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Panama: arbitration with the state and state entities

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Summary

IN SUMMARY

The past few years have seen exponential growth in the number of arbitrations with the state and state entities, particularly in major infrastructure contracts. This article provides an overview of the recent legal developments regarding the use of arbitration as an alternative to the courts in public procurement and public–private partnership contracts. It also addresses Panama's experience in investment arbitration cases and highlights its participation in UNCITRAL Working Group III.

DISCUSSION POINTS

- Arbitration under the public–private partnership regime
- Arbitration under the Public Procurement Law
- Panama's experience in investment arbitration and parallel proceedings
- Investor–state dispute settlement (ISDS) reform

REFERENCED IN THIS ARTICLE

- Panama's Political Constitution (as amended by Legislative Act No.1 of 2004)
- Law 131 of 31 December 2013 (Arbitration Law)
- Law 93 of 19 September 2019 (PPP Law)
- Unique Text of the Law on Public Procurement (Law 22 of 2006, as restated by Law 153 of 2020)
- *Jean-Mark Parienti v ATTT*, of 20 September 2006
- *SPRT Marketing Group SA v FEDEBIS*, of 28 July 2015
- *Omega v Republic of Panama* (ICSID Case No. ARB/16/42)
- *IBT v Republic of Panama* (ICSID Case No. ARB/21/34)
- *Sacyr SA v Republic of Panama* (ICSID Case No. UNCT/18/6)
- *Webuild SpA (formerly Salini Impregilo SpA) v Republic of Panama* (ICSID Case No. ARB/20/10)

Panama's Constitution recognises the power of the state to submit a dispute to arbitration through contractual arbitration agreements. Additionally, since 2004, the Constitution expressly admits the competence-competence principle, according to which arbitral tribunals may determine their own jurisdiction under the arbitration agreement.

Panama's arbitration system is governed by Law No.131 of 2013 (the Arbitration Law). Regarding the matters that may be submitted to arbitration (objective arbitrability), article 4 of the Arbitration Law provides:

> When the arbitration is international and one of the parties is a state or a company, organisation or enterprise controlled by a state, that party shall not invoke the prerogatives of its own laws to avoid its obligations arising from the arbitration agreement.

Although Panama's Arbitration Law is modelled on the UNCITRAL Model Law, this provision is rooted not in the Model Law but in the international principle by which a state shall not invoke provisions of its internal law to justify its failure to perform an international obligation.-[1]

Furthermore, article 14 of the Arbitration Law states:

> The Panamanian state will submit to international arbitration the disputes arising from treaties or international agreements to which it is a party, and which have been duly ratified, in cases in which arbitration has been agreed as a method of dispute resolution.
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> . . . . .
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> The submission to arbitration agreed with the Panamanian state, as well as with the Panama Canal Authority, is valid, regarding the contracts that they enter into. The arbitration agreement shall be effective by itself, in accordance with the provisions of this Law.

Panama's Arbitration Law provides that the state may submit its contractual disputes to international arbitration.[2] This has been recognised by the Supreme Court on multiple occasions.[3] However, when the seat of the arbitration is Panama, the Public Prosecutor's Office must be notified in addition to the state entity involved in the dispute. The public prosecutor has the constitutional role of defending the interests of the state.[4]

In ***Parienti v ATTT,*** the Supreme Court annulled the award, among other grounds, because the state was not given notice.[5] This case involved a concession contract for public passenger transport services and land transport terminals. However, the arbitration was not based on the contract but on the bilateral investment treaty between France and Panama.-[6] Thus, the state, and not only the ATTT should have been notified of the arbitration proceedings. Likewise, in the ***FEDEBEIS*** case, the award was annulled by the Supreme Court because the state (the public prosecutor) was not given notice.[7] ***FEDEBEIS*** (Panama's baseball federation) is a non-profit organisation, part of the Panamanian Institute of Sports (PANDEPORTES), and therefore, the public prosecutor should have been notified of the arbitral proceedings.

Two recent laws reaffirm the power of the state to be a party in arbitration proceedings: the Public-Private Partnership (PPP) Law and the Public Procurement Law. These are not, however, the only ways that the state may participate in arbitration. In fact, each of the investor-state dispute settlement (ISDS) proceedings where Panama is or was a party is grounded on an international investment agreement (IIA), and not an investment contract.

ARBITRATION UNDER THE PUBLIC–PRIVATE PARTNERSHIP REGIME

In 2019, the National Assembly passed Law 93 establishing the PPP regime in Panama. Before its enactment, Panama had adopted laws that privatised state-owned entities, and developed infrastructure and public services projects through joint ventures with private capital. The basis for the administrative concession system for the execution of public work of public interest was Law 5 of 1988,[8] applicable to construction, improvement, maintenance and exploration of roads or other works classified as of public interest.

Law 93 of 2019 defines PPPs as a long-term contract between one or more public entities,[9] and a legal person from the private sector, for the 'design, construction, repair, expansion, financing, exploitation, operation, maintenance, administration or supply of a good or service to the public entity contracting party or the end-users of any public service' (article 3). As such, PPPs are commonly seen as a way of structuring public infrastructure investments, enabling the government to transfer costs and liabilities to the private sector.

PPP contracts must include a phase of amicable dispute resolution between the contracting parties for disputes of a technical or economic nature during the execution of the PPP contract. If an amicable solution between the parties cannot be reached, disputes may be submitted to a dispute board (technical panel) or directly to arbitration. This is a major change in Panama's public policy as it expressly allows for arbitration in PPP agreements.

According to article 77 of Law 93 of 2019, the technical panel shall be composed of two attorneys, two engineers and one economist or financial expert. Any of the parties may submit any technical or economic controversy to the technical panel, which will issue a technical recommendation. This recommendation shall be duly reasoned, but it will not bind the parties. A party who disagrees with the decision of the technical panel may submit a claim to arbitration for a final decision.

Parties to the PPP contract may submit to arbitration the controversies or claims due to the interpretation or application of the PPP contract or its execution (article 78). The PPP contracts shall include not only the arbitration clause but also the rules applicable to the arbitration procedure. However, the Law includes three requirements: (i) the applicable law to the process shall be that of the Republic of Panama; (ii) the seat of the arbitration must be Panama; and (iii) the language of the proceedings shall be Spanish. The arbitration is subject to Panama's Arbitration Law, as modified by the PPP Law and the arbitration clause incorporated in the PPP contract.

One interesting point covered by Law 93 of 2019 is the participation in the arbitration procedure of secured creditors under the PPP contract, which will be without transfer of possession of the pledged rights and assets. In other words, arbitral tribunals must admit the creditors as independent third parties in the arbitration proceedings. It is expected that these creditors will have independent claims in the arbitration.

ARBITRATION UNDER THE PUBLIC PROCUREMENT LAW

Public Procurement is regulated in Panama by Law 22 of 2006, as restated by Law 153 of 2020,[10] which applies to concessions and other agreements not regulated by a specific law and provides guidelines for public procurement agreements and the bidding process (article 1). Bidding processes are monitored by the Public Procurement Directorate.

The 2020 Law restatement, at article 95, expressly provides for arbitration as a way to resolve the controversies that may arise in the execution of a public procurement contract. In this sense, public entities may include an arbitration clause in their contract specifications or their contracts.

Arbitrations arising from public contracting are subject to the rules of Law 131 of 2013, which regulates national and international arbitration in Panama. As for the arbitration clauses under the APP contract regime, the seat of the arbitration shall be the Republic of Panama, and the language shall be Spanish. At the time of writing, the government had not yet regulated for arbitration proceedings under the Public Procurement Law. However, one can

infer certain rules that may apply in the arbitration involving public entities.[11] For instance, the existence of an administrative contract termination clause, which is required by the Public Procurement Law, shall not constitute a waiver of arbitral jurisdiction.

Furthermore, under article 17 of Law 131 of 2013, the arbitration clause generates substantive and procedural effects. The substantive effect obliges the parties to comply with the arbitration agreement, submit the controversy to arbitration and formalise the constitution of the arbitral tribunal. The procedural effect consists of the declination of jurisdiction by the contracting entity, the administrative authority, the judicial court or the administrative court of public procurement, and the immediate referral of the case to the arbitral tribunal without further processing or assessing the claims.

Another advantage of submitting a public procurement agreement to arbitration under Law 131 of 2013 is that the tribunal's decision may only be challenged in an annulment proceeding. According to article 66, annulment is the most appropriate recourse to the protection of a constitutional right that might have been threatened or violated in the course of the arbitration or by the award. Article 67 provides the grounds for annulment, which are rooted in those of the New York Convention[12] and the Panama Convention, and are summarised below:[13]

- one of the parties to the arbitration agreement was under some incapacity, or the agreement is not valid, under the law to which the parties have subjected it, or in accordance with Panamanian Law;
- one of the parties was not given proper notice of the appointment of an arbitrator or the arbitration proceedings, or was otherwise unable to present its case;
- the award deals with a difference not contemplated by or failing within the terms of the arbitration agreement or contains decisions that go beyond its terms;
- the appointment of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the applicable law;
- the arbitrators have decided on matters not capable of settlement by arbitration;
- the international award is contrary to international public policy.

The execution of the award will be suspended until the Supreme Court decides on the request for annulment.

INVESTMENT ARBITRATION AND PARALLEL PROCEEDINGS

Panama has signed 25 bilateral investment treaties (BITs), of which 20 are in force. Panama is also a party to 13 free trade agreements (FTAs) with investment chapters (11 in force).-[14] These IIAs impose international standards and rules on the government regarding the treatment of foreign investments and investors. In addition, all of the BITs and most of the FTAs ratified by Panama allow foreign investors in PPPs and other concession contracts to pursue the state through arbitration.

Further, Panama ratified the ICSID Convention on 8 April 1996, which entered into force on 8 May 1996.[15] The Ministry of Economy and Finances (MEF) represents Panama before the board of governors of the World Bank and is responsible for managing ICSID membership. MEF manages ISDS through the office in charge of investment arbitrations, which takes part in arbitration proceedings and oversees the procurement of external counsel for each of the ISDS cases.

The first case against Panama was registered in December 2006. Since then, the number of cases has grown exponentially. To date, Panama has faced 14 cases under the ICSID Convention and two known cases under the UNCITRAL Arbitration Rules. Currently, there are 10 pending cases against Panama based on an investment treaty; and at least half of these are construction-related projects. More importantly, a single case may involve several infrastructure contracts.

That is the case of ***Omega v Republic of Panama***,[16] involving eight different construction projects, pertaining to a variety of state infrastructure matters (contracts with the Ministry of Health, Ministry of the Presidency, National Institute of Culture, Judiciary, Municipality of Colon and Municipality of Panama), and based on the Panama–United States Trade Promotion Agreement (TPA). Likewise, in ***IBT v Republic of Panama***, the claimants submitted a request for arbitration under the TPA, the Treaty between the United States and the Republic of Panama concerning the Treatment and Protection of Investment, and the Treaty on Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Republic of Panama (TBI Panama-Spain), in relation to 13 infrastructure contracts: four hospital projects with the Ministry of Health, a haemodialysis service project with the Social Security Fund of Panama, five contracts with the Ministry of Housing and Land Management of Panama, two projects for the construction of schools with the Ministry of Education, and one project for the construction and equipment of a women rehabilitation's centre with the Ministry of Government.[17]

Moreover, some of these construction project agreements include an arbitration clause, which could form the basis of parallel proceedings: one based on the construction contract, and the other one based on an IIA. For instance, in ***Sacyr SA v Panama,*** Spanish company Sacyr sued under the UNCITRAL Arbitration Rules for the alleged violation of the TBI Panama-Spain;[18] even though arbitrations were pending before the Court of Arbitration of the International Chamber of Commerce filed by ***Grupo Unidos Por El Canal*** (GUPC) Consortium against the Panama Canal Authority (ACP) for alleged cost overruns arising from the Panama Canal expansion project. Similarly, in 2020, ***Webuild*** (formerly ***Salini Impregilo SpA***), another company of the GUPC Consortium sued the Republic of Panama, this time under the Investment Promotion and Protection Agreement between Panama and Italy.[19] Like in ***Sacyr***, the subject matter of the arbitration relates to the Panama Canal expansion project.

This case is perhaps the most emblematic example that the Republic of Panama has had to face, where the investor, despite having triggered the contract forum, sued the host state in parallel proceedings because it considers that the rights guaranteed by the investment protection treaty had been violated.[20] Not only the basis of the claim but also the defendants differ in both arbitrations: the Republic of Panama and the ACP. This is not an isolated case and may occur in the context of large infrastructure projects involving complex operations that may give rise to multiple disputes throughout the life of the project.

The multiplicity of arbitration procedures as in ***Sacyr/Webuild/GUPC v Panama/ACP***, derived from the breach of a contract and a treaty, causes the potential risk of double recovery.-[21] Moreover, the same infrastructure project may imply the existence of a multiplicity of contracts between different parties (contractors and subcontractors), which in turn may give rise to various disputes subject to parallel arbitration proceedings. In this sense, if the parties have not agreed on accumulation or coordination measures between the different, related

processes, the risk of parallel proceedings becomes imminent, bringing with it a series of additional costs for the parties.

PANAMA'S INPUT INTO UNCITRAL ISDS REFORM

In 2017, UNCITRAL Working Group III on ISDS reform received the mandate to focus on the reform of procedural aspects of ISDS, with the mission of: '(i) identifying and considering concerns regarding ISDS; (ii) considering whether reform was desirable in the light of any identified concerns; and (iii) if so, developing any relevant solutions to be recommended to the Commission.'[22] Possible solutions, as proposed by some states, include the development of soft law instruments, the establishment of an appeal mechanism and the creation of a multilateral investment court.[23] It is too early, however, to determine what would be the concrete solutions that Working Group III will recommend to the Commission for approval.

Panama is currently a member of the Commission[24] and participates in the discussions of Working Group III, through the office in charge of investment arbitrations at MEF. Panama has made submissions on different topics, including comments on the different versions of the Draft Code of Conduct for Adjudicators in International Investment Disputes, and the establishment of an Advisory Centre on International Investment Law. However, Panama, like many other countries, has not taken a stance on some of the proposals under discussion, including the options for establishing an appellate mechanism (ie, standing or permanent body versus roster model), or the establishment of a standing multilateral mechanism. Indeed, it seems too premature to take a position on some of the topics.

In a consultation made to the Attorney General's Office on the advisability of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the Mauritius Convention on Transparency), it highlighted the importance of Panama's participation in the Working Group III discussions. Furthermore, the future adoption of the Mauritius Convention on Transparency represents a willingness of the state to improve transparency in ISDS, contributing to the legitimacy of the ISDS system.

Endnotes

1 Article 27 of the Vienna Convention on the Law of Treaties (1969), available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf- , accessed 2 May 2022. ^ Back to section

2 A similar provision was in force in the previous arbitration law (Decree-Law 5 of 1999) in the following terms: 'The submission to arbitration agreed upon by the State, autonomous entities, semi-autonomous entities, including the Panama Canal Authority, with respect to the contracts that they sign in the present or in the future. Likewise, they may be subject to international arbitration when the capacity of the state and other public persons is established by an international treaty or convention. The arbitration agreement established in this manner will be effective by itself and will not require the approval of the Cabinet Council and the favourable opinion of the Attorney General.' However, prior to the constitutional reform of 2004, the Supreme Court of Justice declared unconstitutional the phrase 'The arbitration agreement thus established will be effective by itself and will not require the approval of the Cabinet Council and the favourable opinion of the Attorney General of the Nation'. Action challenging the constitutionality of article 7 of the Decree-Law 5 of 1999, Decision of 11 June 2003, Judicial record, June 2003. ^ Back to section

3 See for example, ***Panama Supreme Court, Central de Fianzas SA v Ministerio de Obras Públicas***, Decision of 25 November 2002. ^ Back to section

4 Article 220 of the Constitution. ^ Back to section

5 Panama Supreme Court, ***Jean-Mark Parienti v Land Transport Authority (ATTT)***, annulment decision of 20 September 2006, Judicial Registry of September 2006, available at: https://www.organojudicial.gob.pa/uploads/blogs.dir/1/2019/07/406/registro-judicial-septiembre-2006.pdf, accessed 15 May 2022. ^ Back to section

6 Investment protection agreement between France and Panama, 5 November 1982, available at: http://www.sice.oas.org/Investment/BITSbyCountry/BITs/PAN_FRA_s.pdf, accessed 2 May 2022. ^ Back to section

7 Panama Supreme Court, ***SPRT Marketing Group SA v FEDEBIS-***, annulment decision of 28 July 2015, p. 466, available at: https://www.organojudicial.gob.pa/uploads/wp_repo/uploads/2015/06/rj2015-08.pdf, 2 May 2022. ^ Back to section

8 Law 5 of 15 April 1988, establishing the public works execution system and regulating the administrative concession system, GO 21030, https://docs.panama.justia.com/federales/leyes/5-de-1988-apr-18-1988.pdf. ^ Back to section

9 Law 93 of 2019 at article 2 excludes certain public entities from its scope, such as the Panama Canal Authority, the Institute of National Aqueducts and Sewers, the Social Security Fund, the National Bank of Panama, the Agricultural Development Bank, the National Mortgage Bank, the Superintendency of the Stock Market, the Superintendency of Banks, public security services, medical health services, public education services and metallic mineral extraction concessions. ^ Back to section

10 Unique text of Law 22 of 27 June 2006, which regulates the public procurement, as restated by Law 153 of 2020, GO 29107-A, available at: https://www.tacp.gob.pa/tmp/file/3255/Texto-Unico-de-la-Ley-22-de-2006-ordenado-por-la-Ley-153-de-2020.pdf, accessed 5 May 2022. Back to section

11 Public entities include state entities, municipalities, community boards, financial intermediaries and corporations in which the state owns 51 per cent of the shares or assets, as well as those carrying out public funds or national assets. Back to section

12 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf, accessed 6 May 2022. Panama has been a contracting state of the New York Convention since January 1985. Back to section

13 Inter-American Convention on International Commercial Arbitration, concluded at Panama City on 30 January 1975, available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201438/volume-1438-I-24384-English.pdf, accessed 8 May 2022. Back to section

14 Panama does not have an official model BIT. Most BITs negotiated by the Ministry of Foreign Affairs are old-generation investment treaties concluded in the 1990s. The FTA investment chapters negotiated by the Ministry of Trade and Industries are more modern and follow other model BITs such as the 2012 US Model BIT. Most of the FTA investment chapters include pre-establishment rights of national and most favoured nation treatment for admission and establishment, subject to a series of exceptions. Back to section

15 Law 13 of 3 January 1996, GO 22947 of 8 January 1996, available at: https://docs.panama.justia.com/federales/leyes/13-de-1996-jan-8-1996.pdf, accessed 10 May 2022. Back to section

16 *Omega Engineering LLC and Oscar Rivera v Republic of Panama* (ICSID Case No. ARB/16/42). Back to section

17 *IBT Group LLC, IBT LLC and Eurofinsa Concesiones e Inversiones SL v Republic of Panama* (ICSID Case No. ARB/21/34). Back to section

18 *Sacyr SA v Republic of Panama* (ICSID Case No. UNCT/18/6), available at: https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=UNCT/18/6, accessed 10 May 2022. Back to section

19 *Webuild SpA (formerly Salini Impregilo SpA) v Republic of Panama* (ICSID Case No. ARB/20/10), available at: https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/10, accessed 10 May 2022. Back to section

20 Richard Kleinder, 'Arbitral Forum Shopping', in ICC, *Parallel State and Arbitral Procedures in International Arbitration* (2005) 205-163. Back to section

21 Andrea K Bjorklund, 'Private Rights and Public International Law: Why Competition among International Economic Law Tribunals is Not Working' (2007) 59 Hastings LJ 241, 243. Back to section

22 UNCITRAL, 'Official Records of the General Assembly, Seventy-second Session, Suppl N 17, paras 263-264. A/72/17, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V17/058/89/PDF/V1705889.pdf?OpenElement, accessed 11 May 2022. Back to section

23 Margie-Lys Jaime, 'A New Framework for Improving Investor-State Dispute Settlement (ISDS)' in Loïc Cadiet et al (eds) ***Privatizing Dispute Resolution*** (Nomos 2019) 485, 515. Back to section

24 Panama was a Member of the Commission from 2013 to 2019; between 2019 and 2022, it participated as an observer in the Working Group meetings. Panama was recently elected as a member and will continue to participate in this capacity until 2028. Back to section

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