Reinforcing the Arbitration Path in Latin America: Argentina Adopted an International Commercial Arbitration Act

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María Inés Corrá (M & M Bomchil)

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In what should be deemed as an authentic legislative milestone, on July 4, 2018 the Argentine House of Representatives approved the International Commercial Arbitration bill (previously passed by the Senate in 2017). The bill became a law and entered into force as Act 27,449 after its publication in the Official Gazette on July 26, 2018.

The International Commercial Arbitration Law (hereinafter, "ICAL") mostly adopts the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law), as amended in 2006, with some minor differences, most of them of non-substantial nature.

The bill was promoted by the Argentine Ministry of Justice and elaborated by some of the most outstanding specialists of Argentina, including high reputed professors, judges and practitioners.

The ICAL will regulate international commercial arbitration exclusively, without prejudice of any multilateral or bilateral treaty executed by the Argentine State (Section 1).

As for an arbitration to be considered "international", the ICAL adopts the general criteria set forth in Article 1(3) of the UNCITRAL Model Law, although excluding its item (c), according to which "*(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country*" (Section 3).

On the other hand, the ICAL endorses a broad interpretation of the "commercial" nature of the arbitration. It considers "commercial" every relationship, contractual or not, completely or mostly governed by private law. It further orders that, in case of doubt, the commercial characterization of the relationship should prevail (Section 6).

The new law does not establish a definition for an arbitral agreement, and partially departs from Article 7(3) of the UNCITRAL Model Law, setting forth that "*The arbitration agreement shall be in writing. An arbitration agreement is in writing if its content is recorded in any form*", without collecting the terms "*whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means*" (Section 15).

Regarding the arbitrators' appointment, the ICAL follows Article 11 of the UNCITRAL Model Law, adding, however, that the arbitral clause that provides any of the parties with a privileged position for the arbitrators' appointment is null and void (Section 24, second paragraph).

According to the new law, assistance to arbitral proceedings and the decision on

the annulment requests will be performed by the judges and courts of appeals in commercial matters of the arbitration seat, respectively (Section 13). Notably, this provision will serve to consolidate a more uniform case law on matters dealing with the application and interpretation of the new law. It should also prevent the potential intervention by other courts that could be not familiar enough with the relevant principles governing the matter.

Concerning interim measures and preliminary orders, the ICAL partially modifies Article 17.G of the UNCITRAL Model Law, establishing that the party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in said circumstances, the measure or the order should not have been *requested* (instead of "granted") (Section 55).

As regards the arbitral award content, the ICAL partially departs from Article 31(2) of the UNCITRAL Model Law, and only allows the award not to state the reasons upon which it is based, if it is an award on agreed terms, thus excluding the possibility for the parties to agree that no reasons are to be given (Section 87).

In a significant change, the ICAL sets forth a 30-day term in order to file an annulment request (Section 100). In doing so, the new provision departs from Section 759 of the Argentine Civil and Commercial Procedural Code, according to which annulment application should be filed within 5 (five) days as from the arbitral award notification.

Section 106 of the ICLA explicitly endorses the non-exclusive interpretation of Article II (2) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Furthermore, the new law abrogates Section 519 bis of the Argentine Civil and Commercial Procedural Code which formerly regulated the enforcement of foreign arbitral awards (by making reference to the provisions applicable to foreign judicial courts set forth in Section 517) (Section 107).

The ICAL constitutes a substantive advance in favor of arbitral practice in Argentina, which certainly reinforces the arbitration path in Latin America. Through it, Argentina will finally have a separate regulation for international commercial arbitration.

Until today, Argentine legislation did not distinguish between domestic and international arbitration proceedings, being both subject to the provisions contained in procedural codes and, since 2015, in the Civil and Commercial Code.

The new law reverses the difficulties found in the past in order to adopt a modern regulation on the mater, and confirms that a more favorable environment for arbitration is prevailing in Argentina and will hopefully consolidate in the future.

In this path, the ICAL endorses other recent specific regulations, such as the Renewable Energy Regulation in force since 2016 -i.e. Act 26,190, as amended by Law 27,191 and Decree No. 882/2016– and the Public-Private Partnership Contracts Regulation, also enacted in 2016 -i.e. Act 27,328 and Decree No. 118/2017-, which explicitly set forth that disputes arisen from the agreements executed under them may be submitted to arbitration.

Furthermore, the new favorable trend for arbitration has been expressly ratified by the Argentine Ministry of Justice at his opening speech at the IBA Arbitration Day that took place in Buenos Aires in February 2018.

In sum, the International Commercial Arbitration Act recently approved by the Argentine Congress contributes to position Argentina as a pro-arbitration seat, with the significant advantages that this entails for the development of the arbitral practice in the country and in Latin America.