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Argentina

Adalberto Ramiro Barbosa and Patricio O'Reilly

Barbosa Abogados

1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Argentina has adopted several international conventions related to the fight against corruption and has promulgated internal laws in connection with them. The Republic of Argentina is a signatory to and has ratified the Inter-American Convention Against Corruption, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the United Nations Convention against corruption.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The most relevant Argentine regulation prohibiting bribery of a public official is contained in article 256 of the Argentine Penal Code which punishes public officials who directly or indirectly (through third parties) receive money or any other thing of value in exchange for doing, delaying or omitting to do certain actions relating to their public duties or activities.

It should be noted that in order to implement the provisions of the Inter-American Convention Against Corruption, Argentina amended its penal code making the bribery of a foreign public official a crime. Besides the above-mentioned federal provisions, there are also certain regulations that have been adopted at the provincial level as well as in the municipal level.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

The relevant provisions of the Argentine Penal Code prohibit public officials to directly or indirectly (through third parties) receive money or any other thing of value in exchange for doing, delaying or omitting to do certain actions relating to their public duties or activities. The conduct of an individual (not necessarily a public official) who receives money or any other thing of value in exchange for influencing a public official in order to making him do, delay or omit to do a certain action relating to his public duties or activities is also considered a crime. If the relevant public official is a judge, then the basic penalties corresponding to the basic criminal figure are aggravated. Penalties corresponding to the above types of conduct range from one to six years in prison for the basic conduct and from four to 12 years for the aggravated types of conduct. In addition to imprisonment, the law provides for a penalty of permanent ineligibility for public office.

4 Definition of a foreign public official

How does your law define a foreign public official?

Applicable Argentine regulations lack a specific definition of 'foreign public official'. Therefore, the standard definition of 'public official' contained in the Argentine Penal Code, which provides that 'public official' or 'public employee' means a person who has been permanently or temporarily elected or appointed by a competent authority to public office, is applied.

Even when the relevant definition is adopted by analogy, the fact remains that it refers only to public officials of a foreign state as the ones subject to criminal prosecution for acts of corruption but leaves out other public officials such as the ones that belong to international organisations or multilateral agencies, etc. In order to close the 'loop hole' in the current regulations, there are several legislative projects that propose amending article 258 bis of the Argentine Penal Code in order to extend the scope of such article to officials of international or multilateral organisations. In this regard, Argentina has welcomed the recommendation made by the Working Group of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions that functions at the OECD.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

The Ethics in the Public Function Law or 'the Public Ethics Law' provides that public officials shall not receive gifts, donations of any kind, including goods or services given in relation to their official activities or function. The presumption is that a gift was given to a public official in consideration of his public role, if such a gift would not have been given to him if it had not been for his public office role. There are certain exceptions to the rule indicated above which are contained in the Public Official Gifts Rules:

- official recognitions from foreign governments, international organisations or non-profit organisations, so long as said recognitions are admitted by law, official practices or customs;
- travel expenses received from governments, academic institutions, or public or private entities relating to conferences, lectures or academic or cultural activities as long as there is no conflict with the public official's responsibilities or they are prohibited by applicable regulations; and
- gifts or benefits that, owing to their low value based on the circumstances, could not reasonably be considered as intended to influence the will of the public official.

The same rules also establish the creation of a registry of gifts which will be run by the Anti-Corruption Office of Argentina. Even though such an office has already proposed several legislative projects, the registry of gifts has not yet been created.

The above-mentioned rules are designed for public officials without making any distinction as to their domestic or foreign origin.

Following the same criteria provided by the Argentine Penal Code, we understand that the gifts rules apply to both local and foreign public officials.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Applicable Argentine regulations do not allow 'facilitation payments'. Such conduct could be characterised as two different types of crimes: bribery (*cohecho*) or gifts given pursuant to violation (*dádiva*). The penalised conduct implies that an individual gives money (disregarding the amount) to a public official (disregarding his or her seniority) in consideration for such public official's action, inaction or delay in action in relation to his or her functions.

It is important to mention that a facilitation payment investigation (in any of its forms under Argentine law – *cohecho* or *dádiva*) could be initiated by a private individual or by the attorney general's office. The conduct could also be reported and investigated by the Anti-Corruption Office which is competent to act in crimes against public administration. The Argentine Penal Code typifies these types of payments as a crime.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

As a general rule, an individual who directly or indirectly participates in an illegal payment to a public official is subject to the same set of rules and penalties that apply to the relevant crime.

More specifically, intermediation in the payments to public officials is also considered a crime. This would be the case where an individual (not necessarily a public official) receives money or any other thing of value in exchange for influencing a public official in order to make him do, delay or omit to do a certain action relating to his public duties or activities. If the relevant public official is a judge, then the basic penalties corresponding to the basic criminal figure are aggravated.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Individuals that commit any of the offences within the Argentine Penal Code are subject to the penalties and sanctions established therein. Nevertheless, applicable Argentine regulations do not provide penal sanctions against companies or legal entities. However, the current legal trend is to apply attachments over the assets of the companies in order to secure the source of payment in case such companies' officers or employees are found guilty in a given case involving bribery or corruption.

9 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Cases involving foreign citizens in Argentina are generally heard in criminal court. There is no record of cases involving Argentine citizens paying bribes in foreign countries in relation to which the government of Argentina requested information. Considering that anti-corruption regulations rules are relatively new in Argentina, enforcement agencies, in particular the Anti-Corruption Office, are working to implement projects that increase the application of civil penalties to those found guilty of corruption crimes.

10 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The Anti-Corruption Office is the government agency in charge of enforcing the anti-corruption provisions. The Anti-Corruption Office investigates and actively participates in the prosecution of this kind of crime. This agency is currently in the process of implementing a cultural change in the system not only to conduct investigations related to acts of corruption but also to recover the assets related to the proceeds of the relevant crime. The Anti-Corruption Office also represents Argentina in international organisations and forums related to the subject matter, such as the OECD.

11 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

No, there is no such mechanism that would allow companies to disclose information related to violations in exchange for lesser penalties or sanctions. Due to the lack of this kind of regulation, companies have no incentive to inform violations to the authorities, to collaborate in investigations or to implement a much more proactive approach to avoid incurring in violations of the applicable anti-bribery legislation.

12 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

No. Based on the legality principle, once a public official has been informed of a crime, it must be reported, prosecuted and an investigation must be conducted in that regard. However, the Anti-Corruption Office's rules allow said office to select some of the cases that it will investigate based on the economic, social or institutional importance involved. These selective criteria are in line with the dimensions in which applicable law considers that corruption affects public administration. In this regard, a corrupt act must affect government assets, the value of institutions or public policy equity. The Anti-Corruption Office is entitled to apply a quantitative or a qualitative approach, depending on the circumstances: either it focuses its investigation on the amount or value of the assets involved in the relevant offence or, if the relevant offence affects the institutions or the public faith, it disregards the amount involved. That is the reason why, even if a case is excluded from investigation because of its economic irrelevancy, the same case could be investigated or prosecuted for its social or institutional implications.

13 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

There are several projects intended to amend article 258 bis of the Argentine Penal Code in order to extend the scope of such article to officials of international or multilateral organisations. In this regard, Argentina has welcomed the recommendation made by the Working Group of the Convention on Combating bribery of Foreign Public Officials in International Business Transactions that functions at the OECD. Also, the Anti-Corruption Office is in the process of implementing certain changes in its enforcement system that would allow the agency to not only conduct investigations related to acts of corruption but also recover the proceeds related to the relevant crime. Some of the measures under analysis are: attachments, embargos and other procedural tools that could be available to secure the availability of the assets during the course of an investigation.

14 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

Argentine anti-corruption regulations apply to individuals who commit the relevant offence in Argentina. Technically Therefore, a company could not be prosecuted from a criminal standpoint. Nevertheless, companies whose employees are subject to investigation for a corruption offence could suffer attachments over their assets in order to secure the source of payment if such companies' officers or employees are found guilty in a given case. The Anti-Corruption Office is leading the legal trend by encouraging such measures to be applied to companies.

15 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Under article 258 bis of the Argentine Penal Code, an individual that directly or indirectly offers or gives anything of value including promises, gifts or favours to a public official of a foreign state in exchange for said official's actions or omissions, within the scope of his public role, in relation to a commercial or business transaction, may be punished with one to six years in prison and permanent ineligibility to public office.

16 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

There are no decisions available in relation to foreign bribery cases. However, the *Skanska* case, which is currently under investigation, could be considered a leading case in the matter. The case involves an invoicing scheme related to the construction of pipelines in the north and south regions of Argentina. The investigation indicated that in the course of two years the company Skanska paid over 118 false invoices to at least 23 shell companies. The company acknowledges that they have paid illegal commissions. Even though the legal procedure and the investigation are still ongoing, it is clear that the scheme involved a foreign company's payment of bribes to local officials in Argentina.

Financial record keeping**17 Laws and regulations**

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

In general, corporate governance regulations issued by the controller of corporations provide for basic standard reporting requirements for companies, non-profit organisations, etc. As part of the basic rules, reporting requirements include the making and keeping of books, records and accounts in reasonable detail which accurately reflect the transactions of a company. Also, publicly held companies must comply with a specific set of reporting requirements issued by the CNV (SEC equivalent) including that financial statements be subject to internal and external auditing.

18 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Applicable regulations do not require disclosure of a violation (see question 11).

19 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Based on the information available, there have not been cases involving violations of record keeping or internal controls obligations leading to enforcement of domestic or foreign bribery provisions. However, considering that anti-corruption regulation rules are relatively new in Argentina, enforcement agencies could eventually find in the applicable record keeping legislation a useful tool to investigate and prosecute bribery or corruption cases.

20 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

Payments of bribes are not allowed under Argentine regulations; therefore, no legal tax treatment applies to such payments. Argentine GAAP provide that an accountant must certify that financial statements accurately reflect the real financial situation of a given company as of a certain date. In order to be able to make such a certification, an accountant must obtain receipts and other documentation that support or evidence the relevant financial situation of the company. It is important to mention that in the case of payment of bribes the referred receipts do not exist or if they do, they do not reflect the real circumstances under which such payments were made. In those cases, a given balance sheet of the company that paid bribes could be deemed false and if an accountant certified a false balance sheet he could be liable for the offence provided by article 300 of the Argentine Penal Code.

21 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Not specifically. As a general rule the proceeds of a crime cannot enjoy favourable tax treatment due to their illegal origin. Therefore, no tax benefit should apply to domestic or foreign bribes. Argentine income tax regulations allow the deduction of any expense that is deemed necessary in order to obtain and keep the income subject to withholding. In order to be able to claim the referred deductions, the relevant income must be supported by certain documentation in accordance with applicable tax rules. In most circumstances the payment of a bribe is not supported or evidenced by the documentation required by law.

Domestic bribery**22 Legal framework**

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Anti-bribery provisions are contained in chapter VI of the Argentine Penal Code. The rules punish a public official (disregarding his seniority or category) who receives money or any other thing of value (disregarding the amount) from any individual if such a giving is intended to influence the public official's actions to do, not to do or to delay an act within his scope of responsibility. The penalty for this crime ranges from one to six years in prison. The minimum penalty is increased to two years if the public official belongs to the judicial branch of power. It is important to note that a private individual will not be sanctioned if the money or thing of value was demanded by the public official exceeding the limits of his powers. Court decisions consider 'public official' as any person that directly or indirectly participates in public office. Based on these criteria, a simple employee could be considered a public official for his mere participation in a public activity.

The same set of rules also prohibits 'gifts given pursuant to violation' (*dádiva*). In this case the person being punished is the individual

who offers a gift (including money or anything of value) to a public official in consideration for his position in public office. The conduct does not require the public official to do or not to do something but simply the mere giving of the gift configures the crime. The penalty for this crime ranges from one month to one year in prison.

23 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Yes. In addition to punishing the payment of a bribe, the relevant statute prohibits public officials from soliciting or accepting a bribe intended to influence their performance and actions within the scope of their official responsibilities.

24 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

Article 77 of the Argentine Penal Code provides the definition of public official. Public official or public employee means a person who has been permanently or temporarily elected or appointed by competent authority to public office. Also, court decisions have established the definition of public official to include any person that directly or indirectly participates in public office. Therefore, based on both the legislative definition and court interpretation, the term public official includes employees of state-owned or state-controlled companies.

25 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

Yes, provided that the commercial activity is not considered to be in conflict with his or her public role or function. The public official's conflict of interest is regulated by the Ethics in the Public Function Law (25.188). This Law establishes certain parameters for the situations that ought to be considered to conflict with the public function. For example, the relevant law provides that it constitutes a conflict of interest for a public official to provide any service to a person that is a vendor, performs any activity, provides any service to the government or that performs activities regulated by the Argentine government. The government agency in charge of enforcing the conflict of interest rules is the Anti-Corruption Office.

26 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

As a general rule, public officials are prohibited from receiving gifts, presents and donations of any kind, including goods or services given

Update and trends

Some legislative projects have been proposed to amend article 258 bis of the Argentine Penal Code which punishes the bribery of a foreign public official. The proposed amendments aim to extend the scope of such article to officials of international or multilateral organisations. In this regard, Argentina has welcomed the recommendation made by the working group of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which functions at the OECD. Also, the Anti-Corruption Office is in the process of implementing certain changes in its enforcement system that would allow the agency to not only conduct investigations related to acts of corruption but also to recover the proceeds related to the relevant crime. Some of the measures under analysis are: attachments, embargos and other procedural tools that could be available to secure the availability of the assets during the course of an investigation.

in relation to their official activities or function. The legal presumption is that a gift is given to a public official in consideration for his or her public role, if such a gift would not have been given to him or her if it had not been for his or her public office role. (For exceptions to the rule see question 5.)

27 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

Public officials are prohibited from receiving gifts, donations or presents, whether in the form of services, goods or anything of value, while in office or in connection with their public functions. There are exceptions in circumstances when the relevant gift is given in compliance with the performance of a diplomatic tradition or custom. The Anti-Corruption Office has not yet established objective criteria regarding gifts and gratuities to public officials.

28 Private commercial bribery

Does your country also prohibit private commercial bribery?

Even though Argentina has ratified the United Nations Convention Against Corruption, to date no regulations in that regard have been established.

29 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

Penalties range from one to 12 years in prison. In addition to imprisonment, the law provides for ineligibility for public office.

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30 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

There is no available official information regarding cases involving facilitation payments. As already indicated, making a facilitation payment to a public official in Argentina will constitute a crime, which could eventually give place to a criminal prosecution.

31 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

Besides the international component already indicated in question 16, the *Skanska* case also provides elements related to domestic bribery.

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