

Top 10 litigation tips

Fernando Arias and **Claudio De Castro** of **Arias Fábrega & Fábrega** share their insights on litigating in the country and against local counterparties

Be cautious: have guaranties from your counterparty before there is a dispute

This suggestion is not only applicable when facing a Panamanian counterparty, but when facing counterparties in general. It is always advisable to hope for the best and prepare for the worst. Therefore, even when there is no dispute and when you are just entering into a transaction, it is always advisable to anticipate possible disputes between the parties. At this stage, it is important to ask oneself: is my counterparty giving me any guaranties? If so, are those guaranties sufficient?

In general, there are three types of guaranties that can be provided: (i) guaranties issued by a third party (who is solvent and has assets); (ii) guaranties over a specific asset; or (iii) personal guaranties.

The advantage of bank guaranties (for example, a standby letter of credit) or bonds issued by a third party (an insurance company) is that these guaranties are usually issued by a solid, solvent institution, who should have sufficient assets to cover the obligations of the party on behalf of whom the guaranty is issued. When dealing with this type of guaranty, one must always know under what circumstances one can call these guaranties, and be sure not to engage in any conduct that will affect the right to call these guaranties.

It is always advisable to hope for the best and prepare for the worst

Another type of guaranty is an in rem guaranty or a guaranty over specific assets (such as pledges and mortgages). When facing this type of guaranty, it is important to know the value of the assets over which the guaranty is being constituted. This can be verified with the use of experts (accountants and appraisers, for example). No one wants to be in a position where the value of the asset given as collateral is only a small percentage of the debt guaranteed by such asset.

The type of guaranty that one can always ask for are personal guaranties (such as acknowledgment of debt and promissory notes). This type of guaranty is not as convenient as the two types of guaranties previously described, since: (i) there is no commitment by a solid, solvent institution; and (ii) there is no collateral. This type of guaranty also entails the risk that the entity granting the guaranty could become bankrupt or find itself having no assets.

The best type of personal guaranty in Panama are those that give its holder the right to initiate executive proceedings (such as promissory notes), which are considerably faster than ordinary proceedings.

If a personal guaranty (including a parent company's guaranty) is not one that grants its holder the right to initiate executive proceedings, then such a document will merely be considered evidence to be used in an ordinary proceeding to demonstrate the existence of the obligation.

Beware of the corporate veil

A distinctive feature of the Panamanian judicial system is the courts' respect for the doctrine of the corporate veil. Courts are very reluctant to lift the corporate veil and will only do so in very limited circumstances (for example, in specific criminal investigations such as money laundry investigations).

Before entering into an agreement with a Panamanian company, it is important to have sufficient mechanisms and guaranties to execute the credit against that particular company. The fact that a Panamanian company is part of a solid and solvent group of companies does not mean that the other companies will be liable for that specific company's debts.

Beware of bankruptcies: no bankruptcy reorganisation available

The Panamanian legal system does not allow the reorganisation of a debtor's business affairs and assets.

Bankruptcy proceedings in Panama are basically liquidation proceedings. Once a Bankruptcy Court declares that a debtor is in state of bankruptcy, all its pending obligations will become due, its assets will be set aside, an administrator will be appointed, communications and mail of the bankrupt party will be withheld, creditors will be requested to submit their credits to the Bankruptcy Court for review by the administrator, and a meeting of creditors will be called.

Unsecured creditors should conduct a thorough analysis before requesting the bankruptcy of any of their debtors, because in bankruptcy proceedings, unsecured creditors will likely only recover a very small percentage of their credit (if any). This is why creditors are reluctant to request the bankruptcy of a company in Panama – and sometimes courts are also reluctant to grant such a request.

Be safe: use appropriate interim measures

Interim measures are very useful tools in any type of litigation.

There are a limited number of interim measures that can be issued in favour of local judicial proceedings, all of which are decided ex parte: (i) seizing the assets of the defendant; (ii) suspension orders regarding specific assets; and (iii) suspension orders against corporate decisions. Below we will discuss all of these measures.

Attaching or seizing assets (receivables, bank accounts and real estate properties) in Panama is a precautionary measure decided ex parte that aims to ensure the results of a judicial proceeding. When filing a complaint, or prior to doing so, a claimant can file a request to seize the assets of a defendant for the duration of the proceedings until there is a final and binding decision issued by a Panamanian court on the merits. For an attachment to be granted, a claimant does not have to provide prima facie evidence, but

only state that it is planning on filing a complaint and specify who will be the defendant. Once the request is reviewed, Panamanian courts will request that the petitioner post a security bond (in the form of cash, bonds of the Republic of Panama, bank or insurance guarantees), which amount is established at the court's discretion – usually between 30% to 40% of the amount requested to be seized. After posting the security bond, the court will proceed to grant the request for seizure.

Once the request for seizing assets is granted by a court, the petitioner has six working days to file a complaint (in the event that it has not yet done so). If the complaint is not filed within those six working days, the order for seizure will be lifted.

In the event that a final judgment is rendered in favour of the defendant, the defendant can request the amount of the bond as a payment of the damages suffered as a result of the attachment. If the defendant does not claim damages after three months following the issuance of the final and binding decision rejecting the claim, the bond will be returned to the claimant.

Another interim measure that can be requested from a Panamanian court is a decision ordering the defendant to stay or suspend any transaction, negotiation, innovation, transformation, operation or project in connection with the asset relating to the complaint being filed.

No one wants to be in a position where the value of the asset given as collateral is only a small percentage of the debt guaranteed by such asset

There are three conditions that must be fulfilled by the requesting party for a Panamanian court to issue a suspension regarding specific assets: (i) the claim must be an *in rem* claim, rather than an *in personam* claim; (ii) the court must consider, at its own discretion, that the stay or suspension will not cause irreparable damages; and (iii) the requesting party must post a bond, the amount of which is established at the court's discretion.

Any shareholder of a corporation limited by shares organised and existing under the laws of the Republic of Panama (*sociedad anónima*) has the right to request from the Panamanian courts a precautionary measure ordering the stay or suspension of the effects of any corporate decisions of such corporation.

There are three conditions that must be fulfilled by the requesting party for a Panamanian court to order the suspension of a corporate decision: (i) that the requesting party is a shareholder of the defendant company; (ii) that the requesting party has filed its request as an accessory measure to summary proceedings requesting that the corporate decision be declared null and void; and (iii) that the requesting party has filed its complaint within 30 calendar days from the day of the corporate decision. No bond or guarantee is required to be posted by the requesting party.

In addition to these interim measures (which can also be requested in favour of arbitration proceedings) there are other measures that can only be requested in favour of arbitration proceedings and not in favour of judicial proceedings in Panama.

These additional interim measures issued in favour of arbitration proceedings are broader and have a more general nature. Indeed, the law pro-

vides that interim measures in favour of arbitration proceedings (issued by either arbitrators or local courts) can be any type of measure that seeks to: (i) maintain or restore the status quo pending determination of the dispute; (ii) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitration proceedings itself; (iii) provide a means of preserving assets out of which a subsequent award may be satisfied; or, (iv) preserve evidence that may be relevant and material to the resolution of the dispute.

In contrast to interim measures issued in favour of local judicial proceedings, interim measures issued in favour of arbitration proceedings do not require the posting of a guarantee by the party requesting the measure. The Arbitration Act provides that the arbitration tribunal 'may' (not will) require the party requesting an interim measure to provide appropriate security in connection with the measure.

However, unlike interim measures issued in favour of local judicial proceedings, interim measures issued in favour of arbitration proceedings require *prima facie* evidence that there is a reasonable possibility that the requesting party will succeed on the merits of the claim. In addition, the party requesting the measure must satisfy the tribunal that harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm likely to affect the party against whom the measure would be directed.

This is a very high standard in comparison with the requirements for measures issued in favour of local judicial proceedings. The latter do not require *prima facie* evidence for the likelihood of success of the complaint, but usually (depending on the type of measure) only require the party requesting the measure to post a security bond before the court in order to cover any damages that could be caused to the party against whom the interim measure is issued.

Finally, in contrast to measures issued in favour of judicial proceedings, which can only be issued with regard to local proceedings, interim measures in favour of arbitration proceedings can be issued by local courts with regard to national and international arbitration proceedings, and in favour of arbitration proceedings in Panama or abroad.

Be sure to have evidence

Panamanian procedural laws do not provide for discovery. Therefore, each party should always prepare for an eventual litigation and document and save all evidence before any litigation starts.

Be patient: no motions for summary judgements or motions to dismiss

Panamanian procedural laws, unlike other jurisdictions, do not provide for motions for summary judgements or motions to dismiss. There are a limited number of defences that can be raised and that a court can decide on before issuing the final judgment on the merits (such as *res judicata*, previous judicial settlement, and previous withdrawal of the complaint with prejudice). The rest of the defences that are raised by the defendant (such as: statute of limitations; lack of standing of the claimant to sue; lack of standing of the defendant to be sued; and, absence of the obligation) are decided by the court in its final decision on the merits.

The practical effect of this is that a defendant party can find itself before Panamanian courts for many years before a final and binding decision that such party was wrongly sued or that the claim is time-barred.

Do your homework: seek out local counsel

This suggestion is not only applicable when dealing with litigation in Panama, but when dealing with any litigation outside of our own jurisdiction. When facing litigation in any jurisdiction with which you are not familiar, it is essential to retain local counsel who is intimately familiar with local law, courts and procedures. The counsel must understand your needs and goals, provide an accurate assessment of what the procedure will

be like (for example, timing and chances of success), and give you all the information you require to make informed decisions in connection with the litigation (for example, deciding to settle instead of continuing litigation). This is why it is vital to take the time to select the appropriate counsel with whom you will feel comfortable working and who will bring an added value to the matter.

Be involved: develop overall strategies

Even if you have retained local counsel, it is always advisable that you stay involved in the proceedings and that, together with your local counsel, you develop overall strategies regarding the litigation.

This involvement is also important when choosing arbitrators or experts, because this decision will have a significant impact on the outcome of the litigation.

Do not make assumptions regarding prevailing party attorneys' fees

The general rule in Panama is that the court will order the defeated party to cover the attorneys' fees of the prevailing party in the proceedings. These fees do not necessarily have to be the exact amount of attorneys' fees actually paid, since the court decides such an amount at its own discretion. However, the court can exempt the defeated party from paying attorneys' fees to the prevailing party, in the event that the court finds that the defeated party acted in good faith.

Moreover, any agreements that the parties may have entered into regarding attorneys' fees prior to the start of the litigation are null and void.

Be sure that you will be able to enforce decisions obtained abroad

In case you have chosen a forum other than Panama (either a foreign court or arbitration tribunal) but your counterparty is a Panamanian entity or has assets in Panama, you still have to think about enforcing a foreign decision or a foreign interim measure in Panama.

Therefore, it is always advisable that before obtaining such a foreign decision or foreign interim measure, that you know in advance whether or not it will be enforceable in Panama.

Foreign judgments may only be recognised and enforced by the courts of Panama provided that the Fourth Chamber of the Supreme Court of Panama validates the judgment by issuing a writ of *exequatur*. For a judgment to be validated through a writ of *exequatur*, the following requirements must be fulfilled: (i) the courts where the decision was issued must grant reciprocity to the enforcement of judgments from the courts of Panama; (ii) the party against whom the judgment was rendered must have been personally served of the proceedings that led to the issuing of the decision; (iii) the decision must arise out of a personal action against the defendant (it cannot arise out of an *in rem* action); (iv) the obligation in respect of which the decision was rendered must be lawful in Panama and the decision cannot contradict Panamanian public policy; (v) the decision that is filed before the Fourth Chamber of the Supreme Court of Panama must be legalised by means of diplomatic or consular officers of Panama or by means of the formalities of the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (the Apostille Convention); and, if the decision is in a language other than Spanish, it must be translated into Spanish by an authorised translator in Panama.

The Panamanian legal system does not have any express provisions allowing the enforcement or recognition of interim measures issued by foreign judicial tribunals. The Panamanian system only has provisions regarding the enforcement of final foreign judicial decisions deciding the merits of the matter.

Conversely, interim measures issued by foreign arbitration tribunals have been enforceable in Panama since January 2014, subject to the issuance of a writ of *exequatur* by the Fourth Chamber of the Supreme Court of Justice.



Fernando A Arias

Partner, Arias Fábrega & Fábrega
Panama
T: +507 205 7012
E: farias@arifa.com
W: www.arifa.com

About the author

Fernando A Arias joined Arias Fábrega & Fábrega (ARIFA) in 1984 and became a partner in 1995. He is a member of the firm's executive committee and operations committee. He is also head of the firm's corporate services practice group and co-head of its litigation and arbitration practice group.

Arias' practice focuses on litigation, with an emphasis on commercial and civil matters, taxation and administrative cases, corporations, and estates, trusts and foundations.

Arias has a JD from Drake University and a BA from Tulane University. He is admitted to practise in Panama.



Claudio De Castro

Associate, Arias Fábrega & Fábrega
Panama
T: +507 205 7000
E: cdecastro@arifa.com
W: www.arifa.com

About the author

Claudio De Castro has been an associate of ARIFA since 2011. His practice focusses on litigation, with an emphasis on commercial and civil matters and administrative cases.

Before joining the firm, De Castro worked in the international arbitration field in Paris and London. He also participated as an arbitrator in the Willem C Vis International Commercial Arbitration Moot in Vienna and is an ambassador for the Arbitration Academy.

De Castro has a postgraduate degree in international commercial litigation from the Université Paris Est (UPEC), a Masters in international commercial law from the Université Paris 1 Panthéon-Sorbonne and a Bachelor of Laws from Santa Maria La Antigua University, Panama. He is admitted to practise in Panama.