

The International Comparative Legal Guide to:

International Arbitration 2008

A practical insight to cross-border International Arbitration work



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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of Costa Rica?

It must be in writing and reflect the clear agreement of the parties to submit the disputes to arbitration.

1.2 Are there any special requirements or formalities required if an individual person is a party to a commercial transaction which includes an arbitration agreement?

None other than what is expressed in the answer to question 1.1.

1.3 What other elements ought to be incorporated in an arbitration agreement?

You must indicate if: it is a local or international arbitration; if local or foreign law is applicable; if it is an ad hoc arbitration or an institutional one; and if it is an arbitration of law or equity.

1.4 What has been the approach of the national courts to the enforcement of arbitration agreements?

The national courts have accepted the enforcement provided that the process has complied with the basic principles of due process.

1.5 What has been the approach of the national courts to the enforcement of ADR agreements?

Please see the answer to question 1.4.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration agreements in Costa Rica?

It is governed by Costa Rican law.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do the laws differ?

Yes, the same law does govern both domestic and international arbitration for enforcement.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the governing law and the Model Law?

The law governing international arbitration in Costa Rica is not based on, and is different to, the UNCITRAL Model.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of Costa Rica? What is the general approach used in determining whether or not a dispute is “arbitrable”?

All economic disputes can be subject to arbitration.

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

Yes, an arbitrator is permitted to rule on the question of his or her own jurisdiction.

3.3 What is the approach of the national courts in Costa Rica towards a party who commences court proceedings in apparent breach of an arbitration agreement?

An exception is filed arguing that the matter must be resolved by arbitration in accordance with the agreement of the parties (exception of “clausula compromisoria”). It is an exception that must be resolved by the court before analysing the merits of the case.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal?

Any disputes with respect to jurisdiction or competence must be resolved by the arbitral tribunal itself however whatever is resolved by them can be appealed to the supreme court of Costa Rica for a final decision. This could happen in all cases.

3.5 Under what, if any, circumstances does the national law of Costa Rica allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

In general terms there are no circumstances in which this can

happen, although in some cases there have been interpretations concluding that certain parties that did not agree in writing on the clause are subject to it because it is clear that they understood and accepted the clause and agreed to become parties to such agreement. Nevertheless, the principle is clearly that arbitration is a choice that must be expressly agreed by the parties.

4 Selection of Arbitral Tribunal

4.1 Are there any limits to the parties' autonomy to select arbitrators?

No, provided the clause is written correctly there are no limits. In arbitration of law the arbitrators must be Costa Rican attorneys with certain qualifications, regardless of the fact that the arbitration is local or international. This has been an issue in international arbitrations entertained in certain institutions since the list of arbitrators might not include Costa Rican attorneys.

4.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes. If the clause is not clear in determining if it is an arbitration of law or equity it is one of law. The law has the procedure to appoint arbitrators.

4.3 Can a court intervene in the selection of arbitrators? If so, how?

If the parties have not clearly agreed on the selection of arbitrators the secretary of the Supreme Court can be requested to appoint the arbitrator(s).

4.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality?

The same required for judges as indicated in the applicable legislation, which reflect general principles of independence.

5 Procedural Rules

5.1 Are there laws or rules governing the procedure of arbitration in Costa Rica? If so, do those laws or rules apply to all arbitral proceedings sited in Costa Rica?

The arbitration law of Costa Rica includes an arbitration procedure that shall be followed if no specific procedures have been agreed by the parties either by creating a case-by-case procedure or by referring the matter to a centre with its own rules (local or international).

5.2 In arbitration proceedings conducted in Costa Rica, are there any particular procedural steps that are required by law?

The law contains a procedure to follow if no specific reference is made to a centre with its own rules, local or international. That procedure does have certain steps that must be taken.

5.3 Are there any rules that govern the conduct of an arbitration hearing?

There are only very general rules that govern the conduct of an

arbitration hearing, all regarding the need to document the hearings.

5.4 What powers and duties does the national law of Costa Rica impose upon arbitrators?

The powers and duties that the national law of Costa Rica imposes upon arbitrators are equal to those of judges in judicial procedures.

5.5 Do the national courts have jurisdiction to deal with procedural issues arising during arbitration?

The Supreme Court could only nullify the arbitration award to resolve competence in an appeal and to assure due process. There are very specific reasons why an arbitration award can be nullified. The idea is that the award is reviewed by the Supreme Court to assure that certain general principles were respected and that there are no material and clear inconsistencies in the resolution. The resolution on the merits should not be reviewed by the court, at least in principle.

5.6 Are there any special considerations for conducting multiparty arbitrations in Costa Rica (including in the appointment of arbitrators)? Under what circumstances, if any, can multiple arbitrations (either arising under the same agreement or different agreements) be consolidated in one proceeding? Under what circumstances, if any, can third parties intervene in or join an arbitration proceeding?

There are no specific regulations on this matter.

5.7 What is the approach of the national courts in Costa Rica towards *ex parte* procedures in the context of international arbitration?

To our knowledge, there are no precedents in national courts.

6 Preliminary Relief and Interim Measures

6.1 Under the governing law, is an arbitrator permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

No. Any party to an arbitration procedure could always request preliminary or interim relief to courts. Even the arbitrators can request a court to proceed, either upon request of a party to the arbitrator or at its own discretion.

6.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Yes, in all cases such request shall be made. Please see question 6.1.

6.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Any request for interim relief in Costa Rica is difficult. Most courts normally take the approach that the resolution on the merits could always repair the damage caused. There are exceptions to this but

those are rare, although lately the courts have recognised that in some cases damages are not sufficient and therefore have granted interim relief.

6.4 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

No, the national law does not allow for this.

7 Evidentiary Matters

7.1 What rules of evidence (if any) apply to arbitral proceedings in Costa Rica?

The parties must offer proof together with their initial filing of claim or reply, respectfully. They must list all documents, witnesses, expert reports, etc. that they require as evidence. Notwithstanding the above, the arbitrators or institution in charge may change the rules or the parties can set out certain rules of evidence in the agreement.

7.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure of discovery (including third party disclosure)?

There are no specific limits on this scope. The arbitrator may require the parties to submit documents or other evidence any moment during the process and the parties have access to such evidence, however the party is not obligated to provide documents that are not under his/her possession.

7.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

A court can only intervene if the parties include this specification in the agreement or upon request of the arbitrators.

7.4 What is the general practice for disclosure/discovery in international arbitration proceedings?

- Any doubt as to whether or not disclosure is to be made should be resolved in favour of disclosure.
- There is a code of ethics for the arbitrators and the parties.

7.5 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal? Is cross-examination allowed?

Witnesses must be sworn in as per the law and the civil procedures code where cross-examination is also allowed, although only through the arbitration panel.

In general the parties may agree on the rules and/or law for the arbitration if it meets the basic principles of contradiction, due process, and right of defence.

7.6 Under what circumstances does the law of Costa Rica treat documents in an arbitral proceeding as being subject to privilege? In what circumstances is privilege deemed to have been waived?

Documents are treated as being subject to privilege when the arbitrator

considers that or the parties have established that in the agreement.

8 Making an Award

8.1 What, if any, are the legal requirements of an arbitral award?

It shall be in writing, final and binding.

It must include: identification of the parties; date and place in which it was issued; a description of the dispute referred to arbitration; a list of facts, referring to what has been demonstrated and non-demonstrated; the analysis; and the decision.

Although the parties have not requested it, the award must contain guidelines or standards necessary and relevant to identify, facilitate and guide the implementation.

The arbitrator shall state the reasons on which the award is based, unless the parties have agreed otherwise explicitly. Awards rendered in arbitrations of law shall always be motivated.

9 Appeal of an Award

9.1 On what bases, if any, are parties entitled to appeal an arbitral award?

Costa Rican law does not refer to appeal but to nullity and review. The idea is that an award can only be modified by the Supreme Court if a breach of due process has existed. The principle is that the Supreme Court will not enter the analysis on the merits.

9.2 Can parties agree to exclude any basis of appeal or challenge against an arbitral award that would otherwise apply as a matter of law?

No. The request for review and nullity can not be waived.

9.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No. The only grounds are those established by law which in principle indicates that the analysis of the Supreme Court shall not be on the merits but only on confirming that principles of due process were complied with.

9.4 What is the procedure for appealing an arbitral award in Costa Rica?

The petition for annulment must be filed at the first division of the Supreme Court (in Spanish *sala primera de la corte suprema de justicia*) within fifteen days of notification of the award the decision regarding a request to clarify or add the resolution.

Appeal shall not be subject to any formality, but shall indicate the alleged cause of nullity.

The request for a review must be filed before *the Supreme Court*. The deadline is three months from the date of the award or from the moment when a procedural fraud is found among other circumstances.

Both of them have to be by writing and explain the causality in which it is based.

10 Enforcement of an Award

10.1 Has Costa Rica signed and/or ratified the New York convention on the recognition and enforcement of foreign arbitral awards? Has it entered any reservations? What is the relevant national legislation?

Yes. Our country has ratified the indicated convention without reservations.

Basically the relevant legislation is the law on alternative dispute resolutions and of course the constitution that recognises the possibility of resolving disputes by way of arbitration.

10.2 Has Costa Rica signed and/or ratified any regional conventions concerning the recognition and enforcement of arbitral awards?

Yes. The most relevant ones are:

- Convention on recognition and enforcement of foreign arbitral awards.
- Inter-American convention on commercial arbitration.
- Convention for the peaceful settlement of international disputes (convención para arreglo pacífico de disputas internacionales (la haya).
- Geneva Convention on arbitration (convencion de ginebra acerca de arbitraje).

10.3 What is the approach of the national courts in Costa Rica towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

National courts recognise the validity of arbitration awards provided that they comply with principles of due process.

In the event that any of the parties file an action before the courts either party is empowered to institute a plea of *res judicata*.

10.4 What is the effect of an arbitration award in terms of *res judicata* in Costa Rica? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Please see the answer to question 10.4. *Res judicata* excludes the possibility of the national court analysing the ground of the case.

11 Confidentiality

11.1 Are arbitral proceedings sited in Costa Rica confidential? What, if any, law governs confidentiality?

Hearings are private unless otherwise agreed by the parties and awards are public unless otherwise agreed by the parties too.

11.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

No, the information in arbitral proceedings can only be used for same proceeding. Every arbitration resolution is considered *res judicata* for the parties.

11.3 In what circumstances, if any, are proceedings not protected by confidentiality?

Hearings are private except if otherwise agreed by the parties. Awards are public except if otherwise agreed by the parties.

12 Remedies / Interests / Costs

12.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)

There are no specific limits in this matter.

12.2 What, if any, interest is available?

In economic disputes the parties can request the panel to recognise interest over any amount in dispute. Usually the rate used in that from Banco Nacional de Costa Rica.

12.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Yes, the law refers to this. The general rule is that the loser is forced to pay the other party's cost, however in principle both parties (and all parties) contribute to cover the cost until a decision is made when the award can rule otherwise.

12.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The award itself is not subject to taxes. The income generated to one of the parties by way of a favourable resolution shall be analysed on a case by case basis by tax experts. The principal is that no taxes shall be paid due to the award.

13 Investor State Arbitrations

13.1 Has Costa Rica signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)?

Yes. It has been signed and ratified.

13.2 Is Costa Rica party to a significant number of Bilateral Investment Treaties (bits) or Multilateral Investment treaties (such as the Energy Charter Treaty) that allow for recourse to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes ('ICSID')?

Yes, Costa Rica is a party to these.

13.3 Does Costa Rica have standard terms or model language that it uses in its investment treaties and, if so, what is the intended significance of that language?

Yes it has standard terms; the intended significance of language must be analysed according to each treaty in particular.

13.4 In practice, have disputes involving Costa Rica been resolved by means of ICSID arbitration and, if so, what has the approach of national courts in Costa Rica been to the enforcement of ICSID awards?

The enforcement of foreign arbitration resolutions is possible in Costa Rica, these must comply with the following:

1. Duly authenticated resolution.
2. Defendant must be duly notified of the process, represented, and declared as accused according to foreign laws.
3. That the object of the case shall not be of Costa Rican jurisdiction.
4. That there is no file in progress, and or executed sentence by any Costa Rican courts that produce a *res judicata* resolution.
5. Foreign arbitration resolution according to foreign law can be executed in the foreign country that produced the resolution.
6. Cannot be against public order.

13.5 What is the approach of the national courts in Costa Rica towards the defence of state immunity regarding jurisdiction and execution?

Costa Rican courts have recognised state immunity and have denied petitions that violate state immunity.

14 General

14.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in Costa Rica? Are certain disputes commonly being referred to arbitration?

The use of arbitration and arbitration centres is continuing to grow.

14.2 Are there any other noteworthy current issues affecting the use of arbitration in Costa Rica?

This is not applicable in Costa Rica.



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Chambers & Partners considers him as “one of the best lawyers in Costa Rica.”

In 1990 he graduated cum laude as Licentiate in Law from University of Costa Rica and in 1993 he was awarded a postgraduate specialisation in Commercial Law at the same University. In 1993 and 1994 he studied a Program of Business Administration at Georgetown University, Washington, D.C. and he was granted a Master’s Degree in Laws (LL.M.) at the same University.

Mr. Laclé Zúñiga has provided advisory services on disputes, civil and commercial arbitration processes. He specialises in the areas of corporate law, foreign investment and international transactions. He is authorised as an Attorney and Public Notary in Costa Rica.

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