The Arbitration Review of the Americas 2020

Published by Global Arbitration Review in association with

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A Global Arbitration Review Special Report

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This article was first published in July 2019
For further information please contact Natalie.Clarke@lbresearch.com

The Arbitration Review of the Americas 2020

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Cover iStock.com/blackdovfx

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ISBN: 978-1-83862-207-7

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

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Country chapters

Welcome to *The Arbitration Review of the Americas 2020*, one of *Global Arbitration Review*'s annual, yearbook-style reports.

Global Arbitration Review, for anyone unfamiliar, is the online home for international arbitration specialists everywhere, telling them all they need to know about everything that matters.

Throughout the year, *GAR* delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our GAR Live banner) and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a series of regional reviews – online and in print – that go deeper into local developments than our journalistic output is able. *The Arbitration Review of the Americas*, which you are reading, is part of that series. It recaps the recent past and adds insight and thought-leadership from the pen of pre-eminent practitioners from around North and Latin America.

Across 17 chapters, and spanning 107 pages, this edition provides an invaluable retrospective, from 35 leading figures. All contributors are vetted for their standing and knowledge before being invited to take part. Together, our contributors capture and interpret the most substantial recent international arbitration events of the year just gone, supported by footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular country as a seat.

This edition covers Argentina, Bolivia, Canada, Colombia, Ecuador, Mexico, Panama and the United States; has an overview on Brazil's national obsession with corruption and how that is playing into arbitration; and an update on how Mexico's federal courts have started to deal with the personal injunctions that had brought its prospects to a grinding halt as a seat.

Among the other nuggets it contains:

- a deep dive on the battle playing out, in the US courts, between owners of intra-EU investment awards and Spain and the European Commission;
- the strides being taken across the Caribbean to embrace international arbitration;
- a technique arbitrators can use to sense check a valuator's assertions, using a company's audited financial statements; and
- a comparison of USMCA (the new NAFTA) with NAFTA, and what the changes mean – along with an analysis of one of the first case to consider the clash between the environmental and the investor pledges in DR-CAFTA.

Plus much, much more. We hope you enjoy the review. If you have any suggestions for future editions, or want to take part in this annual project, my colleague and I would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels
Publisher
July 2019

Panama

José Carrizo
Morgan & Morgan

Decree Law No. 5 of 1999, which established the regime for general arbitration, conciliation and mediation, reformed the rules on arbitration, contained at that time in the Judicial Code.

Subsequent to Legislative Act No. 1 of 2004, Panama passed a constitutional reform according to which article 202 of the Political Constitution was modified as follows:

> *The Judicial Body is composed of the Supreme Court of Justice, the tribunals and the courts of justice that the Law may establish. The administration of justice may also be exercised by the arbitration jurisdiction as the law may determine. The arbitration courts may hear and decide by themselves on their own competence.*

The constitutional reform mentioned above has given constitutional autonomy to arbitration as a jurisdictional forum for the solution of controversies by decision of the parties.

The arbitration system in Panama is essentially of a consensual and contractual nature. Likewise, article 5(1) of Law No. 131 provides that arbitration is a method of solving conflicts 'whereby any person with juridical capacity to be bound submits the controversies that arise or that might arise with another person to the judgment of one or more arbitrators'.

There are not many works on the subject of arbitration in Panama. However, a high degree of consensus is observed on the subject with respect to the fact that the nature of arbitration is essentially contractual.

It could then be said that the general rule is that arbitration only binds the parties who have submitted contractually to this way of solving disputes. It is true that the doctrine considers that in the arbitration systems of a contractual legal structure some hypotheses may appear wherein a third party is bound to the arbitration agreement, such as the cession of contract, the merger, subrogation (insurance contract cases), novation or assignment of debt.

It should be emphasised that pursuant to Panama's private law legislation – the doctrine and the jurisprudence – the contract binds only the contracting parties. Article 1108 of the Civil Code is very clear in noting as follows:

> *Contracts produce effect only between the parties who execute it and their heirs, except with respect to the latter, the case wherein the rights are not transmissible, or by reason of their nature, or by agreement, or by a provision of law.*

The Panamanian jurisprudence has also recognised the principle of the relativity of contracts.

The fact of whether a corporation has taken part in the negotiation of the contract does not imply adhesion to the agreement set forth in the contract, which should be done expressly by the legal representative of those corporations or by an attorney for them with a power expressly granted to that effect, such as it is stated with absolute clarity in article 1110 of the Civil Code ('No one may contract in the name of another without being authorised thereby or without having by law its legal representation') and in any case, as noted in the following paragraph, with express power to bind them by arbitration.

It should be added that the Constitution itself in article 202 provides that 'arbitration courts may hear and decide on their own competence', without prejudice, certainly, of the judicial revision of the award by the courts or of the analysis made by the Supreme Court of Justice at the time of analysing whether a foreign arbitral award may be enforced in Panama.

Jurisprudence confirms the exceptional character of the extension of the arbitration agreement onto third parties. I refer to the judgment of 5 July 2010 pronounced by the Fourth Courtroom of the Supreme Court, which annulled an arbitration award that extended the arbitration clause to a third party that was not a signatory to the contract by reason of considering that the arbitration court did not have the power to extend such arbitration clause to a third party as per Panamanian law.

The elements of this case are as follows:

- an arbitration agreement was entered between two persons within an agreement for the licence of use of a mark;
- the plaintiff initiated an arbitration proceeding against a third party, with whom he had entered into a different contract (partnership and commercialisation agreement) but that did not contain an arbitration clause;
- the arbitration court considered that a natural person and the plaintiff had as their stockholders a preponderant position with respect to the third party;
- the third party whose contract did not contain an arbitration clause was bound to the process by the court and condemned to pay an amount of money; and
- the Fourth Courtroom of the Supreme Court nullified the award that extended the arbitration to the third party and set forth as follows:

> *In connection with the third cause of annulment, the appellant alleges the absence of competence of the arbitration court and we observe that, in the case of the nullity subject matter hereof, the right and desire of the parties to submit to arbitration stems from the will agreed in Clause Twenty-fifth of the Partnership Agreement subscribed between the corporation EMPRESA HOPSA, S.A. and the Panamanian corporation named M2 PANAMA, INC. Notwithstanding the foregoing, we observe that the Arbitration Court duly constituted to hear only the contract that contained such arbitration clause, declared itself competent to hear additionally about other contracts and agreements, which had not been submitted to Arbitration and wherein it was visibly violated the will of third parties not making part of the arbitration proceedings. For such reason, we coincide with the appellant that the decision of the Arbitration Court in Equity, regarding its competence exceeded wrongly its capacity to hear and decide the totality of the conflicts submitted to*

their consideration by EMPRESAS HOPSA, S.A., under the pretext that they were accessory contracts, that followed the same line as the main contract, whereon falls the arbitration process.

It results that with such principle it was ignored the will of all and particularly that of the third parties who were submitted to an arbitration in equity against their will, since, such as Boutin says, it is indispensable the autonomy of the will of the parties and in the case subject matter hereof, we observe how other contracts and agreements are taken to arbitration, which either do not contain an arbitration clause or if they do, they do so at Law and not in Equity. In connection with it, the first cause alleged by the appellant is accepted, since it is within the causes for annulment described in Decree Law 5.

For the purpose of adapting its legislation to the advance of international trade, Panama adopted, by means of Law No. 131 of 31 December 2013, a new national and international commercial regime, which constitutes the legal reference parameter for arbitration of controversies in those cases wherein the parties have agreed on the adoption of special rules of procedure (eg, ICC and UNCITRAL).

Law No. 131, currently in effect, covers, among various aspects, the following.

- International and national arbitrations. The former refers to arbitrations wherein the parties have their establishments in different places, their seat is located outside of Panama or otherwise the compliance of one substantial part of the obligations is located outside of Panama. National arbitration, meanwhile, refers to arbitrations that have their seat in Panama.
- Although the principle that the basis of arbitration is essentially contractual is maintained, in exceptional circumstances an extension is allowed to parties that are not signatories thereof.
- The parties may determine of their own free will the number of arbitrators, provided that it is an odd number. If no agreement is reached, it shall be one sole arbitrator.
- Arbitrators may be of any nationality, unless there is an agreement between the parties to the contrary.
- The arbitration court, save for an agreement to the contrary between the parties, may order precautionary measures. Judicial courts are likewise allowed to decree precautionary measures.
- Judicial courts may also decree precautionary measures to the service of arbitration proceedings, regardless of whether they are substantiated in the country of their jurisdiction.
- The parties may determine of their own free will the seat of the arbitration, as well as the application of a foreign law and language.
- A nullity action may be brought against partial or final awards before the Fourth Chamber of the Supreme Court.

Awards are subject to nullity motions that are filed with the Supreme Court of Justice

- Article 67 of Law No. 131 provides six different grounds for annulment, each of which applies in the case at hand and any of which justifies the annulment of the award.
- Paragraph (1) of article 67 of Law No. 131 provides for annulment where 'one of the parties to the arbitration agreement . . . was suffering from any incapacity, or that said agreement is invalid, as regards the law the parties chose to govern it, or if nothing had been said in relation to this matter, in accordance with the Panamanian Law'.
- Paragraph (2) of article 67 of Law No. 131 provides for annulment where 'one of the parties has not been duly notified about the appointment of an arbitrator, or on the arbitration proceedings, or it was not able to, for any other reason, enforce its rights'.
- Paragraph (3) of article 67 of Law No. 131 provides for annulment where 'the award makes reference to a dispute that has not been provided for in the arbitration agreement or contains decisions that go beyond the terms of the arbitration agreement'.
- For non-arbitrable matters, the Supreme Court has indicated that disputes relating to matters that are not freely available to the parties, such as those related to protection functions or guardianship of persons, cannot be subject to arbitration. Also those regulated by mandatory rules of law.
- In accordance with international public order, it is not possible to ignore the superiority of the Political Constitution of the Republic of Panama over other rules, so that any provision contained in acts, resolutions or judgments and so on, that are not in accordance with the Constitution, should be deemed unconstitutional.
- The pending of the annulment by the Panamanian court prevents its execution.

Rules applicable to the enforcement of foreign awards

The general rules applicable to the enforcement of foreign arbitral awards in Panama are the following.

- Foreign awards shall have the legal effect and strength given to them pursuant to international covenants or treaties on enforcement of foreign awards executed and ratified by both Panama and the government of the country in which the award was rendered.
- If there are no such covenants or treaties between Panama and the state in which the award was rendered, the judgment can be executed in the territory of Panama, provided that the country in which the award was rendered provides reciprocity for the execution of Panamanian awards in their territory.
- The foreign award should come from a state that executes Panamanian awards rendered by Panamanian courts. In the event that this type of reciprocity does not exist, Panamanian law does not give strength or legal effect to awards rendered by courts of countries that do not provide such reciprocity. Such enforcement is carried out in Panama through exequatur proceedings.

The Procedural Code of Panama provides that the requirements for executing a foreign award in Panamanian territory are the following:

- that the foreign award was rendered as a consequence of the exercise of an action in personam, with the exception of what the law especially regulates for probate matters commenced in other countries;
- that the foreign award was rendered as part of a proceeding in which the lawsuit was personally served to the defendant;
- that the obligation that is sought to be enforced in Panama is legal in the territory of Panama; and
- that the copy of the foreign award must be authentic (that is, it must have been authenticated either by the Panamanian consul of the place where it was issued or by an apostille prior to its submission in Panama as part of the request of enforcement).

The Procedural Code also establishes the procedural steps that must be followed to obtain the award, as outlined below.

A request has to be made and presented to the Fourth Chamber of the Supreme Court of Panama for it to decide if the foreign award can or cannot be enforced in Panama.

The Fourth Chamber will deliver a copy of the request to the party that has to comply with the enforcement and to the Attorney General of Panama, giving each a term of five days in which each may submit arguments in connection with the enforcement of the applicable award. If all parties agree on its enforcement, the Chamber continues with proceedings.

If the parties do not agree, the Supreme Court must give them a period of three days to file evidence and 15 days to prepare such evidence (ie, carry out the proceedings or other acts necessary to obtain the evidence). The Court may grant an extraordinary evidentiary term if there was evidence that had to be collected in another country.

When the evidence has already been presented and the preparation of the evidence has concluded, the Supreme Court shall give three days to each party to submit their closing arguments (briefs).

After the closing arguments are presented by the parties, the Fourth Chamber shall decide if the foreign award can or cannot be enforced in Panama. If it decides that it can be enforced, it will send the case file to a competent tribunal that will proceed with the enforcement.

Law No. 131 regulates the arbitration process for foreign arbitral awards and their enforcement in Panama. To this effect it states that the competent chamber for the recognition and enforcement of foreign arbitral awards is the Fourth Chamber of the Supreme Court. It also establishes the requirements the party has to fulfil for the arbitral award to be enforced. To this effect, the party must enclose the following documents:

- an authentic copy or certified copy of the arbitration award; and
- an authentic copy or certified copy of the arbitration agreement (including an official translation if the arbitration was not held in Spanish). Panama is a state party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

Article IV of the Convention establishes what documents the party has to supply when requesting the enforcement of the arbitration award. To this effect, the documents are the same as those set out in Panama's internal legislation.

Article III of the Convention establishes the obligation of the contracting states to recognise arbitral awards as binding as well as enforce them in accordance with the rules of procedure of the territory where the award is relied upon (the same rules of procedure are those mentioned previously).

The statute of limitation for the purposes of filing a motion seeking enforcement of a foreign judgment is seven years from the date of the ruling issued. However, based on some rulings issued by the Supreme Court, the statute of limitation could depend on the nature of the obligation: seven years for civil obligations and five years for commercial obligations.

On the other hand, it is possible to file a motion to attach assets of the defendant. However, since the proceedings for the recognition and further executions of an award are not ex parte, it is advisable to file a separate legal action before a circuit court and as part of such proceedings, a motion could be filed to attach assets of the defendant. It would be an advantage in this scenario to get those precautionary measures ex parte.

The Panamanian judicial system accepts solely the doctrine of lifting of the veil. The general rule is that in Panama's judicial system, a company or corporation is respected as such, therefore civil liability falls exclusively upon the corporation itself.

Panamanian jurisprudence and doctrine has set forth the limits within which the corporate veil can be lifted: essentially, for the investigation of crimes committed in Panama and to establish the patrimonial liability against those that actually control the corporation. It may also be applied, for example, to discern the true owner of the funds deposited in the bank account of a corporation that has no operations that generate income since either the person who disposed of the funds misappropriated them (crime) or acted properly as their legitimate owner.

In the event that none of the limited assumptions wherein the Panamanian law admits the doctrine of the corporate lifting of the veil, such theory provides no ground for having as the defendant in an arbitration process stockholders of a company debtor or juridical persons that are not part of the contract.

José Carrizo
Morgan & Morgan

José Carrizo joined Morgan & Morgan in 2003 and is currently a partner in the litigation and dispute resolution department. Mr Carrizo focuses on complex matters related to civil, criminal, administrative, commercial, banking and insurance litigation.

His experience covers all kinds of litigation proceedings contemplated in Panamanian law before the different jurisdictional organs of Panama including civil, administrative and criminal courts. Furthermore, Mr Carrizo has ample experience in both domestic and international arbitration processes.

His client portfolio includes well-known private companies, banking and financial entities, and multinational corporations that carry out operations in Panama.

Mr Carrizo has been recommended as a leading individual in *Chambers and Partners* and *The Legal 500* in the area of dispute resolution.

He is also involved in pro bono activities and regularly assists legal open houses organised by the firm in very low-income communities to provide free legal orientation on subjects such as family law, domestic violence, labour law, immigration and litigation.

Mr Carrizo graduated in 1996 from Santa María La Antigua Catholic University in law and political science. In 2003, he completed his master's degree at Externado University of Colombia, specialising in civil liability.

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Morgan & Morgan is a full-service Panamanian law firm, regularly assisting local and foreign corporations from different industries, as well as the most important financial institutions and government entities. The firm has a solid legal department with specialised services to give an effective answer to the needs of our clientele when doing business in Panama.

On litigation matters, Morgan & Morgan covers all kinds of litigation proceedings contemplated in Panamanian law before the different jurisdictional organs of the Republic of Panama including civil, administrative and criminal courts. Our attorneys have solid academic backgrounds and experience, and form a highly skilled team capable of effectively attending any litigious or other adversarial matters placed in their hands.

Furthermore, the firm has ample experience in arbitration processes both domestic and international. Our team is known for having a leading and active practice across a broad range of issues in Panama and the region. Recent work includes assisting Panama Ports Company (a member of Hutchinson Ports Holding) in an international arbitration on a port concession administrative agreement resolved under the Rules of the Chamber of Commerce of Quito, Ecuador. The firm also represented Environmental Solutions Corporation in a litigation process regarding an emissions reduction purchase agreement resolved under the Rules of the Conciliation and Arbitration Center of Panama wherein we successfully won the case.

Our client portfolio includes well-known corporations, and banking and financial institutions, such as the AES Corporation, Banistmo, Panama Ports Company, Minera Panamá, Telefónica, Tropigas, Petrobunker, Assa Insurance Company and Cemex.

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THE ARBITRATION REVIEW OF THE AMERICAS 2020 ISBN: 978-1-83862-207-7