

The host with the most?

Ricardo M Arango and Gian Castillero of Arias Fábrega & Fábrega explain why Panama could be the offshore jurisdiction that has it all

In terms of offshore vehicles, few jurisdictions offer such a wide range of solutions as Panama. From the widely-known Panama corporation to limited liability companies and from trusts to foundations, this jurisdiction provides vehicles to address a broad range of needs.

Not surprisingly, Panama vehicles have been used by publicly-held multinational corporations, by private equity funds, by closed-end funds and mutual funds, by companies seeking to establish asset protection trusts, bankruptcy-remote vehicles or collateral trust arrangements and by individuals for their personal investment or family and estate planning purposes.

Panama corporations

Perhaps the most widely used offshore vehicle in Panama is the corporation (*sociedad anónima*). Based on early 20th century Delaware and New York corporate law, Panama's general corporation law is extremely flexible, a trait that has successfully permitted this vehicle to be used in many forms.

Several NYSE-listed companies are incorporated in Panama, such as Carnival Corporation (CCL), Copa Holdings SA (CPA), Willbros Group Inc (WG), McDermott International Inc (MDR) and Banco Latinoamericano de Exportaciones

SA (BLX). All of these companies comply with the strict corporate governance and disclosure rules applicable to public companies. Panama's general corporation law has been able to accommodate such needs, including demands not only from securities regulators and the NYSE but also from rating agencies and shareholders' watch groups.

Panama corporations are also increasingly being used as holding companies by Latin American conglomerates and regional holding companies by multinational corporations.

In addition, Panama corporations are also frequently used to structure closed-end funds and mutual funds, as Panama's general corporation law offers the flexibility to deal with issues common to this class of vehicles, such as the subscription and redemption of shares, the calculation of the shares' net asset value, the appointment of investment managers and the need to limit corporate purposes to specific investment objectives and policies. Offshore funds and private equity funds are also frequently incorporated in Panama.

Finally, Panama corporations are used as personal investment companies by millions of individuals and corporations around the world.

a) Articles of incorporation and bylaws

Panama corporations are incorporated by filing the articles of incorporation with the Public Registry Office in Panama. The articles of incorporation are the main organisational documents of a corporation. In addition, Panama corporations may, but are not required to, adopt bylaws for the regulation of their internal affairs and procedures. Bylaws may, but need not, be filed with the Public Registry Office.

b) Corporate name

Corporations may adopt a name in any language, provided that it includes an abbreviation that denotes that it is a corporation, such as SA, Inc or Corp. The

use of certain words such as bank, trust and insurance is restricted for use only by corporations that are licensed to operate in such industries.

c) Corporate purpose

Panama corporations are authorised by law to engage in any lawful business or activity in Panama or outside of Panama. Most corporations are incorporated with broad corporate purposes. However, when the proposed structure or transaction requires that corporate purposes be limited or restricted, such as in the case of certain bankruptcy-remote securitisation vehicles or certain funds, Panama's general corporation law does permit it. In these cases, the articles of incorporation are drafted only to allow the corporation to engage in limited or restricted business or transactions.

d) Capital

Panama corporations must have an authorised capital, which may be stated: (i) in terms of a certain sum of money of any currency divided into a stated number of shares with a stated par value each; (ii) in terms of a stated number of shares without par value; or (iii) a combination of both.

No minimum paid-in capital

There is no minimum regulatory or paid-in capital for Panama corporations. Capital may be paid in over time. In fact, shares of stock can be issued as fully-paid or partially-paid, although bearer shares and no par value shares can only be issued as fully-paid and non-assessable. Shares are issued by resolution of the board of directors and consideration for the stock can be in cash, kind or services.

Classes and series

Panama corporations may issue all classes of stock, in one or more series, with such designations, preferences, privileges, voting powers and other rights, as well as with such qualifications, limitations and restrictions, as their articles of incorporation may provide. All types of common, preferred and convertible securities are frequently issued by Panama corporations.

Registered and bearer shares

Shares may also be issued either in registered form or to the bearer. All shares of stock issued by a corporation must be recorded in the share registry of the corporation. In the case of shares issued in registered form, the name of the shareholder is stated both in the share certificate and in the share registry. When shares are issued to the bearer, only

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the word, bearer, is recorded. The share register is a private corporate document in Panama. The names of the shareholders are not filed in any public offices and are not a matter of public record.

Voting rights

Generally, each common share of a corporation entitles its holder to one vote in all matters to be decided by shareholders. However, non-voting shares, both common and preferred, as well as limited voting right shares, are also permitted in Panama. Voting trust arrangements are lawful in Panama, as is the appointment of proxy holders to attend and vote at meetings on behalf of shareholders.

Preemptive rights

Preemptive rights are granted to holders of common stock with respect to new issues of common stock. However, if preemptive rights are not desirable for a particular structure or transaction, the articles of incorporation may deny such rights to shareholders.

e) Shareholders

No minimum or national requirements

There is no mandatory minimum number of shareholders in Panama. A corporation can be wholly-owned by one single shareholder. In addition, there are no nationality or residency requirements, therefore any person of any nationality or place of residency can be a shareholder in a Panama corporation.

Meetings

Meetings of shareholders can take place anywhere in the world, if so provided in the articles of incorporation. There is no requirement to hold a minimum number of meetings per year, although most corporations hold at least an annual general meeting. Shareholders owning at least 5% of the issued and outstanding voting shares have a right to request that a stockholders' meeting be called. Notice of meetings can be given no less than 10 and no more than 60 days before the date of the meeting, and record dates can be fixed up to 40 days before the meeting. If there is no time to give proper notice, Panama's general corporation law allows shareholders to waive notice of meetings before, during and after meetings. The default quorum to hold a meeting is a majority of issued and outstanding voting shares, but a higher or lower quorum can be established in the articles of incorporation or bylaws of the corporation. Ordinarily, decisions of

Author biographies



Ricardo M Arango

Arias Fábrega & Fábrega

Ricardo M Arango joined Arias Fábrega & Fábrega in 1987 and became a partner in 1995. He is a member of the firm's executive and operations committees. He is also head of the firm's capital markets and banking practice group. Ricardo's practice focuses on securities regulations, banking and finance, mergers, acquisitions and joint ventures, corporations and tax. In the area of capital markets and banking, Ricardo regularly advises clients in connection with medium-term note

programmes, commercial paper programmes, syndicated term and revolving loan agreements, 144-A Reg-S notes, securitisations and initial public offerings. He has also acted as lead counsel in connection with the largest M&A transactions in the country. Ricardo has a Master of Laws from Yale Law School, a Master of Laws from Harvard Law School and a Bachelor of Laws from the University of Panama.

Tel: +507 205 7000

Email: rarango@arifa.com



Gian Castillero

Arias Fábrega & Fábrega

Gian Castillero joined Arias Fábrega & Fábrega in 1994 and became a partner in 2008. He was the resident lawyer of our London office from 1994 to 2000. Gian is head of the firm's offshore services practice group and oversees the activities of our network of offices abroad. In the area of offshore services, Gian has extensive experience in representing private clients in connection with the organisation and management of companies, philanthropic entities and foundations in different jurisdictions, estate planning, international tax planning and asset protection structures.

Gian has a Master of Laws from The London School of Economics and a Bachelor of Laws from Santa Maria La Antigua University. Gian is chairman of the Panamanian International Lawyers' Association.

Tel: +507 205 7014

Email: gcastillero@arifa.com

shareholders are adopted by a majority of the issued and outstanding shares entitled to vote on the matter under consideration, but a supermajority vote for specific matters can be established in the articles of incorporation of the corporation. Shareholders' resolutions can be adopted either at meetings or by written resolutions in lieu of meetings.

Powers

Shareholders have broad powers to control the corporation. Almost any rights can be reserved for shareholders in the corporation's articles of incorporation. Even if the articles of incorporation do not grant shareholders any specific powers, the following corporate decisions are reserved by law for shareholders: the appointment and removal of directors; the amendment of the articles of incorporation; the granting of security interests on corporate assets for the benefit of third parties; the transfer of all or substantially all of the corporation's assets; a merger of the corporation; and the

dissolution and winding-up of the company.

Shareholders' agreements

Shareholders' agreements are lawful in Panama and are frequently used in joint-venture corporations and other investment corporations to establish rights among various classes of shareholders, particularly between controlling and minority shareholders. There is no need to file shareholders' agreements with the Public Registry Office or any other governmental agency in Panama.

f) Transfer of shares

Transfer of stock

Shares of stock in a Panama corporation can be easily transferred, and generally no transfer restrictions or limitations apply. Bearer shares can be transferred by simple delivery of the share certificate. Shares issued in registered form are transferred by assignment and delivery of the share certificate (usually by means of blank stock

powers) and an annotation of the transfer in the corporation's share registry. No filings with the Public Registry Office or governmental consents are required for the transfer of shares of a Panama corporation. Where a structure or a transaction requires that limitations be imposed on the ability of shareholders to transfer their shares of the corporation, such limitations are possible, provided that they are included in the articles of incorporation of the corporation or in a shareholders' agreement.

Right of first refusal

There is no statutory and mandatory right of first refusal in Panama. However, where a structure or a transaction requires that shareholders be given rights of first refusal or other similar options to purchase the stock of a selling shareholder, such rights can be lawfully established either in the corporation's articles of incorporation or in a shareholders' agreement.

Tag-along and drag-along rights

Other common rights associated with the transfer of shares and control of a corporation, such as tag-along rights and drag-along rights, are commonly used and lawful in Panama. These rights can be established either in the corporation's articles of incorporation or in a shareholders' agreement.

g) Board of directors

Composition

The board of directors must be comprised of at least three members, but a higher number of directors is permitted as provided for in the articles of incorporation or bylaws. There are no nationality or residency requirements for directors, nor are directors required to be shareholders of the corporation. Panama's general corporation law does not impose qualification requirements on directors, but when such qualifications are desirable they can be established in the articles of incorporation of the corporation. Alternate directors can be used if provided for in the articles of incorporation. Staggered and classified boards are lawful in Panama.

Election and removal

Directors are elected and removed by shareholders, although vacancies can be filled by a resolution of the remaining directors. Directors are usually elected by all shareholders, although the articles of incorporation may provide that a particular class of shareholders have the right to elect a specific number of directors. Directors are

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elected by general vote, but supermajority voting and cumulative voting are also allowed for the election of directors. Directors can be removed from office by shareholders with or without cause.

Duties and powers

Panama law entrusts the control, management and supervision of the business and affairs of a corporation to its board of directors. As a general rule, the board of directors exercises all corporate powers that are not expressly reserved for shareholders by law or in the articles of incorporation or bylaws of the corporation. Notwithstanding these broad corporate powers, when a structure or transaction requires that the powers of the board of directors be limited or that certain of these powers be transferred to shareholders, this can generally be achieved in the articles of incorporation.

Directors' liability

Under Panama law, directors may become jointly and severally liable to the corporation, its shareholders and creditors if they do not discharge their duties with the care that ordinarily prudent men usually exercise in the discharge of their own affairs. Besides being liable for breach of their general duty of care, directors are also expressly liable for false capitalisations, for insufficient funds to pay declared dividends, for keeping accounting books improperly and for authorising acts that violate the articles of incorporation, the bylaws, resolutions of shareholders or the law. Notwithstanding the foregoing, Panama's director protection statute shields directors from personal liability, unless shareholders approve the commencement of an action against the directors. This protection, however, is not accorded in three cases: unlawful declarations and payments of dividends; unlawful capital reductions; and materially false statements on reports issued on behalf of the corporation. Panama law does allow the corporation to indemnify directors and officers against personal liability and permits D&O insurance, except in cases of gross negligence or wrongdoing.

Meetings

Meetings of the board of directors can be held anywhere in the world. There is no requirement to hold a minimum number of meetings per year. Directors are entitled to receive notice of all meetings, but there is no statutory minimum notice period. Directors can waive notice of meetings before, during and after meetings. The default quorum to hold a meeting is a majority of the directors then in office, but a higher or a lower quorum can be established in the articles of incorporation or bylaws of the company. Decisions of the board of directors are adopted by the favourable vote of the majority of the directors present at the meeting, but boards can be classified to give directors representing a specific class of shareholders the veto or right to vote on certain matters. Directors' resolutions can also be adopted by written resolutions in lieu of meetings.

Committees

Panama's general corporation law allows the board of directors to create committees and approve their charters. Committees are commonly used in Panama by publicly-held corporations and corporations in regulated industries, such as banks.

Officers

The board of directors also has responsibility for appointing and removing the corporation's officers. Corporations usually have a president, a secretary and a treasurer, but can have any such other officers as the board of directors may determine. Officers need not be directors.

h) Dividends

Dividends are declared and paid by resolution of the board of directors. Dividends can be paid in cash, stock or kind. Directors can declare and pay dividends out of net earnings or from the surplus of the corporation's assets over its liabilities and capital. In addition, dividends cannot be declared or paid if, after giving effect to such dividend, the corporation's assets are less

than the sum of the corporation's liabilities and capital.

i) Books, accounting and filings

Corporations are required to keep a share registry and corporate minutes. Records can be maintained in physical or electronic form, and may be kept in Panama or any other place. There is no need to register or file corporate records in Panama. If the corporation does not engage in business or trade within Panama, accounting records can use any accounting standard approved by the board of directors.

Panamanian trusts

Panama also has one of the most flexible trust laws in Latin America. Panamanian trusts are frequently used to create collateral trust arrangements to hold a wide variety of assets, including real property and chattel, stocks and accounts, for the benefit of lenders and creditors in connection with secured loans and note offers. Panamanian trusts have also been used as issuing vehicles in connection with the securitisation of toll-road receivables and residential mortgages. Other common uses of Panamanian trusts include voting trust agreements, retirement and pension funds, real estate investment funds and estate planning.

Trusts are established in Panama by execution of a trust agreement between a settlor and a trustee. There is no need to file the trust agreement in Panama, unless the trust owns real property located in Panama. Under Panama's trust law, the trustee becomes the owner of the record of all trust assets, while beneficiaries only retain a beneficial interest. The trustee is required to own the trust assets and use them strictly in accordance with the terms of the trust agreement and may be liable to the settlor and the beneficiaries for negligence in the discharge of its obligations as trustee.

Panama foundations

Modeled after the Liechtenstein Family Foundation, Panama's private interest foundation is the most recent offshore vehicle added to the list of alternatives offered in this jurisdiction. However, foundations have rapidly become a vehicle of choice for establishing asset protection and estate planning structures.

Panama foundations offer a simple, affordable and structured alternative to attain the preservation and transition of an estate to future generations. They essentially reconcile the wishes of any person to maintain control over his assets, with the two basic priorities of any estate planning: (i) to protect the estate; and (ii)

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to ensure that the estate serves specific purposes beyond the existence of its owner.

In connection with the protection of assets, a foundation is a legal entity that is separate and independent from its founder. Consequently, assets transferred to a foundation are not subject to seizure or attachment as a result of claims for risks inherent in the personal or professional activities of the founder or the obligations of the members of its foundation council, its beneficiaries or third parties.

Perhaps one of the most attractive features of the foundation is the fact that, as opposed to the trust, where the settlor must transfer ownership and control of trust assets to the trustee, in a foundation the founder can keep control of the administration and the assets of the foundation during his lifetime.

Limited liability companies

Panama limited liability companies have become popular in recent years with US taxpayers as they qualify for an entity classification election, commonly referred to as a check-the-box election, which allows the limited liability corporation to be treated as a disregarded entity for US tax purposes.

The increasing use of limited liability companies has motivated an initiative to have its regulatory framework reviewed to align it with the requirements of the changing international environment. A bill is now being discussed at the National Assembly for this purpose.

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PANAMA

ARIAS, FABREGA & FABREGA
gcastillero@arifa.com

HONG KONG

ARIAS, FABREGA & FABREGA
COMPANY SERVICES HONG KONG LTD
cwong@arifa.com.hk

LONDON

ARIAS, FABREGA & FABREGA
esibauste@arifa.com

BRITISH VIRGIN ISLANDS

ARIAS, FABREGA & FABREGA
TRUST CO. BVI LIMITED
jquezada@arifa.com

LUXEMBOURG

ARIAS, FABREGA & FABREGA
(LUXEMBOURG), S.A.
arias@pt.lu

BELIZE

ARIAS, FABREGA & FABREGA
(BELIZE) LIMITED
belize@arifa.com

www.arifa.com