7-1-1989

Argentina

LEGAL MEMORANDA

ARGENTINA

The following is a brief summary of recent legislative developments in Argentina.

I. Argentina Ratifies the 1958 New York Convention Of Recognition and Enforcement of Foreign Arbitral Awards

On November 4, 1988, Law 23,612, through which Argentina approved the "New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards," was published in the Official Bulletin. The ratification comes more than thirty years after Argentina signed the Convention. In ratifying the Convention, Argentina subscribed to the view that its interpretation of the Convention will take into account the principles and clauses of the Argentine Constitution.

It must be noted that Argentina ratified the Convention, including both the "reciprocal reservation" and the "commercial reservation." This means that Argentina will apply the Convention only to arbitral awards issued in the territory of a state having ratified the Convention, and that Argentina will only apply the convention to contractual or non-contractual disputes of a commercial nature.

Argentina has thus joined seventy-eight other countries in the world which have ratified the New York Convention. Of its signatories, only El Salvador and Pakistan have not ratified the Convention.

II. Civil Rights of Foreigners Under the Constitution and the Presumption of Unconstitutionality of Certain Restrictive Laws

On November 8, 1988, the Federal Supreme Court of Argentina in *Repetto v. Province of Buenos Aires*, declared unconstitutional a law of the province of Buenos Aires which required any teacher teaching at a public or private school to be an Argentine citizen. In this case, the plaintiff, a United States citizen employed as a kindergarten teacher at a private school, had previously obtained a teaching permit valid in Argentina and within the Province. After the enactment of the law, the plaintiff had been *de facto* prevented from continuing her employment as a kindergarten teacher and from being selected as a substitute teacher.

The four Supreme Court Justices, Messrs. Caballero, Belluscio, Petracchi and Bacque unanimously declared the law unconstitutional. They agreed that it violated Article 20 of the National Constitution of Argentina, which states that foreigners enjoy all the civil rights of a citizen within the National Territory, including the right to exercise their "trade, commerce, and profession . . . ."

Beyond the actual grounds which were given by the Supreme Court, it is of particular interest to review the reasoning the Court employed to reach its verdict. It is quite unusual for the Supreme Court to strongly defend an explicit constitutional guarantee (Article 20). The Court rejected an argument by the Province of Buenos Aires which contended that the prohibition was a "reasonable regulation" of the right to exercise the profession of teacher. Article 14 of the National Constitution of Argentina, states, *inter alia*, that, "All inhabitants of the Nation enjoy the following rights, pursuant to the laws regulating their exercise: to teach and to learn." According to the Justices, such regulation would be unconstitutional because it would lead to a conflict between Article 14 and Article 20 of the Constitution, thereby precluding a harmonic interpretation of the constitutional provisions.

In a separate opinion, Justices Petracchi and Bacque used a "strict scrutiny" analysis, giving rise to a presumption of unconstitutionality. This approach probably marks the first time in the history of the Supreme Court that a court imposed a rebuttable presumption that a law is unconstitutional. In order to justify a law's validity, the State must give more than sufficient reasons to defend it. A law discriminating between an Argentine citizen and a for-

eigner which interferes with the exercise of a civil right guaranteed by the Constitution is presumed unconstitutional. Foreigners exercising civil rights are on an equal standing with Argentine citizens. Therefore, any law discriminating between them shall be at odds with the Constitution.

The opinion finally examined the origins of the "strict scrutiny" analysis with its presumption of unconstitutionality, (citing *inter alia*, the following U.S. precedents, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Truax v. Raich*, 239 U.S. 33 (1915); *In re Griffiths*, 413 U.S. 717 (1973); and *Nelson v. Miranda*, 413 U.S. 902 (1973)) and the development of the "reasonableness" test (citing *Foley v. Connelie*, 435 U.S. 291 (1978); *Ambach v. Norwick*, 441 U.S. 68 (1979); *et al*).

III. Debt to Equity Conversion

The Payment of Interest Accrued up to Conversion Date

The Central Bank, in Communication "A" 1367 (March 3, 1989), clarified the manner in which holders of foreign debt instruments that are to be capitalized through debt to equity procedures should expect to be treated vis-à-vis the payment of interest accrued on these instruments (up to the respective conversion date).

The regulations deal with: a) the conversion of Public Foreign Debt; and b) the cancellation of loans and rediscounts with Public Foreign Debt instruments.

Interest accrued up to the respective conversion date shall be paid as follows: a) in foreign currency, all interest corresponding to maturities accrued up to the date on which interest for obligations was paid to other parties; and b) the balance, up to the conversion date, by delivering External Bonds (BONEX) 1987, at par, to the holder of the obligations.

Sixth Call for Bids

On March 28, 1989, the Argentine Central Bank accepted general debt-to-equity conversion offers. These offers, filed in connection with the sixth call for bids, were for a total of US$80 million. As a result, foreign debt instruments were redeemed for a face value of US$348 million. The average discount obtained by the Central Bank per round was 77.33 percent. Thirty-six different

projects competed against each other, representing investments for approximately US$160 million. The minimum discount required for the bidding process was fifty-five percent. Offerors were, however, prepared to give discounts ranging from 64.38 percent to 79.26 percent.

The minimum discount ultimately accepted by the Central Bank was 75.10 percent. In the prior round, the minimum accepted discount was 71.03 percent. The maximum discount which bidders offered was 74.10 percent.

The twenty-two different industrial projects accepted will benefit from the sixth call conversion, while the sixteen not accepted will not benefit.

The present value of the Argentine foreign debt instruments in the open market is somewhere around eighteen percent of its face value. Offerors bidding with a discount of approximately eighty percent were still able to obtain a small margin.

IV. ARBITRATION - THE SUPREME COURT TAKES A STAND ON A BANKRUPTCY SITUATION

Frequently, national public policy dictates that courts have exclusive jurisdiction to hear claims against companies in bankruptcy. The rationale for such a principle is to avoid possible collusive arbitral proceedings designed to milk assets away from general creditors.

Argentine Bankruptcy Law states: "The declaration of bankruptcy makes inapplicable all arbitration agreements executed by the debtor, except when prior to the declaration of bankruptcy the arbitral tribunal is constituted"[1] (Ley de Concursos, Art. 138, Ley 19.551 XXXII-B A.D.L.A. 1847 at 1883 (April 4, 1972)).

The Argentine Supreme Court recently decided *La Nacion Sociedad Anonima v. La Razon Sociedad Anonima*, La Ley, Apr. 28, 1989, at 3. In this case, the plaintiff (La Nacion, S.A.), had started arbitration procedures against the defendant (La Razon, S.A.) try-

1. W. Craig, W. Park & J. Paulsson, International Chamber of Commerce Arbitration § 5.07, at 29 n.61. This is a reminder that there is a case where an award rendered in Japan against a U.S. company in bankruptcy was enforced by the U.S. Federal Courts. *See* Copal Company Ltd. (Japan) v. Fotochrome Inc., 337 F. Supp. 26 (E.D.N.Y. 1974). In the UK the trustee in bankruptcy has the option to adopt or repudiate all contracts entered into by the bankrupt. Should he chose to adopt a contract containing an arbitration clause, he is bound by it. *See* J. PARRIS, THE LAW AND PRACTICE OF ARBITRATIONS 34 (1974).

ing to exclude the defendant from a shareholders' agreement connected with a third company. The defendant subsequently requested, in court, its reorganization through a meeting of creditors (*concurso*). The bankruptcy court ordered the interruption of the arbitration process, claiming it had jurisdiction over them. On appeal, the Supreme Court, in a short and straightforward decision taking into account that the arbitration tribunal had been constituted, invoked "mutatis mutandi," (Article 138 of Law 19.551) thus denying the bankruptcy court the power to interrupt the arbitration process.

In a country where arbitration is not yet very popular, this is a welcome development which strengthens arbitration by giving all the guarantees which a major jurisdictional alternative should have.

Widespread acceptance of arbitration requires: a) that the sanctity of arbitration agreements be respected; b) that the arbitration process proves to be effective; and c) that arbitration procedure, as such, be provided with all necessary safeguards. The Argentine Supreme Court has certainly taken a step in the right direction.

NICO LAUER
EMILIO J. CARDENAS
CARDENAS, HOPE & OTERO MONSEGUR
Buenos Aires, Argentina