Argentina and Uruguay: A new hope for arbitration

In July 2018, both Argentina and Uruguay passed new arbitration laws governing arbitrations seated in the respective countries, **WilmerHale** counsel **Rina See** and visiting foreign lawyer **Tomas Ambrosini** offer a comparison on the new laws against the text of the UNCITRAL Model Law

Both International Commercial Arbitration Laws are based on the UNCITRAL Model Law, replacing outdated rules in both countries' domestic legislations for international arbitrations.

The simultaneous enactment of international arbitration law – and both countries' choice to follow the Model Law, adopted by more than 80 countries around the world – ensures certainty, and is a welcome step for arbitration in the region.

Background

In recent years, Argentina and Uruguay have both sought to attract more foreign investment, which has created a need for a reform in both countries' international arbitration framework. For Argentina, a marked turning point was President Macri's election to office in 2015. Prior to that, there had been significant negative sentiment against foreign investment and arbitration, created by the former government's protectionist and isolationist policies and fuelled by the Argentinian **ICSID** experience (where the Argentine Republic was the target of a record 60 investor-state claims after the 2001 economic crisis).

Macri's government policies radically changed this scenario. From 2015, Argentina has strengthened its relationship with foreign investors and pursued a strong business presence in capital-exporting countries. Correspondingly, a suite of pro-arbitration measures were put in place, such as provisions in the Public-Private Partnerships Law (PPP) in 2016, followed with the recent Argentinian ICAL.

Nevertheless, the ICAL relates only to international commercial arbitration. Domestic Argentinian arbitration is still governed by the existing procedural codes and the Argentinian Civil and Commercial Code (CCC). Even though the CCC introduced a set of provisions relating to arbitration in 2015 in an attempt to update the existing framework, it contains controversial provisions, several of which conflict with other procedural codes. This creates uncertainty and has been subject of significant criticism.

Unlike Argentina, Uruguayan courts and commentators have always been pro-arbitration. Despite this, Uruguay lacked cohesive regulation for international commercial arbitration. The arbitration framework provided in the Uruguayan General Code of Procedure (GPC) was formalistic and outdated – there were no express provisions on separability and *kompetenz-kompetenz*, nor any express reference to institutional arbitration. The GPC's arbitration provisions have also been interpreted as being only applicable to domestic arbitration. A previous attempt to enact an international arbitration law based on the Model Law stalled in 2004 after approval by the Representatives Chamber.

Even though Uruguayan courts recognise the validity of arbitration agreements made in accordance with the New York or Panama Conventions, there has been pressure to provide for international arbitration in a more straightforward manner – thus the enactment of Uruguay's ICAL. Domestic arbitration is, however, still governed by the GPC.

The ICALs compared

The new ICALs both adopt the 1985 Model Law, including some of its 2006 amendments, but certain region- or country-specific modifications have been made. The following points of

comparison may be useful for parties selecting between the two as a potential arbitral seat:

- Parties cannot agree that an arbitration is 'international', as permitted by Articles 1(3)(b)(i) and (c) of the Model Law. Instead, the Argentinian ICAL omits these provisions in its Article 3, and the Uruguayan ICAL goes further, making clear in Article 1.4 that "[t]he agreement of the parties alone cannot determine the internationality of the arbitration". This departure from the Model Law is likely intended to prevent domestic parties avoiding the application of domestic arbitration provisions by agreeing on its internationality. Article 107 of the Argentinian ICAL specifically states that it does not preclude the application of article 2605 of the Argentinian CCC (which states that in "patrimonial and international matters" parties can defer jurisdiction to judges or arbitrators outside of Argentina, unless Argentinian judges have exclusive jurisdiction or deferment is prohibited by law), while section 2403 of the Uruguayan GPC contains a similar provision preventing parties from choosing to depart from its conflict rules of jurisdiction and choice of law.
- Both ICALs adopt a broad definition of 'commercial' in accordance with the Model Law. Article 6 of the Argentinian ICAL states simply that "any legal relationship, contractual or non-contractual, of private law or predominantly governed by it in Argentine law" is considered commercial. It also provides that the term should be widely construed, and, in case of doubt, should be considered commercial. In contrast, Article 1.7 of the Uruguay ICAL incorporates the exact language used in footnote 2 of the Model Law, listing inclusive examples of "relationships of a commercial nature". Some commentators consider the Argentinian formulation overly broad, but a common-sense interpretation will avoid any potential ambiguities.
- On the requirement that an arbitration agreement be 'in writing', neither ICAL includes the 2006 Model Law version of Article 7 specifying that this is "whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means". The Argentinian ICAL otherwise adopts the language in the 2006 Model Law version, noting in Article 15 that an arbitration agreement is in writing "if its content is recorded in any form". The Uruguayan ICAL does not use that phrase, merely specifying in Article 7.3 that the agreement is written if it is "consigned in a document signed by the parties" or otherwise in an exchange of documents.
- Interestingly, the two jurisdictions have taken diverse approaches to the grounds for arbitrator appointment and challenge, set out in Articles 11 and 12 of the Model Law. The Argentinian ICAL supplements the Model Law provisions with defined (and rigid) rules on unacceptable arbitrator appointments. Article 24 of the Argentinian ICAL renders null and void any clause conferring a situation of privilege to one party in appointing arbitrators, and Article 28 presumes a lack of impartiality or independence giving rise to grounds for challenge where the arbitrator (or a member of his or her firm) participates in another arbitral or judicial proceeding representing one of the parties, or as counsel for a third party in a matter concerning the same subject. In contrast, the Uruguayan ICAL further limits the grounds for challenge provided in the Model Law. It expressly provides in Article 12.3 that where a

state or a public entity is a party to an arbitration, the appointment of a public official as an arbitrator does not necessarily provide grounds for challenge.

- While the Argentinian ICAL has incorporated the Model Law's provisions on interim measures and preliminary orders wholesale, including its 2006 amendments (see Articles 38–61 of the Argentinian ICAL and Article 17 of the Model Law), the Uruguayan version is substantially abridged. Its version of Article 17 is more similar to the original text of the Model Law on this issue, providing only for interim measures without delineating preliminary orders as a separate category. Nevertheless, under Article 17.5, "without notice" preliminary orders can still be made, if the arbitral tribunal considers that harm would otherwise be caused by the delay.

  The Uruguayan ICAL further recognizes the binding nature of interim measures ordered by an arbitral tribunal, and incorporates grounds specified in the Uruguayan GPC for granting interim measures to harmonize the two regimes. Because these grounds only require the measure to be necessary for the protection of the right and where there is risk of harm simpliciter, this appears to be a lower threshold than the Model Law's requirement for "harm not adequately reparable by an award of damages" and that "substantially outweighs" harm to the other party.
- Both ICALs provide for different timeframes for various matters. Argentina's time limits tend to be for the parties, while Uruguayan time limits tend to relate to its courts. Article 11 of the Argentinian ICAL specifies a 20-day time limit for a party to exercise its right to object, as opposed to the "without undue delay" rule in the Model Law and Uruguay's ICAL. Similarly, Article 100 of the Argentinian ICAL reduces the time limit in which parties can apply to set aside an arbitral award from three months to 30 days. In contrast, the Uruguay ICAL sets a time limit of 60 days for courts to decide on the challenge of an arbitrator (Article 13), termination of an arbitrator's mandate (Article 14), and the arbitral tribunal's jurisdiction (Article 16), while the Argentinian ICAL does not. Notably, if an arbitrator is challenged, under Article 13 of the Uruguayan ICAL the arbitral tribunal must stay the arbitration, while Article 13 of the Model Law and Article 31 of the Argentinian ICAL permits the tribunal (including the challenged arbitrator) to continue the arbitration and make an award.
- Both ICALs provide for a more flexible approach where the arbitral tribunal determines the substantive law of the dispute. Although Article 28(2) of the Model Law directs tribunals to "apply the law determined by the conflict of laws rules which it considers applicable", Article 80 of the Argentinian ICAL and Article 28.2 of the Uruguayan ICAL simply refers to the applicable rules of law that the tribunal deems appropriate. This also provides legislative clarification that section 2403 of the Uruguayan GPC restricting parties from selecting the applicable law does not apply in an international arbitration.
- Article 87 of the Argentinian ICAL departs from Article 31(2) of the Model Law permitting the parties to agree that no reasons need to be given in the award, providing only that the award "must be reasoned". This is because a failure to state reasons could be considered contrary to due process and unconstitutional under Argentine law. Uruguay's ICAL does not contain such a restriction.
- The Uruguayan ICAL uniquely includes a default costs regime in Articles 34–38 based on the UNCITRAL Arbitration Rules, which apply in the absence of contrary agreement. The Argentinian ICAL did not consider this necessary, perhaps reflecting research showing that arbitration in Argentina is predominantly

conducted under institutional rules rather than on an ad hoc basis.

- On setting aside, recognition and enforcement of an arbitral award, the Argentinian ICAL introduces a further ground. In addition to a party being "under some incapacity," it adds "or capacity restriction." The Argentinian ICAL also specifies that an arbitral award may be refused recognition or enforcement if a court finds that it is contrary to Argentinian "international" public policy (Article 104) – but oddly, does not include the word "international" in equivalent grounds for setting aside (Article 99). In contrast, Uruguay's ICAL qualifies the Model Law public policy ground with the word "international" for both setting aside and refusing recognition and enforcement in Articles 39 and 41 respectively.

Both ICALs require additional formalities when recognising and enforcing foreign arbitral awards compared to the Model Law: notably, if a copy of the arbitral award is used, it needs to be certified (Article 103, Argentinian ICAL; Article 40, Uruguayan ICAL).

Ultimately, the Argentinian and Uruguayan ICALs do not differ significantly from each other or from the Model Law. The above differences can be traced back to specific requirements of Argentine or Uruguayan law or may be rooted in country-specific context. This consistency is positive, engendering certainty and predictability for foreign parties already familiar with Model Law provisions.

Unlike some other recent Model Law legislation, such as Fiji's International Arbitration Act 2017, neither Argentina nor Uruguay have gone further to incorporate provisions reflecting more recent developments in arbitral practice. The Fijian arbitration statute expressly provides for emergency arbitrators, guarantees the confidentiality of arbitration proceedings, delineates the liability and immunity of arbitrators and clarifies that the public policy ground for refusing enforcement includes where an award is affected by fraud and corruption. Nevertheless, given the historical anti-arbitration sentiment in Latin America, both jurisdictions have already come a long way.

Looking ahead

The twin introduction of Argentina and Uruguay's ICALs signals a new era for international arbitration in the region. It fosters certainty and clarity for foreign parties and removes an obstacle for investors who were potentially deterred by the contradictory law previously applying to international arbitration, especially in Argentina. It is also a necessary step in positioning Argentina and Uruguay as regional arbitration hubs. This is particularly relevant for Uruguay. Given its geographical location between energy investment magnets Argentina and Brazil, along with its reputation for transparency, neutrality and stability in the region, Montevideo is likely to become a highly sought-after seat for international arbitrations in the region.

As for next steps, greater certainty can be achieved by harmonising the domestic and international arbitration regimes. In Argentina, for example, issues with the pre-existing legal framework mentioned above continue to plague domestic arbitrations. For local investors and those who may choose to invest through a local entity, having a single arbitration regime across and between each jurisdiction would promote consistency and predictability; a further development in the right direction.

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