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INTERNATIONAL ARBITRATION IN THE MERCOSUR – IS HARMONISATION THE SOLUTION?

Nigel Blackaby and Sylvia Noury*

I. INTRODUCTION

LATIN America has become a fashionable topic in arbitration circles. In the last six months, conferences in Miami, Dallas, and Paris have all focused on the subject of arbitration in Latin America. Ten years ago there would have been little to talk about at such a conference. Arbitrations involving parties from the region have risen by a factor of five before the International Chamber of Commerce (ICC) since the 1980s. At the close of the last century, more arbitrations involved Latin American parties than Africa, Central and Eastern Europe combined. So, what happened?

In short, the region’s often fledgling democracies embraced free market economics and sought to attract foreign direct investment to assist in the upgrade of their public services infrastructure in sectors such as gas, water, roads, and power projects. This upgrade occurred through privatisation and joint ventures with foreign participation. Inevitably, such investors were not prepared to trust the local court systems with their multimillion-dollar investments and, consequently, required the incorporation of arbitration clauses.

Latin American states have historically rejected arbitration due to the suspicion that it placed in doubt the sovereign right of each state to resolve disputes involving investments in its territory before its national courts. This philosophy is known as the “Calvo Doctrine,” named after the famous Argentine jurist Carlos Calvo. The MERCOSUR states were no exception. By the creation of MERCOSUR, however, Argentina, Brazil, Paraguay, and Uruguay (the “Member States”), as well as Bolivia

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and Chile (the "Associate States") were realizing the limitations of this doctrine and tentatively adopting more investor-friendly solutions on an individual level. A few years later, given the different pace of these developments, these states collectively made it their goal to implement harmonised, modern, and effective international commercial and investor-state arbitration mechanisms under the umbrella of MERCOSUR to resolve disputes arising from investments made in the region.

Although several of these MERCOSUR mechanisms remain unimplemented, Brazil’s ratification of the MERCOSUR International Commercial Arbitration Agreement (MAA) on June 5, 2003 (which agreement shall enter into force in respect of Argentina and Brazil on July 5, 2003), together with Argentina’s recent advances in the enactment of a modern new arbitration law, put international arbitration in MERCOSUR squarely into the forefront of key legal issues in the region.

Part II of this article explores the ambitions behind MERCOSUR’s attempts to harmonise arbitration mechanisms in the region in light of the individual laws and conventions already in force in the Member and Associate States. Part III focuses on Argentina and Brazil. Finally, the Conclusions seek to provide a response to the question: "Is harmonisation the solution?"

II. THE AMBITIONS OF THE MERCOSUR ARBITRATION AGREEMENTS

The arbitration-related ambitions of MERCOSUR can be split into two strands: (a) the harmonisation of international commercial arbitration within MERCOSUR (under the MAA); and (b) the establishment of effective mechanisms by means of which foreign investors can arbitrate claims against MERCOSUR Member States (under the Colonia and Buenos Aires Protocols to MERCOSUR).

A. INTERNATIONAL COMMERCIAL ARBITRATION IN THE MERCOSUR

1. The Creation of the MAA

On July 23, 1998, the Member States entered into an agreement establishing a set of common rules to govern international commercial arbitration proceedings relating to MERCOSUR. On the same day MERCOSUR entered into an almost identical agreement with Chile and Bolivia. Collectively, these agreements are known as the MAA. The stated purpose of the MAA is that of "regulating arbitration as a private alternative method of dispute resolution, arising out of international commercial contracts between private corporations or individuals."2

The agreement between the Member States shall enter into force with respect to Argentina and Brazil on July 5, 2003, which is thirty days after

2. MERCOSUR International Commercial Arbitration Agreement, art. 1 [hereinafter MAA].
ratification by Brazil on June 5, 2003 (Argentina having previously ratified the agreement). The agreement is not yet in force with respect to Paraguay or Uruguay. The agreement between MERCOSUR and the Associate States will come into force when it is ratified by either Chile or Bolivia.

2. Influence of the UNCITRAL Model Law

The MAA derived much inspiration from the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law in 1985 (UNCITRAL Model Law), as is acknowledged in the preamble. Further, the MAA explicitly provides that the principles and rules of the UNCITRAL Model Law shall supplement the MAA where the latter, or the procedural rules and conventions and norms referred to in the latter, are silent. This is noteworthy, given that at the time the MAA was drafted, none of the Member or Associate States had adopted the UNCITRAL Model Law in their domestic arbitration laws.

3. Other Arbitration Conventions Referred to in the MAA

In addition to the UNCITRAL Model Law, the MAA refers to the following rules and conventions:

- The Inter-American Convention on International Commercial Arbitration of 1975 (Panama Convention), which currently binds the four Member States and Chile (excluding Bolivia). This convention is a regional reflection of another more global arbitration convention: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), signed in 1958 and now in force in over 130 states worldwide. Like the New York Convention, the Panama Convention is mainly devoted to the direct enforceability of arbitration agreements and to the recognition and enforcement of foreign arbitral awards. Additionally, the Panama Convention requires the automatic application to any arbitration agreement falling within its scope (unless the parties state otherwise) of the arbitral rules established by the Inter-American Commercial Arbitration Commission (IACAC),

3. The agreement was ratified in Brazil by means of Decree No. 4719/2003, published on June 5, 2003. Article 26(1) of the agreement states that "this Agreement shall enter into force, with respect to the two first State Parties to ratify it, thirty (30) days after the second country deposits its instrument of ratification." MAA, supra note 2, art. 26(1).
4. The idea behind the UNCITRAL Model Law was to promote a text that any country could adopt with minimal changes. The initiative was spearheaded by the leading practitioners and users of international arbitration, and produced a coherent model well adapted to the needs of international commerce. See UNCITRAL Model Law on International Commercial Arbitration, June 21, 1985, available at http://www.jus.uio.no [hereinafter UNCITRAL Model Law].
5. MAA, supra note 2, art. 25(3).
which are based on the UNCITRAL Rules of Arbitration.  

- The Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention) has been ratified by the Member States, but not by either of the Associate States. This convention is only of subsidiary application to the Panama Convention. Its practical importance is therefore virtually confined to recognition and enforcement of foreign arbitral awards on civil and labour matters.

- The Las Leñas Protocol on Cooperation and Judicial Assistance in Civil, Commercial, Labour and Administrative Matters of 1992 (Las Leñas Protocol) has been signed and ratified by all four Member States. This is a MERCOSUR instrument on international judicial cooperation to facilitate the enforcement of foreign court judgments rendered in the Member States, but its scope was extended to enforcement of foreign arbitral awards.

Unfortunately, the MAA refers to these three instruments, particularly in the context of the recognition and enforcement of the award, without stating an order of preference in their applicability. The resulting overlap of applicable rules is addressed further below.

4. **Content of the MAA**

The content of the MAA loosely follows that of the UNCITRAL Model Law, but with a number of regional modifications. The following is a very brief overview of the most important provisions of the MAA.

a. **Scope of Application**

The MAA applies to “international arbitration,” which is defined as the “private means for the resolution of disputes relating to international commercial contracts between private parties.”

Article 3 of the MAA sets out a list of five instances in which the MAA would apply to a particular international arbitration. Sections (d) and (e) require that the parties expressly agree on the application of the MAA. Section (c) requires the base contract to have “an objective and legal or

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9. Id. art. 20(e).

10. See INTERNATIONAL ARBITRATION IN LATIN AMERICA, Ch. 10 (Nigel Blackaby et al. eds., 2002), for a more detailed review of the provisions of the MAA.

11. MAA, supra note 2, art. 2(b).

12. Id. art. 3(d), (e).
economic contact” with, and the seat of the arbitration to be in, a Member or Associate State and no agreement to the contrary by the parties. Sections (a) and (b) are more controversial, in that they provide that the MAA will apply simply if: (a) the arbitration agreement is concluded between persons domiciled in different Member or Associate States; or (b) the base contract has “an objective or economic contact” with more than one Member or Associate State. If read at face value, this would lead to difficulties in a case where the parties fulfill condition (a) and/or (b), but have chosen a seat of arbitration outside MERCOSUR. Consequently, (a) and (b) should be interpreted in accordance with the principle that the MAA cannot apply to cases where the parties have agreed to a seat outside the Member or Associate States, unless they have expressly agreed that the MAA is applicable.

b. The Arbitration Agreement

Article 2(e) of the MAA defines the “arbitral agreement” (convención arbitral) as “the agreement whereby the parties decide to submit to arbitration all or some of the disputes which have arisen or which may arise out of contractual relationships between them,” and adds that “the arbitration agreement can be found in a clause contained in a contract or in a separate agreement.” This provision eliminates from the MAA the antiquated two-stage process envisaged by the national arbitration laws of some of the Member and Associate States. These laws provide that the mere inclusion of an arbitration clause in the contract is not enough; the parties are also required to enter into a specific agreement, known as a compromiso, once the dispute has arisen in order to submit the dispute to arbitration.

Pursuant to article 4 of the MAA, the arbitration agreement shall be made in good faith, provide equitable treatment to the parties, and be reasonably easy to identify in the contract. Article 6 specifies the formalities with which the agreement should comply; for example, it shall be in writing. Article 5 provides for the autonomy of the arbitration agreement from the main contract, which means that the invalidity of the main contract will not imply the nullity of the arbitration agreement. The MAA further provides that the law governing the validity of the arbitration agreement is that of the Member or Associate State where the arbitral tribunal is seated and that the tribunal is competent to rule on the existence or validity of this agreement.

13. Id. art. 3(c).
14. Id. art. 3(a), (b).
15. Id. art. 2(e).
17. MAA, supra note 2, arts. 7(b), 8.
c. The Applicable Law

Pursuant to article 10 of the MAA, the parties (or in the absence of agreement between the parties, the arbitrators) may choose the law applicable to the dispute on the basis of "private international law and its principles, as well as the law of international trade." 18 This would arguably put restrictions on the parties' freedom to choose the applicable law. 19 Perhaps for this reason, in its instrument of ratification, Brazil clarified that article 10 was to be interpreted so as to permit the parties to choose the applicable law freely, provided that the chosen law respects international public order (ordem pública internacional). 20

d. The Arbitral Tribunal

In articles 16 and 17, the MAA provides for the appointment, challenge, and replacement of the arbitrators. In institutional arbitrations, such matters are governed by the relevant institutional rules. However, in ad hoc arbitrations, the MAA provides that (unless the parties agree otherwise) the appointment, challenge, and replacement of arbitrators are governed by the IACAC rules. Pursuant to the new IACAC rules, decisions on the appointment and replacement of arbitrators are now made by the IACAC Arbitrator Nominating Committee. 21 Parties to an arbitration governed by the MAA no longer have to resort to the national courts in such matters, as they previously would have under the UNCITRAL Model Law.

e. The Conduct of the Proceedings

The MAA governs most aspects of the arbitral procedure with only slight variations from the procedure set forth in the UNCITRAL Model Law. In addition, procedural aspects not explicitly regulated by the MAA, the Panama Convention or the other conventions and norms referred to in the MAA will be regulated by the UNCITRAL Model Law in accordance with article 25(3). Variations from the UNCITRAL Model Law relating to the conduct of the proceedings include:

- In the absence of procedural rules agreed by the parties, the IACAC rules are applicable (art. 12(2)(b));
- If the seat of the arbitration is not chosen by the parties, the tribunal must designate one of the Member of Associate States as the seat (art. 13(1));

18. Id. art. 10.
19. UNCITRAL Model Law, supra note 4, art. 28.
20. See Decree 4719/2003, supra note 3. The authors would like to thank Giovanni Ettore Nanni of Tozzini Freire Teixeira e Silva Advogados for his insight into the process of ratification of the MAA in Brazil.
If the language of the arbitration is not chosen by the parties, it will be the language of the seat of the arbitration (art. 13(2));

- The provisions of the MAA regulating the commencement of arbitration proceedings are more detailed than those of the UNCITRAL Model Law (art. 15);

- Although objections to jurisdiction are addressed in article 18, there is no provision empowering the parties to apply to national courts to challenge the jurisdiction of the tribunal; and

- The provisions of the MAA addressing the granting of interim measures by arbitrators and national courts are more cumbersome and complicated than those of the UNCITRAL Model Law (art. 19).

f. The Arbitral Award

The final award shall be made in writing and shall settle all matters submitted to the tribunal. The award may record a settlement agreement reached by the parties, if such request is made to the arbitral tribunal. Pursuant to article 20(1), the award is final and binding on the parties, except for the recourses found in articles 21 and 22.

g. Recourse against the Arbitral Award

Under sections 21 and 22 of the MAA, an arbitral award is subject only to the recourses of rectification and interpretation before the same arbitral tribunal and setting aside before the national courts of the seat of the arbitration. The award is not subject to appeal before national courts on the merits.

The grounds for an application for setting aside under article 22 are similar to those contemplated by the UNCITRAL Model Law, although some differences exist. For example, the lack of capacity of one of the parties and the lack of proper notification of the appointment of an arbitrator are not expressly contemplated by the MAA, but they should be deemed to be included in the grounds of "breach of the principles of due process." Further, unlike the UNCITRAL Model Law, the MAA does not expressly contemplate as a ground for setting aside that the subject matter of the dispute is incapable of being settled by arbitration or that the award is contrary to public policy. It is likely, however, that such grounds would be considered in national courts.

h. Recognition and Enforcement of Foreign Arbitral Awards

In dealing with the enforcement of foreign awards, article 23 of the MAA refers to the Panama Convention, the Las Lefias Protocol, and the...
Montevideo Convention.\textsuperscript{26} Unfortunately, this provision does not provide an order of preference in the application of these three conventions. Although the Montevideo Convention provides that it is of subsidiary application to the Panama Convention, the Las Leñas Protocol states that it does not exclude the application of other conventions on the same subject in force between the signatory states “provided they do not contradict it.”\textsuperscript{27} This might amount to a preference for the Las Leñas Protocol over both the Panama Convention and the New York Convention, which is now in force in all Member and Associate States (Brazil ratified the New York Convention in July 2002). This preference is a potential cause for concern given that, unlike the other two conventions, for recognition and enforcement of foreign arbitral awards the Las Leñas Protocol requires the intervention of both the judiciary of the state in which the award was made and the judiciary of the state in which enforcement is sought. The Protocol requires that the award must have attained \textit{res judicata} in the state where it was rendered, which in practice constitutes the requirement of \textit{double exequatur}.\textsuperscript{28}

5. \textit{Ambitions of the MAA}

The conclusion of the MAA was an ambitious attempt to modernise and harmonise the differing arbitration systems of the Member and Associate States by way of the establishment of a common “international arbitration law.”\textsuperscript{29} The agreements, which seek to “internationalise” (i) the arbitral procedure, (ii) arbitral tribunals and their interaction with state courts, and (iii) the eventual recognition and enforcement of awards, were intended to send a message to foreign investors that arbitration in MERCOSUR will be conducted in accordance with the same modern international regime irrespective of the arbitral seat selected. The MAA is now entering into force in Argentina and Brazil. How this agreement will interact with the arbitration mechanisms already in force in those two countries is discussed in Part III.

B. \textit{Investor-State Arbitration in the MERCOSUR}


Prior to an attempt to harmonise international commercial arbitration in the region, the MERCOSUR Member States embarked upon another

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\textsuperscript{26} No doubt reference to the New York Convention was omitted because, at the time of drafting, Brazil was not a signatory state. Brazil ratified the New York Convention in July 2002.

\textsuperscript{27} Montevideo Convention, \textit{supra} note 7, art. 1; Las Leñas Protocol, \textit{supra} note 8, art. 35.

\textsuperscript{28} Las Leñas Protocol, \textit{supra} note 8, art. 20(e). Chile and Bolivia seem to be in better positions because the Las Leñas Protocol does not apply to them as Associate States.

\textsuperscript{29} The preamble of the MAA states that the parties are “\textit{convinced} of the need to standardise the organization and functioning of international arbitration among the State Parties to contribute to the expansion of regional and international trade.” MAA, \textit{supra} note 2 (emphasis added).
ambitious investor-friendly initiative: the establishment of protocols intended to “promote and protect” foreign investment in the region. Two protocols were signed: (i) the Colonia Protocol on Reciprocal Promotions of Investments within MERCOSUR (Colonia Protocol), and (ii) the Buenos Aires Protocol on Protection of Foreign Investments from Non-Parties to MERCOSUL (Buenos Aires Protocol). As their names indicate, the Colonia Protocol protects investors from a Member State in the territory of another Member State, and the Buenos Aires Protocol protects investors from non-Member States in the territory of a Member State.

Neither Protocol is yet in force. Further, only the standards of the Colonia Protocol are intended to be of immediate application once the Protocol enters into force. The standards of the Buenos Aires Protocol are intended merely to establish a substantive framework within which the Member States may conclude future investment agreements with third states.

2. The Colonia Protocol

a. Scope of Application

The Colonia Protocol applies to any dispute concerning its provisions between an investor of one Member State, and the Member State in the territory of which the investment was made, or the Host Member State. Such disputes are known as “investment disputes.”

b. Substantive Protections

In a manner similar to many recent bilateral investment treaties (BITs) and multilateral investment treaties (MITs) (e.g., NAFTA, ch. 11), the Colonia Protocol refers to both general and specific standards of treatment of investments to which the State Parties must adhere. General standards include fair and equitable treatment of investments, full protection of investments, prohibition of unjustified or arbitrary measures that affect investments, and national and most-favoured-nation treatment of investments. Specific standards of treatment concern the prohibition of expropriation or nationalisation of investments except under certain conditions, compensation for losses due to armed conflict or civil disturbance, unrestricted transfer of sums in relation to investments, and...

32. See INTERNATIONAL ARBITRATION IN LATIN AMERICA, supra note 10, for a more detailed insight into the Colonia and Buenos Aires Protocols.
33. The terms “investment” and “investor” are defined in article 1, and the term “territory” is defined in article 9.4 of the Colonia Protocol. These definitions are similar, although not identical, to those that can be found in most BITs. Colonia Protocol, supra note 30, art. 9.4.
recognition of subrogation due to the operation of investment insurance arrangements.

c. Dispute Resolution Provisions

The Colonia Protocol also follows the pattern of recent BITs and MITs by providing that investment disputes that cannot be resolved amicably be settled by means of binding international arbitration. Article 9, the dispute resolution clause of the Protocol, provides for a multi-tier dispute resolution mechanism:

- Any investment dispute shall, to the extent possible, be resolved through amicable consultations.
- If the parties cannot settle the investment dispute within six months, it shall be submitted (at the request of the investor) to:
  - the competent court of the Host Member State; or
  - international arbitration; or
  - the permanent system of settlement of disputes with private parties which will eventually be established within the framework of the Treaty of Asunción.34
- The choice of one of these three procedures shall be final.
- If the investor chooses to submit the dispute to international arbitration, it has the choice of the following fora:
  - arbitration under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), either under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention)35 when each State Party to the Protocol has adhered to such Convention, or, when this condition is not met, under the ICSID Additional Facility Rules; or
  - ad hoc arbitration under the UNCITRAL arbitration rules.

Thus, if the investor has not achieved settlement of a dispute six months after providing notice thereof to the Host Member State, the investor can submit the dispute to arbitration under the ICSID Convention, the ICSID Additional Facility Rules, or the UNCITRAL Rules.

Although this choice of forum provision is not unlike those contained in most BITs and MITs, one (unfortunate) distinguishing point bears noting. The provision contains a phrase that reads as a condition precedent for submitting disputes to arbitration under the ICSID Convention. This arbitration forum would only be available when each State Party to the present Protocol has adhered to such Convention.36 This phrase poses an important gap in the availability of ICSID arbitration, given that not all of the Member States are yet Contracting States to the ICSID Convention.

34. This system has not yet been established.
36. Colonia Protocol, supra note 30, art. 9.
Presently, Argentina, Paraguay, and Uruguay are ICSID Contracting States, but Brazil is not. If the condition precedent of article 9 is strictly interpreted, nationals of Argentina, Paraguay, and Uruguay with covered investment disputes amongst themselves would not be eligible to submit their investment disputes to arbitration under the ICSID Convention unless, and until, Brazil also becomes an ICSID Contracting State, despite there being no Brazilian connection. Nor would these states be eligible to use the ICSID Additional Facility, which is only available when one party is a non-ICSID Contracting State. Only arbitration under the UNCTRAL Rules would be available.

In contrast, Argentine, Paraguayan, or Uruguayan nationals who make investments in Brazil, although ineligible to submit their investment disputes with Brazil to arbitration under the ICSID Convention, would be able to submit them to the ICSID Additional Facility or arbitration under the UNCTRAL Rules. The same would be true of Brazilian nationals who make investments in Argentina, Paraguay, or Uruguay.

Until Brazil becomes an ICSID Contracting State, arbitration before ICSID under the Colonia Protocol would consequently be limited to Additional Facility arbitration of covered disputes involving either Brazil or Brazilian nationals.

d. The Applicable Law

Article 9.5 of the Colonia Protocol provides that the arbitral tribunal shall decide the dispute on the basis of the provisions of the Protocol; the law of the Host Member State, including its rules concerning conflicts of law; the terms of any particular agreements entered into with regard to the investment; as well as the applicable principles of international law.

While this provision incorporates the elements of applicable law that would operate in the absence of agreement of the parties under article 42(1) of the ICSID Convention, it contains an additional element of applicable law; namely, the terms of any particular agreements entered into with regard to the investment. The inclusion of this element should not be interpreted as an attempt to broaden the scope of application of the Protocol to cover purely contractual disputes. Article 9 of the Protocol clearly states that it applies to disputes concerning the provisions of the substantive protections of the Protocol. Thus, only disputes within this category will be decided in accordance with the elements of applicable law set forth in article 9.5.

e. The Award

Article 9.6 of the Colonia Protocol provides that arbitral awards shall be final and binding on the parties to the dispute and that each Member State shall enforce them “in accordance with its legislation.”

37. Id. art. 9.5.
38. Id. art. 9.6.
Member States doubtfully intended, by means of this formulation, to derogate from their obligations to recognise and enforce arbitral awards under other applicable treaties. One such treaty is the ICSID Convention, article 54 of which provides that each ICSID Contracting State “shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”

Two other such treaties are the New York Convention and the Panama Convention, referred to above, which provide strictly limited grounds on which the contracting parties can refuse the recognition and enforcement of an arbitral award. All Member States are contracting parties to both the New York and Panama Conventions, which should be applicable to the recognition and enforcement of any award rendered under the ICSID Additional Facility or the UNCITRAL Rules.

3. The Buenos Aires Protocol

a. Scope of Application

The Buenos Aires Protocol is meant to complement the Colonia Protocol by setting forth standards of treatment applicable to investments of investors from non-Member States. The preamble of the Buenos Aires Protocol emphasises the need to harmonise the general legal principles to be applied by each of the State Parties [to the Protocol] to the investments originating in States not party to MERCOSUR (hereinafter referred to as Third States), so as not to create differentiated conditions that distort the flow of investments.

b. Substantive Protections

Article 1 of the Buenos Aires Protocol provides that the States Parties commit themselves to grant to investments made by investors of Third States, treatment no more favourable than that established in the present Protocol. Article 2 of the Protocol then sets forth the various standards of treatment to be granted to such investments.

From the text and context of the Buenos Aires Protocol, it appears that its object and purpose are to establish maximum standards of treatment to be granted to investors from Third States in treaties for the promotion and protection of investments concluded by each Member State with such Third States. Thus, the introductory phrase of article 2 provides that “the general treatment to be agreed to by each State Party [to the Protocol] with Third States shall not recognise benefits and rights to the latter which are greater than those recognised to the investor on the following

39. ICSID Convention, supra note 35, art. 54.
40. These standards also apply to the Associate States Chile and Bolivia, which are not parties to either the Colonia Protocol or the Buenos Aires Protocol.
42. Id. art. 1.
normative bases.”\textsuperscript{43} Similarly, article 2(I), concerning the investments and disputes covered by the Protocol, refers to the application of the “norms of the agreements to be concluded.”\textsuperscript{44} Article 3 of the Protocol provides for consultation between the Member States with regard to current and future negotiations of investment treaties by each Member State with Third States, particularly in the event of a substantive departure from the standards of the Protocol.

c. Dispute Resolution Provisions

Similarly, the provisions on dispute resolution in article 2(H) of the Protocol constitute a general framework rather than being specific in nature. These provisions, which apply to any dispute concerning the interpretation or application of an agreement on the promotion and reciprocal protection of investments that arises between an investor of a Third State and a State Party, foresee a multi-tier approach to dispute resolution similar to, but less detailed than, that provided in the Colonia Protocol:

- Any investment dispute arising under the Protocol shall, to the extent possible, be resolved through amicable consultations.
- If the parties cannot settle the investment dispute within a reasonable time, it shall be submitted (at the request of the investor) to:
  - the competent court of the Host Member State; or
  - international arbitration;
- The choice of one of these three procedures shall be final.
- If the investor chooses to submit the dispute to international arbitration it has the choice of \textit{ad hoc} or institutional arbitration (no specific rules or institutions are mentioned).\textsuperscript{45}

4. \textit{Ambitions of the Protocols}

The Colonia Protocol follows a well-established pattern of BITs and MITs that provide for the promotion and protection of foreign investment on a global level. This protocol also complements a growing network of BITs by and among the individual Member States themselves (which will be addressed briefly below). The Colonia Protocol is a modern instrument that aims to provide investors in the region with real and effective protection against unlawful action by the Host Member States.\textsuperscript{46} By contract, the Buenos Aires Protocol is a novel legal instrument, setting forth the parameters within which Member States commit themselves to negotiate future investment agreements with Third States. The combined aim of the Colonia and Buenos Aires Protocols is that, once in

\textsuperscript{43} \textit{Id.} art. 2 (emphasis added).
\textsuperscript{44} \textit{Id.} art. 2(I) (emphasis added).
\textsuperscript{45} \textit{Id.} art. 2(H).
\textsuperscript{46} The Preamble to the Colonia Protocol states, \textit{inter alia}, that the parties are “convinced that the creation of favourable conditions for the investment of investors of one of the Contracting Parties in the territory of another Contracting Party will intensify the economic cooperation and will speed up the process of integration between the four countries.” Colonia Protocol, \textit{supra} note 30.
force, they will establish a modern and harmonised legal framework for investor-state arbitration within MERCOSUR.

III. THE REALITY – INDIVIDUAL APPROACHES, INDEPENDENT SOLUTIONS

A. OVERVIEW

The MAA and the Colonia and Buenos Aires Protocols constitute attempts to revolutionise and harmonise, on a regional rather than an individual national level, international arbitration mechanisms (both commercial and investor-state) in the MERCOSUR Member and Associate States.

The reality of how these harmonised mechanisms will function (assuming that they are all eventually ratified) is another matter, particularly in light of (i) the lack of coherence and clarity of parts of the text of the agreements and (ii) the confusing parallelism with the other international conventions entered into by the individual Member and Associate States, not to mention the national arbitration laws and practice of those states.

The purpose of this section is to provide a brief overview of the approach adopted by the individual Member and Associate States in their movement towards (a) modernising their own national arbitration laws (i.e., have they adopted a new and modern arbitration law based on the UNCITRAL Model Law) and arbitration practice; and (b) implementing important international arbitration conventions (i.e., the Panama Convention, the New York Convention, the ICSID Convention, and BITs with third states).

This approach has been far from uniform. As could be expected, given a history of isolation and detachment, each state has reacted differently to the pressure to modernise and provide effective dispute resolution mechanisms for foreign investment. The tangible results of this arbitration drive can be reduced to tabular form.

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B. INDIVIDUAL APPROACHES

In this section, we will first focus on the approaches to arbitration adopted by Argentina and Brazil, the largest of the Member and Associate States. A review of tangible arbitration progress (such as enactment of new legislation and accession to international conventions) in each state is not sufficient without a parallel consideration of the attitude of the local judiciary in its application of those laws and conventions. A law or convention is only as good as the judges called upon to implement and support it. That said we will also take a quick look at the more tangible steps taken by Paraguay, Uruguay, Bolivia, and Chile in adopting new laws.

1. Argentina

a. Background and Practice of Arbitration in Argentina

Argentine legislation referring to arbitration dates back to an 1812 Ordinance of Justice. Arbitration proceedings were first regulated in the Code of Procedure of 1880. This antiquated code is still applicable to arbitrations in Argentina.

For most of the previous century, decisions by Argentine courts concerning arbitrations taking place in Argentina were erratic and inconsistent (although not necessarily hostile to arbitration). This uncertainty discouraged the use of arbitration for many decades. More recently, however, in the context of a substantially different political and economic scenario, and despite the fact that all attempts to reform the arbitration legislation itself have failed (or perhaps because of it), Argentine courts have been reversing the above pattern through a number of decisions consistently reflecting a more favourable attitude towards arbitration. The official statistics provided by the ICC reveal that Argentina and Mexico are the Latin American states most active in international arbitrations under the ICC rules.

b. Overview of Arbitration Legislation in Argentina

A new and modern arbitration law, approved by the Senate in November 2002, is currently before Congress and could be enacted in a matter of weeks. Until this law is enacted, however, arbitration proceedings in Argentina continue to be governed principally by the nineteenth century National Code of Civil and Commercial Procedure (Code). Articles 736-772 of the Code govern arbitration proceedings seated in Buenos Aires, where the vast majority of domestic and international arbitrations take place. These provisions, apart from some minor amendments, have not changed since their enactment in 1880. Some of the most inadequate provisions of Argentina's current arbitration legislation are as follows:

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47. See INTERNATIONAL ARBITRATION IN LATIN AMERICA, supra note 10, Ch. 2, for a more detailed insight into arbitration in Argentina.
• No distinction is made between domestic and international arbitration.
• No express reference is made to the autonomy of the arbitration agreement.
• The principle of *compétence-compétence* (i.e., the arbitral tribunal is competent to determine its own jurisdiction) is not expressly contemplated.
• The power of the arbitral tribunal (rather than the courts) to determine issues of arbitrability is not expressly contemplated.
• The power of the arbitral tribunal to order interim measures of protection is not addressed.
• Both a *cláusula compromisoria* (agreement to submit a future dispute to arbitration) and a *compromiso* (agreement to submit an existing dispute to arbitration) are required. The arbitration agreement is not operative until the dispute has arisen and the *compromiso* has been executed.
• A *de iure* arbitral award is subject to all the means of recourse available against a court judgment, including a full appeal on the merits (although the right of appeal may be excluded or limited by agreement of the parties, which would include exclusion pursuant to institutional rules such as those of the ICC).

c. Overview of the Application of Arbitration Legislation by the Argentine Courts

The limitations of the existing legislation were noted in the landmark decision rendered in 1989 by the Buenos Aires Commercial Court of Appeals in the *Welbers* case.\(^\text{48}\) On that occasion, in an international arbitration due to take place in Buenos Aires, the court observed that certain provisions of the Code were “relatively inadequate for international arbitration proceedings” and then made a ruling on the basis of internationally recognised principles and provisions of the UNCITRAL Model Law.\(^\text{49}\)

In fact, a series of decisions of the Argentine courts has gone a long way to redress the limitations of Argentina’s arbitration legislation, mitigating the most important criticisms listed above. For example, the Buenos Aires Commercial Court of Appeals has in more than one case drawn a clear line between domestic and international arbitration. In the *Welbers* case, for instance, this court held that although national courts retain powers of supervision over arbitral proceedings, these powers must be exercised with extreme caution in the case of international arbitrations.\(^\text{50}\) Similarly, the principle of autonomy of the arbitration agreement was recognised by the Argentine Supreme Court as early as 1918 in the *Otto Frank* case,\(^\text{51}\) and more recently by the Buenos Aires Commercial Court of Appeal in the *Welbers* case.

\(^{49}\) Id.
\(^{50}\) Id.
\(^{51}\) Otto Frank v. Provincia de Buenos Aires, CSJN, 128 Fallos 402 (1918).
Regarding the issue of *compétence-compétence*, in 1926 the Buenos Aires Commercial Court of Appeals in the *Romero* case disregarded the provisions of the Code, holding that it was not up to a national court to decide what issues should be included in the *compromiso* because this would intrude on the jurisdiction of the arbitral tribunal, which includes the power to decide its own jurisdiction.\(^{52}\) Although most subsequent judicial decisions have followed the same line of reasoning, unfortunately, there have also been some decisions to the contrary.\(^{53}\)

d. The New Draft Arbitration Law in Argentina

In 1991, an *ad hoc* committee was first entrusted with the task of drafting a new law on arbitration in Argentina. Following several unsuccessful drafts, in 2001 a new draft arbitration law applicable to both domestic and international proceedings in Buenos Aires was submitted to the Senate. This proposed new law is modelled on the UNCITRAL Model Law, but regulates in more detail certain topics such as the arbitration agreement and evidence. The proposed law also tackles other aspects of modern arbitration, such as multi-party arbitration and consolidation of arbitration proceedings.

This draft arbitration law was approved by the Senate and communicated to the President on November 28, 2002. The draft law is currently before the Argentine Congress (*Cámara de Diputados*) and will hopefully be enacted by the end of July 2003. The enactment of the new law would bring about a welcome codification of the Argentine courts’ valiant attempts to modernise the practice of international arbitration in Argentina. Its enactment would be especially welcome at this juncture, given that the MERCOSUR International Commercial Arbitration Agreement (MAA, discussed in Part II, which is also loosely modelled on the UNCITRAL Model Law) shall enter into force in Argentina on July 5, 2003, following ratification by Brazil. Modernised arbitration norms across the board would be vastly preferable to a two-track system in which international arbitrations falling under the MAA benefit from the modern laws, whereas all others are governed by the outdated Argentine Code.

e. Argentina’s Accession to International Arbitration Conventions

Article 31 of the Argentine Constitution recognises the supremacy of international treaties over internal legislation. This is important for international arbitration proceedings seated in Argentina given Argentina’s accession to various international conventions on the subject, principally the New York Convention, the Panama Convention, and the MAA. Ar-

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\(^{53}\) As recently as 1989, the Argentine Supreme Court held that when the validity of the main contract had been questioned, a decision on the validity of the arbitration agreement which forms part of that main contract can only be rendered by national courts. Nidera Argentina v. Rodriguez Alvarez de Canale, CSJN [1990-A] L.L. 419 (1989).
Argentina is also a party to the Montevideo Convention and the Las Leñas Protocol, discussed above.

Argentina became a Contracting State to the ICSID Convention in 1994 and has entered into one of the widest networks of BITs in Latin America. By 2000, Argentina had signed a prolific fifty-three BITs, and ratified forty-three of them. This highly developed network of BITs, most of which grant aggrieved investors direct access to international arbitration, is proving to be a popular recourse for foreign investors in Argentina. For example, a total of twenty ICSID arbitrations have been registered against Argentina by foreign investors on grounds of alleged violations of substantive obligations under BITs. Fourteen of these arbitrations were registered by ICSID in the last two years, the majority as a result of the economic crisis. But the treaties work both ways, and one Argentine investor recently brought, and won, ICSID proceedings against Spain on grounds of breach of the provisions of the Argentina-Spain BIT.

2. Brazil

a. Background and Practice of Arbitration in Brazil

Brazilian legislation referring to arbitration also dates back a long way, to the Emperor Dom Pedro’s Constitution of 1824. In practice, however, arbitration was disregarded as a method of dispute resolution in Brazil, winning Brazil the dubious accolade of being “one of the last ilôts de resistance to international commercial arbitration.”

In the 1980s, certain efforts largely driven by academics and scholars were made to reverse this negative attitude towards arbitration. Three new bills on the subject were even prepared but never forwarded to the National Congress. Real progress was not made until the 1990s. In 1995, Brazil took the first important step of ratifying the Panama Convention. In 1996, largely as a result of the valiant efforts of then-Senator Marco Mariel, the National Congress enacted a new arbitration law (1996 Law). Brazil’s legislators chose not to adopt the UNCITRAL Model Law in 1996, but instead conceived a “Brazilianised” adaptation, which was nevertheless an important development.

Soon after publication of the 1996 Law, but prior to its entry into force, the new Law became the object of a constitutional challenge in the Brazilian Supreme Court. The challenge was sponsored by Justice

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55. Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7 (Oct. 28, 1999).
Pertence, who based his position on article 5, XXXV, of the Brazilian Federal Constitution: "The law cannot exclude from the consideration of the Judiciary any damage or threat to a right."59 This constitutional challenge sparked a lengthy and heated debate, and the fate of arbitration in Brazil hung dangerously in the balance.60 The debate was finally resolved by a majority decision of the Supreme Court in December 2001 in favour of the constitutionality of the new Law. This decision was followed by the ratification in July 2002 of the New York Convention. Brazil was no longer the black sheep of the international arbitration community.

These steps may not be enough to convert Brazil overnight into a haven for arbitration, but Brazil has gone a long way to redress the previous hostility that made well-advised contract drafters resolutely avoid the country as a seat for arbitration.

b. Overview of Arbitration Legislation in Brazil

Brazil's new arbitration law (Law No. 9307) was published on September 24, 1996, and replaced the provisions of the Brazilian Code of Civil Procedure dealing with arbitration.61 The 1996 Law was inspired by various international arbitration instruments: the UNCITRAL Model Law, the Spanish Arbitration Act of 1988, the New York Convention, and the Panama Convention.62 To these inspirations, the legislators added a twist of "Brazilianisation," resulting in a perhaps impractical hybrid of traditional protectionism and quasi-modern thinking. We do not propose to review the 1996 Law in detail,63 but the following are a selection of its most important highlights and drawbacks.

**The Highlights:**

- Before the 1996 Law, an arbitration clause was considered as a mere *pactum in contrahendo*, and its non-execution only entitled a party to damages. Article 4 of the new Law protects the validity and the enforceability of the arbitration clause.
- Article 8 of the 1996 Law establishes the autonomy of the arbitration clause, and provides that the arbitrator can rule on his own jurisdiction (*compétence-competence*).
- Under article 41 of the 1996 Law the national courts are required to dismiss a claim if a party invokes an arbitration clause.
- Article 21 of the 1996 Law permits the parties to choose freely the applicable procedural rules, either by referring to a set of institutional rules or by establishing detailed *ad hoc* rules.

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60. See Nigel Blackaby, *Arbitration and Brazil: A Foreign Perspective*, 17 ARB. INT'L 129 (2001), for an English language discussion of the issues.
63. See *INTERNATIONAL ARBITRATION IN LATIN AMERICA*, supra note 10, Ch. 3, for a more detailed insight on the 1996 Law.
• Article 28 of the 1996 Law provides for the possibility of a settlement, which has the same effects as an arbitral award (such as a consent award).

• Article 34 of the 1996 Law supports the principle of the supremacy of international treaty provisions. Thus, foreign arbitral awards shall be enforced and recognised in accordance with the international treaties that Brazil has ratified (inter alia the New York Convention, ratified in July 2002).

• Double exequatur of arbitral awards is no longer required (articles 38 and 39).

**The Drawbacks.**

• Unlike the UNCITRAL Model Law, the 1996 Law does not differentiate domestic arbitration and international arbitration.

• Under the 1996 Law, the arbitration clause itself is not necessarily sufficient to initiate the arbitration.\(^{64}\) If the arbitration clause contains a mechanism to constitute the arbitral tribunal, which it may do by reference to a set of institutional rules (a "full" arbitration clause), it will be sufficient to commence arbitration; if no such mechanism is provided (an "empty" arbitration clause) a compromisso (submission agreement) will be necessary.\(^{65}\)

• This obligation to conclude a compromisso goes against the principle of "compétence-compétence." In the event of a disagreement between the parties, the national courts will be called upon to decide the contents of the compromisso (article 7). Thus the courts will decide whether the dispute falls within the scope of the arbitration clause, and consequently, whether the arbitrators are competent to entertain the dispute.\(^{66}\)

• The survival of the compromisso corrupts other parts of the 1996 Law, which refers several times to the compromisso instead of the arbitration agreement (e.g., articles 16 and 32(1)). Subsequent case law must interpret these apparent contradictions.

• A foreign arbitral award has to be approved in order to be enforceable in Brazil. The 1996 Law asserts the competence of the Supreme Court for the homologation of the arbitral award, and establishes the conditions for this approval. This homologation appears to run contrary to the New York Convention, recently ratified by Brazil. This contradiction has sparked a lively debate among scholars in Brazil, which seems to turn on whether the competence of the Supreme Court in the homologation procedure is established by the Brazilian Constitution.\(^{67}\)

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67. The Supreme Court is competent to grant the homologation of "foreign judgments" but, for a view that this includes foreign arbitral awards. See Martins, *supra* note 57.
Although the grounds for refusal to recognise and enforce arbitral awards (and conditions to obtain homologation) under the 1996 Law are based on the New York Convention (article 38), the new Law has not unified them with the grounds for annulment or setting aside of an award (article 32), which could lead to articulation problems.

c. The Reaction of the Brazilian Courts to the 1996 Law

The Brazilian courts' attitude with regard to the 1996 Law is still unforeseeable, although the fact that the majority of the Supreme Court voted in favour of the constitutionality of the new Law sends a strong signal to other courts that arbitration is to be supported. The 1996 Law limits the intervention of the national courts, but they still maintain an important role, notably in the enforcement of the arbitration clause, granting of interim measures, decision of applications for annulment of the arbitral award, and the recognition and enforcement of the arbitral award. The assistance of the national courts is therefore critical for the implementation of the 1996 Law and the development of arbitration in general. Given the absence of an arbitration tradition in Brazil, some fluctuations in future judicial decisions are to be expected.

d. Brazil's Accession to International Arbitration Conventions

Brazil acceded to the Panama Convention in 1995 and ratified the New York Convention in July 2002. Brazil is also a party to the Montevideo Convention and the Las Leñas Protocol. As noted above, Brazil ratified the MAA on June 5, 2003; consequently, this agreement should come into force in both Brazil and Argentina on July 5, 2003. Discrepancies clearly exist between the provisions of the MAA and Brazil's 1996 Law. As with Argentina, this two-track arbitration system is not ideal.

Brazil has yet to become a Contracting State to the ICSID Convention, or ratify any of the fourteen BITs it had signed by 2000. We understand that there is no current move to advance ratification, which is possibly a result of the recent flurry of claims against Brazil's neighbour.

3. Paraguay

In terms of the "tangible" trappings of an arbitration-friendly nation, Paraguay displays an exemplary spirit. Paraguay is the only Member State to have enacted a new arbitration law adopting the UNCITRAL Model Law. The new Law, which was heralded as "an international norm encompassing the most advanced trends in the area, which seeks to convert Paraguay into an important arbitration centre on both the national and international level," came into force in April 2002. Obviously,

68. Mr. Jose Felix Fernandez Estigarribia, the Senator who was responsible for the introduction of the draft arbitration law, described it as providing "un marco legal adecuado para el desarrollo del arbitraje, tanto el nacional como el internacional, al igual que el institucional y el independiente adoptando los principios y solu-
there is still little, if any, indication of how the Paraguayan courts will react to this new arbitration Law. In the last ten years, Paraguay has not been the seat of any ICC arbitration; this may change with the adoption of the new law.

In terms of international conventions, Paraguay acceded to the Panama Convention in 1976, followed by the New York Convention in 1997. It is also a party to the Montevideo Convention and the Las Leñas Protocol. Paraguay became a Contracting State to the ICSID Convention as early as 1983 (the earliest of the Member and Associate States), and by 2000 had signed twenty-three BITs, fifteen of which were in force at that time. Paraguay has been a defendant in only one ICSID arbitration, filed by a Peruvian national under the BIT between Peru and Paraguay.69

4. Uruguay

Uruguay has not enacted a new arbitration law adopting the UNCITRAL Model Law, and instead relies on the rather more antiquated arbitration provisions of its General Code of Procedure (which, like the Argentine Code, calls for the two-step procedure of arbitration agreement and compromiso). The provisions of the UNCITRAL Model Law are of interpretive value only (doctrina más recibida), applying where Uruguayan legislation does not specifically regulate any aspect of the arbitral procedure.70 Uruguay has, however, been the seat of three ICC arbitrations in the last ten years.

Uruguay was among the first of the Member and Associate States to accede to the Panama Convention (1977) and the New York Convention (1983). Uruguay is also a party to the Montevideo Convention and the Las Leñas Protocol. Uruguay became a Contracting State to the ICSID Convention in 2000, having signed twenty-four BITs and ratified thirteen of them by that time. No ICSID arbitrations have yet been registered against Uruguay.

5. Bolivia

Bolivia has a relatively new arbitration law, Law 1770 of March 10, 1997, which is loosely based on the UNCITRAL Model Law (although it


70. The authors would like to thank Juan Carlos Blanco of Pérez del Castillo-Navarro-Inciarte-Gari for this insight into the applicable arbitration legislation in Uruguay.
runs to ninety-eight articles). This law was a step towards modernising Bolivia's previous legislation. Unfortunately, a new law is currently under discussion in Bolivia that would distance the 1997 law from the Model Law. Bolivia has been the seat of one ICC arbitration in the last ten years, which took place under the 1997 arbitration law.

In 1995, Bolivia took two important steps in the international arena: having not even acceded to the Panama Convention, it ratified both the New York Convention and the ICSID Convention within three months. By 2000 Bolivia had signed twenty BITs and ratified three quarters of them. One ICSID arbitration has been registered against Bolivia, filed under the BIT in force between Bolivia and the Netherlands.

6. Chile

A draft new arbitration law based on the UNCITRAL Model Law, prepared by the Santiago Arbitration and Mediation Centre of the Santiago Chamber of Commerce and the American Chamber of Commerce Arbitration Centre in Santiago, is currently before the Chilean Congress. This proposed law would replace Chile's current outdated nineteenth century arbitration legislation. The fact that Chile (a large economy with substantial foreign investment) has been the seat of only one ICC arbitration in the last ten years (as compared to Argentina's eighteen) is perhaps an indication of the change needed.

Chile, however, has shown a modern approach to the enforcement of foreign arbitration awards, being the first of the Member and Associate States to accede to both the New York and Panama Conventions in 1975 and 1976 respectively. A relatively early Contracting Party to the ICSID Convention (1991), Chile had signed an impressive forty-five BITs by 2000, and ratified twenty-two of them. Chile has been a defendant in two ICSID arbitrations brought under those BITs.

As can be seen from the steps taken by the Member and Associate States to reform and modernise their arbitration regimes, the approaches taken by the six countries have been quite different. Although each country has awoken to the benefits of nurturing arbitration as part of the legal framework to attract foreign investors, they have done so at different times, to different degrees, using different tools, and eliciting different reactions from their respective judiciaries. Against this background, the idea of harmonising arbitration mechanisms across the MERCOSUR region was clearly an ambitious one.

71. The authors would like to thank Ramiro Guevara, of Guevara & Gutiérrez S.C., for this insight into the current status of arbitration legislation in Bolivia.
73. Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2; MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile, ICSID Case No. ARB/01/7.
IV. CONCLUSIONS

At the beginning of this article we set out to review arbitration mechanisms (i) under the MERCOSUR agreements and protocols and (ii) in the individual Member and Associate States, posing the question: "Is harmonisation the solution?" The answer, we submit, is no.

The MAA contains important flaws in drafting and scope, particularly in respect of the recognition and enforcement of the award, which could prove more confusing than harmonising. This confusion is principally caused by (a) the plethora of parallel arbitration conventions already existing in respect of the same subject matter (the Panama Convention, the New York Convention, the Montevideo Convention, and the Las Leñas Protocol); and (b) the failure of the MAA to provide for an order of preference for the application of these conventions. The Las Leñas Protocol (which seeks to establish its own supremacy) and the Montevideo Convention are unsuitable for international arbitration. Rather than solve this problem of priority, the MAA simply adds another convention to the pile. Similarly, the rules applicable to the arbitration procedure set forth in the MAA (which are loosely based on the UNCITRAL Rules), when set against the national arbitration legislation of each of the individual states and added to the IACAC rules already in existence in the region, further complicate matters. Now that the MAA is entering into force in Argentina and Brazil, the reality of how this plethora of rules and conventions will interact needs to be addressed.

The need for some order in these overlapping arbitration mechanisms becomes painfully obvious when a potential real-life scenario is analysed. For instance, a dispute arises relating to a contract between a Brazilian corporation and an Argentine corporation that contains a clause providing for arbitration in Buenos Aires, but specifying no arbitration rules. Given that the parties are domiciled in different Member States that have both ratified the MAA, the first question is whether the MAA or the Argentine arbitration law (the Code) governs the proceedings. Although prima facie, the MAA should govern the proceedings and any an uncooperative party could dispute this in the Argentine courts. As the parties did not select any procedural rules in their agreement, the IACAC rules would apply. The Arbitrator Nominating Committee of the IACAC would consequently be available to assist in the appointment and replacement of the arbitrators. If at the end of the process the arbitrators find in favour of the Brazilian party, and the Brazilian party seeks to enforce the arbitral award against the Argentine party's assets in Uruguay, pursuant to which legal norms should the Brazilian party make its application: the New York Convention, the Panama Convention, the Montevideo Convention, or the Las Leñas Protocol? All deal with the question of the enforcement of a foreign arbitral award and all are in force in Uruguay.

In sum, rather than attempting to harmonise the already existing commercial arbitration mechanisms by means of yet another arbitral convention, we believe that the Member and Associate States of MERCOSUR
would have done better simply to enact new national arbitration laws adopting the UNCITRAL Model Law (as Paraguay has done) and confirm their commitment to the New York Convention (in preference to the other arbitration conventions on the same subject they have ratified).\footnote{11f If the experience of a successful economic cooperation and integration scheme spanning over more than forty years had been considered relevant, the example of the European Union could have been followed. The New York Convention—and not a specific European Union convention for the recognition and enforcement of arbitral awards—has sufficed for permitting the expansion of commercial arbitration in that part of the world in a manner satisfactory to users, practitioners and national courts alike.” See Horacio Grigera Naón, Recent Trends Regarding Commercial Arbitration in Latin America, at 15 (paper presented at the 1998 Conference of the International Bar Association (IBA) in Vancouver).}

The same can be said for the agreements dealing with investor-state arbitration in the region. The Colonia Protocol, as drafted, will not permit investors in the MERCOSUR region to have recourse to arbitration under the ICSID Convention unless and until Brazil becomes a Contracting State. The recognition and enforcement of an arbitral award rendered in an ICSID Additional Facility or UNCITRAL arbitration suffers from the same ambiguities as a commercial arbitral award in terms of the rules applicable. To put it simply, if the Colonia Protocol came into force, an investor with a choice of arbitration pursuant to the Protocol or a BIT providing for arbitration under the ICSID Convention would be better advised to commence arbitration pursuant to the BIT.

Given the different approaches of the Member States to investor-state arbitration (particularly Brazil’s approach, having failed to ratify any BITs) we believe that the harmonisation attempt contained in the Colonia Protocol was again too ambitious. It would have been simpler if the Member States had proceeded at their own pace to sign and ratify BITs with each other, and indeed with Third States, on individual bases. The Buenos Aires Protocol adds little to the equation either way.

In summation, the construction of a solid edifice is not a function of the number of bricks used, but the way in which the bricks are assembled. The desire of the Member and Associate States of MERCOSUR to seek the adoption of common solutions to the question of arbitration is a noble one, but such solutions need to address clearly their scope of application. Failure to do so will cause confusion that will continue to frustrate the development of the region as a host to arbitration. Such failure will also render the task of educating the judiciary much more complex. It is perhaps time for the MERCOSUR states to issue a clear statement as to how they envisage the co-existence of these structures.