

THE PROJECTS AND
CONSTRUCTION
REVIEW

TENTH EDITION

Editor
Júlio César Bueno

THE LAWREVIEWS

THE PROJECTS AND
CONSTRUCTION
REVIEW

TENTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in July 2020
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Júlio César Bueno

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGER

Joel Woods

SENIOR ACCOUNT MANAGERS

Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS

Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Tommy Lawson

PRODUCTION AND OPERATIONS DIRECTOR

Adam Myers

PRODUCTION EDITOR

Gillian Fraser

SUBEDITOR

Robbie Kelly

CHIEF EXECUTIVE OFFICER

Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
© 2020 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at June 2020, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-492-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ANDERSEN TAX & LEGAL

BASAN ATTORNEY PARTNERSHIP

BECCAR VARELA

BRIGARD & URRUTIA AND CLIFFORD CHANCE SLPU

COVINGTON & BURLING (PTY) LTD

DENTONS

DLA PIPER AUSTRALIA

HAMMAD & AL-MEHDAR LAW FIRM

MCCULLOUGH ROBERTSON

MILBANK LLP

N DOWUONA & COMPANY

NADER, HAYAUX Y GOEBEL, SC

NAGASHIMA OHNO & TSUNEMATSU

OCAMPO MANALO VALDEZ & LIM

PECKAR & ABRAMSON PC

PINHEIRO NETO ADVOGADOS

STIBBE

WALDER WYSS LTD

CONTENTS

PREFACE.....	v
<i>Júlio César Bueno</i>	
Chapter 1	INTERNATIONAL PROJECT FINANCE..... 1
<i>Aled Davies and Andrew Pendleton</i>	
Chapter 2	DISPUTE RESOLUTION IN CONSTRUCTION PROJECTS 13
<i>Robert S Peckar and Denis Serkin</i>	
Chapter 3	RELATIONSHIP CONTRACTING 25
<i>Owen Hayford</i>	
Chapter 4	ARGENTINA..... 34
<i>Pedro Nicholson and Delfina Calabró</i>	
Chapter 5	AUSTRALIA..... 42
<i>Matt Bradbury, Evan Economo, David Gilham, Wei Lim, Strati Pantges, Andrew Bukowski and Xavier Milne</i>	
Chapter 6	BELGIUM 63
<i>Rony Vermeersch, Olivia de Lovinfosse and Mitch Windsor</i>	
Chapter 7	BRAZIL..... 76
<i>Júlio César Bueno</i>	
Chapter 8	COLOMBIA..... 98
<i>Carlos Umaña, Julián Parra and Rafael Bernal</i>	
Chapter 9	GHANA..... 114
<i>NanaAma Botchway and Achiaa Akobour Debrah</i>	
Chapter 10	JAPAN 127
<i>Makoto (Mack) Saito and Rintaro Hirano</i>	

Contents

Chapter 11	MEXICO	135
	<i>Vanessa Franyutti and Santiago Medina</i>	
Chapter 12	PHILIPPINES	146
	<i>Carlos Alfonso T Ocampo and Angela K Feria</i>	
Chapter 13	QATAR.....	161
	<i>Andrew Jones, Zaher Nammour, Niall Clancy, Paul Prescott and Peter Motti</i>	
Chapter 14	SAUDI ARABIA.....	177
	<i>Abdulrahman M Hammad</i>	
Chapter 15	SOUTH AFRICA	189
	<i>Deon Govender</i>	
Chapter 16	SPAIN.....	201
	<i>José Guardo, Juan Ignacio Guillén and Gabriel Miranda</i>	
Chapter 17	SWITZERLAND	213
	<i>Thomas P Müller and Francis Nordmann</i>	
Chapter 18	TURKEY.....	223
	<i>Reşat Gökhan Basan and Güllü Gülver</i>	
Chapter 19	UNITED KINGDOM	237
	<i>Munib Hussain and Yi Ming Chan</i>	
Chapter 20	UNITED STATES	249
	<i>Karen Wong, Henry Scott and Miguel Duran</i>	
Chapter 21	URUGUAY	273
	<i>Federico Formento</i>	
Chapter 22	UZBEKISTAN	286
	<i>Eldor Mannopov, Yakub Sharipov, Madina Hamidova and Fayoziddin Kamalov</i>	
Appendix 1	ABOUT THE AUTHORS.....	299
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	319

PREFACE

*La meilleure façon d'être actuel, disait mon frère Daniel Villey,
est de résister et de réagir contre les vices de son époque.*

Michel Villey, *Critique de la pensée juridique modern* (Paris: Dalloz, 1976)

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association, the International Academy of Construction Lawyers, the Royal Institution of Chartered Surveyors, the Chartered Institute of Arbitrators, the Society of Construction Law, the Dispute Resolution Board Foundation, the American Bar Association's Forum on the Construction Industry, the American College of Construction Lawyers, the Canadian College of Construction Lawyers and the International Construction Lawyers Association. All these institutions and associations have dedicated themselves to promoting an in-depth analysis of the most important issues relating to projects and construction law practice and I would like to thank their leaders and members for their important support in the preparation of this book.

Project financing and construction law are highly specialised areas of legal practice. They are intrinsically functional and pragmatic, and require the combination of a multitasking group of professionals – owners, contractors, bankers, insurers, brokers, architects, engineers, geologists, surveyors, public authorities and lawyers – each bringing their own knowledge and perspective to the table.

I am glad to say that we have a chapter from Turkey in this edition. Although there is an increased perception that project financing and construction law are global issues, the local knowledge offered by leading experts in 19 countries has shown us that to understand the world, we must first make sense of what happens locally; to further advance our understanding of the law, we must resist the modern view (and vice?) that all that matters is global and what is regional is of no importance. Many thanks to all the authors and law firms that graciously agreed to participate.

Finally, I dedicate this tenth edition of *The Projects and Construction Review* to a dear friend, the late Vinayak P Pradhan, who died on 8 March 2020. Vinayak Pradhan was an advocate and solicitor of the High Court of Malaya and the Supreme Court of Singapore. He was a partner and consultant at Skrine for more than 45 years, recognised throughout his legal career as a talented advocate, whose oratorical brilliance regularly outshone the best and was immensely respected in the arbitration world. Vinayak was appointed director of the Asian International Arbitration Centre in November 2018. The then Honourable

Attorney General of Malaysia, in announcing the appointment, described Vinayak as ‘the doyen of arbitration in Malaysia and recognised the world over for his ability, experience and leadership in the field of arbitration’. He is survived by his wife, Varsha, and his two children, Avinash and Anisha.

Júlio César Bueno

Pinheiro Neto Advogados

São Paulo

June 2020

ARGENTINA

Pedro Nicholson and Delfina Calabró¹

I INTRODUCTION

In December 2019, Alberto Fernández became the president of Argentina. Because of the economic crisis that started in the first semester of 2018, along with an agreement with the International Monetary Fund reached in mid 2018, the new administration took additional measures – primarily regarding foreign exchange – to contain the crisis. The country was in the middle of a negotiation regarding its foreign exchange debt when the covid-19 pandemic broke. Unfortunately, a worst economic crisis is very likely as a consequence of the pandemic.

The new administration will no doubt face a huge challenge in order to help the country's economy to recover.

II THE YEAR IN REVIEW

In September 2016, Law No. 27,271 was enacted. This law created an inflation-adjusted unit called the UVA, an instrument for savings, loans and investments for natural and legal persons or for the public sector, to be used for the long-term financing of the acquisition, construction or extension of real estate property in Argentina. This law also modified Article 2210 of the Civil and Commercial Code, establishing a new maximum term for mortgages of 35 years.

The mortgage system in Argentina was virtually non-existent until mid 2017. However, with Law No. 27,271 and some other regulations issued by the Central Bank, national and private banks began to grant 30-year mortgage loans in Argentine pesos for housing. During 2017, national and private banks were flooded with requests from prospective residential property purchasers, which has resulted in a rise in house prices. Unfortunately, the 'mortgage boom' was considerably diminished in mid 2018, owing to an economic crisis as a result of inflation, but house prices were not modified. The mortgage crisis continued during 2019. The economic crisis, which was caused primarily by high inflation rates, has stalled growth in the real estate market.

In December 2017, Argentina enacted a comprehensive tax reform (Law No. 27,430), which in general is effective as of 1 January 2018. The tax reform introduced amendments to the Income Tax Law, the Value Added Tax Law, the Tax Procedural Law and the Criminal Tax Law, among others. Some of these amendments were further regulated by the Argentine Executive Branch.

In December 2018, Argentina enacted Law No. 27,467, which amended the Argentine Customs Code to include the export of services within the scope of exports in the Customs

¹ Pedro Nicholson is a partner and Delfina Calabró is an associate at Beccar Varela.

Code, thus allowing export duties to be applied to them. Through Decree No. 1,201/2018 and its amendments, a duty on exports of services was established (i.e., services carried out in Argentina whose effective use is carried out abroad) until 31 December 2021. The duty applies to exported services rendered and invoiced since 1 January 2019.

In December 2019, Argentina enacted Law No. 27,541, the Social Solidarity and Productive Reactivation Law, which introduced amendments to income tax, the tax on personal assets and the tax on debits and credits and further created a new tax on the purchase of foreign currency or goods, and other transactions (called Impuesto PAIS) applicable on transactions carried out by residents abroad.

III RISK ALLOCATION AND MANAGEMENT

As mentioned in Section I, the Argentine project finance sector is no stranger to financial and political risks. Politically, Argentina has been stable, with some exceptions, for the past few decades; economically, it has experienced both surging growth and daunting setbacks. Therefore, while political risks are minor, Argentina's recent economic history has left a legacy of regulations that continue to dramatically affect project finance and construction contracts.

The most salient example arose as part of the Law of Convertibility in 1991: a prohibition on indexation of contracts and payments. A valuable tool used by private parties to manage changes in price levels, indexation involves writing into a contract an upward adjustment of nominal payments based on standardised inflation rates. With this law, the government prohibited indexed contracts, including all forms of currency updates, cost variations and debt restatements. Although the prohibition on indexation was specifically promulgated in tandem with the Law of Convertibility, the prohibition on indexation inexplicably remained even after the Law was scrapped in 2002, and technically continues today.

The architects of project finance and construction contracts have become creative in their use of legally permissible methods to stem rising costs, notwithstanding this prohibition. Those used most frequently include price increases and a combination of fixed and variable prices. For example, a three-year lease may provide for a fixed increase in rent each subsequent year, such as US\$100 for the first year, US\$125 for the second and US\$155 for the third. While this may seem like indexation, Argentine courts have confirmed that these price increases do not fall foul of the law. In addition, investments in construction projects often involve a combination of fixed down payments and subsequent instalments that vary in cost based on the cost of construction materials.

Indeed, because of the prohibition on indexation, gradual inflation is difficult to compensate for in construction contracts except in the manner described above. The next question becomes whether *force majeure* clauses can be invoked in cases of hyperinflation. While no legal codes exist to that effect, the answer is almost certainly 'no'. In Argentina, *force majeure* clauses are permissible, but their applicability is limited to situations in which the events are extraordinary and unpredictable. In Argentina's case, hyperinflation is not an extraordinary occurrence. As a result, the majority view is that an inflation crisis – even a crisis of hyperinflation – constitutes an expected phenomenon that does not merit the exercise of a *force majeure* clause. The message is clear: inflation is a foreseeable evil for Argentinians, and prudent parties ought to invoke other measures to manage the risk.

IV SECURITY AND COLLATERAL

As in other parts of the world, security interests in Argentina can be obtained through pledges and security assignments, and be ensconced in trusts or tucked into mortgages.

Argentina has a two-tiered system of ordinary and registered pledges. The ordinary pledge functions as one would expect: the debtor physically transfers the pledged property into the possession of the creditor or into the custody of a third party. Unlike the previous Civil Code, which required a creditor to sell an asset in a court-administered auction, disclaiming self-help remedies to foreclose on a pledge, the new Unified Civil and Commercial Code does not require necessarily a court-ordered foreclosure procedure, since it enables the parties to agree on the creditor keeping the pledged property if a default occurs, as well as on a private sale of the asset. If nothing is specified in the contract, the creditor can choose from any of the possibilities foreseen in the Code.

When a security interest takes the form of a registered pledge, the debtor retains possession of the property instead of transferring it to the creditor. As Law No. 12,962 describes, that pledge must be filed with the Registry of Pledges, through either a public deed or an authenticated private instrument, before the pledge becomes enforceable against third parties. When that act of registration occurs, the creditor must also decide whether the pledge will be 'fixed' or 'floating'. If the pledge is fixed, then the registration only encompasses the particular asset and nothing more. In contrast, if the pledge is floating, the creditor captures any changes the asset may undergo while it is registered and any additional assets that derive from those changes. The choice between a fixed and a registered pledge has another consequence: jurisdiction. If a fixed pledge is chosen, the assets fall under the jurisdiction of the registry of pledges in the place where they are located. In contrast, floating pledges fall under the jurisdictional wing of the registry of pledges located where the debtor is domiciled.

Trusts, security assignments and mortgages round out the various forms of security interests. Crucially, when property is placed in a trust, the secured assets are protected from the prying fingers of a debtor's other creditors. Argentina expressly regulated trusts in 1995 with the enactment of Trust Law No. 24,441, imbuing trusts with one key quality: limited liability for the trustee. Moreover, the Trust Law also establishes that trust property will be treated separately from property belonging to either the trustee or the trustor. Largely because of these two protections, trusts have become a popular component of project finance transactions in Argentina since the Trust Law was enacted.

Notwithstanding this, the new Unified Civil and Commercial Code has amended a significant majority of the legislation applicable to international transactions, including the Trust Law. However, the key components of this law remain unchanged. Security assignments share some characteristics with trusts, but differ in that assigned assets are generally limited to rights or credits. Trusts are free from this limitation, and can encompass most forms of assets, including movable property and real estate. Mortgages, for their part, grant security interests over real estate, ships and aircraft, and usually secure the principal amount plus accrued interest. Created by means of a notarised deed, a mortgage only becomes valid in relation to third parties once it is registered with the public real estate registry in the jurisdiction in which the property lies.

Indeed, registration is obligatory to ensure the validity of most security interests. Mortgages and registered pledges must be catalogued – and fees paid, which are calculated on the basis of the total value of the secured asset. Certain descriptions must also be included. When registering mortgages, the value of the collateral security must be specified in the deed; if that step is overlooked, there is a risk of the entire mortgage being invalidated in accordance

with Section 2189 of the Unified Civil and Commercial Code. Similarly, the value of the collateral must also be noted when registering a pledge, in addition to information regarding the applicable interest rate and the method of repayment. Finally, when executing a mortgage, notary public fees must be paid as well.

V BONDS AND INSURANCE

In accordance with the Public Works Law, contractors are required to deposit 1 per cent of the total cost of a project to submit their proposal and must maintain their tender within the time limit set on the basis of this tender. Pursuant to this regulation, this deposit may be made using one of the following methods: cash, certified cheque, public debt securities issued by the federal or provincial government, bank guarantee, surety insurance or demand note.

Surety insurance may be used both in public and private contracting and can be effected in different forms, such as: (1) a bid bond that ensures the bidder on a contract will enter into the contract and furnish the required payment and performance bonds if awarded the contract; (2) a performance bond that ensures the contract will be completed in accordance with the terms and conditions of the contract; (3) a down payment or collection that ensures that the policyholder will use the advance payments received for the material supply; or (4) funds for reparation orders.

VI ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

The process of foreclosing on a pledge differs depending on whether the pledge is ordinary or registered. As mentioned in Section IV, the new Unified Civil and Commercial Code does not necessarily require a court-ordered foreclosure procedure for ordinary pledges, since it enables the parties to agree that the creditor will keep the pledged property if a default occurs, as well as on the private sale of an asset. If nothing is specified in the contract, the creditor can choose from any of the possibilities foreseen in the Code. If the pledge is registered, the foreclosure process varies in accordance with whether the secured party is classified as a financial entity under the Financial Entities Law No. 21,626, as decreed by the Central Bank. If the secured party is not a financial entity, then the lender must pursue a judicial foreclosure proceeding similar to that described below for mortgages. If the lender is a financial entity, then the court's presence is circumscribed.

Mortgages are foreclosed through either a summary proceeding in court that ends with a public auction of the property, or a speedier, more simplified process in which the creditor can assume a greater role. In a traditional judicial proceeding, the property is sold to the highest bidder at auction (the lender is permitted to bid on the property as well), as long as the debtor does not offer any successful defences. After the sale, the proceeds are deposited in a bank under court order and the creditor's claim is satisfied against those proceeds. This traditional foreclosure process can take anywhere from one to two years from start to finish.

If a debtor is insolvent, the procedures differ yet again depending on whether it decides to pursue a judicial reorganisation or a bankruptcy proceeding. The reorganisation procedure can only be instigated by the individual or corporate debtor in question, who must file a petition for relief under the Bankruptcy Law with evidence of both its inability to satisfy debts and its ability to reorganise. Once this petition has been filed, all claims by unsecured

creditors are in effect stayed, although creditors may proceed with claims relating to mortgages and pledges – but only if they give notice to the bankruptcy court. That is to say, the creditor will have to request admittance of his or her credit and collateral to the relevant court.

Bankruptcy proceedings can be commenced either voluntarily by the debtor or involuntarily by his or her creditors. In contrast to the reorganisation process, the debtor is not allowed to manage its own assets; a trustee is appointed as administrator in its place. All creditors – including preferred creditors – must submit evidence of their claims to the debtor's trustee. Certain creditors do retain an advantage, however, when the time comes for distribution of the debtor's assets. Creditors with a lien over a particular secured asset are granted a special preference by law, which entitles them to priority over the proceeds from the sale of that asset. In addition, Section 239 of the Bankruptcy Law provides for the subordination of debt, with the result that senior creditors will be paid before subordinated lenders. It is important to note, however, that lenders will not incur liabilities if project assets are foreclosed.

VII SOCIO-ENVIRONMENTAL ISSUES

Beyond the litany of usual permits needed for a particular building project, Argentina has one licensing requirement that applies specifically to foreign citizens and companies; that is to say, foreign nationals and national or foreign companies who wish to acquire land in a border security zone must seek special permission from the National Commission of Security Zones to complete their purchase. Generally speaking, border security zones encompass land that lies within 150km of Argentina's borders or within 50km of the sea. This permission is typically granted within about six months. Note, however, that local companies controlled by foreign nationals are deemed to be foreign companies for the purposes of this legislation, in contrast to standard corporate legislation. Moreover, this licensing requirement applies even if a new company (either foreign or national) decides to acquire shares in a company that already holds land in a security zone; if management of the local company shifts into foreign hands, permission from the National Commission of Security Zones must be granted before the transaction can proceed. Foreign citizens and companies that wish to acquire rural land in Argentina also need a special approval from the Rural Land Registry. A rural land law was enacted in 2011, which establishes that foreigners may only acquire 15 per cent of the rural land of the country, and each foreign nationality cannot exceed 30 per cent within the total 15 per cent available. This permission is typically granted within about six months. For the purpose of this legislation, local companies controlled by 51 per cent of foreign nationals are considered foreign companies as well.

With the amendment of the Constitution in 1994, environmental legislation – and sanctions for environmental violations – has increased in tandem. As stated in Section 41 of the Argentine Constitution: 'All inhabitants are entitled to the right to a healthy and balanced environment fit for human development . . . and shall have the duty to preserve it.' Furthermore, the Constitution requires that a person or company who damages the environment has the 'obligation to repair it according to law'. If a person believes that his or her environmental rights are being infringed, he or she can file a Section 43 summary proceeding (an *amparo*) for immediate injunctive relief. Environmental legislation exists at both the federal level and the provincial level. At the federal level, Congress has the power to set forth minimum standards legislation for the protection of the environment, which is applicable throughout the country. Conversely, the provinces may establish supplementary

legislation to these minimum standards either by enacting more stringent regulations or by passing their own environmental regulations in areas in which the federal government has not established any minimum standards.

Certain environmental legislation specifically prescribes criminal penalties for environmental transgressions (e.g., the National Hazardous Wastes Law No. 24,051 and the Buenos Aires Special Wastes Law No. 11,720 hold representatives of companies liable for environmental damage caused by the activities of their companies, to the extent of their participation in the action). Further, some courts have invoked Section 200 of the Criminal Code regarding crimes against public health to sanction people who release hazardous substances into the environment. Otherwise, administrative sanctions, injunctive relief or civil penalties usually accompany environmental offences.

VIII PPP AND OTHER PUBLIC PROCUREMENT METHODS

Public-private partnerships (PPPs) have not been as popular in Argentina as in other Latin American countries in the past decade, though the country already had regulations regarding PPP such as those provided in Decree 967/05 and Decree 966/05 of 'Private Initiative'.

However, Decree 967/05 was abolished by Law No. 27,328, which was enacted in 2016 and establishes the terms and conditions for PPPs, and in February 2017, the Executive issued Decree 118/2017, implementing Law 27,328. This legislation governs PPPs at the federal level and was implemented in anticipation of the significant increase in investment in infrastructure that is expected in the next few years.

PPPs have not had the impact since 2018 that was expected. The previous government therefore established a trust by which PPPs would be implemented, which was created by Decree 153/2018. The aim of the trust is to ensure transparency and integrity in the execution of PPP contracts, considering especially the 'Notebook' case, which is being investigated before the federal courts and involves incidences of corruption relating to the public works and construction industry under the previous administration.

Under the new legislation, several projects have been drafted (e.g., road construction), which means big opportunities for PPP investments in areas such as highways, railways, hospitals, schools and prisons, among others. For example, the first project that was launched and is currently being executed is the Highways and Safe Routes PPP, which covers the construction of more than 2,800km of highways and 4,000km of safe roads. The location of the project is in the provinces of Buenos Aires, La Pampa, Santa Fe, Córdoba, Mendoza, Santiago del Estero, Tucumán, Salta, Jujuy, Misiones, Corrientes and Chaco. The parties have already signed the contracts and currently each section of roadworks is under construction. In the energy sector, a high voltage transmission lines project and ancillary works has been designed, but their launching to tender has been suspended in accordance with the country's current situation. Although the launch was originally foreseen for March 2020, the covid-19 pandemic and economic situation has reorganised public priorities.

IX FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

According to the Business Associations General Law No. 19,550, foreign companies may only engage in isolated activities in Argentina if they are not registered in the country. Although an exact definition of 'isolated' is not provided by the law, a project finance transaction would not be likely to fall under its scope. Thus, to perform regular activities in Argentina, a foreign

company has to register either a branch or a local subsidiary. If it fails to do so – and carries out ‘regular’ activities nonetheless – the company assumes the risk that its activities will be unenforceable and its representative held jointly liable. Therefore, it is advisable that project finance transactions are organised locally.

The most convenient forms of legal entities for foreign investors include stock corporation, limited liability company and branch. The first two forms limit the liability of shareholders with respect to third parties; however, if an entity is set up as a branch, the foreign parent company can be held liable for its activities. Consequently, project companies are usually organised as a stock corporation, both to limit liability and to invoke the favourable tax treatment given to corporations.

With the exception of investments in certain sectors, including rural land, energy and broadcasting, foreign investors are granted the same rights under the Argentine Constitution as local investors and may invest in any economic or productive activity. In terms of taxation, foreign investors are also treated largely the same as locals: they, too, must pay federal, state and municipal taxes, although dividend payments are exempt from taxation. But there is one salient difference: profits from the sale of shares in an Argentine company are not taxed as income if the seller is a non-resident investor.

From 2007, many foreign exchange restrictions were set concerning funds entering the country and being transferred abroad. Fortunately, these restrictions, which limited foreign investment in Argentina, have been relaxed by the government since December 2015.

X DISPUTE RESOLUTION

Argentine courts do not jealously guard their jurisdictional power. Parties to a contract can choose to submit to the jurisdiction of a foreign court as long as there is a connection to the chosen jurisdiction and the dispute is pecuniary. There is an exception to this openness, however – Argentine courts claim exclusive jurisdiction over debtors domiciled in the country. If a debtor’s domicile is abroad, insolvency proceedings in Argentine courts will only touch those assets held in the country.

With regard to the choice of law, contractual parties are generally free to choose which laws will govern their agreements. The major caveat is that foreign law will not be accepted if it flouts Argentine public policy. As a consequence, disputes involving bankruptcy, tax, criminal and labour laws will be governed by the Argentine public policy laws corresponding to those areas. Specifically, Argentine law shall also govern rights and legal actions relating to real estate and movable property located permanently in the country.

Foreign judgments and arbitral awards, for their part, are enforceable in Argentina, either in accordance with international treaties or the Unified Civil and Commercial Code. If a country has signed a treaty with Argentina regarding foreign judgments, those procedures will prevail; if not, the Unified Civil and Commercial Code shall apply in federal court. (Each province has its own rules for enforcement of foreign judgments in its local courts.) Article 517 of the Code sets out several requirements that a foreign judgment must meet for it to be enforced in Argentina. The judgment must have been issued by a competent court, as determined by Argentine law; be final and valid in the foreign jurisdiction, and later authenticated according to Argentine law; and cannot conflict with Argentine public policy, or with a prior or contemporaneous judgment in Argentine courts. Finally, the defendant must have undergone due process of law, including a proper summons and a chance to defend itself.

Once all these prerequisites are fulfilled, a number of procedural requirements must also be satisfied before enforcement can occur. The petitioner must file a statement proving that the aforementioned legal requirements are satisfied; all documents in a foreign language must be translated into Spanish by a translator registered in Argentina; a copy of the foreign judgment must be notarised and filed with the appropriate Argentine court; and all pertinent documents must be authenticated by the Argentine consulate located in the foreign court's jurisdiction. Finally, a 3 per cent court tax must be paid upon enforcement.

The enforcement of foreign arbitral decisions follows the same framework. As long as both the legal and procedural steps are fulfilled, foreign arbitral awards will be accepted by Argentine courts. If a treaty applies, however, its procedural and substantive requirements take precedence. Notably, Argentina has been bound by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) since 1988.

XI OUTLOOK AND CONCLUSIONS

This chapter should be taken as a mere outline of the project finance landscape in Argentina. While the legal framework does not differ much from other Latin American countries, decisions regarding investments in public works have been unusually politicised in recent times.

No important measures have been taken since the new government took office; it has mainly focused on the renegotiation of the national foreign debt. However, since March 2020, the covid-19 pandemic has monopolised the political agenda. Some time will pass until we can assess exactly where we are standing not only regarding the health of the national economy but also with respect of future investments in infrastructure and real estate in our country.

ABOUT THE AUTHORS

PEDRO NICHOLSON

Beccar Varela

Pedro Nicholson is the head of the real estate and hospitality department of Beccar Varela. He has vast experience in real estate, hospitality, tourism, mergers and acquisitions, and corporate finance. He has advised local and foreign clients in all sorts of local and international deals.

Pedro has lectured in conferences in Argentina and abroad. He was awarded the title Real Estate Lawyer of the Year 2017 by *Best Lawyers* and has been recognised by *Chambers Latin America*, *The Legal 500*, *Latin Lawyer 250*, LACCA Approved and Practical Law Company publications from 2008 to date.

He is co-chair of the Real Estate Committee of the American Chamber of Commerce in Buenos Aires, a member of the Executive Committee at the Housing Entrepreneurs Association, an officer of the Real Estate Committee at the International Bar Association, an officer of the Latin American Law Committee of the International Council of Shopping Centers, and a former president of the Alumni Association of the Real Estate Business Centre of the University of San Andrés. Pedro obtained postgraduate degrees in real estate transactions (2006) and hotel investments (2009) from the University of San Andrés (2006), an LLM from the University of Illinois at Urbana-Champaign (1993) and he worked as a foreign associate at Hogan & Hartson, Washington, DC (1995).

DELFINA CALABRÓ

Beccar Varela

Delfina Calabró has been a lawyer at Beccar Varela since 2016, where she works in the real estate department. Her practice areas include real estate and mergers and acquisitions. She has broad expertise in corporate law.

Delfina received her law degree with honours from the Pontifical Catholic University of Argentina (2013) and received a business law master's degree from the University of San Andrés in 2018.

BECCAR VARELA

Edificio República

Tucumán 1, 3rd Floor

C1049AAA Buenos Aires

Argentina

Tel: +54 11 4379 6800 / 4700

Fax: +54 11 4379 6860

pnicholson@beccarvarela.com

dcalabro@beccarvarela.com

www.beccarvarela.com

an LBR business

ISBN 978-1-83862-492-7