



# LITIGATION & DISPUTE RESOLUTION

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## ARGENTINA

Leandro M. Castelli, Marval, O'Farrell & Mairal

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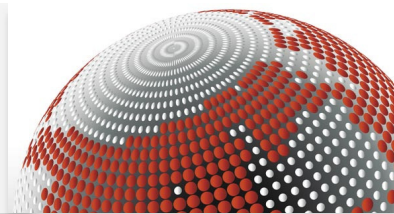
### **Could you outline some of the current market challenges at the centre of commercial disputes in your region? What recurring themes are you seeing?**

The main matters currently behind many commercial disputes relate to increasing regulations and state intervention in business activities, employee and labour related claims, and consumer claims including class actions and punitive damages related to these. Class actions represent the highest litigation threat to companies given the extensive *res judicata* effects of a judgement on these. In February 2009, the Federal Supreme Court ruled in *Halabi v Poder Ejecutivo Nacional – Ley 25.873* outlining for the first time the characteristics of class actions filed to protect collective rights whose object are individual interests. Although class actions are not regulated there are several bills pending before the National Congress so far. Notwithstanding the lack of specific legislation, collective actions are briefly regulated by the Consumer Protection Law (CPL) and they stand as the current trend regarding complex litigation. Several NGOs and Civil Associations have already filed a huge amount of collective claims against domestic and foreign companies, on behalf of harmed consumers. The imposition of punitive damages is another issue that raises some concern to companies. According to the last amendment to the CPL, companies might be fined by a judge up to AR\$5m – approximately US\$1,15m – if a consumer right is violated.

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### **What is your advice to companies on implementing an effective dispute resolution strategy to deal with conflict, taking in the pros and cons of in-court versus out-of-court methods?**

Given current high inflation, and the fact that indexation clauses are forbidden, time is a very important factor to consider when determining a strategy. If we consider the 25 percent average annual inflation rate, we must be aware that the future value of any commercial claim will tend to be zero by the fifth year of the procedure. Monetary depreciation is a fact that the parties in conflict must take into account before engaging an in-court dispute, where proceedings might last no less than five years before the final award is rendered. Nonetheless, more effective dispute resolutions are available in the Argentine legislation. Out-of-court methods (ADR's) are, of course, faster and usually cheaper than ordinary litigation proceedings. For example,



mediation procedures do not require the payment of the Court Tax, 3 percent of the amount. However, ADR's remedies are not always enforceable before the Argentine Courts.

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**What alternative dispute resolution (ADR) options are available to companies in your region?**

Mandatory pre-trial mediation is required by the parties before filing any pecuniary claim. The mediator shall be officially appointed by the court or privately selected by the parties. Negotiation remains confidential and the final agreement may be rapidly executed if not duly fulfilled. The National Code of Civil and Commercial Procedure entitles the judge to invite the parties for a conciliation at any time during the judicial process. It also provides that controversies may be submitted to the decision of 'amicable compounders' – a kind of arbitration in which the amicable compounders are not bound by the applicable laws in order to reach their decisions. Argentine regulations also provide for certain specific conciliation proceedings which are subject to special rules. For example, pursuant to the CPL rules, mediation proceedings shall be held before the Consumer Protection Agencies, while in labour conciliatory proceedings they are heard by the Obligatory Labour Conciliatory Service (SECLO). In both cases the proceedings are free of charge. Arbitration is also available as an ADR in Argentina.

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**How would you describe arbitration facilities and processes in your particular region of focus? Are there any obstacles or challenges to the arbitration process that companies should bear in mind?**

Unfortunately, Argentina has not yet enacted an international arbitration law, providing a modern legal framework for this kind of procedure. Arbitration matters represent procedural legislation which constitutionally belongs to the local jurisdictions. Each province has passed its own procedural system, although most of them are quite similar to the National Code of Civil and Commercial Procedure (NCCCP). The NCCCP is applicable in the national courts of the city of Buenos Aires and in federal courts around the country. Several rules of domestic arbitral institutions refer to the NCCCP in default of specific provisions. In summary, Argentina has not

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yet followed the guidelines established in the Model Law, nor the recent changes on worldwide development with regard to the arbitration process. Despite this, judicial courts generally follow the correct path towards modern commercial arbitration.

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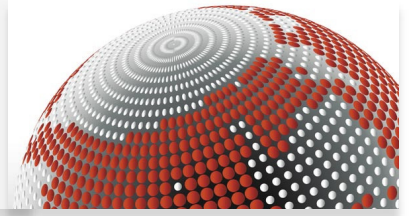
**What practical issues need to be dealt with when undertaking complex international, multi-jurisdictional disputes in your region? Are such cases traditionally problematic, or are there mechanisms in place to ease the process?**

Complex international, multi-jurisdictional disputes in Argentina are as problematic as in other regions but, unlike several countries that have recently introduced reforms to overcome the obstacles identified in these types of processes, our country has not yet adopted any mechanism to ease the process. Hence, how to deal with practical issues related to complex and multi-jurisdictional disputes should be, as far as possible, agreed in advance by the parties, without simply relying on the law.

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**In your experience, what legal and contractual considerations should companies make to address the possibility of encountering future disputes in their commercial activities?**

Companies should be aware that the drafting of the jurisdiction clause has the same importance as other main terms of any agreement. They should select the ADR that best suits the circumstances of the contract and they should choose as seat of arbitration a country that fosters arbitration and has a modern law of arbitration. Finally, it would be advisable that the companies select arbitrators with strong case-management skills, familiarised with the reality of the region in which the contract will be enforced and with enough time to devote to the case in question.



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