Arbitration in Panama

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Panama's geographic location, its international banking centre, flexible corporate regime and its canal, are what make this country interesting for foreign and domestic investors. These investors need fast and effective mechanisms to solve any controversies that may arise due to their business activities, without the complications, costs and delays that are known in civil courts of justice.

Regulation of arbitration was first set forth in chapter IV of title XII, of the Second Book of the Judicial Code of Panama. This regulation was later superseded and replaced by means of Law Decree No. 5 of 8 July 1999, and ever since this subject has been regulated in an autonomous manner.

Law Decree No. 5 faced initial obstacles which caused some of its articles to be declared unconstitutional due to conflicts with provisions in the 1972 Constitution of Panama. The constitution contains rigid schemes that made it impossible to include an efficient arbitration model in Panama. Owing to this, during 2004 the government of Panama amended the constitution and included the figure of arbitration in Panama.

Henceforth, article 200 of the constitution, now establishes that the president and the ministers of state (the Cabinet Council) will be able to decide jointly with the president of the republic to submit to arbitration matters to which the Panamanian state is a party to, subject to favourable concept of the attorney general of the nation.

Another significant advance was the modification of article 202 of the constitution, so that the administration of justice could also be exercised by means of an arbitration jurisdiction, but always according to that determined by law. Likewise, it is now possible that the arbitration courts can review and decide by themselves regarding their jurisdiction. This reform created the possibility for the arbitration court to function without the need of another court questioning the legitimate right of the parties to file their controversy before a third party named by them and which is to decide the conflict.

Recently, Law 15 dated 22 May 2006 reinstated articles 7 and 17 of Law Decree No. 5, which had been declared unconstitutional owing to rulings of 11 June 2003 and 13 December 2001, issued by the Supreme Court of Justice of Panama. With the re-establishment of article 7 of Law Decree No. 5, the arbitration agreement is defined as the means whereby the parties decide to subject to arbitration the controversies that arise or may arise between them, from a juristic relationship, whether it is contractual or not. The norm even establishes arbitration when a previous arbitral agreement does not exist and a conflict arises. In these cases, one of the parties will provide a notice to the other expressing their decision to submit the conflict to arbitration. The required party will have seven business days to designate its arbitrators. The referred Law 15 of 2006 introduces this in article 7-A of Law Decree No. 5, developing in this manner numeral 4 of article 200 of the Constitution of Panama. According to this legal provision, the submission to arbitration agreed by the state, autonomous or semi-autonomous entities, as well as the Authority of the Panama Canal is valid, regarding contracts that these entities enter into in the present or future. The arbitration agreement established in this manner is effective on its own.

For those cases where a contract lacking an arbitration clause has been entered into and a conflict arises, in order to subject it to the arbitration procedure it is necessary to secure the approval of the Cabinet Council and the favourable opinion of the attorney general of the nation. It is observed that the norm offers flexibility for the cases where the state of Panama contracts with some clause of arbitration. But for the cases where there exist conflicts with the state of Panama without the referred clause, the legal requirement must be met, in accordance with numeral 4 of article 200 of the constitution. In this particular situation, the favourable opinion of the attorney general is required.

Types

The main element of arbitration is the principle of the autonomous will of the parties, granting supremacy to this versus the principle of free access to the governmental jurisdiction. Further to this principle, the parties replace the traditional judicial mechanisms to resolve their controversies by means of arbitration.

The new legislation has substantially varied from the Civil Code (article 1510) with regard to the capacity of those who can submit their controversies to arbitration. Whereas the Civil Code limited this to those with the sufficient capacity to reach an agreement, Law Decree No. 5 makes it mandatory for those that wish to submit a controversy to arbitration to have the capacity to commit. This variation is because the capacity to commit one's self is broader than the capacity to reach an agreement. Any person can commit himself, but to be able to dispose of the assets, he requires an express capacity.

Arbitration in Panama has evolved through time, having changed its valuation criteria. Initially, its detractors maintained that the power to grant justice is unique, exclusive and not transferable by the state and, consequently, this mission should not be left in the hands of individuals. Also, it was pointed out that this constitutional right is essentially free, in contrast with the excessively onerous character of the arbitration process.

But, this criterion has varied to such a point that the same Judicial Code in its article 3 recognises that sometimes individuals can also grant justice, referring to the case of arbitrators, clearly as a consequence of the postulates found in article 202 of the Constitution of Panama.

In Panama, the enactment of Law Decree No. 5 was well received by other jurisdictions such as labour and maritime, which may be the reason why it has been used often. In this sense, in Panama, it has turned into a general practice to submit controversies to arbitration, whereby the parties indicate that the applicable law (substantive) is the Panamanian due to its versatility, endowed with mercantile elements which correlate to the new requirements of international commerce and with procedures such as those of the ICC, with total independence, if the venue of the arbitration court is within or outside the Republic of Panama.

With regard to the types of arbitration, this can be in equity

or law, as per the decision of the parties. If it is in law, the arbitrators must solve according to the rules of law and, if it is in equity, according to their faithful knowledge and understanding.

If nothing is mentioned regarding the matter, it is understood that it will be done in equity. This is a difference in comparison with the regulation of the Judicial Code that in case of lack of information, the arbitration wil be in law. Law Decree No. 5 also sets forth that in any case there is the possibility to name foreign arbitrators and, if it is in law, the arbitrator must be bachelor of law or juris doctor.

The arbitration can be ad hoc or institutionalised. It will be ad hoc if it is undertaken according to the rules of procedure specially established by the parties for the specific case, without submitting to the Regulation for Arbitration, Conciliation and Mediation of the Center of Conciliation and Arbitration of Panama (the Regulation). Nevertheless, this arbitration will be subject to the regulation of Law Decree No. 5. The arbitration will be institutionalised, if it is practiced by an authorised arbitral institution.

The arbitration agreement

The arbitration agreement is defined as the means whereby the parties decide to subject to arbitration any controversies that arise or may arise between them, from a juristic contractual relationship or not (article 7 of Law Decree No. 5).

In this sense, the agreement is understood as the desire of the parties to solve the controversies by means of the establishment of arbitration. The arbitration agreement can adopt the form of a clause included in the contract, an independent agreement or a unilateral declaration followed by acceptance from the other parties. In any case, the autonomous character of the agreement is recognised in such a manner that it survives even when the contract is declared void.

The agreement shall always be in writing, it being understood that if the arbitration is accepted by both parties their will to submit go to arbitration procedure is accredited by means of a document exchanged between the parties (be it by fax, telex, electronic mail or any other form of communication). We must indicate that this represents an advance towards the simplification tools of Law Decree No. 5 with respect to the provisions of the Judicial Code, which required that the same be evidenced in a public deed, a private document or the judicial minutes.

Regarding the procedural effects of the arbitration agreement, it is important to comment regarding the inhibition by the ordinary courts to review the claims related to an arbitral agreement, as per the international treaties that regulate arbitration. Law Decree No. 5 instructs the judge to reject the suit and resend it immediately to the arbitration court. Even when the law suit is filing, the arbitral proceedings will continue. The same is ordered in the event that the controversy has been decided by a governmental, municipal or provincial entity.

Formation of the arbitral court

Law Decree No. 5 has promoted the principles for the formation of the arbitral court, respecting the will of the parties. The designation of the arbitrators proposed by the parties is made in the initiation writ or in the defence to the initial request for arbitration. If the parties do not state anything regarding the number of arbitrators, the arbitral court will be comprised of three arbitrators if the process is of a non-determined or higher amount, and of one arbitrator if it is of a lesser sum.

The parties have the right to name a referee within the 20 days following the requirement of the other party. In ad hoc or special arbitration, if a party does not name an arbitrator in the established term, the arbitration will be performed with the designated arbitrator.

Finally, the arbitral court will be constituted with the acceptance of the last arbitrator. Once the court is constituted, if it is deemed pertinent, a secretary will be named, according to the procedure or according to the same court. With respect to this matter, we should not forget that the position of secretary implies an additional cost, which is why the naming of such should be avoided if it is not necessary.

Procedure

For the initial phase, the arbitral court will decide on its jurisdiction and the scope of the same, as well as regarding the disability, non-existence or deficiency of the arbitration agreement or the lack of solution by arbitration for the controversy. This jurisdiction can be opposed by means of annulment action before the Fourth Chamber of the Supreme Court of Justice or within the proceeding of recognition and execution of the judgment.

If it is the case, the exception of forum non conveiniens of the arbitral court must be filed no later with the reply writ to the suit, and it will be decided within the period of one month counted from its constitution. This rule is brought to legal life by Law 15 of 2006 .

The beginning of the procedure in itself is done by means of the arbitration petition provided by any one of the parties to the secretary general of arbitration, which is detaileded in article 10 of the Law Decree No. 5. It is important regarding this item to indicate that the petition must be accompanied by the provision of funds established, because no request will be processed until this requirement is met.

The procedure is adjusted by the parties or according to the applicable regulation, considering the principles of contradiction, officious impulse and faithful collaboration of the parties.

Within the 10 business days following the constitution of the court, if the provision of funds has been made with the request, the arbitral court will direct itself to the parties providing a term of 10 business days to complete the initial request of arbitration and its response.

With their respective writs, the parties must make reference to their evidence; their exceptions (incompetence, disability, statute of limitations, inefficiency of the arbitration agreement or lack of possibility for arbitration of the controversy) and the defendant can, in its reply, reconvene (the costs are processed separately in this case for both suits).

The arbitration court will practise the admission of testimonies or any other evidence for which it will have a maximum term of 20 days, which can be extended according to the difficulty in the practice or discovery abroad.

Arbitral judgment

The arbitral judgment is the final decision rendered by the arbitral court regarding the items that have been submitted to arbitration.

It must be said that depending on the type of arbitration - in law or equity - the judgment must be reasoned. In the case of arbitration in equity, the arbitrators (whose denomination was changed in Spanish from *arbitradores* to *árbitros* was kept in the Judicial Code) will decide according to their free criteria, their faithful knowledge and understanding. If it is in law, however, it must be motivated and based on the contract, on the uses of commerce and on the principles of contracts of international trade of UNIDROIT.

In case of disagreement between the arbitrators, the decision of the majority will prevail and if there is no majority, it will be

decided by the president of the court of arbitration, admitting the salvage of vote of the non-agreeing arbitrator.

Last, the judgment ought to gather that set forth in article 34 of Law Decreee No. 5, and specifically decide regardingthe costs.

The judgment will be served by the means agreed to by the parties or according to that established in the Law Decree No. 5, by means of the appearance of the parties, their representatives or counsellers for the complete reading of the judgment.

The judgment may be corrected (arithmetically or for typing errors), clarified or interpreted within the term of five business days as of its notification, at the request of a party, and if nothing to the contrary has been arranged. The judgment is definitive and has been granted the character of judged issue, to be opposed only by means of an annulment action due to one of the reasons listed in Law Decree No. 5 (most causes are due to form).

The competent court will be the Fourth Chamber of the Supreme Court of Justice, and the annulment action is filed in writing, accompanied by the pertinent evidences and the served judgment, granting copy to the other parties of the process, who may oppose it in the term of 20 business days. If there are evidences to be performed, they will be done in 20 business days and it will be resolved in 15. The decision of the court admits no further recourse.

Recognition and execution of foreign judgments

The execution of the judgment foresees the copy to the other party for 15 days, who in the event of not in agreement with the same can only allege that it is pending the nullity recourse.

The recognition of the arbitration judgment is completed:

- if the judgment is issued outside the territory of Panama; or
- if the judgment is dictated within the territory of Panama, but within the process of an international commercial arbitration.

In these two cases, the judgment has to be recognised by the Fourth Chamber of the court, by means of a foreign judgment execution process (exequatur). Its recognition can only be denied if one of the causes listed in article 41 of Law Decree No. 5 is applicable (mostly regarding formality).

International arbitration

International commercial arbitration, at a national level, is a new concept introduced by Law Decree No. 5. This figure comes to life when the object or legal business contains elements from abroad, or with enough significant elements that define it as such, or also that, according to the rule of conflict of forum, it qualifies as international. Regarding this matter, the Law Decree indicates the parameters under which it is to be considered an international commercial arbitration in its article 5, lex cit in agreement with article 41 and 42 of same legal except.

Regarding this matter, Law Decree No. 5 indicates that when an international commercial arbitration is agreed, the parties can agree or the Law Decree No. 5 establishes the waiver of the annulment action. This waiver is presumed, except where there is agreement to the contrary. Additionally, Law Decree No. 5 establishes special provisions for this arbitration, such as:

- the capacity of the parties will be governed by the personal law (the law of the country of origin, where the party came from, rules all matters of its capacity); and
- as for the validity and effects of the agreement, it will be subject to the law designated by the parties on their own or through the regulation of an institution of arbitration. owing to absence of the second, it shall be in accordance with the law of the place where the arbitral judgment is to be issued, and if there is no determination of this, the law of the place where the agreement was executed. In default of the second, Panamanian law will be applicable.

The possibility of the application of foreign law is considered if it has been agreed by the parties for arbitration by law. Failing this, the law that the arbitrators freely choose will be applied, applying or not a conflict provision, without denaturing the will of the parties.

In any event, the uses of trade and the rules of private international contracting will be taken into consideration. Second, the Civil Code will rule regarding elements of internationality or from abroad.

International treaties and agreements in force in Panama: With respect to these, we have:

Code of Bustamante

This instrument approved in 1928 has considered the existence of sentences issued by arbitrators, if the matter admits arbitration according to the law of the country where the execution is requested.

Law 11 dated 1975 whereby the Inter-American Convention regarding International Commercial Arbitration is approved (the Panama Convention)

This convention, sponsored by the member states of the Organisation of American States, directs the application of international arbitration to matters of mercantile nature, only.

New York Convention dated 1958 regarding Recognition and Execution of Foreign Arbitral Awards (the New York Convention)

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In conclusion, Panama enters the 21st century with a renewed legal structure so as to consolidate the acceptance that this forum has found by nationals and foreigners alike for the solution of their controversies. The Panamanian government has taken the initiative to provide the next steps and this is the path to be followed by this nation.