ARGENTINA:

FROM INTERNATIONAL MARKET ISOLATION TO PROMISING OPPORTUNITIES FOR INVESTORS

After more than a decade of isolation from international financial markets, with a new president in office, Argentina is making significant efforts to get its economy back on track by attracting foreign investment. **WilmerHale's Nicolás Costábile** and **Laura Galindo Romero** outline the more arbitration-friendly measures being taken

Argentina is keen to attract foreign investment. Not only has it recently implemented a series of economic measures, but it has also made changes to its legal framework including the enactment of a new arbitration regulation, which, although not entirely based on the 2006 UNCITRAL Model Law, enshrines many of its core principles.

Argentina's recent economic crisis

Following the 2001/2002 economic crisis in Argentina, which resulted in one of the largest-ever sovereign debt defaults (more than USD 80 billion), foreign companies that had invested in Argentina during the 1990s claimed that their countries' respective bilateral investment treaties (BITs) had been breached. As a result, Argentina was involved in a number of high-profile international investment arbitrations, as well as in a number of United States court proceedings. To date, almost 10% of claims registered at the **International Centre for the Settlement of Investment Disputes** (ICSID) have involved Argentina as respondent.

Argentina's new approach to foreign investment

After 12 years of 'Kirchnerism' (referring to former presidents Nestor Kirchner and Cristina Fernandez de Kirchner's three consecutive terms in office), the new government led by President Mauricio Macri (the former mayor of Buenos Aires), known for his more liberal economic policies, is trying to restore investor trust. Since Macri assumed office in December 2015, Argentina has undertaken a series of market-friendly measures aimed at restoring its economy *(see box overleaf)*.

In addition to the measures outlined, Argentina has also managed to put an end to a series of disputes over holdout bondholders, by achieving some milestone settlements this year.

Elliott Management v Argentina

On 28 February 2016, Argentina initially agreed to pay **NML Capital**, the fund managed by **Elliott** (a hedge fund specialised in distress debt acquisitions), and several other funds that had sued alongside NML, the aggregate sum of approximately USD 4.65 billion to settle all claims, both in the US federal court of the Southern District of New York and worldwide.

Abaclat and ors v Argentina

In the first mass claim in ICSID's history, *Abaclat and ors v Argentina*, Argentina has paid USD 1.35 billion – a cash payment equal to 150% of the original principal amount of the affected bonds – to settle an investment treaty claim brought by a number of Italian bondholders. The final settlement was signed on 21 April 2016 between Argentina and **Task Force Argentina**, a group of Italian banks representing the 50,000 claimants.

BG Group and El Paso Energy v Argentina

More recently, on 13 May 2016, Argentina agreed to pay USD 217 million to two energy companies (**BG Group** and El Paso Energy (now part of **Kinder Morgan**) to settle long-standing investment arbitration cases stemming from Argentina's 2001/2002 economic crisis. The settlement was less than the original USD 317 million which the companies were awarded in total (BG Group obtained a final award of USD 243 million, and El Paso Energy obtained a final award of USD 74 million).

New arbitration legal framework

It is often said that an arbitration-friendly regime is regarded as crucial for foreign investors. Argentina's new economic approach, which attempts to attract more capital inflows to the country, is accompanied by a new arbitration legal framework. After several failed attempts over the last 25 years to update the Argentine arbitration regime, in August 2015 the new National Civil and Commercial Code (NCCC) entered into force, introducing a modern arbitration legal framework that, although not entirely based on the 2006 UNCITRAL Model Law, expressly adopts many of its core principles.

For example, it recognises in Article 1653 the principle of separability (the legal doctrine that allows an arbitration agreement to be considered separate from the underlying contract in which it is contained), and in Article 1654, the principle of *kompetenz–kompetenz* (which provides an arbitral tribunal with jurisdiction to rule on its own jurisdiction on an issue ▶

before it).

Argentina's arbitration legal framework is divided into federal (nationwide) legislation and provincial (local) legislation. While the federal regime was contained in the former Federal Code of Civil and Commercial Procedure, enacted in 1968 and amended in 1981, each of the 24 Argentine provinces has its own procedural code that regulates specific aspects of arbitration procedure. The newly adopted NCCC introduces a set of substantive provisions under its Chapter 29 (Contract of Arbitration) in an attempt to modernise the legal framework for arbitration at the federal level.

MACRI'S MEASURES

■ **Lifting currency controls:** Allowing the exchange rate to float freely for the first time, allowing Argentines to buy dollars freely for the first time in four years, easing capital controls, cutting export taxes, and even updating Argentina's national statistics (which were considered unreliable), so that investors can have a better understanding of the economy.

■ **Promoting its energy sector:** Offering investors new opportunities in the renewable energy sector. Among other things, the country has set a target to increase its total renewable energy share to 20% by 31 December 2025 (approximately 10,000 MW and between USD 15 to 20 billion of investment).

■ **Committing to improving investor confidence in the oil and gas sector:** The government aims to do this by fostering an increase in domestic production, through a more unified and stable regulatory system for conventional and unconventional resources (including shale, offshore deposits, and tight oil and gas), which will guarantee legal certainty.

For example, according to publicly available information, despite the worldwide oil crisis, the region known as *Vaca Muerta* in Patagonia has received USD 15 billion in foreign investment in the past four years and the new administration will continue attracting investors – according to press reports, **YPF** (the state-owned Argentine energy company), **Pan American Energy** and **Wintershall** are reportedly expected to invest USD 38 billion in the next 20 years for the exploitation of unconventional hydrocarbons in the region.

■ **New agreement:** Signing a bilateral trade and investment framework agreement (TIFA) with the US, reflecting Argentina's new economic openness regarding its foreign policy.

■ **Returning to the bond markets:** In April 2016, Argentina issued USD 16.5 billion of sovereign debt for the first time in 15 years, the largest emerging market debt sale on record. More interestingly, its domestic financial sector is increasingly revamping, with an upcoming wave of private equity deals, initial public offerings and merger and acquisition deals.

Interim measures

In line with Article 17 of the UNCITRAL Model Law, Article 1655 of the NCCC authorises arbitrators to grant interim relief. Before the NCCC was enacted, there was no specific law in Argentina granting arbitrators the power to issue interim measures. In the past, some courts have denied arbitrators' power to grant interim measures based on the wording of Article 753 of the National Code of Civil and Commercial Procedure, which provides that arbitral tribunals cannot issue interim or preliminary measures, and tribunals had to resort to state courts for assistance.

Article 1655 of the NCCC now makes clear that, upon the request of any of the parties, arbitrators have the power to adopt any interim measures deemed to be necessary. The arbitrators may require security for costs from the requesting party. Further, Article 1655 provides that interim measures shall be enforced by a judicial court.

However, Article 1655 establishes that interim measures may be challenged before state courts if they 'violate constitutional rights' or the courts 'deemed them unreasonable'. Although it is still too soon to tell how Argentine courts will interpret this provision, it suggests that the courts may have significant discretion to invalidate measures adopted by arbitral tribunals on the basis of 'unreasonableness' of such measures.

Further, while the NCCC provides Argentina with new arbitration provisions that are in line with other modern regional and global arbitration regimes, the NCCC contains limitations that may prove to be problematic for investors. For example, commercial matters in which 'public policy' is at stake are non-arbitrable (Article 1649). Nothing in the NCCC clarifies what is to be understood by 'public policy' in this context. Article 1651 of the NCCC expressly provides that other specific matters are also non-arbitrable: family matters, consumer disputes, adhesion contracts, labour matters and matters in which the state or its provinces are involved.

Consumer disputes

With regard to consumer disputes, the National Civil Court of Appeals (NCCA) recently issued a ground-breaking decision on the application of the NCCC's provisions to ongoing consumer disputes. In *Blanco Rodriguez v Madero Urbana*, the NCCA considered an arbitration agreement in a consumer contract made before the new code came into effect to be null and void, pursuant to

Article 1651 of the NCCC, thus acknowledging its applicability to ongoing consumer disputes with arbitration agreements predating the NCCC.

Labour disputes

In Argentina, Law No. 24.635 provides that labour disputes (both individual and collective) are subject to compulsory conciliation, and, if the parties cannot reach an agreement, they may submit the dispute to arbitration. In addition, among the rights provided to workers by the Argentine Constitution, section 14(*bis*) guarantees trade unions the right to resort to conciliation and arbitration. The new NCCC, however, expressly excludes labour matters from being settled by arbitration. Since the NCCC has not derogated Law No. 24.635, it is yet to be seen how Argentine courts will interpret this incongruity.

Disputes against the Argentine state, provinces, and state-owned entities

Article 1651 of the NCCC provides that disputes involving either the "national or the provincial state" as a party are incapable of being settled by arbitration. The Argentine Supreme Court, however, has consistently found that governmental entities (including state enterprises) are capable of submitting disputes to arbitration when they are expressly authorised by the law.

Setting aside of arbitral awards

Finally, the last paragraph of Article 1656(3) of the NCCC provides that "[i]n the framework of an arbitration agreement, parties cannot waive their right to challenge a final award in court, where said award contravenes the legal order". Nothing in the NCCC clarifies what is to be understood by 'challenge' or by '[an] award [that] contravenes the legal order'.

It thus remains unclear whether the term 'challenge' (*impugnacion*) refers to an application for setting aside an award (and therefore simply provides that a party cannot waive its right to seek to annul an award) or to the right to appeal the arbitral award before a state court (and therefore suggests that a party has that right, and cannot waive it, at least in certain circumstances).

Argentine court rules on the enforcement of ICSID awards

Parallel to Argentina's arbitration law being modernised, the court's procedure for the recognition and enforcement of ICSID awards has been simplified. In a groundbreaking decision, the NCCA clarified that ICSID awards are not technically 'foreign' awards but rather 'international' awards, therefore *exequatur* proceedings are not required.

This means that awards do not need to go through a double-review process, which is lengthier and more cumbersome. The final award in this case granted Peru costs for over USD 2 million against a private Argentine construction company that lost a USD 125 million investment treaty claim against Peru. This case may serve as a valuable precedent for foreign investors attempting to enforce ICSID awards in Argentina. It is yet to be seen whether this holding will be followed in the case of non-ICSID arbitration awards.

Conclusions

Although it is still too early to tell, Argentina may be commencing a new economic era. Its recent regulatory changes, including its new arbitration legal framework and its aggressive development plans, are all steps that should attract the attention of foreign investors.

There are still, however, many challenges ahead. With inflation at 35% and a deep recession in its largest trading partner, Brazil, Argentina still has important changes to make to its economy. Among the questions that Argentina needs to address is how the NCCC will be implemented, and how provisions that appear to potentially impose limitations on the ability of the state entities to enter into arbitration agreements, and impose arbitrability restrictions or specific procedural requirements for arbitrations, will influence investor decisions to invest in the country.

Although there is some uncertainty on how Argentine courts will deal with these issues in a pro-arbitration fashion, the express recognition of some core principles in arbitration should be seen as a step forward for Argentina. ■

About the authors

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