

The International Comparative Legal Guide to:

# International Arbitration 2008

A practical insight to cross-border International Arbitration work



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# El Salvador



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## 1 Arbitration Agreements

### 1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of El Salvador?

The statute governing international arbitration in the Republic of El Salvador is the *Ley de Mediación, Conciliación y Arbitraje*, enacted in 2002 (hereinafter LMCA). However, the international conventions ratified by El Salvador take precedence to the national statute. In all cases, the arbitration agreement must be in writing. The agreement is legally in writing when it is contained a contract or a separate document, or in an exchange of letters or any means of communication or correspondence that unequivocally evinces the will of the parties to submit to arbitration. A presumptive agreement in writing is deemed to exist when one party submits a controversy to an arbitrator or arbitral tribunal and the other party, under notice of this initiative by the arbitrator or arbitrators, consents to such submission by appearing in the proceedings without objecting.

In consumer contracts, the arbitration agreement must be negotiated at arms-length. It is not legally permitted for suppliers of goods or services to impose arbitration, or any other conflict resolution method, as a term in their standard contracts.

### 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?

There are no special requirements for a legally capable individual to be party to an arbitration agreement.

In consumer law, the consumer has no legal capacity to waive in advance any rights afforded by law.

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

In El Salvador there are no institutions with experience in international arbitration. It is advisable to include true ad true international arbitration rules from renowned international arbitration institutions. This is particularly important as regards method of appointing arbitrators and rules of evidence.

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

There is a strong judicial policy in favour of enforcement of

arbitration agreements. The right to arbitrate civil and commercial matters is specifically protected by the Constitution at Art. 23.

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

ADR agreements are generally enforced.

## 2 Governing Legislation

### 2.1 What legislation governs the enforcement of arbitration agreements in El Salvador?

Primarily, the international instruments ratified by El Salvador govern the execution of foreign arbitral awards. For awards from non-signatories of such instruments, the LMCA, article 82 sets the causes for denial of enforcement, which strictly follow the UNCITRAL Model Law.

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

Although the same law (LMCA) governs both domestic and international arbitration, there is a separate Section (*Sección Tercera*) on the latter. The provisions in that Section pertain to the primacy of treaties and international law over the LMCA. Parties in international arbitrations are permitted to agree freely on the applicable substantive and procedural law, as well as to the place of the arbitration. The State is mandated to submit all its international arbitrations to renowned centres.

### 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?

Yes, the LMCA follows the UNCITRAL Model Law. Important differences include the definition of international arbitration, defined not by the place of establishments but by domicile, and the exclusion of the parties' agreement on the international nature of the dispute. Unlike the Model Law, the LMCA sets Spanish as a mandatory language, alongside any other agreed on by the parties. As regards arbitrators, there is no express allowance for foreigners to serve as arbitrators, contrary to Art. 11 of the Model Law. In the matter of challenges, the LMCA departs from the Model Law and requires legal causes under the provisions of the Code of Civil

Procedure of 1882, a *numerus clausus*, which are not only impossibly quaint but most difficult to prove.

### 3 Jurisdiction

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

The LMCA expressly excludes arbitrability of the following subject matters:

- a) Matters contrary to public order.
- b) Matters directly pertaining to the authority and powers of the State and State agencies.
- c) Criminal liability.
- d) Future alimony and child support.
- e) Controversies over rights of persons not legally capable, unless preceded by judicial authority.
- f) Family relations, except insofar as patrimonial rights.
- g) Matters under *res judicata*.
- h) Labour matters.

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

Under Art. 51 LMCA an arbitrator is expressly permitted to rule on the question of competence, a power which extends to deciding on the existence and validity of the arbitration agreement as a source of their jurisdiction.

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

Most courts overzealously react by dismissing the complaint (and even applications for interim measures or discovery) on the basis of the existence of an arbitration clause in any filed document. However, the LMCA does not mandate such dismissal *in limine*; it establishes an arbitration exception, which must be argued by the opposing party. Under the procedure for exception, the court must actually serve the complaint on the defendant, who will react as convenient, either arguing the arbitration exception or else replying to the complaint, thereby tacitly renouncing arbitration. The exception must necessarily be argued within the term allowed to reply the complaint, which is three days in mercantile trials and three to six days in civil trials.

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

For a court to be able to address the issue of jurisdiction and competence, the parties must necessarily have raised it before the tribunal itself at the inception of the arbitral process. Upon issuance of the final award, the law allows for a recourse before a court of appeals, for the annulment of the award on the basis of the partial or total nullity of the arbitration agreement or illegality in the constitution of the arbitral tribunal, Art. 68, 1) 2) LMCA.

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

There is no express provision allowing extension of arbitral jurisdiction over third parties.

### 4 Selection of Arbitral Tribunal

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

There are two special capacity requirements for arbitrators that merit consideration by the parties when the place of arbitration is to be in Salvadoran territory. The application of these requirements to international arbitration is not yet settled.

Where the arbitrators are to decide the matter “in accordance to law”, the LMCA requires that they be “authorised attorneys-at-law”. Although this requirement for special legal capacity to serve as arbitrator in El Salvador is contained in Article 35, *Sección Segunda, Arbitraje Nacional*, of the LMCA regulating domestic arbitration, its strict and extensive construction can become an issue in international arbitrations sited in El Salvador. However, reasonably, if the applicable substantive law, as selected by the parties or determined by conflict of laws rules, is not Salvadoran law, there is no sense in such strict construction of this requirement and it cannot have been the legislative intent for it to apply in international arbitration sited in El Salvador under those conditions.

Another special capacity requirement under Art. 35 LMCA is that arbitrators in El Salvador must be “in full exercise of citizenship rights.” Only Salvadoran nationals can have citizenship rights under the Salvadoran Constitution. This would then seem to exclude all non-nationals from serving as arbitrators. Again, the general context of this requirement is of national arbitration. The section of international arbitration of the LMCA refers to the primacy of international law. Therefore, a construction of such a restrictive requirement to apply to international arbitration would be generally incompatible with the customary law of international commercial arbitration, and specifically incompatible with the Interamerican Convention on International Commercial Arbitration, Art. 2, paragraph 2.

It must be noted, as evidence that these issues are latent, that the only authorised arbitration centre in the country, that at the Salvadoran chamber of commerce, has actually followed a broad construction of these requirements and to date has included no foreigners in its roster of arbitrators. The experience is still too limited for the issues to have been settled by arbitral tribunals or by the courts.

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

If the parties fail to select their arbitrators by their chosen method, the LMCA default procedure provides for such appointment to be made by an arbitration centre authorised in El Salvador. This also applies for the party appointed arbitrators failing to agree on a third. At present, there is only one such centre, that of the Salvadoran Chamber of Commerce.

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

The parties may agree on a court to act as appointing authority or to decide challenges.

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

Art. 33 of the LMCA mandates strict impartiality of the arbitrators and keeps them independent of any order or authority that may prejudice their powers. Further, they are protected by privilege in the information relative to the process. Arbitrators do not and may not represent the interest of the party that appoints them.

Also, the LMCA declares null any agreement that places one party in a privileged situation in the appointment of arbitrators. Art. 38.

## 5 Procedural Rules

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

The law allows full freedom for the parties to submit to the rules of procedure of any specific institution, to agree on their own rules to delegate on the arbitrators to determine same. (Art. 45, par. 2 LMCA.) If there is no agreement on this matter, the law provides a set of ad hoc rules of procedure which would apply to any arbitral proceeding sited in El Salvador.

The ad hoc procedure is established in article 47 of the LMCA. From admission of the complaint, through the stages of reply, a conciliatory effort, evidence, final arguments, and award, the basic structure is designed to allow equal opportunities for both parties to be heard.

There is an abbreviated ad hoc procedure for cases dealing only with legal issues, where the award comes immediately after the conciliation stage.

### 5.2 In arbitration proceedings conducted in El Salvador, are there any particular procedural steps that are required by law?

All those procedural steps that are essential to due process must be observed. The effective notice of the complaint, a reasonable term for reply and defence, possibility to present evidence, and the effective notice of the award to the parties, are such indispensable procedures in any arbitration.

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

There are no rules specifically applicable to arbitration hearings.

### 5.4 What powers and duties does the national law of El Salvador impose upon arbitrators?

The rule is that arbitrators have the same duties, powers and responsibilities as judges. Among these are the duty to conduct the process with celerity, to prevent procedural fraud and malice, not to allow indecorous behaviour or expressions by the parties; the safekeeping of the case file and evidence. However, they do not have the power to request the use of public force to execute their decisions, and must look to the courts for assistance when this is required. Arts. 35, par. 4, 28 b) LMCA.

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

LMCA art. 28 a) excludes the courts from all matters arising from

the arbitration during the arbitral proceedings. They can only intervene in assistance requested by the arbitral tribunal.

### 5.6 Are there any special considerations for conducting multiparty arbitrations in El Salvador (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 special provisions for joinder and consolidation in the LMCA. The Salvadoran Code of Civil Procedure would probably apply in cases where conducting separate arbitrations could result in contradictory judgements on the same issues, affecting the same parties. Under the common rules, a third party could be forced to arbitrate if called upon on the basis of a duty to defend another party haled to arbitration, as in hold-harmless clauses or product liability cases. Intervention by third parties could be allowed when in defence of property interests.

### 5.7 What is the approach of the national courts in El Salvador towards *ex parte* procedures in the context of international arbitration?

The rule is to exclude all *ex parte* procedures during the arbitration. The only exceptions are interim cautionary measures, such as attachments of assets.

## 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?

An arbitrator could award interim relief such as forced exhibit of documents or objects, protective or conservatory measures on property, preventative attachment of assets. However, the execution of such measures must be done through a court.

### 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?

Once the tribunal is in place, courts will generally refuse to accept petitions for interim relief but by the tribunal. However, the LMCA (art. 32) appears to allow the parties to petition a court for interim relief measures even during the arbitration proceedings.

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

Courts are generally mindful of their legal obligation to fully cooperate with arbitral tribunals.

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

Security for costs as general a rule has been expunged from

Salvadoran court procedure for decades.

The arbitrators may legally decide the mode of payment of costs and fees, and can order that security be provided.

## 7 Evidentiary Matters

### 7.1 What rules of evidence (if any) apply to arbitral proceedings in El Salvador?

Art. 55 of the LMCA sets forth the special rules applicable: Arbitrators may order ex officio the production of any evidence, require clarifications from the parties and experts; all evidence, except documentary, must be presented at hearings; arbitrators may commission third parties to receive or obtain evidence, in the country or abroad;

in weighing the evidence, the LMCA directs arbitrators to apply a system termed *Sana Crítica*, which consists of an overall evaluation of all evidence in accordance with the rules of logic, science and experience; the reasons for assigning or denying evidentiary value to evidence must be expressed.

All evidence must be received in the presence of all the arbitrators.

### 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)?

The arbitrator's authority extends as far as the judge's authority in respect of the ordering of disclosure of evidence. The law gives any person the right to petition a court to order a third party the disclosure of documents necessary to prepare a claim or a defence. The court is then authorised to order the production of such documents.

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

A court may intervene at the request of a party or of the arbitral tribunal.

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

The tribunal, ex officio or at the request of a party, may order the disclosure/discovery of evidence. If the party holding the evidence refuses to comply, the law provides for payment of damages.

### 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?

There are no formal rules for reception of testimony. Perjury penalties are however applicable to witnesses in arbitration proceedings.

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

Documents in arbitral proceedings are under the privilege granted to arbitrators by the LMCA. The parties may release the arbitrators from the restrictions of privilege.

## 8 Making an Award

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

The award must be in writing, dated, fully identify the parties and controversy, fully, clearly and precisely decide all matters submitted to arbitration, and signed by all arbitrators.

An institutional arbitration award must be certified by the arbitration centre. A non-institutional award must be entered in a notarial register.

## 9 Appeal of an Award

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

Under article 68 MCA, the only causes for recourse against the award are:

- Nullity of the arbitration clause.
- Illegal constitution of the tribunal.
- Lack of proper and effective notice of procedural acts.
- Illegal denial of evidence.
- Extemporaneous issuance of award.
- Judgement in equity in a procedure subject to substantive law.
- Contradictions and arithmetic errors in the award.
- *Ultra petita*.
- *Infra petita*.

### 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?

Parties cannot waive or compromise their fundamental right to appeal; they can only freely decide not to exercise it once the opportunity for appeal arises.

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

No. Appellate jurisdiction is a matter of public law. However, parties may agree on multi-tiered arbitration.

### 9.4 What is the procedure for appealing an arbitral award in El Salvador?

There is no true appeal from an arbitral award. None of the substantive issues may be reviewed de novo. The remedy available is only against the validity of the award itself, for a *numerus clausus* of legal causes. The parties must file for nullity of the award before an appellate court within 5 able days of having notice of the award. The case must be argued 5 calendar days after notice of admission of the recourse, and the court decides within 60 days of admission. There is no further recourse.

**10 Enforcement of an Award**

**10.1** Has El Salvador 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?

El Salvador ratified without reservations the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (D.L. 114, 22nd October, 1997, pub.D.O. N° 218, T. 337, 21st November 1997.)

**10.2** Has El Salvador signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

El Salvador has ratified without reservations the Interamerican Convention on International Commercial Arbitration (D. Ley N° 236, 19th May, 1980, pub. D.O. N° 98, T. 267, 27th May, 1980).

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

Courts will enforce awards in the same manner as any judgement. Foreign arbitral awards not under the New York Convention must undergo a *pareatis* or *exequatur* procedure for recognition prior to enforcement. This process is usually lengthy.

**10.4** What is the effect of an arbitration award in terms of *res judicata* in El Salvador? 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?

An arbitration award has the full effects of *res judicata* as between the same parties, on the issues of fact as decided. Courts are barred from hearing any matter finally decided by a valid award.

**11 Confidentiality**

**11.1** Are arbitral proceedings sited in El Salvador confidential? What, if any, law governs confidentiality?

Fundamentally, arbitration proceedings, as a matter of contract law, come under the constitutional right to privacy. No party without a legally established legitimate interest can have access to the proceedings.

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

Each arbitral tribunal is obliged to receive and weigh the evidence for the case before it. Information disclosed in a previous arbitration is not necessarily binding in subsequent proceedings.

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

Tax authorities and criminal courts may order the disclosure of information contained in arbitration proceedings.

**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)?

The parties may agree on the types of remedies recoverable through arbitration, absent such agreement, substantive Salvadoran law of obligations becomes applicable. Generally, only effective damages are recoverable in the forms of *lucrum cessans* and *damnum emergens*. Recent Supreme Court decisions have broken this traditional limitation, allowing moral damages as recoverable by direct application of the constitution, despite absence of legal regulation. (*Casación Ref. 134-C-2005, Sala de lo Civil, 8:50hrs 22 November, 2005: decided existence of moral damages in the form of emotional suffering due to violation of subjective Rights. Apelación Ref. 1686 S. S; Sala de lo Civil 9:00hrs 23 Sept. 2004: dismissed argument that lack of legal regulation prevents award of moral damages, as rights to such derive from the constitution which must be directly applied.*)

**12.2** What, if any, interest is available?

In commercial matters, the legal interest is fixed by the Ministry of Economy. At present, it stands at 12% per annum.

**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?

There is no specific rule for awarding costs and fees. This matter must be specifically included in each party's claims. The general practice is for the losing party to pay costs and fees of the victor, except where both parties have succumbed in part of their claims.

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

An award is not subject to any tax.

**13 Investor State Arbitrations**

**13.1** Has El Salvador signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)?

El Salvador signed Washington Convention on June 9th, 1982, and ratified it on 7th December, 1982 (D.L. 111 7th December, 1982, pub. D.O. N° 230 T.N° 277 14th December, 1982).

**13.2** Is El Salvador 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')?

El Salvador is a party to 12 BITs that allow recourse to ICSID arbitration (Benelux, Costa Rica, Finland, Germany, Israel, Netherlands, Paraguay, Peru, South Korea, U.K. USA, Uruguay).

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

El Salvador will usually require express “according to law” language to afford investment protection. This has been construed to exclude all investment tainted by fraud or corruption (See *Inceysa Vallisoletana* referred to at question 13.4 below).

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

No disputes involving El Salvador have been resolved by ICSID arbitration. The only case brought to ICSID (*Inceysa Vallisoletana vs. Republic of El Salvador*) ARB03/26) the tribunal decided against jurisdiction.

**13.5 What is the approach of the national courts in El Salvador towards the defence of state immunity regarding jurisdiction and execution?**

The Salvadoran Constitution expressly allows the State to submit to the jurisdiction of international arbitral tribunals in commercial and contractual matters. This curtails the sovereign immunity defence. Courts have not refused execution of arbitral awards on the basis of sovereign immunity.



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**14 General**

**14.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in El Salvador? Are certain disputes commonly being referred to arbitration?**

International contracts with Salvadoran parties now generally include arbitration clauses, as well as an increasing number of local contracts. However, use of local institutional arbitration has never taken off, and parties usually submit to ICC or AAA arbitration.

**14.2 Are there any other noteworthy current issues affecting the use of arbitration in El Salvador?**

At present, there is only one authorised arbitration centre in the country. The lack of more centres offering qualified rosters is a major hindrance to the application of the LMCA and to a more generalised use of arbitration. Universities and professional associations are only starting to take interest in establishing other centres.



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