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New Signs of Good Prospects for International Arbitration in Argentina?

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On 4 July 2018, the Argentine National Congress passed a new arbitration act modernizing the framework for the conduct of international commercial arbitrations in Argentina (the ***Arbitration Act*** or the ***Act***), based on the UNCITRAL Model Law and its 2006 amendments (the ***Model Law***). The development comes in response to calls from the arbitral community in Argentina, which have been ongoing for some time, to rehaul the country's arbitration legislation, particularly following problematic amendments introduced in 2015. The approval of the new Act mirroring the Model Law represents a solid step towards enhancing the status of international arbitration in Argentina.

The Model Law is considered to embody the most widely accepted and highly regarded rules of arbitration practice and principles; its adoption by 80 countries attests to its reputation. Even countries not officially listed as "Model Law" jurisdictions follow its main principles, thereby further ensuring the uniformity and predictability of arbitral practice worldwide.

In November 2016, the Argentine Ministry of Justice presented to Congress a draft bill on international arbitration (the ***Bill***) prepared by a working group composed of lawyers, arbitrators, academics, and public authorities (including the Treasury Attorney General's Office). The Bill had its genesis in a project to enhance the judicial system so as to achieve quicker, more independent, and more secure resolution of disputes. The Bill acknowledged the importance of arbitration as a flexible, fast and reliable dispute resolution method. In September 2017, the Senate approved the Bill, and on 4 July 2018 it was finally passed into law by the House of Representatives. Once promulgated by the executive power, the Act will enter into full force and effect. The legislative decision to foster international arbitration forms part of a broader policy to reform Argentina's political and economic framework, aimed at improving legal certainty as to attract foreign investors, in line with the recent policies of President Macri. The promotion of international arbitration as a means of dispute resolution can also be seen in other recent legislation, including the Public-Private Partnership Act, which expressly refers to international arbitration as a means of resolving disputes involving state parties.

The previous arbitration framework in Argentina

Historically, arbitration in Argentina has been regulated by the procedural codes of each jurisdiction, i.e. each province or the federal territory. While each code dealt with the procedural aspects of arbitration in a different way, there were no substantial differences between them. The Argentine courts applied the provisions of these procedural codes to both domestic and international arbitrations, as the rules provided no distinction between the two.

In 2015 Argentina introduced a new Civil and Commercial Code, which included a specific chapter on domestic arbitration. This Code, which applied in all provinces and federal territories, recognized the Model Law as one of its main sources (along with the French arbitration law and the Quebec Civil Code). Its enactment meant great improvements in the arbitration framework in Argentina, as it incorporated the principles of separability and *kompetenz-kompetenz* (articles 1653 and 1654), which were not previously formally codified, and that of *favor arbitrandum* for the interpretation of arbitration agreements (article 1656).

The provisions on arbitration contained in the procedural codes of each province, however, also remained in force. The Civil and Commercial Code did not clarify the scope of its application either, so both instruments governed domestic and international arbitration in Argentina.

The new Arbitration Act has sought to clarify this issue, specifying that it, exclusively, will govern international commercial arbitration (along with the relevant international treaties). The Act thus consolidates all relevant domestic rules for international commercial arbitration into a single instrument. The Act further provides that an arbitration will be "international" if: (i) at the time of the conclusion of the arbitration agreement the parties had their places of business in different states, or (ii) their places of business are different from either the seat of the arbitration, any place where substantial obligations are to be performed, or the place of the closest connection to the dispute. The procedural codes and the Civil and Commercial Code will continue to apply, but only to domestic arbitrations. As a consequence, the realms of international and domestic arbitration will now have different regulatory instruments.

The new rules for international commercial arbitration pursuant to the Act

Unlike other countries that have adopted the Model Law whilst making significant alterations to its text, Argentina has decided to adopt the model text almost in its entirety with few modifications. As such, Argentina's new Arbitration Act offers cutting edge solutions with regard to some issues, but takes a more conservative approach regarding other novel practices.

In the definition of "arbitration agreement," for instance, the Arbitration Act adopts option I of article 7 of the Model Law, which contains the requirement that an arbitration agreement shall be in writing. Congress indicated in the Act that the circumstances mentioned in article II(2) of the New York Convention under which an arbitration agreement is deemed to be "in writing" (arbitration clause, or arbitration

agreement signed by the parties or contained in an exchange of letters or telegrams), shall be interpreted as non-exhaustive, as recommended in 2006 by UNCITRAL. However, the Act takes a conservative approach by declining to adopt the possibility that an arbitration agreement may be considered to be in writing "whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means" (article 7.3 of the Model Law).

The Arbitration Act also excludes the qualification of arbitration as "international" when the parties expressly agree that the subject matter of the arbitration agreement relates to more than one country (article 1.3.c Model Law).

Another deviation from the text of the Model Law relates to the law applicable to the merits where the parties are silent on the issue. Instead of taking the Model Law approach, which provides that the arbitral tribunal shall apply the law determined by the conflict-of-laws rules, the Arbitration Act creates a shortcut by stating that the tribunal shall simply apply the "rules of law" that it considers appropriate.

In turn, a few elements have been added to the original text of the Model Law, as follows:

1. In the definition of the term "commercial," instead of including footnote 2 of the Model Law (which recommends a wide interpretation of such term), article 6 of the Arbitration Act states that the term "commercial" refers to any contractual or non-contractual relationship predominantly governed by Argentinian private law. Article 6 also explains that the interpretation should be wide and, in case of doubt as to the nature of a relationship, there should be a presumption in favour of its commercial nature. While this provision may have been intended to foster arbitration, it probably went too far, as it may now encompass situations that are governed by private law but can hardly be considered "commercial" in nature.
2. In the constitution of the arbitral tribunal, the Act states that an arbitration agreement whereby either party is granted an advantage over the other in the appointment of arbitrators shall be null and void. This provision is unusual, and represents a departure from the Model Law, which provides that any advantage in the appointment of arbitrators is governed by a general rule on equal treatment of the parties (see, for example, article 18 of the Model Law).
3. While the Model Law provides general rules for challenging arbitrators, article 28 of the Act includes additional (non-exhaustive) grounds for challenge. It refers, for example, to the participation of an arbitrator (or members of his/her law firm or equivalent organization) in another arbitration (or judicial procedure) as: (i) counsel of one of the parties, regardless of the subject matter of the dispute, or (ii) counsel of a third party in a case with the same subject matter, and provides that either situation will constitute grounds for challenge, irrespective of any evidence to the contrary about the arbitrator's independence and impartiality. This provision might therefore pave the way for frivolous challenges and generate delays.

The rules governing domestic arbitration pursuant to the existing instruments

Although Argentina's new Arbitration Act establishes a new framework for international commercial arbitration, it leaves the existing procedural codes and the

Civil and Commercial Code to govern domestic arbitration. The procedural codes are quite outdated, and, as noted above, the chapter on arbitration contained in the Civil and Commercial Code contains several technical flaws. For instance, one of the most problematic provisions relates to the challenge of awards (the last paragraph of article 1656). This provision (i) establishes an annulment recourse without indicating the applicable grounds, and also (ii) refers to a non-waivable "judicial challenge" against any final award "contrary to the legal system", virtually creating a system of appeal for arbitral awards.

In an effort to address these issues, Congress is in the process of analyzing a draft bill which proposes several amendments to the Civil and Commercial Code, including on the vital issues of arbitrability and challenges to arbitral awards.

On arbitrability, the bill proposes to eliminate the Code's limitation on the arbitrability of disputes involving public policy (article 1649). It also proposes to replace the Code's blacklist of non-arbitrable matters with a general rule confirming the arbitrability of all disputes involving freely transferable rights (article 1651).

With regard to challenges of arbitral awards, the bill proposes to remove the last paragraph of article 1656 providing for the judicial challenge of awards "contrary to the legal system" mentioned above and an existing ground to challenge interim measures on the basis that they violate constitutional rights or are "unreasonable" (article 1655).

Such changes will hopefully provide the much-needed certainty required to achieve consistency of the arbitration framework at the domestic level as well.

Conclusions

In sum, Argentina's decision to pass the new Arbitration Act is a positive step towards the promotion of the country as an arbitration-friendly jurisdiction. The Act now establishes a clear distinction between the rules applicable to domestic versus international arbitration, and a modern body of rules for the latter. There remain some aspects that could be improved in the legal framework applicable to domestic arbitration, but the reforms proposed in the current bill being considered by Congress appear promising in this regard.

The ultimate success of the Arbitration Act will be measured by its application in the domestic courts. It remains to be seen whether the Argentine courts will respect the new dividing line between the instruments governing international and domestic arbitration and apply the provisions of the Act to the exclusion of the old procedural codes. While many courts have been contributing to the creation of a solid body of pro-arbitration case law even prior to the introduction of the new Act, a limited few still show some reservations towards its use.

By passing its new Act, Argentina follows in the legislative footsteps of several of its Latin American neighbours. In the last decades, almost all countries in the region have modernized their arbitration legislation. Like Argentina, most of them have followed the Model Law, with some also incorporating the 2006 amendments. Most of them, like Argentina, have also consolidated their international arbitration laws into a single

standalone act, with the exception of Mexico, where arbitration is still governed by the commercial code. Uruguay, for instance, passed its new and long awaited arbitration legislation on 3 July 2018 (almost simultaneously with Argentina), replacing its old procedural code-based rules with a new framework based on the 1985 Model Law with some 2006 amendments. In view of these developments, the future of arbitration in Argentina and in Latin America seems bright.

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