THE ARBITRATION REVIEW OF THE AMERICAS 2015

Published by Global Arbitration Review
in association with

Arias, Fábrega & Fábrega (ARIFA)

The international journal of commercial and treaty arbitration

www.GlobalArbitrationReview.com

Panama

Claudio De Castro
Arias, Fábrega & Fábrega (ARIFA)

In an effort to continue pursuing the pro-arbitration avenue, to redress some of the confusing provisions of the previous arbitration act that differed from international tendencies and to address some of the relevant and current issues being discussed in the international arbitration community, on 31 December 2013, the National Assembly of Panama adopted Law No. 131 of 2013, which regulates national and international commercial arbitration in Panama (the Arbitration Act).[1] The Arbitration Act 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 other additional provisions.

Panama is no stranger to promoting arbitration: it is a party to the main conventions on international arbitration, such as the Inter-American Convention on International Commercial Arbitration,[2] the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards[3] and the Convention on the Settlement of Investment Disputes between States and Nationals of other States.[4]

In 2004, the Panamanian Constitution was amended[5] 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. These constitutional amendments also included the express mention of the capacity of the government to be a party to arbitration proceedings without the need for 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. 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 Previous Act).[6] This was Panama's first attempt to enact a modern legislation on arbitration (prior to the Previous 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 Previous Act contained some provisions that differed from the uniform international tendencies. For example, if the parties did not agree otherwise, or if the chosen rules of arbitration did not provide otherwise, the default rule was that the arbitral tribunal decided the case ex aequo et bono or as amiable compositeur. The Previous Act also provided that, in ex aequo et bono arbitration proceedings, the arbitral tribunal applied its 'free criteria' and the awards did not need to be reasoned.

This chapter discusses the key changes introduced by the Arbitration Act, with special focus on changes regarding interim measures in favour of arbitration proceedings.

What's new?

Among the various changes introduced by the Arbitration Act, the following are worth mentioning:

Amiable compositeur is no longer the general rule

As mentioned above, the Previous Act provided that if the parties did not agree otherwise, or if the chosen arbitration rules did not provide otherwise, the default rule was that the arbitrators would decide the case ex aequo et bono or as amiable compositeurs. The Arbitration Act redresses this provision to follow the global tendency, which is to consider that the arbitrators can only act as amiable compositeurs when expressly agreed by the parties (article 56 of the Arbitration Act).

Interpretation based on general arbitration principles

All issues related to the Arbitration Act that are not expressly regulated therein will be decided in conformity with the 'general principles of arbitration' (article 6 of the Arbitration Act). 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'.

Reasoned awards as a general rule

Contrary to the Previous Act, which seemed to exempt ex aequo et bono arbitral tribunals from issuing reasoned awards, the reasoning of all awards is now mandatory, unless the parties agree that no reasons shall be given or unless the award contains the terms of a settlement by the parties (article 60(2) of the Arbitration Act).

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 Arbitration Act does not force the arbitral tribunal to apply 'conflict of laws rules', but rather allows it to directly apply the 'rules of law' it considers appropriate without going thru the process of using conflict of law rules to find such applicable law (article 56(2) of the Arbitration Act). 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.

Default number of arbitrators

Parties may freely agree on the number of arbitrators provided it is an uneven number. The Arbitration Act also establishes that the default number of arbitrators shall be one unless otherwise agreed by the parties. Other exceptions to this rule are the cases where the state or a state entity is involved, in which case the number of arbitrators shall always be three (article 19 of the Arbitration Act). This provision differs from the Previous Act, which fixed the default number of arbitrators at three for any case.

Enforcement of international arbitral awards rendered in Panama

Contrary to the Previous Act – according to which the enforcement of arbitral awards rendered in international arbitration proceedings was subject to the issuance of a writ of exequatur by the Supreme Court of Panama, even in cases when the seat of the arbitration was Panama – the Arbitration Act establishes that the enforcement of international arbitration awards rendered in Panama can be requested directly to local courts without prior issuance of a writ of exequatur (article 70 of the Arbitration Act).

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

The Previous Act provided that the language to be used in the arbitral proceedings would always be Spanish when both parties were Panamanians. In contrast, the Arbitration Act has adopted a more international approach, mirroring the UNCITRAL Model Law by establishing that, if the parties do not agree on the language, the arbitral tribunal shall determine the language or languages to be used in the proceedings (article 49 of the Arbitration Act).

Delay for issuing the arbitral award

The Previous Act provided that, unless otherwise provided by the parties, the arbitral tribunal had to issue the award six months after the acceptance of the appointment by the last arbitrator, and that this period could be extended according to the will of the parties or to the applicable rules.

In contrast, the Arbitration Act establishes a difference between domestic and international arbitration with regards to this matter (article 55 of the Arbitration Act). For domestic arbitrations, the Arbitration Act follows the tendency of the Previous Act by establishing a delay to the issuing of the award. This delay is two months after the filing of 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 Arbitration Act follows the tendency of the UNCITRAL Model Law, which does not establish such delay and allows this to be decided by the parties, the applicable rules or, in the absence of such, the arbitral tribunal.

Protection of arbitral decisions from writs of amparo

In Panama, 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 available whenever all other available remedies have been used.

The Panamanian courts have, on 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 to the availability of the writ to set aside (or annul) the arbitration award as a means to judicially control the final arbitral award once the arbitration proceedings have concluded, in addition to the judicial control of the final arbitral awards when their recognition and enforcement is sought.

Therefore, with the intention of putting an end to the discussion of whether or not a decision from an arbitral tribunal could be subject to a writ of *amparo*, the Arbitration Act expressly establishes that in the matters governed therein, local courts cannot intervene and do not have jurisdiction, except in cases expressly established by the law (eg, assistance with the taking of evidence, assistance regarding interim measures, setting aside of arbitral awards) (article 11 of the Arbitration Act).

Moreover, the Arbitration Act also establishes that the request to set aside arbitral awards is the only available action to protect any constitutional right violated or threatened within the arbitral proceedings or by the arbitral award (article 66 of the Arbitration Act).

What's new with regards to interim measures?

Despite the importance of the aforementioned amendments to the Panamanian arbitration legislation, in our view, one of the main changes introduced by the Arbitration Act is the treatment of interim measures in favour of arbitration proceedings. Therefore, we will discuss issues related to interim measures and arbitration proceedings under Panamanian law.

Interim measures in favour of local judicial proceedings

The Panamanian legal system has a limited number of interim measures that may be requested in favour of local judicial proceedings (eg, seizure, suspension of acts related to assets, suspension of corporate decisions, measures to preserve evidence, etc), which are decided by local Courts ex parte and, therefore, the defendant is only notified of the request for interim measures once the measure has been adopted and executed.

Moreover, the scope and effect of interim measures as defined in Panama is very limited (numerus clausus) since Law No. 19 of 26 March 2013 repealed article 569 of the Judicial Code, which previously granted local Courts the possibility of adopting general interim measures.

The previous treatment of interim measures in favour of arbitration proceedings

The Previous Act provided that, unless otherwise agreed by the parties, the arbitral tribunal could, at the request of one of the parties, grant the interim or protective measures that the tribunal considered necessary. This very general provision of the Previous Act did not regulate in detail how interim measures worked in favour of arbitration proceedings. For example, it was not clear if the interim measures issued by arbitral tribunals were the same as the ones issued by local courts; if interim measures by arbitral tribunals could be issued via ex parte proceedings without notifying the party against who the measure was sought – such as interim measures in favour of local judicial proceedings; or if there was a difference between interim measures issued by local courts in favour of arbitration proceedings and interim measures issued by arbitral tribunals in favour of arbitration proceedings.

According to the Previous Act, the arbitral tribunal had the possibility (not the obligation) of requiring the party requesting the measure to provide appropriate guaranties. For the enforcement of these measures, the arbitral tribunal could request the assistance of the Circuit Courts.

Because of the vagueness of this provision of the Previous Act, what regularly happened in practice was that:

- interim measures issued by arbitral tribunals were also granted ex parte – as previously explained, interim measures issued in favour of judicial proceedings are granted ex parte and since the Previous Act did not provide otherwise, a local approach was used to treat interim measures;
- interim measures issued by arbitral tribunals, contrary to those granted by local courts, did not necessarily required the posting of guaranties by the party requesting the measure;
- interim measures issued by arbitral tribunals could be as broad as interim measures issued by local courts under article 569 of the Judicial Code (as mentioned before, until the enactment of Law No. 19 26 March 2013, local courts had the power to order any and all interim measures which they considered appropriate); and
- since there was no express provision regarding the recognition and enforcement of interim measures issued by arbitral tribunals seating abroad (and since our Judicial Code only contemplates the possibility of enforcing 'final' judicial decisions issued abroad), such measures could not be recognised and enforced in Panama.

The current treatment of interim measures in favour of arbitration proceedings

The Arbitration Act mirrors, almost identically, Chapter IV of the UNCITRAL Model Law. The new Arbitration Act introduced some changes regarding the treatment of interim measures in favour of arbitration proceedings, in comparison with the situation under the Previous Act and with the situation of interim measures issued in favour of local judicial proceedings.

Contrary to interim measures issued in favour of local judicial proceedings, interim measures issued in favour of arbitral proceedings are broad and general, since they seek to:

- maintain or restore the status quo pending determination of the dispute;
- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- provide a means of preserving assets out of which a subsequent award may be satisfied; or
- preserve evidence that may be relevant and material to the resolution of the dispute.

Therefore, it could be understood that, in a certain way, arbitrators have more freedom than local courts when issuing interim measures. This is because arbitral tribunals can issue general (not specific) measures while local courts are constrained to issue specific interim measures that appear expressly listed in Panamanian law (eg, seizure, suspension orders, etc).

Contrary to interim measures issued in favour of local judicial proceedings, it could be considered that interim measures issued in favour of arbitral proceedings are not decided ex parte. There is no express provision in the Arbitration Act stating that arbitral tribunals must hear all parties before deciding a request for an interim measure. However, the Arbitration Act does specify that preliminary orders are granted 'without notice to any other party', and does not specify this with regards to interim measures.

This lack of specification (that arbitral tribunals must hear all parties before deciding a request for an interim measure) could cause some confusion. The UNCITRAL Model Law was drafted with the preconceived idea that idea interim measures issued by arbitral tribunals are decided with the audience of all interested parties, while in Panama, local practitioners have the preconceived idea that interim measures are granted ex parte, since this is the regular treatment for interim measures issued by local courts.

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

Contrary to interim measures issued in favour of local judicial proceedings, interim measures issued in favour of arbitral 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 shall 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 that is likely to result to the party against whom the measure is directed if the measure is granted.

This is a very high standard in comparison with the requirements for measures issued in favour of local judicial proceedings, which do not require prima facie evidence for the likelihood of success of the complaint, but usually (and 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.

The enforcement of interim measures issued by arbitral tribunals seated abroad is now possible in Panama, subject to the issuance of a writ of exequatur by the Fourth Chamber of the Supreme Court of Justice.

In this regard, foreign arbitration proceedings could be considered to have a clear advantage over foreign judicial proceedings since the Panamanian legal system does not have any express provision regulating the recognition and enforcement of interim measures issued by foreign judicial authorities, only provisions regarding the enforcement of final foreign judicial decisions on the merits.

Moreover, the arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted or that granted a local court in favour of the arbitration proceedings, upon application of any party. In exceptional circumstances and upon prior notice to the parties, the arbitral tribunal may also modify, suspend or terminate such interim measure on its own initiative.

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.

Local courts also have the power to issue interim measures in relation to arbitration proceedings, irrespective of the place of arbitration. This is also a clear advantage over foreign judicial proceedings since the Panamanian legal system does not have any express provision that allows for local courts to issue interim measures in favour of foreign judicial proceedings.

Conclusion

As a service-based economy, Panama meets all the practical conditions to be a popular seat of arbitration: a strategic geographic location; a historic transit hub; a dollarised economy; suitable and available infrastructure; and qualified bilingual personnel to assist the arbitral tribunal.

With regards to the legal conditions to be a popular seat of arbitration, the Arbitration Act, including its provisions on interim measures, is a step forward for pro-arbitration policy in Panama.

To continue pursuing this pro-arbitration policy, it is important to construe the Arbitration Act under the spirit of the UNCITRAL Model Law, which is to protect and respect the legitimate expectations and will of the parties who entered into an arbitration agreement to have their disputes settled through arbitration and that such expectations may not be undermined.

Notes

1 Law No. 131 of 31 December 2013, published in Official Gazette No. 27449-C of 8 January 2014.

2 Law No. 11 of 23 October 1975, published in Official Gazette No. 18056 of 30 March 1976.

3 Law No. 5 of 25 October 1983, published in Official Gazette No. 20079 of 15 June 1984.

4 Law No. 13 of 3 January 1996, published in Official Gazette No. 22947 of 8 January 1996.

5 Legislative Act No. 1 of 27 July 2004, published in Official Gazette No. 25176 of 15 November 2004.

6 Law Decree No. 5 of 8 July 1999, published in Official Gazette No. 23837 of 10 July 1999.

Claudio De Castro
Arias, Fábrega & Fábrega (ARIFA)

Claudio De Castro has been an associate of the firm since 2011. His practice focuses on litigation with emphasis on commercial and civil matters and administrative cases. Prior to joining the firm, Mr De Castro worked in the international arbitration field in Paris and London.

Mr De Castro has participated as an arbitrator in the Willem C Vis International Commercial Arbitration Moot in Vienna and is an ambassador for the Arbitration Academy.

ARIFA

ARIAS, FABREGA & FABREGA

Plaza 2000, 16th Floor, 50th Street
PO Box 0816-01098
Panama, Republic of Panama
Tel: +507 205 7000
Fax: +507 205 7001/02

Claudio De Castro
cdecastro@arifa.com

www.arifa.com

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.

ABA Section of International Law
Your Gateway to International Practice

Strategic Research Sponsor of the
ABA Section of International Law

Law
Business
Research

THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012

 ISSN 1759-6416