Panama

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Becoming a popular seat for international arbitration is a challenge for any country. There are practical reasons that the parties or counsel will take into consideration when drafting an arbitration clause and selecting the country where the seat of arbitration will be, such as logistics, suitable and available infrastructure (eg, hotels and conference centres), qualified personnel to assist the arbitral tribunal and, of course, qualified arbitral institutions. In addition to these practical considerations, there are legal considerations involved in this reasoning: the country to be chosen as seat of arbitration should have modern and arbitration-friendly laws, as well as courts that understand the relevance and importance of arbitration that will generally uphold awards rendered in such seat in accordance with the applicable rules. Of all the aforementioned elements, the one in which the state can exercise a more significant influence is the adoption and amendment of the national arbitration law. A country seeking to become a popular seat for international arbitration will likely begin by enacting a pro-arbitration law or adopting significant or necessary amendments to its current arbitration law, to send a positive message to the international arbitration community.

Many countries in Latin America have undertaken the task of becoming pro-arbitration jurisdictions, making this a state policy. In order to be more competitive, many countries in the region are adopting modern arbitration laws inspired on the 1985 UNCITRAL Model Law on International Commercial Arbitration, as well as updating their already modern laws on arbitration. It is not a coincidence that Colombia recently issued a brand new arbitration statute (Law No. 1563 of 2012) for both international and domestic arbitration, and that other countries in the region are undertaking the same task.

Panama is no stranger to the goal of promoting arbitration. It started by becoming a party to the main Conventions on International Arbitration, such as the Inter-American Convention on International Commercial Arbitration,[1] the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards[2] and the Convention on the Settlement of Investment Disputes between States and Nationals of other States.[3]

In 2004, the Panamanian Constitution was amended to recognise arbitration as a valid system for the resolution of disputes separately from the Panamanian Courts, and to incorporate the *kompetenz-kompetenz* principle into the constitution. Furthermore, these constitution amendments also included the express mention of the capacity of the government to be a party in arbitration proceedings without the need of an express authorisation, provided that an arbitration clause is included in the contract to which the government or any state-owned entity is a party.

However, before that, in 1999, Panama enacted its first modern law on arbitration, known as the Law Decree No. 5 of 1999 on Arbitration, Mediation and Conciliation (the current Arbitration Act).[4] This was Panama's first attempt to enact a modern legislation on arbitration (prior to the current Arbitration Act, arbitration was regulated by the provisions of the Judicial Code of Panama). However, despite being inspired by the 1985 UNCITRAL Model Law on International Commercial Arbitration, the current Arbitration Act contains some provisions that differ from the uniform international tendencies. For example, in Panama, if the parties do not agree otherwise or if the chosen rules of arbitration do not provide otherwise, the default rule is that the arbitral tribunal will decide the case ex aequo et bono or as amiable compositeur. The current Arbitration Act also provides that, in ex aequo et bono arbitration proceedings, the arbitral tribunal applies its 'free criteria' and the awards may not be motivated.

This is why, in an effort to continue pursuing the pro-arbitration avenue, to redress some of the confusing provisions of the current Arbitration Act that differ from international tendencies and to address some of the relevant and current issues being discussed in the international arbitration community, Bill No. 578 of 2013 has been presented to the National Assembly for the adoption of a new Arbitration Act (the Bill). The Bill is largely inspired by the 1985 UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006 (the UNCITRAL Model Law), including some domestic adjustments and additional provisions.

This chapter discusses the key changes introduced by the Bill and the provisions that, in our opinion, should be amended before the Bill is passed.

What is new?

With the intention of focusing on cross-border issues and presenting a comparative overview of the Bill with regards to the current Arbitration Act, as well as with the UNCITRAL Model Law, we have identified the following main changes introduced by the Bill:

- amiable compositeur is no longer the general applicable rule;
- a broader scope of interim measures has been introduced;
- the concept of preliminary order has been introduced;
- procedures for the enforcement of interim measures have been simplified;
- court assistance for arbitral tribunals by taking evidence and enforcing international arbitral awards rendered in Panama;
- the reasoning of all awards is now mandatory;
- the arbitral tribunal can determine the applicable law without applying conflict of law rules;
- all provisions of the Bill have been interpreted in the light of general arbitration principles;
- the default number of arbitrators has been modified;
- the arbitral tribunal has broader powers to determine the language of the proceedings; and
- the delay for issuing the award has been modified.

Amiable compositeur is no longer the general rule

As mentioned before, the current Arbitration Act provides that if the parties do not agree otherwise, or if the chosen rules of arbitration do not provide otherwise, the default rule is that the arbitrators will decide the case ex aequo et bono or as amiable compositeur.

The Bill redresses this provision in order to follow the global tendency, which is to consider that the arbitrators can only act as amiable compositeur when expressly agreed by the parties.

Broader scope of interim measures

The Panamanian legal system has a limited number of interim measures (eg, attachment, suspension, measures to preserve evidenc, etc). By adopting the definition of interim measures of the UNCITRAL Model Law, the Bill enlarges the scope of interim measures as defined in Panama and gives arbitrators broader powers in comparison to national courts.

Preliminary orders as a new concept

The Panamanian legal system does not include preliminary orders. This legal concept is introduced by the Bill following the definition given by the UNCITRAL Model Law. It could be considered that the power to issue a preliminary order would be a power invested only on arbitral tribunals and not on national courts.

Enforcement of interim measures

The enforcement of interim measures issued by arbitral tribunals seating abroad is simplified by the Bill since it could be considered that the enforcement and execution of the interim measure could be requested without the previous issuance of a writ of exequatur by the Supreme Court of Panama.

Court assistance in taking evidence

The Bill contains a provision applicable to both domestic and international arbitration proceedings, which obliges local courts to assist arbitral tribunals with the taking of evidence provided that it is within their competence and in accordance with the local rules on taking evidence. Local courts have only 10 business days to take the evidence and forward it to the arbitral tribunal. There does not seem to be a condition to go through a letter rogatory process for arbitral tribunals seating abroad requesting the assistance of local courts in taking evidence. This is a clear advantage that arbitral tribunals seating abroad have over foreign national courts, which should go through a letter rogatory process and comply with additional conditions in order to request assistance from local courts in taking evidence.

Enforcement of international arbitral awards rendered in Panama

Pursuant to the current Arbitration Act, the enforcement of arbitral awards rendered in international arbitration proceedings is subject to the issuance of a writ of exequatur by the Supreme Court of Panama, even in cases when the seat of the arbitration is Panama. The Bill has circumvented this process for international arbitration awards rendered in Panama by considering that their enforcement can be requested directly to local courts without prior issuance of a writ of exequatur.

Reasoned awards as a general rule

Unlike the current Arbitration Law, which seems to exempt ex aequo et bono arbitral tribunals from issuing reasoned awards, the Bill follows the wording of the UNCITRAL Model Law and provides that all arbitral awards shall state the reasons upon which they are based unless the parties have agreed that no reasons are to be given or the award contains the terms of a settlement by the parties.

Arbitral tribunals can determine the applicable law without applying conflict of law rules

Contrary to the UNCITRAL Model Law, which provides that 'failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules that it considers applicable', the Bill does not force the arbitral tribunal to apply conflict of laws rules and allows it to directly apply the 'rules of law' it considers appropriate. This liberal provision, similar to article 21 of the Rules of Arbitration of the International Chamber of Commerce, gives a larger freedom to arbitrators when determining the applicable law.

Interpretation based on general arbitration principles

Article 6 of the Bill provides that all issues related to the Bill which are not expressly regulated therein, will be decided in conformity with the 'general principles of arbitration'. This wording represents a step further from the original wording of the UNCITRAL Model Law that mentions, in its article 2A, 'the general principles on which this Law is based'.

Default number of arbitrators

Article 19 of the Bill provides that parties can freely agree on the number of arbitrators provided it is an uneven number. It also establishes that the default number of arbitrators shall be one unless otherwise agreed by the parties. Other exceptions to this rules are cases where the state or a state entity is involved, in which case the number of arbitrators should always be three. This provision differs from the current Arbitration Act that fixes the default number of arbitrators at three.

Broader powers for the arbitral tribunal to determine the language of the proceedings

The current Arbitration Act provides that the language to be used in the arbitral proceedings will always be Spanish when both parties are Panamanians. In contrast, the Bill has adopted a more international approach, mirroring the UNCITRAL Model Law by establishing that, failing an agreement by the parties on the language, the arbitral tribunal shall determine the language or languages to be used in the proceedings.

Delay for issuing the arbitral award

The current Arbitration Act provides that, unless otherwise provided by the parties, the arbitral tribunal shall issue the award six months from the acceptance of the appointment by the last arbitrator, and that this period can be extended according to the will of the parties or to the applicable rules.

For domestic arbitrations, the Bill follows the tendency of the current Arbitration Act by establishing a delay to the issuing of the award. This delay is two months from the closing statements by the parties. This delay can be extended for another two months by the arbitral tribunal, depending on the complexity of the case.

For international arbitrations, the Bill follows the tendency of the UNCITRAL Model Law, which does not establish such delay and lets this be decided by the parties, the applicable rules or, failing such, the arbitral tribunal.

What remains to be done?

There are some provisions that could be amended before the Bill is passed, in order to solve some minor problems that arbitration is currently facing in Panama, as well as some foreseeable problems that could arise from the wording of the Bill. The main issues we have identified are the following:

- the potential availability of writs of amparo against arbitral decisions;
- possible difficulties in appointing arbitrators in ad-hoc proceedings;
- possible difficulties in challenging of arbitrators in ad-hoc proceedings;
- possible difficulties with interim measures; and
- a lack of provisions regarding joinder of additional parties and consolidation.

The potential availability of writs of amparo against arbitral decisions

Although article 46 of the Bill establishes that parties cannot file any motions before local courts, the Bill does not expressly prohibit the filing of writs of amparo against arbitral decisions. Maybe the Bill represents the best opportunity to finally settle this issue, which has been troubling the local arbitration community for some time.

The writ of amparo – or action for the protection of constitutional guarantees – is an independent action seeking protection against orders from the authorities or public servants that violate constitutional guarantees. This action is conceived as an extraordinary remedy to be accessed whenever all other available remedies have been used.

The Panamanian courts have, in different occasions and with different results, discussed the issue of whether or not a decision from an Arbitral Tribunal could be subject to a writ of amparo, mainly because this action was conceived as a means to review decisions issued by public servants, and there has been much debate as to whether arbitrators should be considered public servants.

In addition, writs of amparo are mainly used by parties to attack preliminary arbitral decisions and 'torpedo' the arbitral proceedings. This could be seen as contrary to the *kompetenz-kompetenz* principle, which prevents the courts from reviewing preliminary decisions of arbitrators (mainly as they relate to their capacity to decide the dispute), and the availability of the writ to set aside (or annul) the arbitration award as a means to judicially control the final arbitration award once the arbitration proceedings have concluded, in addition to the judicial control of the final arbitral awards when its recognition and enforcement is sought.

Therefore, it would have been interesting for the legislator to expressly establish in the Bill that the writ of amparo is not available against decisions by arbitral tribunals.

Possible difficulties in appointing arbitrators in ad-hoc proceedings

In its goal to reduce the interference of the judiciary in arbitration proceedings, the Bill does not establish a Court or other authority for certain functions of assistance and supervision of the arbitration, especially regarding the appointment of arbitrators failing agreement by the parties. This would most likely become a problematic source when constituting a tribunal for an ad hoc arbitration. In this regard, the Bill only refers the parties to the rules of the chosen arbitral institution.

All these foreseeable problems could be avoided by mirroring the UNCITRAL Model Law and appointing (or even creating) a court or other authority for certain functions of assistance and supervision of the arbitration, especially considering the interest of Panama in becoming a popular seat of arbitration.

Possible difficulties in challenging arbitrators in ad-hoc proceedings

As mentioned before, the Bill does not establish a Court or other authority for certain functions of assistance and supervision of the arbitration. Therefore, the challenges of sole arbitrators in ad-hoc proceedings are decided by 'an arbitral institution, national or international, pursuant to its own rules within 15 days from the request'. We could foresee some practical problems with regards to this procedure taking into account the vague description of the institution that should decide the challenge.

Possible difficulties with interim measures

With regards to interim measures issued by arbitral tribunals seating abroad, the Bill mirrors the grounds for refusing recognition or enforcement of such measures, which are included in the UNCITRAL Model Law. However, with regards to interim measures issued by arbitral tribunals seating in Panama, there is a general principle for the immediate recognition and enforcement by local courts of such measures without establishing any grounds for refusing their recognition or enforcement. This could represent a possible open door for the enforcement of interim measures that do not comply with even minimal conditions, such as respect for international public policy.

This provision could create unnecessary confusion and therefore, in our opinion, the Bill should be modified to establish clear limited grounds for refusing recognition or enforcement for all interim measures, irrespective of the country in which they were issued.

Lack of provisions regarding joinder of additional parties and consolidation

One of the most relevant issues in the arbitration community is the joinder of additional parties and consolidation of arbitral proceedings. It is no coincidence that this issue has been included in the Rules of Arbitration of the International Chamber of Commerce in force as from 1 January 2012.

Therefore, we consider that the Bill could be an opportunity for establishing clear rules that regulate this issue in Panama and avoiding future uncertainties in this regard.

Conclusion

As a service-based economy, Panama meets all the practical conditions for being a popular seat of arbitration: strategic geographic location, historic transit hub, 295 daily flights to 70 destinations in 31 countries, connection to five submarine fiber optic cables, a dollarised economy, suitable and available infrastructure and qualified bilingual personnel to assist the arbitral tribunal.

With regards to the legal conditions for or being a popular seat of arbitration, the Bill is a step forward to confirm the pro-arbitration policy of Panama. Indeed, despite the existence of some issues that could be improved, the Bill, as a whole, represents a positive message from Panama to the international arbitration community.

Notes

1 Law No. 11 of October 23, 1975.
2 Law No. 5 of October 25, 1983.
3 Law No. 13 of January 3, 1996.
4 Law Decree No. 5 of July 8, 1999.

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He is part of the firm's litigation and arbitration practice, and focuses on cross-border litigation, international arbitration and the representation of international clients in local disputes.

In recent years, Mr Aued has had an active role in many of the firm's cross-border ligation cases, and regularly works with foreign counsel on issues of Panamanian law in civil and commercial international litigation and international commercial arbitration.

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His practice focuses on litigation with an emphasis on commercial and civil matters and administrative cases, and he has also intervened in arbitration proceedings conducted under the auspices of, inter alia, the International Court of Arbitration of the International Chamber of Commerce and the International Centre for Settlement of Investment Disputes, as well as in ad hoc proceedings.

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ARIFA has been at the forefront of the legal profession, advising leading international financial institutions and multinational corporations, as well as some of the largest companies in Panama, for nearly 100 years.

Our practice includes over 28 areas of law, organised into 12 practice groups, including capital markets, banking and finance, M&A, corporations, regulatory work, government contracts, trade, competition and antitrust, real estate, environmental matters, employment relations, trust and estate planning, litigation, taxation and IP.

ARIFA also has a strong offshore practice, for which it has developed its own network of affiliated offices in London, Luxembourg, Geneva, Hong Kong, BVI and Belize. Under our brand name, ARIFA Corporate Services, we offer clients a complete list of offshore solutions, including company formation and management services, as well as trust and foundation services. For selected clients, we offer more sophisticated estate and family financial planning services, as well as trustee services, through our affiliate SWISSARIFA.

ARIFA has ample experience in cross-border litigation, serving as leading counsel in multi-jurisdiction disputes involving applications of Panamanian law. ARIFA also serves as team coordinator as part of its cross-border litigation practice. Litigation partners frequently work with US and European counsels, acting as expert witnesses or foreign counsel, in proceedings before foreign courts or international arbitration panels.

ARIFA lawyers are very knowledgeable of the arbitration rules of the ICSID, ICC, UNCITRAL and AAA.

ARIFA is a founding member of the Panama Chapter of the International Chamber of Commerce, an organisation serving as host to the International Court of Arbitration.