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THE NEW ARGENTINE CONSUMER DEFENSE LAW. PUNITIVE DAMAGES: THE MAIN STAR

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I. INTRODUCTION

ON April 3, 2008, the Argentine Legislative Branch passed Law 26,361 (“the New Law”), which modifies Consumer Defense Law 24,240.² The New Law introduced the concept of punitive damages—a controversial U.S. remedy—into the Argentine Consumer Defense legislation. In this comment, the author examines the central legal and social issues presented by the new regulation and ponders its effect on Argentine Commerce.

II. FINANCIAL OPERATIONS AND CREDIT TO CONSUMERS

The New Law modifies Section 36 of Law 24,240 to require financial institutions that provide financial and credit services to consumers to clearly inform those consumers of specific information, including: (i) the description of the good or service that is the object of the transaction; (ii) the cash price; (iii) the amount of money that the consumer will have to pay as down-payment and the total financed amount; (iv) the effective annual interest rate; (v) the total amount of interest that the consumer will pay; and (vi) the system of amortization and the method for cancellation of interest.³

Importantly, Section 36 provides that if the financial institution omits the information above, the consumer may request the nullification of the contract or some of its clauses.⁴ In the particular case where the financial institution fails to specify the interest rate in the contract, the New Law fills this interest rate with the average passive annual rate released by the Argentine Central Bank, which generally is much lower than the rate that commercial banks in Argentina offer their customers.⁵

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2. Law No. 26361, Apr. 3. 2008, [LIII-D] A.D.L.A 4125 [hereinafter Law No. 26361].

3. *Id.*

4. *Id.* In doing so, the New Law replicates former Section 37.

5. *Id.*

The New Law also includes rules regarding the enforceability of a contract in which the parties agree that a third party will provide financing to the consumer and that the original contract will be conditioned upon the consumer obtaining the financing.⁶ The New Law provides that if such third-party financing is not obtained, the original contract will be resolved without cost for the consumer.⁷ Moreover, in such a case, the provider is obliged to refund any monies paid by the customer as a down payment and all expenses paid in advance.⁸ This rule provides increased protection to real estate and banking customers that were previously charged huge expenses before obtaining financing, and were not refunded any security deposits or monies advanced. In the past, such expenses were considered non-refundable costs, even though it was not the consumer's fault that the third party failed to provide the necessary financing.

III. EQUITABLE TREATMENT OF FOREIGNERS

Section 8 also provides that providers (the whole chain of merchants involved) should abstain from engaging in conduct that intimidates consumers.⁹ The New Law expressly prohibits providers from charging foreigner customers a different price than Argentine citizens.¹⁰ Moreover, the New Law prohibits any difference in the quality or any other aspect of a good or service that is based on whether the consumer is Argentine.¹¹ Any exception must be properly authorized by the Executive Branch, and in all cases must describe the basis for such a determination.¹² This last regulation is long overdue. After the economic crisis of 2001 and 2002, many providers (hotels, restaurants, and airline companies, among others) used to charge different prices on the basis of whether a consumer was an Argentine Citizen.¹³ The New Law will prevent such behavior and should promote confidence among foreign investors and tourists.

IV. ARGENTINA'S INTRODUCTION TO PUNITIVE DAMAGES

The New Law introduces the new Section 25 which describes punitive damages as follows:

In the instance that a provider does not comply with its legal or contractual obligations to the consumer, by request of the plaintiff, the judge would be entitled to apply a civil fine for the benefit of the consumer. The amount of the damage will be estimated on the basis

6. *Id.*

7. *Id.*

8. *Id.* § 8.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Larry Rohter, *International Business; Amid Financial Despair, Argentines See a 'Little Summer,'* N.Y. TIMES, Dec. 16, 2002, <http://query.nytimes.com/gst/fullpage.html?res=9C01E7DC163DF935A25751C1A9649C8B63>.

of the magnitude of the damage and the circumstances of the case, independently from any other indemnification that might apply to the case. In the case that the fault of the damage or the breach of the contract is attributable to more than one provider, all providers will be jointly responsible, even when reimbursements will apply among them.¹⁴

The incorporation of punitive damages in the Consumer Defense Law was proposed a long time ago in the project of the Civil Code of 1998¹⁵ and is considered by many scholars—including the author of this comment—as an extremely positive tort remedy that will pose a great challenge to the Argentine judicial system.¹⁶

One of the issues that has arisen from the adoption of the New Law is the question of when punitive damages should be awarded. Some scholars believe that damage estimation should be based in seriousness of the facts and other circumstances of the case. This is the method articulated by the New Law.¹⁷ Other scholars believe that the amount of punitive damages should be based on: (i) the damage produced to the consumer; (ii) the position of the consumer; (iii) the position of the provider in the market; (iv) the status of the provider as a recidivist; and (v) any other circumstances that the judge or the administrative authority considers relevant to the case.¹⁸ Indeed, as professor Alterini has remarked, it is important that the New Law keep the amount of damages independent of all other indemnifications, and that the chain of providers be jointly responsible for the estimated amount of damages.¹⁹

Moreover, the New Law's mandate that the consumer herself be awarded punitive damages individually has sparked controversy. Some scholars have criticized this rule and have suggested that the monies regulated as punitive damages should either be allocated by the presiding judge or transferred to a special fund created for the education of consumers.²⁰

Further, judges will need to analyze whether the rule allows for up to AR\$5,000,000 in potential punitive damages for each independent cause of action, or whether it caps damages at a cumulative AR\$5,000,000 in the event of multiple causes of action. Strict application of the New Law may produce a situation in which many consumers request independent punitive damages in the same cause of action and based on the same conduct of a financial institution. This author agrees with professor Alterini that the text should have stated that a global cap of AR\$5,000,000 in pu-

14. Law No. 26361, *supra* note 2.

15. Alterini, Ameal, & Lopez, *Derecho de las Obligaciones*, 3rd Ed., Buenos Aires, 2006, 267.

16. *Id.*

17. Law No. 26361, *supra* note 2.

18. Alterini, Ameal, & Lopez, *supra* note 15.

19. Alterini, *El Consumidor en la Edad Postmoderna*, Estudios de Derecho Civil, Buenos Aires 2007, 299.

20. Alterini, *Las Reformas a la Ley de Defensa del Consumidor*, Primera Lectura, 20 Anos Despues. L.L., 04/09/28.

nitive damages should not apply where the same cause of action is brought by many individuals based on the same conduct of a company because in such a case the cap would be unreasonably low.²¹ For instance, even if the company deliberately violated the law harming millions, such an interpretation would not only create a safe harbor for such companies but would also destroy the New Law's objective of permitting punitive damages against companies that intentionally violate the law.²²

V. STATUTE OF LIMITATIONS

New Section 50 of Law 24,240 establishes a three-year statute of limitations period. According to the New Law, if this statute of limitations differs from that of another claim of the consumer, the period more favorable to the consumer will govern. Thus each cause of action may now have a uniform statute of limitations.²³ For instance, this modification may change the statute of limitations of many contracts and civil institutions including (a) general transportation contracts (for personal damages and total or partial loss of goods) regulated by the Commerce Code; (b) air transportation contracts regulated by the Aeronautic Code; and (c) revocatory, nullity and redhibitory vice actions regulated by the Civil Code.

VI. METHODS OF RESCISSION OF CONSUMER CONTRACTS

Under the text of the New Law, when consumers acquire services including any public or home service—via phone, electronically, or through any similar method—they have the option to rescind the contract using the same method that they used to acquire the service.²⁴ In the event that the consumer decides to cancel the contract by one of the above methods, the company will be obliged to send—without cost to the consumer and within seventy-two hours of receiving the consumer's notice of rescission—a receipt indicating that the company received the request for rescission.²⁵ The author consider this rule an advance in terms of public and private service because, prior to the enactment of the New Law, companies in Argentina often provided convenient ways to acquire a service (*i.e.*, through the internet or phone) but it was often very inconvenient and expensive for a consumer to rescind contracts established by these methods.

21. *Id.*

22. Dan Dobbs, *The Law of Torts*, West Group, v. 2, 1062.

23. For more information, please refer to Farina, J. M., *Defensa del Consumidor y del Usuario*, Buenos Aires, 1995, p.395; Lorenzetti, R. L., *Consumidores*, Santa Fe, 2003, p.499; A.V. Della Maggiora, J.M. Zarate, La Prescripción en la Relación de Consumo, en Cartapacio, Universidad Nacional del Centro de la Provincia de Buenos Aires, no 6, <http://www.cartapacio.edu.ar/ojs/index.php/ctp/article/view/File/49/29>; Lass, G. E., "La Prescripciones de las Acciones de Consumo, en Lopez Herrera, E. director), "Tratado de la Prescripcion Liberatoria," Buenos Aires, 2008, t. II, p.931.

24. Law No. 26361, *supra* note 2.

25. *Id.*

VII. DIRECT DAMAGES

New Section 40 of Law 24,240 allows the administrative authority to determine that a provider's act or omission has resulted in damage to the consumer's assets or person, and consequently allows such authority to grant damages up to five "Canastas Basicas Total para el Hogar 3" in each case.²⁶ Under this proceeding, the provider will be able to appeal an administrative judgment under the terms of Section 45 of the New Law. However, once the appeal is exhausted and the judgment becomes final, the New Law will grant the consumer a right to execute on property in a summary proceeding. This is a great improvement in Argentina's Consumer Protection Law because prior to the New Law, the administrative authority was only allowed to impose fines based on compliance with the Law, but never based on direct damages to the consumer.

Before the New Law, consumers often did not request that companies be fined because the procedure was difficult and costly, and rarely used to the economic advantage of the consumer. Now under the New Law, small indemnifications will be covered directly by administrative proceedings and will not require judicial procedures.

VIII. CONCLUSION

The New Law is a huge step for consumer advocates and the people of Argentina. The New Law requires disclosure of important financial information to consumers, requires equitable and equal treatment for foreign consumers, increases the statute of limitations for many consumer causes of action, provides for a procedure to recover direct damages, and gives judges the authority to grant punitive damages.

The New law will undoubtedly require lawyers, judges, and other members of the judicial system to exert great effort to ensure that the new regulation is applied fairly and accurately. Given their increased powers, judges should exercise restraint and must not lose their objectivity in their decisions. Judges should also properly sanction lawyers who unethically attempt to request excessive damages. All in all, the author is convinced that the New Law will benefit Argentine commerce and will be a milestone in Argentine consumer defense legislation.

26. *Id.* The value assigned by the INDEC to the "Camasta Basica Total 3" in February 2008 is AR\$1055,67 (which represents U.S. \$330 using a reference currency of U.S. \$1 = AR\$3.20).

