimately opt for the arbitral jurisdiction.

On top of that, there are even some concrete norms referring to consumer arbitration. For instance, the Consumer Act (Law 24.240) promotes — with an imperative terminology—the creation of consumer arbitral tribunals (Article 59). Likewise, Decree 276/98 created the national system on consumer arbitration. Actually, it is worth remarking that, almost at the same time the new Code was enacted, Congress also enacted Law 26.993 on the settlement of consumer conflicts, which Article 72(38) mentions as consumer law arbitral tribunals. Therefore, the legislator's intention is not so clear, since, on the one hand, it expressly prohibits consumer arbitration and, on the other, seems to also promote it.

Lastly, it must be recalled that Article 42 of the Federal Constitution mandates to facilitate consumers with the most expeditious way to resolve their disputes. Of course, the determination of which is the most effective way will depend on the circumstances of each concrete case. However, even without affirming that arbitration is the most expeditious way to resolve consumer disputes, the mere fact that it is a good option is enough to keep it available. Conversely, closing the door to arbitration beforehand is not the most convenient solution for consumers and it can be regarded as a step backward with respect to the previous system, which, while far from being perfect, at least admitted the existence of consumer arbitration.

### 5.3 Adhesion contracts

The category of 'adhesion' contracts (where one party drafts the instrument and the other simply adheres to it) is sometimes confused with consumer contracts. Although the latter are almost always concluded in an 'adhesion' manner, on the contrary, there are adhesion contracts, which do not qualify as consumer contracts. In fact, the new Code clearly excludes the possibility of submitting to arbitration questions related to adhesion contracts, whatever their object. Moreover, consumer contracts and adhesion contracts are listed separately so the category of adhesion contracts must refer to the adhesion contracts that are not related to consumer relations.

68 Except for art 57 of Law 17.418 on insurances.

69 Roque J Caivano, *Arbitraje* (2<sup>120</sup> edn, Ad-Hoc 2008) 136.

70 *ibid* 137.

71 Law 24.240 on consumer protection, art 1; new Code, art 1.092. See examples in Juan M Farina, *Defensa del consumidor y del usuario* (3<sup>121</sup> edn, Astrea 2004) 59.

Besides this conceptual distinction, the practical problems of adhesion contracts are quite similar to the ones of consumer contracts. It is understandable that the legislator is afraid of situations where one party includes an arbitral clause in an adhesion contract without this being noticed by the other party, making it complicated for the latter to challenge such inclusion at a later stage. However, it is also possible that the party adhering to the contract consents such inclusion and that arbitration turns out to be an advantage for both parties.

In adhesion contracts that do not relate to consumer relationships it is even more evident that, although the adhering party did not draft the contract, this does not necessarily mean that it is a weak party or that arbitration will constitute a detriment to its rights. Large companies daily enter into a great number of adhesion contracts, since such modality enhances effectiveness and organization. If a company daily concludes a specific type of contract, it is logical to count on a model, repeating the same clauses that it considers appropriate, facilitating the work in each opportunity where it needs to conclude the same type of contract, instead of drafting it all over again. Actually, it is not naive at all to believe that this practice can even benefit the adhering party if it does not hold relevant experience in such type of contracts, as the experience of the other party may allow it to prepare the document faster and more professionally.

For example, a company that provides drilling services in the oil & gas industry may offer contract models that are reviewed and freely accepted by the oil company hiring it. The same occurs when a multinational company wants to make a derivatives operation, which will surely be done through an instrument provided by a bank which has the technical knowledge to draft that kind of contract.<sup>72</sup>

Of course, our intention here is not to plead in favour of the interest of the party drafting the contract, but just to remark that, in any case, there is a need for particular rules that do not prohibit arbitration in those contracts, which could have a negative impact in regular commercial relationships. All in all, the point should be that the adhering party consents to arbitration and it is not imposed on it. Actually, this has been the solution provided by case law prior to the new Code.<sup>73</sup> The logic that made the legislator emphatically exclude the possibility to arbitrate disputes arising out of adhesion contracts is not understandable and must be based on an incorrect assessment of the reality of those contracts. Ideally, courts should continue applying the same rationale as before, thus only excluding arbitration in abusive situations.

#### 5.4 Labour matters

The situation of labour matters presents some similarities with consumer matters, in the sense that the employee is clearly in an inferior bargaining position in the labour relationship. However, instead of excluding arbitration, some legal systems allow it, but under specific rules. Thus, it can be seen that labour arbitration is not only possible but also even desirable.

72 See further examples in Rivera (n 15) s 4.2.2.

73 Court of Justice of San Juan, Chamber I, *MC Servicio de Consultora S.R.L. v MC Minera Argentina Gold S.A. - MAGSA*, 12/06/14, 2015-A-104, with note of Verónica Sandler Obregón.

In fact, although with some deficiencies, the Argentinian legal system has contemplated labour arbitration in various norms. For instance, Decree-law 32.347/44 created a non-permanent arbitration commission where jurisdiction was voluntary. This was then eliminated through Law 18.345 on the organization of labour justice, which also opened other doors to arbitration. In turn, this law was further amended by Law 24.635 that also refers to arbitration. However, in practice, labour arbitration was not able to achieve any success.

It may be possible that, in some situations, submitting a dispute to arbitration is more attractive to the employee than submitting it to State courts. Truly, given the undeniable obstacles of the Argentinian judicial system to offer efficient solutions, it is necessary to foster other methods to settle labour disputes.<sup>74</sup> Thus, far from leaving the employees without protection, arbitration may represent a good tool to protect them. Actually, it is so like this, that the Argentinian legal system has contemplated this option in many norms. Consequently, the objective should be to keep working on designing an appropriate arbitration system to benefit employees, instead of just abandoning this possibility, as proposed by the new Code.

### 5.5 Disputes involving the State

Far from avoiding arbitration, historically, the Argentine Republic has chosen such means to settle its own disputes with its fellow States,<sup>75</sup> foreign investors,<sup>76</sup> and other individuals.<sup>77</sup> However, even prior to the enactment of the new Code, case law had set forth some rules for the State to subject to arbitration.<sup>78</sup> Therefore, the exclusion of disputes involving the State does not seem to substantially modify the existent scenario. Basically, it was considered that questions affecting the State as a public power or its sovereign prerogatives could not be submitted to arbitrators, but when the State acted as an entity of private law, it could be subject to arbitration.<sup>79</sup>

The wording of Article 1651 may generate doubts as to whether disputes involving the State are arbitrable or not, but when they are submitted to arbitration the rules of the Code will not apply. However, the structure of the Article seems to confirm the arbitrability of disputes where the State is involved. The said Article lists five matters that are excluded from arbitration [the list goes from (a) to (e)]. In a separate paragraph, it states that the provisions of the arbitration chapter in the new Code do not apply to disputes where the State is a party. If the intention of the legislator were to exclude those disputes, they would be listed with the other exclusions [as (f)]. Hence, it must be understood that there is no prohibition for the State to submit to arbitration (except the ones previously created by case law), but whenever

74 See Roque J Caivano, 'El arbitraje laboral en la ley 24.635: una oportunidad desperdiciada', *LL* 1997-C-1341.

75 For example, in 2012, Argentina initiated arbitration against the Republic of Ghana to resolve a dispute over the frigate ARA Libertad.

76 Argentina has concluded innumerable bilateral investment treaties, in which foreign investors are offered the option of resolving their disputes with the States through international arbitration, for example, ICSID arbitration.

77 For instance, in cases before the Inter-American Commission on Human Rights, an *ad hoc* arbitral tribunal determines the quantum of damages. See eg Decrees 1.033/08 and 2.131/13.

78 Rivera (n 15) s 4.1.3.

79 Caivano (n 69) 133. See the precedents of the Supreme Court cited therein.

the State submits to arbitration the new Code will not apply and one should determine which will be the applicable rules (for which the Code gives no guidance).

### 5.6 Public policy at stake

With regard to the exclusion of disputes where public policy is at stake, in practice it does not seem to present substantial changes with respect to the previous situation. Under the Federal procedural code, it was already considered that questions in which public policy was involved, were of interest to the whole society or exceeded the strict scope of private law were not capable of being submitted to arbitration.<sup>80</sup> That solution arose from the remission of Article 737 of the Federal procedural code to the provisions of the Civil code on transaction (Articles 842 and 849) as well as the interrelation of Articles 21, 844, and 953 of the latter Code.<sup>81</sup> We expect that this exclusion will be construed in the same sense, that is, to confirm that the matters submitted to arbitration are capable of being disposed.

Of course, since public policy is a concept very hard to define and the proposed definitions tend to suffer from vagueness,<sup>82</sup> there will always be room for debating its exact scope. As it is known, this concept cannot be determined with a general rule because it is dynamic and changeable. It has been exemplified with the case where the courts held that the fact that the parties had agreed on the constitution of an arbitral tribunal to settle all disputes related to a brokerage relationship did not entail the lack of competence of the criminal courts to entertain fraud questions.<sup>83</sup>

It is important to remark that public policy in itself is not the same as a 'public policy law'.<sup>84</sup> Thus, the mere fact that a public policy law governs the subject matter of the dispute does not affect its arbitrability.<sup>85</sup> As to this point, it has been debated whether arbitrators could entertain disputes where a constitutional norm is at stake. For instance, there were cases where the constitutional validity of the economic emergency legislation was challenged before arbitral tribunals. In many of those cases arbitrators held that they were empowered to decide on such challenges.<sup>86</sup> In turn, some State court rulings have admitted such power,<sup>87</sup> whereas only a few others

80 Colombo and Kiper (n 65) 684. Caivano (n 69) 133.

81 Caivano (n 69) 133.

82 Horacio H De la Fuente, *Orden público* (Astrea 2003) 1–2. See also National Court of appeals in commercial matters, Chamber C, *CRI Holding Inc. Sucursal Argentina v Compañía Argentina de Comodoro Rivadavia Explotación de Petróleo S.A.*, 05/10/10, LL 2011-A-555, with note of Julio César Rivera.

83 Caivano (n 69) 134, citing Court of appeals in criminal matters of the Capital City, 01/09/41, LL 24-523. See also Parodi (n 59) 859, citing a judgement where it was decided that State courts have exclusive jurisdiction over environmental matters (National Court of Appeals in Commercial Matters, Chamber C, 4 July 2013).

84 De la Fuente (n 82) 27–28.

85 Julio César Rivera, *Arbitraje comercial: Internacional y doméstico* (Lexis-Nexis 2007) 162–64.

86 Augusto Morello, '¿Pueden los árbitros declarar la inconstitucionalidad de las leyes?' ED 198-467 (2002); General Arbitral Tribunal of the Buenos Aires Stock Exchange, *CIE R P S.A. v Grinbank, Daniel Ernesto*, 19/03/02, ED 198-464; General Arbitral Tribunal of the Rosario Stock Exchange, *T.T. v B.B.*, 19/11/02, LL 2004-D-18, with note of Lino E Palacio.

87 See the precedents cited in Roque J Caivano, 'Planteos de inconstitucionalidad en el arbitraje' (2006) 2 *Revista Peruana de Arbitraje* 107.

have denied it.<sup>88</sup> Overall, the most accepted position is that arbitrators cannot only decide on the constitutional validity of a law,<sup>89</sup> but they must do so due to the constitutional control system in force in Argentina (according to which every jurisdictional body must conduct such control).<sup>90</sup>

In this aspect, it would have been sound to include in the provision a phrase like the one in Article 2639 of the Quebec Civil Code (source of the new Code), which states that the arbitration agreement cannot be opposed on the grounds that the rules applicable to the dispute are of public order nature.

In sum, from a practical standpoint, the exclusion of disputes where public policy is at stake should not substantially modify the existent scenario, as long as there is a correct understanding of what 'public policy' means. What disconcerts is the wording of the provision and, above all, the rationale pointed out by the Congress Commission (which is different from the drafting commission) when including this unnecessary phrase. In concrete, the Congress Commission report states that the purpose of this inclusion was to exclude the possibility of submitting public law issues to arbitration and prevent from declining legislative and jurisdictional sovereignty.<sup>91</sup> The translation of this intention into practice would be rather complicated, unless it is considered that the report links this reference to public policy to the exclusion of disputes where the State is involved (Article 1651).<sup>92</sup> Although those things are not necessarily connected, courts should bear in mind this idea in some kind of 'authentic' interpretation, respecting the intention of the legislator.

## 6. INTERIM MEASURES: A MICROSYSTEM

Article 1655 of the new Code is devoted to interim measures in the course of arbitral proceedings. To some extent, the regime given to this topic constitutes a microsystem that reflects the overall framework of arbitration in the new Code; although it presents progress in some aspects, it also presents concerns in some others.

### 6.1 The interim power of arbitrators

Historically, the topic on interim measures (in its different aspects) has been one of the most burning ones in the field of arbitration. Among other more specific aspects, it was discussed a long time ago whether arbitrators had the power to issue interim measures or not. Such discussion was settled in favour of the existence of such power, and the current general trend is that arbitrators can issue interim measures because they are the true judges of the case. One of the reasons for this is the old principle *a maiori ad minus*; so if they are the ones who will finally resolve the whole dispute, they should also be able to make preliminary decisions on interim issues.

Despite this clear and logical global trend, at the local level, Article 753 of the Federal Procedural Code has generated some discussions over its correct interpretation. The wording of said provision states that arbitrators cannot render compulsory

88 Court of appeals in civil and commercial matters of San Isidro, Chamber II, *Peyras, Hernán M. v Nordelta Constructora S.A.*, 23/12/04, LL AR/JUR/5198/2004.

89 Rivera (n 85) 165.

90 Caivano (n 87) 152–53.

91 Rivera (n 15) s 4.1.2

92 Parodi (n 59) 850.

or enforcement measures but ‘they must request them to the judge’. Therefore, some held that arbitrators could not grant interim measures.<sup>93</sup> However, many others considered that arbitrators did have the power to grant those measures but could not enforce them.<sup>94</sup> In the end this last position prevailed.<sup>95</sup>

Now, the rule in Article 1655 of the Code sheds some light and confirms the position that arbitrators have the power to render interim measures unless otherwise agreed by the parties. In fact, not only legislations<sup>96</sup> but also arbitral institutions provide several options to obtain interim relief from arbitrators.<sup>97</sup>

In addition to granting arbitrators such interim powers, the new Code also allows the parties to request interim measures to State courts, without constituting a breach or waiver of the arbitration contract.<sup>98</sup> This is to say that there is a concurrent jurisdiction and the interested party may request the measure through the most convenient way. This makes sense because, given that interim measures assume the existence of urgency, depending on the particular circumstances of each case, it may be more efficient to request them to the arbitral tribunal or a state court.

The provision under analysis does not specify whether the procedure on interim measures should be bilateral or if they can be granted *ex parte*. Although in order to avoid their frustration, interim measures in themselves are generally *ex parte*, the international trend is that, when granted by arbitrators, they cannot be rendered without the intervention of the party against whom it is directed (what sometimes could be a good reason to prefer requesting them to a State court). This question was particularly in the centre of discussions when UNCITRAL amended the Model Law, giving rise to many discrepancies but finally confirming this solution.<sup>99</sup> In this sense, regarding the obligations of arbitrators, Article 1662 of the new Code states that ‘in all cases’ they shall guarantee the contradictory proceeding, what would prevent *ex parte* interim measures.

Lastly, the Code states that once the measure is rendered, court assistance would be necessary to enforce them. In this aspect, the legislator has apparently followed the idea that the arbitrators’ power comes from the agreement of the parties and not from the public power, which would be insufficient to allow them to exercise coercive powers (*imperium*). Therefore, the solution proposed is more cautious than in

93 For example, Court of appeals in civil and commercial matters of Mar del Plata, Chamber I, *Sasso Nicolás v Neyra Osbella* (applying the Procedural code of the Province of Buenos Aires), 07/07/98, ED 181-239.

94 For example, National Court of appeals in commercial matters, Chamber B, *Soletanche Bachy Arg. S.A. v Victorio Americo Gualtieri S.A.*, 20/11/02, LL 2003-D-415; Court of appeals in civil and commercial matters of Mar del Plata, Chamber I, *Pestaña, Odilio Alberto v Guerini, Oscar*, 2/12/1999, ED 187-338.

95 Colombo and Kiper (n 65) 723.

96 Model Law, art 17.

97 For example, since 1990, ICC offers the services of the pre-arbitral referee. Likewise, the ICC Rules offer an emergency arbitrator before the constitution of the tribunal (art 29), which is also available in the LCIA Rules (art 9.b), ICDR Rules (art 6); Arbitration Rules of the Stockholm Chamber of Commerce (Annex II); and SIAC Rules (art 26.2).

98 This was already admitted by case law; See National Court of appeals in commercial matters, Chamber C, *S. R., A. A. v Prime Argentina S.A. (Holdings)*, 29/10/02, LL 2003-C-122; National Court of appeals in commercial matters, Chamber D, *Searle Ltd v Roemmers S.A.I.C.F.*, 22/09/05, JA 2006-I-225.

99 See Diego P Fernández Arroyo, ‘Acerca de la introducción de las llamadas medidas cautelares ex-parte en la Ley Modelo de UNCITRAL sobre arbitraje comercial internacional’ (2005) 3 *DeCITA* 329.

other modern legislations which even empower arbitrators to enforce certain types of interim measures under some conditions.<sup>100</sup>

## 6.2 Court review of interim measures

As has already been said, although Article 1655 of the Code represents great progress in several aspects, it also presents certain problems in some others, in particular, with regard to court review of interim measures issued by arbitrators. In its last part, the provision states that those measures ‘may be judicially challenged when they violate constitutional rights or are unreasonable’, a phrase obviously also included in the unhappy passage through the Congress Commission. The worst deficiency of the added phrase is that it is unclear whether it refers to a set aside recourse, an appeal, or something else (this will be analysed below in Section 7.7). But, besides the categorization of the recourse in question, what concerns is that the grounds for invoking such recourse are extremely broad and undetermined.

In the first place, almost always when an interim measure is attacked as inadequate, it will also be considered that it violates some constitutional rights. For example, it is quite likely that an interim measure - to some extent - affects the right to property guaranteed in Article 17 of the Federal Constitution. In the second place, the ground of ‘unreasonableness’ of the measure may widely open the door to review the merits of said measure, according to the courts’ own criteria.

In this aspect, the international trend is that, with a few concrete exceptions, State courts cannot review the merits of the interim measures rendered by arbitrators, just as happens with arbitral awards. One reason for this is that arbitrators have real jurisdiction to render those measures, which would be meaningless if, as a rule, State courts could always review them.<sup>101</sup> Another reason is that, given the importance of interim measures (eg the success of a party in the case can really depend on it) and the urgency that they involve, it is quite evident how counterproductive it would be to allow a broad review by State courts. If there were no limits to such review, it would be in vain to even turn to the arbitrators. All in all, the combination of both grounds clearly affects the very nature of the arbitrators’ interim power and the real efficiency of the measures.

## 7. COURT REVIEW OF ARBITRAL AWARDS: THE ACHILLES’ HEEL

The last paragraph of Article 1656 of the Code sets out the rules related to the review of arbitral awards. This provision represents, without any doubt, the Achilles’ heel of the chapter on arbitration, since it gives room for interpretations that could be fatal for arbitration. In less poetic language, it could be said that this is the aspect that best shows the little knowledge of the legislator on the topic and on Argentinian law in general. Accordingly, there is no need to say that this part of the provision was not in the original draft and was later added by the Congress Commission as were many other negative elements of the new regulation.

100 See, especially in this sense, art 48 of Decree 1.071/2008 governing arbitration in Peru.

101 We insist with art 48 of the Peruvian Decree 1.071 of 2008, which in its para 3, states that ‘the judicial authority does not have competence to interpret neither the content nor the extent of the interim measure’.

Preliminarily, it is worth making a brief comment. According to the report of the Congress Commission, the intention of this inclusion was to strengthen the exclusion of the State from arbitration (of Article 1651 *in fine*), maybe trying to support the position of Argentina before international arbitral tribunals (eg ICSID tribunals).<sup>102</sup> If this was the real intention, then it must be recalled that, in principle, the Code has no application whatsoever in investment arbitrations, which are based on international treaties freely accepted by the States, so such objective would not make any sense at all. Nevertheless, even without thinking about such a far-fetched motivation, the incorporation of this rule is regrettable for various other reasons that will now be explained.

### 7.1 The maze: looking for the grounds for annulment of arbitral awards

The last paragraph of Article 1656 basically states that arbitral awards may be reviewed when annulment grounds are invoked. Although with some minor differences, the possibility of requesting the annulment of an arbitral award is a tool available in most legislations. However, the norm adds that the recourse is available 'when grounds for total or partial annulment are invoked, in accordance with the provisions of the present Code'. Despite the clarity of the text, when it comes to its practical application it creates serious inconvenience. This is because, throughout the 2671 articles contained within the Code, none of them provides any ground to annul an arbitral award. Article 386, for example, refers to the nullity of legal acts; however, arbitral awards are not technically 'legal acts' but jurisdictional acts with the effect of a judgement.<sup>103</sup> Consequently, there is a great enigma as to which are the grounds for annulment referred to by Article 1656.

All legal norms must be construed in a way that allows their practical application. In this sense, pursuant to Article 2 of the new Code, the law must be construed in a coherent way with all the legal system. Now, even without judging if the text of Article 1656 constitutes an error of the legislator, it is undeniable that trying to look for the grounds of annulment in the articles of the Code would be like entering into a maze with no exit. Thus, finding the coherence of the norm is a real challenge, if not an impossible task.

Once the option of seeking the grounds for annulment within the Code is dismissed, it is inevitable to recourse to other instrument, even when this contradicts the text of the article. Of course, the idea is not to force the interpretation of the norm but, on the contrary, to find one that would allow its application. Some consider that the norm may be referring to the annulment grounds contained in the procedural codes,<sup>104</sup> since that is where such grounds are generally found. Irrespective of whether this was the real intention or not, it seems to be the only plausible way to escape from this maze.

102 See the commentary of Rivera (n 15) s 4.3.3.

103 Colombo and Kiper (n 65) 673.

104 José A Martínez de Hoz, 'El contrato de arbitraje en el Código civil y comercial de la Nación' (2015) *Centro Empresarial de Mediación y Arbitraje* 3 <medyar.org.ar/el-contrato-del-arbitraje.pdf>.

## 7.2 The obscure ‘judicial challenge’

Besides what has been mentioned in the previous section about Article 1656, this provision presents an even more serious complication, arising out of its last sentence, which reads as follows: ‘in the arbitration contract the parties cannot waive the judicial challenge of the definitive award that is contrary to the legal order’. It can be said without much risk that this last sentence is the most problematic one in the whole chapter on arbitration. This raises a key question: what does ‘judicial challenge’ mean?

Conceptually, the analysis of such question could be broken down into two parts: first, what does ‘challenge’ mean, and secondly, which are the grounds to invoke such challenge. However, a better and practical methodology suggests that both questions be analysed together, since the identification of the grounds would also help to categorize the recourse.

We will not try here to affirm which kind of recourse it really is, since trying to guess the complicated intention of the legislator is something too ambitious. Nevertheless, we will expose the possible interpretations and indicate the one that is more plausible in order to achieve a correct functioning of arbitration.

The possible interpretations of the norm at hand are innumerable, given that each detail of the text coupled with all the details found in other provisions of the Code creates an immense menu of possibilities. However, we will limit this analysis to the main possible answers that the ‘judicial challenge’ may imply; that is (i) a setting aside recourse or (ii) an appeal. Although there are arguments to support each of these positions, the soundest interpretation is to consider it as a request to set aside, and any other interpretation would fatally affect the effectiveness of arbitration.

### 7.2.1 The ‘judicial challenge’ as an appeal

Some details of the norm could lead to the terrible conclusion that it provides for an appeal.<sup>105</sup>

In the first place, it could be argued that the term ‘challenge’ is generic and therefore includes both appeal<sup>106</sup> and annulment.<sup>107</sup> Thus, given that the same article previously refers to the annulment recourse, the subsequent change of terminology would mean that the legislator wanted to refer to a different recourse, that is, an appeal.

In the second place, in both situations the grounds are different. The ground to invoke the judicial challenge is that the arbitral award is ‘contrary to the legal order’. The first impression on the extent of the terminology ‘legal order’ is that it includes all the existent legislation. Hence, if the recourse were available whenever there is an alleged violation to any norm, then it would constitute an appeal or, in other words, a general right to a second view over the case.

In general terms, the wording of the provision seems to get back to the so-criticized doctrine of the *Cartellone* case,<sup>108</sup> where, among other things, the

105 See Rivera (n 15) s 4.3.6.

106 See eg art 241(1) del Federal procedural code.

107 Pursuant to the dictionary of the Real Academia Española, the term ‘impugnar’ (*challenge*) means to file recourse against a judicial decision, see <www.rae.es> accessed 16 March 2016.

108 Federal Supreme Court, *José Cartellone Construcciones Civiles S.A. v Hidroeléctrica Norpatagónica S.A. o Hidronor S.A.*, 01/06/04, *Fallos* 317:1881, s 14. Rivera (n 15) s 4.3.4.

Argentinian Supreme Court held that arbitral awards could be subject to appeal when they were (i) unconstitutional, (ii) illegal, or (iii) unreasonable. Although the Supreme Court never had the chance to clarify the extent of such doctrine, fortunately, some of its subsequent rulings have departure from that path.<sup>109</sup> If the aim of the norm under analysis was to get back to the *Cartellone* doctrine, this would entail a big step backwards, since it would allow an unlimited review of arbitral awards, affecting one of the most vital advantages of arbitration, that is, the exclusion of court intervention. Who would recourse to arbitration if a *second round* will always be available by law? The answer is obvious.

### 7.2.2 The 'judicial challenge' as a setting aside recourse

Fortunately, there are also several reasons to believe that the judicial challenge is equivalent to the setting aside recourse.<sup>110</sup> Methodologically, the judicial challenge is found in the immediate next sentence to the annulment recourse, so it could mean that the legislator was elaborating on the same point. However, as this argument is not sufficiently solid to rebut the ones in favour of the appeal, it is worth resorting to others.

In the first place, it must be remarked that Article 2 of the Code states that the law must be interpreted according to its purpose. Considering the judicial challenge as an appeal would affect the real purpose of arbitration. One of the main objectives of arbitration is to exclude court intervention or reduce it to the greatest possible extent; therefore, the waiver of the appeal becomes paramount. For this reason, the trend is that the decision of the arbitrators is final and not subject to appeal. In this sense, some legislations establish that the arbitral award cannot be appealed but the parties may agree otherwise, or that it is subject to appeal but the parties can waive it. Actually, in practice, the appeal is renounced almost always. For instance, many institutional rules indicate that by accepting their application the parties waive the right to appeal.<sup>111</sup> If the award could always be appealed, then said objective would be lost, since in any case the debate would be likely to continue before State courts.

This result would turn even more evident when the arbitrators act as *amicable compositeur*. If the terminology 'legal system' refers to any existent legal norm, this could imply that an award rendered by an *amicable compositeur*, which is not based on the law, would be actually reviewed under the law, that is, under the exact rules that the parties validly intended to exclude under Article 1652.<sup>112</sup>

In the second place, as already mentioned, Article 2 of the Code mandates to apply the law in a coherent way with all the legal system. In this sense, after carefully looking through the articles of the Code, it can be noticed that the term 'challenge' is employed in various articles referring to the 'request for annulment'.<sup>113</sup> Clear examples of this can be found in the wording of Articles 2467 and 1647. Likewise, the

109 Federal Supreme Court, *Cacchione, Ricardo Constantino v Urbaser Argentina SA*, 24/8/06, Fallos 329:3399; Federal Supreme Court, *Pestarino de Alfani, Mónica Amalia v Urbaser Argentina SA*, 11/3/08, JA 2008-II-49.

110 Rivera (n 15) s 4.3.6.

111 See eg ICDR Rules, art 30(1); ICC Rules, art 34(6); SIAC Rules, art 28(9); LCIA Rules, art 26(8).

112 Martínez de Hoz (n 104) 7.

113 *ibid* 6.

Code refers to the ‘challenge’ of the private instrument (Articles 314–315), the simulated act (Article 337), the filiation (Article 588), the accountability (Article 2230), and the inventory (Article 2344). In all these cases, the Code refers to matters that, due to their own legal nature, cannot be ‘appealed’, but in any case can be annulled. Moreover, if the prohibition of waiver refers to the appeal, then there would be no prohibition to waive the annulment of the award, but such solution would contradict the trend that the annulment recourse cannot be waived (except for a few exceptions).<sup>114</sup> Consequently, a coherent interpretation of the ‘judicial challenge’ would be that it refers to the request to annul the arbitral award.

In the third place, considering that the norm refers to an appeal would be inconsistent with the sources of the new Code,<sup>115</sup> that is, the Model Law (Article 34) and the French Law (Article 1519). Both instruments indicate that the only recourse against the arbitral award is the setting aside. In fact, in the Spanish version of the Model Law, the title of chapter VII that is exclusively devoted to the annulment recourse, is ‘*Impugnación de laudos*’ (ie challenge to awards). Moreover, it would be inconsistent with the Mercosur Agreement (Article 22), which also considers that the only recourse against the arbitral award is the setting aside. Actually, this is the trend followed by most legislations.<sup>116</sup>

Consequently, in order to solve this enigma, it has been proposed that the terminology ‘legal system’ employed by the article would not refer to the ‘whole’ legal system but to the ‘relevant’ one, that is, the one applicable to the setting aside of arbitral awards. Thus, given that the grounds for annulment of awards are only contained in the procedural codes, then the norm would be referring to those codes.<sup>117</sup>

In sum, even acknowledging that no interpretation would be safe from questioning, the aforementioned reasons show that the soundest solution is to construe the ‘judicial challenge’ as a request for annulment. In any event, even if it is possible to adapt the interpretation of this provision, the legislative technique employed is totally regrettable.

## 8. THE BALANCE OF THE NEW REGULATORY FRAMEWORK

Despite the well-intentioned efforts of the State courts, it cannot be denied that the current situation of the judicial system in Argentina (overwhelmed with cases) requires the fostering of other dispute resolution methods. Of course, this is not the only reason for the need for arbitration, which has proven to be an excellent tool to resolve disputes and a wonderful revitalizing of commerce and economy. Thus, we welcome that, after so much debate and many failed attempts, Argentina has finally concreted the update of its regulation on arbitration. This new regulation offers some important progress, in line with the most accepted trends at the international

114 For instance, Swiss Private International Law Act, art 192.

115 Official text (n 10) s VI-IV-3.

116 For example, in Chile (Law 19.971, art 34), El Salvador (Decree-law 914, art 67), Spain (Law 60/2003, art 40), Mexico (Commercial code, art 1457), Nicaragua (Law 540, art 61), Panama (Decree-Law 5, art 34), Paraguay (Law 1.879, art 40), Peru (Legislative Decree 1.071, art 62), Dominican Republic (Law 489-08, art 39), United Kingdom (1996 English Arbitration Act, arts 68 and 69), and Uruguay (General code of procedure, Law 15.982, art 499).

117 Martínez de Hoz(n 104) 8.

level, although, unfortunately, some of its norms could obscure such progress. In fact, the potential problems are related to core aspects of the correct functioning of arbitration, and may impact both the domestic and international field.

Regarding the limits to arbitrability, we regret some of the exclusions and it is fair to ask whether the door is finally closed for some matters or if there is still potential to achieve an adequate regulation for them. Regarding the judicial review of interim measures and arbitral awards, a wrong interpretation of the relevant norms could affect the whole system of arbitration and destroy its advantages. Likewise, it could turn out that the Argentine territory would not be attractive as an arbitral seat, so arbitrations that could genuinely have their seat there would be taken to other places, which should concern not only practitioners but also institutions in the country. Besides, it could also affect the enforcement of foreign arbitral awards in Argentina.

Therefore, in general terms, it is regrettable that the legislator has adopted norms that are so questionable that they generated doubts on their application even before their entry into force. In this scenario, those judges that are still a little bit resistant to arbitration could use some of the new norms as tools to restrict it even more. However, some other judges, who have previously been able to create a pro-arbitration case law, even without a favourable legal framework, could find in the new Code good weapons to keep on developing arbitration. We are confident that the higher courts, in particular, will be able to find the best interpretation to the problematic norms (apparently included by the legislator in an effort to influence in the investment arbitrations involving Argentina, in which the Code has no impact whatsoever, and where, in the end, the country has not gotten such bad results).

In conclusion, although as in other fields (eg private international law) it would have been desirable to update the regulation on arbitration through a separate special law because of its evident autonomy as a discipline, we welcome the fact that the legislator has taken advantage of this opportunity to make a necessary change. In this sense, as it also happens in the chapter devoted to private international law, it seems that it was worth taking the train instead of staying on the platform waiting for the ideal train, which has already derailed several times. However, it is still not clear if we have not arrived at the platform on the run and have taken a train without knowing its destination. We hope - and we are confident - that the ones in charge of driving the train will know how to take it in the right direction.