ARGENTINA:
FROM INTERNATIONAL MARKET ISOLATION TO PROMISING OPPORTUNITIES FOR INVESTORS
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...
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.

**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 1651). Nothing in the NCCC clarifies what is to be understood by ‘public policy’ in this context. Article 1651 of the NCCC expresses 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 groundbreaking 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
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.