Panama's ADR push

Fernando Arias and Fernando Aued of ARIFA describe the use of alternative dispute resolution by the Panamanian government in international public contracts

Panama has become an interesting place for foreign investors. The country has allocated an estimate $2.95 billion for much need infrastructure work for the period 2011-2012. That is without considering the Panama Canal expansion works estimated at $5.25 billion to be spent between 2007 and 2014. Among the relevant projects, the country held a public bid to build the first metro (known as the Metro Line 1 project), is investing in additional terminal facilities in the Tocumen International Airport (North Terminal), and also held a best value tendering process to reorganise the traffic circulation system in Panama City, which includes the construction of additional car lanes and access roads.

In March and May 2010 the country obtained Class BBB- investment grade qualifications from Fitch Rating and Standard & Poor's rating agencies; this has been actively marketed by the country to attract international private investors and banks. Panama is one of the most stable countries in the Latin-American region.

But being awarded multimillion dollar contracts may sometimes not be enough to attract foreign investors and banks to participate in public contract bids; there is always the risk of termination of the public contract through the exercise of the country's sovereign rights, or because there is an alleged breach. On other occasions there may be a need to revise the terms of the contract, or a need to determine the amount of termination payments and indemnities.

These are all matters that need to be considered by the foreign investor before embarking on a government contract. In general, the foreign investor is not comfortable resolving these issues before the Panamanian courts, where proceedings are lengthy and the judges may be perceived as pro-government.

Panama has understood this need of the foreign investor to settle disputes without having to resort to the traditional judiciary litigation formula, and has adopted a policy favouring the use of alternative dispute resolution (ADR) mechanisms in international large-scale public infrastructure contracts, such as the design and build of the third set of locks of the Panama Canal, and Metro Line 1.

Alternative dispute resolution

Although, as of 1984, Panama has been a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Panama's alternative dispute resolution law, which implemented and regulated arbitration, conciliation, and mediation as alternative dispute resolution mechanisms, was only passed in 1999.

At first, the law was not well perceived by the judiciary, who considered rendering justice was its exclusive function (arbitration proceedings were previously governed by the Code of Civil Procedure). The ADR law was the object of various challenges before the Supreme Court, the most relevant of which was a decision of December 13 2001 which eliminated the *kompetenz – kompetenz* principle from the ADR law. This allowed the arbitration tribunal by itself to determine if it was competent or not to decide the matters submitted to arbitration; the judiciary concluded such function was of its exclusive competence.

There was then the issue of obtaining consent from the Cabinet of Ministers of the Executive Branch, in order to submit a dispute to arbitration with the government. Such requirement of constitutional hierarchy made it mandatory to secure approval from the Cabinet of Ministers even when the relevant governmental agency or entity had already agreed to arbitrate disputes in the relevant public contract. This situation created a legal barrier that prevented the counterparty in the

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public contract from successfully initiating arbitration proceedings even when the public contract had an arbitration clause.

In 2004, Panama submitted to the National Assembly the approval of a series of amendments to the Constitution. Among the matters to be considered were certain provisions relevant to the acknowledgement of the use of arbitration in the resolution of disputes. The Constitutional amendments were approved and as a result, an important step forward was made in the promotion of the use of arbitration in the resolution of commercial disputes as well as in contracts with the government.

In addition to acknowledging that arbitration was also a means of administering justice, the amendments acknowledged the arbitration tribunal's capacity to decide, on its own, if it was competent or not to decide on a matter submitted to arbitration and not the ordinary civil courts. It was also acknowledged that approval from the Cabinet of Ministers was not necessary as a formality to initiate arbitration proceedings, provided the public contract object of dispute already had an arbitration clause.

Ever since the Constitutional amendments were adopted, the Panamanian government has been proactive in promoting the use of arbitration as an alternate dispute resolution mechanism for private matters as well as in public contracts, and has incorporated its use in various areas of the law. For example, in recent amendments to the Code of Maritime Procedure, the use of arbitration was acknowledged as a mechanism to resolve maritime litigation disputes, establishing the duty of the maritime judge to refer disputes to the arbitration tribunal when evidence of the existence of an arbitration clause was provided by one of the parties; the Consumer Protection law of 2007 introduced a chapter on Consumer Matters Arbitration (a matter yet to be regulated).

Panama's dominant arbitration centres are namely the Center for Conciliation and Arbitration hosted by the Panamanian Chamber of Commerce, Industries and Agriculture (CeCAP), which was established in 1994, and the Center for Resolution of Controversies of the Panama Construction Chamber (CESCON).

Both have extensive experience in national and international commercial arbitration, as well as in disputes related to the public and private sector. In addition the International Chamber of Commerce (ICC) has established a Panama Chapter with the Panamanian Chamber of Commerce, Industries and Agriculture, and actively promotes ICC arbitration for the resolution of commercial disputes.

> **"The country has adopted a pro-arbitration policy and is aware of foreign investors' need to resolve contractual disputes in neutral conditions"**

Dispute resolution in international public contracts

The Panama Canal expansion

Perhaps the most important public contract in Panama's history so far, with an estimated value of $3.12 billion, is the design and construction of the third set of locks of the Panama Canal. Here, disputes between the contractor and the employer (the Panama Canal Authority) are to be resolved through the use of dispute boards, then negotiation, and finally through arbitration.

Pursuant to the dispute resolution section of the design and build contract, a dispute is first to be submitted to a Dispute Adjudication Board (DAB) to be comprised of three members, one nominated by each party and a third member serving as chairman to be appointed by the parties after conferring with their nominated members. It should be noted that the DAB does not act as an arbitration tribunal. The DAB must issue its decision within 84 days after its chairman receives the dispute reference documents.

The decision will be binding on the parties unless they decide to revise its terms through amicable settlement or arbitration. If either party is not satisfied with the DAB's decision or if the DAB fails to issue its decision within the 84-day term, then either party can issue a notice of dissatisfaction. This must explain the reasons for dissatisfaction with the decision and be communicated by one party to the other within a 28-day term after the 84-day period for the DAB to render its decision has elapsed, or 28 days after receiving service of the decision. In absence of issuance of a notice of dissatisfaction within the 28-day term, the DAB decision will become final and binding upon the parties.

In principle, arbitration can only be initiated if a note of dissatisfaction has been given within the mentioned term and the parties have tried to amicably settle the dispute by 56 days after the notice of dissatisfaction was given. However if a party fails to comply with the DAB decision and no notice of dissatisfaction has been issued, then the party affected by the non-performance can initiate arbitration proceedings directly to request compliance of the failure. Arbitration may be also commenced directly if for any reason there is no appoint-

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ment of a DAB.

Arbitration proceedings under the design and build contract are governed by documents which are highly relevant in the arbitration world. The arbitration proceedings will be international and at law (the Panama arbitration rules provide that in absence of indication of the arbitration being at law shall mean the arbitration will be in equity). The applicable rules of the arbitration proceedings will be those of the ICC, in addition to the application of the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration. The dispute will be settled by three properly-qualified arbitrators who must be licensed attorneys, and the venue of the arbitration will be Miami, US. Finally the arbitration agreement and the arbitration shall be governed by the US Federal Arbitration Act.

Except for disputes directed referred to arbitration (enforcement of a failure to comply with a DAB decision or absence of appointment of a DAB), the arbitrators will have full powers to review the DAB decision and there will be no limitation to the evidence or arguments previously submitted to the DAB decision, which will be considered evidence.

The Panama Metro

This design and construction of the first line of the country's metro is a project estimated at $1.5 billion which is intended to provide Panama with a modern system of transportation, such as those in existence in Argentina, Brazil, Colombia, Chile, Mexico and other countries of the region. By 2014, Panama will be the ninth country in Latin America (and the first in Central America) to have a high-tech metro. The adjudication of this public contract was made by the end of 2010. It contains a dispute resolution section establishing that all disputes between the government and the contractor resulting from the contract shall be settled through negotiation and if not possible, through arbitration.

Within the dispute resolution section, the term "controversy" has been broadly defined as to include all disputes, controversies and claims resulting from or in connection with the contract, with the including of those related to the execution, interpretation, termination or invalidity of the same. Furthermore, in such cases where the dispute between the parties to the contract involve or relate to third parties, subcontractors or parent companies, their inclusion is permissible, once such request has been made by the contractor or the government, during or after the commencement of the arbitral proceeding.

In order to activate the dispute resolution clause, any party to the contract has to deliver a written notice to the other party indicating the existence of a controversy. From that moment, the parties will have 30 days or a longer period as agreed by the parties in writing, to amicably settle the disputes, otherwise the controversy would be submitted to binding arbitration. Finally, it is important to note that the arbitral proceeding may be initiated only after the parties have exhausted the negotiation phase.

As opposed to the arbitral proceedings under the Panama Canal expansion contract, the Metro Line 1 contract provides for a less complex formula, but one which is equally relevant for the foreign investor contracting with the Panamanian government, as the parties may end up arbitrating disputes in a national arbitral institution with experience on the field of international arbitration (in this case the CeCAP and its rules of arbitration).

Disputes or controversies arising between the contractor and the government will be settled through arbitration in law. As previously mentioned in this article, it is necessary for the parties to specify in the *clause compromisssoire* whether the arbitral proceeding will be conducted in equity or at law, otherwise under Panamanian law the arbitration shall be in equity.

The seat of the arbitration will be the Republic of Panama and Panamanian law will be the applicable law. Spanish will be the language of the arbitration, meaning that all documentation, hearings, and rulings in connection with the arbitration proceeding must be filed or conducted in Spanish.

Panama is keeping up with modern trends and is active in the use of ADR mechanisms on international public contracts for large scale projects. The country has adopted a pro-arbitration policy and is aware of foreign investors' need to resolve contractual disputes in neutral conditions: the country is heading in the right direction.

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About the author

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