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Tailwind for Arbitration in Uruguay: the Model Law Finally Reaches Safe Harbor

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Uruguay's long journey to approve an international commercial arbitration law has finally come to an end. Act Nº 19.636 (the "Arbitration Act") was passed at the beginning of July, almost fourteen years after the Executive first sent a draft bill to Congress to regulate arbitration. The Arbitration Act largely incorporates the 1985 UNCITRAL Model Law on International Commercial Arbitration and some of its 2006 amendments (the "Model Law"). The objective of the Arbitration Act is to align Uruguay with accepted international legislative standards, although certain provisions are tailored to adjust them to the country's procedural regulations, long-standing judicial practices and private international law principles.

Arbitration in Uruguay before the Arbitration Act

Uruguay's legislative recognition of the institution of arbitration dates back to the second half of the nineteenth century. The Commercial and Civil Codes of 1865 and 1868 respectively included provisions making arbitration mandatory for certain disputes (such as those arising out of commercial lease agreements or between partners in any business entity). Although these provisions requiring mandatory arbitration were repealed in 1975, the country kept its longstanding tradition of recognizing arbitration as a valid dispute resolution mechanism in its general procedural legislation. For example, Uruguay's first procedural code of 1878 included several provisions on, *inter alia*, the enforceability of arbitration clauses, the appointment of arbitrators, and the conduct of proceedings, which provided the foundation for domestic arbitration in the country. Subsequently, the 1988 procedural code (the General Procedure Code or "GPC") included a specific chapter on arbitration.

Uruguay has also adopted, since 1977, numerous bilateral and multilateral treaties, including the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, the Panama Inter-American Convention on International Commercial Arbitration of 1975 and the Montevideo Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979.

More recently, amendments to the GPC in 2013 brought a number of improvements to the field of commercial arbitration, including the express recognition, for the first time, of the *kompetenz-kompetenz* principle (art. 475.2), regulation on preliminary measures granted by a court before arbitration is commenced (art. 488) and the inclusion of some additional grounds for the annulment

of an award (art. 499).

However, under the GPC, which is still applicable to domestic arbitration in Uruguay, an arbitration clause is not sufficient to submit a dispute to arbitration, and a submission agreement (or *compromis*) is required once a dispute has arisen. If one of the parties refuses to execute a submission agreement, the other party can request specific performance to a judicial court. This pitfall, coupled with the fact that it is relatively inexpensive to submit a dispute to Uruguayan courts, has traditionally undermined the appeal of arbitration as a dispute resolution mechanism for Uruguayan parties.

Other aspects of the GPC's provisions on arbitration are also troublesome. For example, arbitrators must ensure that the parties had a chance to conciliate the dispute before commencing the arbitration proceeding (art. 490). Failure to do so could cause subsequent proceedings to be void. Moreover, by default arbitration proceedings will be decided *ex aequo et bono* unless the parties expressly state in the submission agreement that the dispute will be decided by the application of the law (art. 477).

International Commercial Arbitration under the new Arbitration Act

The recently enacted Arbitration Act has come to solve most of these difficulties for international commercial arbitration.

The Arbitration Act's scope is limited to international arbitration. According to its provisions, an arbitration is international only if: (i) the parties to the arbitration agreement have their places of business in different countries when such agreement was executed (art. 1.3.a); and (ii) the place of the performance of a substantial part of the commercial obligations, or the place with the closest relation to the subject matter of the dispute, are located outside the country where the parties have their places of business (art. 1.3.b). Hence, the Arbitration Act deviates from the Model Law in the sense that "[t]he sole will of the parties cannot determine the internationality of the arbitration" (art. 1.4). This limitation is rooted in Uruguay's restrictive approach to party autonomy under its private international law rules, embodied in art. 2403 of the Appendix to the Civil Code which states that the "[t]he rules of legislative and judicial competence […] cannot be modified by the parties' will. They can only act within the margin conferred by the competent law". The Arbitration Act continues to reflect the conservative predisposition of the Uruguayan legislator in relation to party autonomy.

A second aspect regulated by the Arbitration Act is what constitutes an "arbitration agreement". The Act adopted the definition included in art. 7 of the 1985 version of the Model Law, with the purported intention of being consistent with the NY Convention.

Third, the Arbitration Act also recognizes that the tribunal shall decide the merits of the dispute in accordance with the rules of law chosen by the parties (art. 28.1). This provision ratifies the criteria already adopted by scholars and case law, rejecting the application of art. 2403 of the Appendix to the Civil Code to international arbitration (which prevents parties from choosing the applicable law to a contract when the conflict of law rules point to Uruguayan law). However, the Arbitration Act establishes that in the absence of such an agreement, the tribunal will choose the applicable law based on the criteria it deems more convenient (art. 28.2). In contrast, under the Model Law, the tribunal should apply the law determined by the applicable conflict of law rules.

Fourth, the Arbitration Act adopted art. 17 of the original 1985 Model Law on interim measures,

incorporating some of the 2006 amendments and additional provisions to harmonize it with the GPC. The Arbitration Act recognizes the binding character of interim measures adopted by an arbitral tribunal (art. 17.2) and incorporates the definitions provided in art. 17.2 of the 2006 version of the UNCITRAL Model Law (art. 17.3). The Arbitration Act requires that notice to the non-requesting party be given before the measure is granted, unless the tribunal determines otherwise due to the harm that would be caused by the delay (art.17.5). Interim measures granted before an arbitration begins will expire in 30 days unless the proceedings are initiated (art. 17.8).

Finally, the Arbitration Act departs from the provisions of the Model Law in several other aspects:

12. Where a State or a public entity appoints a public official as an arbitrator in a proceeding to which it is a party, this shall not necessarily provide grounds for challenge (12.3).
13. A specific definition and chapter on costs is included, inspired by the UNCITRAL Arbitration Rules, which shall be applicable in the absence of the parties' agreement (arts. d and 34-38).
14. In order to guarantee the celerity and efficiency of the procedure, the Arbitration Act provides that certain arbitration-related issues submitted to judicial courts must be decided within a 60-day period: (i) judicial review of arbitrator challenges rejected by the arbitral tribunal, when requested by the challenging party within 30 days as from the rejection (13.3); (ii) judicial review of the *de iure* or *de facto* inability of an arbitrator to perform his or her functions (art. 14.1); and (iii) judicial review of the arbitral tribunal's decision upholding its jurisdiction as a preliminary question, when requested by any of the parties within 30 days as from the decision (art. 16.3).

The Uruguayan judiciary's approach to arbitration

Uruguayan courts have traditionally shown themselves to be favorable to arbitration. Case law had resolved certain issues that were not addressed in the previous legislative framework governing arbitration in the country. For example, case law had recognized the doctrine of separability, and that parties could choose the applicable law to a contract when international arbitration was agreed. This pro-arbitration stance was also reflected in annulment proceedings, and proceedings on the recognition and enforcement of foreign arbitral awards.

The pro-arbitration approach of the courts combined with the Arbitration Act will likely position Uruguay well to compete with other jurisdictions as a reliable seat of arbitration in the region. As a first step to making this a reality, the Government has signed an agreement with the Permanent Court of Arbitration establishing Uruguay as a seat country. Furthermore, Uruguay's leading arbitral institution, the Conciliation and Arbitration Centre of the Chamber of Commerce of Uruguay (International Court for MERCOSUR)—which has so far been used mainly for domestic disputes—may also capitalize on the opportunity to administer more international arbitration proceedings.

Conclusion

The Arbitration Act has at last filled a significant lacuna in the legal framework governing international arbitration in Uruguay and will hopefully position the country as a reliable seat, promoting arbitration as an effective mechanism to resolve international controversies. The application of the Arbitration Act will also hopefully pave the way for future changes to the current domestic arbitration framework.

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