

# Chapter 1

## Argentina

Guido Santiago Tawil and Federico Campolieti\*

This chapter explains the process of gathering evidence in Argentina to be used for litigation purposes in the United States. The applicable regulations are comprised of both the 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Convention) and the federal procedural rules contained in the Argentine Code of Civil and Commercial Procedure (NCCCP).<sup>1</sup>

### I. UNDERSTANDING THE ARGENTINE JUDICIAL SYSTEM

Argentina is a civil law country. The judicial proceedings are formalistic and litigation is mainly conducted in writing, with precise stages established by procedural codes or laws. Argentine courts have limited discretion to tailor the procedure to the particular needs of the case. This rule is known as predetermination by law.<sup>2</sup> Compliance with court time limits and procedural requirements are as important as presenting the facts and merits of the case. There is no right to a jury trial in civil or commercial cases.

Regarding evidence, Argentina has an adversarial regime—as opposed to an inquisitorial regime. The parties must submit all relevant evidence to prove their factual allegations. While the courts are empowered to order the production of evidence *ex officio*, they do so only under exceptional circumstances.<sup>3</sup> The courts normally render

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\* Guido Santiago Tawil is an independent arbitrator. He has also held the following positions: Former Co-Chair, International Bar Association's Arbitration Committee (2009-2010); Member of ICCA's Advisory Board and Former Member of its Governing Council; Former Chair, Latin American Arbitration Association (ALARB); Former Court Member, LCIA; Member, International Chamber of Commerce's Latin American Arbitration Group; Chair Professor of Law, University of Buenos Aires. Federico Campolieti is a partner at Bomchil in Buenos Aires and professor of law at the University of Buenos Aires.

1. Argentina is a federal country, thus each of its twenty-four jurisdictions (i.e., provinces) has its own rules of procedure. We will exclusively focus our analysis on the federal regulations.
2. Formal requirements for filing a lawsuit; service of claims; admissibility, offering and production of evidence; limits to the judicial powers; hearings; and post-hearing briefs are established and regulated in detail in the procedural legislation. Neither the parties nor the courts are empowered to deviate from the rules provided in the NCCCP.
3. As a general rule, it is not for the courts to amend the failure of a party to adequately present or prove its case.

a judgment within the scope of the parties' petitions and only subject to the evidence actually produced. Decisions *ultra petita* or *infra petita* are inadmissible.

The process of gathering evidence is limited and controlled by the court's decision in accordance with Sections 333 and 360 to 386 of the NCCCP.

U.S.-style discovery is unknown in Argentina. The disclosure of documents in the possession of the other party is limited in scope. As a general rule, the requesting party must prove that the document is actually under custody of the non-requesting party and why it is relevant to the case. Requests for production of a category of documents or a broad scope of information are generally considered inadmissible.

The NCCCP does not regulate the process to be applied whenever there is a request for document production that will have effect in a foreign procedure. Instead, the NCCCP sets forth in Sections 369 to 374 the requirements that each party must fulfil to produce evidence in a foreign country that will have effect in an Argentine procedure.

## II. OBTAINING DISCOVERY IN ARGENTINA

### A. Applicable Statutes and/or Conventions

Argentina ratified the 1970 Hague Convention, which has been in force since July 1987. The application of the Hague Convention has served as a useful tool for obtaining extraterritorial evidence through the execution of the "letters of request" in accordance with the procedure established in the Convention.

Notwithstanding this, Argentina made an express and full reservation to the application of Chapter 2 of the Hague Convention, namely the "Taking of Evidence by Diplomatic Officers, Consular Agents and Commissioners."

Further, Argentina made a formal statement that it would not accept any letters of request intended to apply the procedure known in common law countries as the *pretrial discovery of documents*.

In addition, Argentina made a reservation to Article 4 (paragraph 2) of the Convention; and thus, it does not accept letters of request in either English or French without the corresponding translation into Spanish.

Leaving aside these limitations, Argentina allows discovery in accordance with the provisions contained in Chapter 1 of the Hague Convention (i.e., the production of evidence by using a formal letter of request sent from the competent requesting authority to the Argentine authority). Regarding the procedure to be followed, the provisions of the Hague Convention are often complemented by the NCCCP rules or other applicable statutes.

### B. Application of the Hague Convention

Testimony and documentary evidence located in Argentina may be requested by using a "letter of request" as provided for in the Hague Convention and only for the purposes of pending or future litigation in the U.S.

A U.S. litigant must submit the request for evidence production to the competent judicial authority, which is later transmitted to the U.S. Central Authority.

A letter of request shall contain: (i) the U.S. requesting authority and the Argentine requested authority (if possible); (ii) the names and addresses of the parties to the proceedings and their representatives; (iii) the subject matter and nature of the pending or future proceedings, including a summary of the facts and all relevant information; and (iv) the evidence to be produced (or other judicial act to be performed).

Additionally, in case of witness examinations, a letter of request must contain: (i) the names and addresses of the persons to be examined, and (ii) the questions to be posed to them or a statement of the subject matter about which they are to be examined.

In the case of documentary evidence, the letter of request must specify where the documents are located and the identity of the person in possession of the documents.

A letter of request must be written in Spanish or, at least, be accompanied by a certified Spanish translation. There is no need to legalize the letter of request.

Argentina has appointed the Office of International Assistance of the Legal Affairs Department of the Ministry of Foreign Affairs to serve as the Central Authority to receive and serve letters of request from other Contracting Parties to the Hague Convention. Therefore, once a letter of request has been transmitted from the U.S. Central Authority to this agency, the latter will send it to the judicial competent authority to produce the requested evidence.

The letter of request is enforced in compliance with Argentine procedural rules (the NCCCP or other provincial statutes).

Argentine courts may refuse to execute a letter of request if the addressed party alleges a privilege or a prohibition to testify pursuant to local law or the U.S. law.<sup>4</sup> Further, Argentine courts may reject a letter of request when (i) the request is incomplete or irregular, (ii) the courts have no jurisdiction to execute it, or (iii) the court considers that the request contravenes local security or sovereignty.

According to Section 132 of the NCCCP, a letter of request must be executed by the Argentine courts provided that (i) it has been ordered by a foreign competent authority under the Argentine rules of international jurisdiction, (ii) it complies with the requirements established in the Hague Convention, and (iii) it does not affect the Argentine public order.

The compliance with the request by Argentine courts would neither imply recognition of the jurisdiction of the requesting court nor the commitment to recognize the validity or the enforcement of a judgment rendered by the foreign court.

### **C. Other Multilateral and Bilateral International Treaties**

Argentina is a party to the 1965 Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, to which the United

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4. Article II of the Hague Convention. For instance, under Argentine law, a party may refuse to provide testimony based on the professional secrecy or any other privilege established in local regulations.

States is also a party. Further, Argentina is a party to the Inter-American Convention on Rogatory Letters executed in Panama on January 30, 1975, and to the additional protocol executed in Montevideo, Uruguay, on August 5, 1979. The United States is also a party to both conventions.

Argentina is a party to the 1975 Inter-American Convention on the Taking of Evidence Abroad executed in Panama and to the 1984 additional protocol signed in La Paz, Bolivia. The United States is not a party to these treaties.

#### D. Production of Documents

Regarding documentary evidence, Argentine courts often follow the procedure established in the NCCCP, which states that a party must disclose the existence of any document relevant to the subject matter of the case if it is in its possession or custody.<sup>5</sup>

Under Argentine law, the courts can obligate the requested party to submit a specific document. If the requested party fails to produce any document requested, the court may infer that such document is adverse to that party.<sup>6</sup>

Like most civil law countries, Argentina lacks a general regulation addressing issues such as privileges and confidentiality. Nevertheless, institutions such as *professional secrecy*, *bank secrecy*, *commercial secrecy*, etc. are regulated as a way of protecting certain kinds of information in specific and limited cases.

Under the NCCCP, the court may order a third party to disclose documents that are in its possession and custody. The third party may only object to such a request when disclosure may cause harm to it.<sup>7</sup>

While Argentina has made an express reservation to Article 23 of the Hague Convention concerning the application of the U.S. procedure known as *pretrial discovery of documents*, it is possible that the U.S. litigant may obtain a similar result if a letter of request provides for a complete and exhaustive list of the requested material, explaining in detail how each document has a precise and direct relevance to the subject matter of the foreign litigation.

#### E. Depositions

In the case of depositions, a letter of request must meet the specific requirements set out in Article 3 of the Hague Convention.

Argentine law requires that a letter of request include specific questions to be posed to the witness during its examination. The court is not allowed to rephrase or strike out objectionable questions or offensive wording. Instead, the court may reject the request.

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5. ARGENTINE CODE OF CIVIL AND COMMERCIAL PROCEDURE (NCCCP) § 387.

6. *Id.* § 388.

7. *Id.* § 389.

The requesting party shall send prior notice to the witness so that it may attend the hearing. The witness is examined under oath by the court.<sup>8</sup> Questions to be addressed to the witness are not provided in advance. If interpreters are needed to assist the witness, they must be previously certified by the court. Once the hearing has finished, the court records the witness's testimony.

According to Section 431 of the NCCCP, if the witness fails to attend to the hearing without a reasonable explanation, the court is empowered to impose a pecuniary fine. The court may also force the witness to provide testimony.

## F. Written Interrogatories

Argentina does not have a written interrogatory procedure similar to the one stated in U.S. Federal Rule of Civil Procedure 33. It is possible, however, for a party to request that the court examine the other party based on a written interrogatory previously submitted by it.<sup>9</sup> This kind of evidence is only admitted when litigation is pending.<sup>10</sup>

According to Section 410 of the NCCCP, the interrogatory should be written in an affirmative and clear manner and should refer to the controversial facts of the case.

Failure to attend the hearing by the requested party or its refusal to answer any question during the examination will be considered an admission of the facts alleged against him (*ficta confession*).<sup>11</sup>

The requested party is examined under oath by the court. The court is entitled to modify the order or the terms of the questions or even to eliminate them provided that they prove to be irrelevant. The requesting party is allowed to attend the hearing during the court's examination.

## G. Parties' Freedom to Resort to Other Mechanisms of Evidence Production

The parties to a dispute are free to agree on a different procedure to obtain evidence abroad. In this regard, nothing in the NCCCP or the Hague Convention prevents the parties from resorting to any private mechanism—outside the scope of the local courts—to produce evidence.

For instance, if the parties have agreed to settle the dispute through arbitration, the issue will be governed by those applicable rules of procedure (either the arbitration rules of a given institution or those rules agreed by the parties). Notwithstanding this, the arbitral tribunal—due to its lack of *imperium*—may request the assistance of the local court in case it tries to enforce any decision on evidence.

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8. *Id.* §§ 440 and 442.

9. *Id.* § 404.

10. *Id.* § 326.

11. *Id.* § 417.

### III. CONCLUSION

While Argentina and the United States have different rules and methodologies for gathering evidence to be used in litigation, the Hague Convention reconciles most of the differences between both systems and serves as a channel so U.S. litigants may request the production of evidence such as depositions and documents located in Argentina for using them in a U.S. judicial procedure.

Besides relying on the Hague Convention's procedures when seeking to obtain discovery in Argentina, U.S. litigants should take into account the applicable procedural statutes, like the NCCCP, since they govern the execution of letters of request and other details of the procedure to produce the requested evidence.

#### Discovery Procedures in Argentina

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***Application of the Hague Convention***

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters entered into effect in Argentina in July 1987 with three reservations (Article 4, paragraph 2; Article 23; and Chapter II) and one declaration (pretrial discovery of documents).

Argentina allows production of evidence via letters of request pursuant to the procedure set out in the Hague Convention. The documents must be written in Spanish or accompanied by a certified translation in Spanish.

***Scope of Documentary Discovery***

Argentine courts follow the procedure established in the NCCCP, which states that a party must disclose the existence of any document relevant to the subject matter of the case if it is in its possession or custody.

Courts can obligate the requested party to submit a specific document.

A party is allowed to refrain from producing evidence against itself in the event that the evidence could result in criminal charges against itself, or in the case of privileged information.

***Scope of Oral Discovery***

Argentine law requires that a letter of request include specific questions to be posed to the witness during its examination.

The witness is examined under oath by the court.

Questions to be addressed to the witness are not provided in advance.

If the witness fails to attend the hearing without a reasonable explanation, the court is empowered to impose a pecuniary fine. The court may also force the witness to provide testimony.

***Written Interrogatories Addressed to Parties***

Argentina does not have a written interrogatory process similar to the U.S. Federal Rule of Civil Procedure 33.

A party may request that the court examine the other party based on a written interrogatory previously submitted by it. This kind of evidence is only admitted when litigation is pending.

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**Discovery Procedures in Argentina** *(Continued)*

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Failure to attend the hearing by the requested party or its refusal to answer any question during the examination will be considered an admission of the facts alleged against him (*ficta confession*).

***Confidentiality and  
Waiver of Protection***

Argentina lacks a general regulation addressing issues such as privileges and confidentiality. Nevertheless, institutions such as *professional secrecy, bank secrecy, commercial secrecy*, etc. are regulated as a way of protecting certain kind of information.

***Third-Party Discovery***

The court may order a third party to disclose documents that are in its possession or custody.

The third party may only object to such a request when disclosure may cause harm to it.

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