

The International Comparative Legal Guide to:

# International Arbitration 2008

A practical insight to cross-border International Arbitration work



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# Guatemala

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## 1 Arbitration Agreements

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

An arbitration agreement must be in writing. The Arbitration Act of Guatemala (Decree 67-95) (“the AA”) includes in its Article 10 (1) the same text as Article 7 (2) of the Uncitral Model Law on International Commercial Arbitration (“the Model Law”). Arbitration agreements can be included as part of a main agreement or can be separately agreed.

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?

No there is not.

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

If included in an “agreement of adhesion” to a standard form of contract prepared by one party, that form or agreement must indicate in special characters that it includes an arbitration agreement.

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

If the arbitration agreement is invoked in a timely manner or is evident from the documents used by the plaintiff, generally, national courts remand the case to arbitration and decline jurisdiction.

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

In general, the answer is the same as for question 1.4. The difference could only be if mediation or conciliation was not agreed upon as a MANDATORY step before going to litigation (assuming the parties did not agree on arbitration), then national courts would generally admit jurisdiction without the need to conclude the mediation phase.

## 2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration agreements in Guatemala?

The Arbitration Act (the “AA”) (Decree 67-95 of the Guatemalan Congress) governs the enforcement of arbitration agreements.

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

Yes. Guatemala is a Model Law Country. It was adopted using its version of applicability to both domestic and international arbitration.

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. Generally, it follows it very closely. Differences can be found in two or three areas, such as the legal recourse against the arbitral award (the competent court is allowed to modify the award, as well as to confirm or annul it). It must be kept in mind that Guatemala used the Model Law to govern both domestic and international arbitrations. Therefore, Guatemalan AA shall be compared, as to the Model Law, in its version as the applicable law for both domestic and international arbitrations.

## 3 Jurisdiction

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

The general principle is that parties may submit to arbitration any subject matter where such parties have the liberty to dispose partially or totally of their rights. In other words, any matter where parties have the freedom to contract is arbitrable. Notwithstanding there are some limitations expressly stated in Article 3 of the Guatemalan AA. For example matters that are inseparable from others where parties can not freely dispose of their rights or duties, are not arbitrable. An addition to the local version of the Model Law was section 3, subsection “c” of said Article 3, because it prohibits the submission to arbitration of any matter that is expressly forbidden in a law or any matter where there is a specific

procedure legally determined to be used for its resolution.

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

Yes. Article 21 of the AA clearly provides for the “kompetenz-kompetenz” principle.

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

The approach of national courts in this aspect has been to remand the parties to arbitration. In general, there has been a respect for arbitration agreements and their binding nature between the parties to them.

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

When an arbitral tribunal decides the issue of jurisdiction and competence as a prima facie or preliminary issue, then any party can present to a national competent court an objection to the arbitral tribunal’s decision within 15 days after such determination has been served to the parties. The decision of the national court shall be final and binding and not subject to any other remedy or recourse.

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

Only when such party has been sued through arbitration proceedings and he, she or it does not oppose to arbitration in its first response to the original claim or request for arbitration (tacit arbitral agreement, as provided for in Article 10, section 1 of the Guatemalan AA).

## 4 Selection of Arbitral Tribunal

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

The only limit expressly provided for in the AA (Article 14, section 3) is in regard to any judges, officers or employees working in the Judicial Branch of Government.

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

Yes. Article 15, section 1 follows almost literally the provision of Article 11 of the Model Law (except of the terms provided for in such Article 11 that in the Guatemalan AA are reduced, from 30 to 15 days).

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

Yes, if one party fails to appoint an arbitrator within a period of 15 days or if both arbitrators, already appointed, fail to appoint the third arbitrator within the same period of time, then, after the

expiration of such terms, a national court provided for in Article 9 of the AA shall become the sole and definite appointing authority. The same applies for arbitrations with a sole arbitrator.

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

There are no specific requirements defined in the AA. There are general provisions such as: Article 14, section 3 (Capacities to be an Arbitrator); Article 15, section 5 (Appointment of Arbitrators); and Article 16, section 2 (Grounds for Challenge). Article 14 creates a parallelism with the causes for challenging a judge. In other words, individuals who have some relationship with the parties or the controversy which may create a possibility of abstention, excuse or challenge of a judge, may not be appointed as an arbitrator. More specifically, Article 15 states that the arbitrators do not represent the interests of any of the parties and shall perform their duties with absolute impartiality and independence. Finally, Article 16 follows strictly the Model Law when it states that “an arbitrator may only be challenged if there are circumstances that give rise to justified doubts regarding the impartiality or independence, or if it does not possess the qualifications agreed by the parties”.

## 5 Procedural Rules

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

Yes, the Guatemalan AA is the law governing any arbitral proceeding in the absence of any particular procedural rules provided for by the parties or in the absence to the submission of any arbitral institutional regulation. If the place of arbitration is Guatemala, the Guatemalan AA is fully applicable and controls the arbitral proceedings, again, only if the parties have not tailored their own arbitral proceedings either through ad-hoc arbitration or institutional arbitration.

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

The Guatemalan AA, following the criteria of the Model Law allows for wide disposition of the parties as to provide for the proceedings. This authority is delegated to the same arbitral tribunal or sole arbitrator, if not limited by the parties. This authority in favour of the arbitral tribunal includes the determination as to admissibility, pertinence and the weighing of the evidence. The only aspects that cannot be modified by the will of the parties is the general principle of fair and equal treatment under Article 23 of the Guatemalan AA (Article 18 of the Model Law).

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

No. Article 29 of the Guatemalan AA, under the title of “Hearings and written proceedings” determines that unless otherwise agreed by the parties, the arbitral tribunal will decide if hearings must take place for the rendering of evidence and oral pleas or if the proceedings will be substantiated based upon the documents and other evidences.

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

Please see the responses to questions 5.3 and 5.5.

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

Yes. Article 24 (Determination of Proceedings) states that the parties have the liberty to determine the proceedings that the arbitral tribunal must follow, but in absence of such determination, the arbitral tribunal is fully empowered to conduct the arbitration in the manner it considers appropriate.

#### 5.6 Are there any special considerations for conducting multiparty arbitrations in Guatemala (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?

Regarding multi-party arbitrations, the Guatemalan AA is absolutely silent. In regard to third parties intervening in or joining an arbitration proceeding, Article 21 section 4, of the AA contains a provision forbidding third parties to join an arbitration proceeding. This prohibition was not part of the original draft law presented to the Guatemalan Congress, but was added during the final discussion and approval of the initiative, based on an old rule contained in the Code of Civil and Commercial Procedures.

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

No information is available in this respect. The author was not able to find any cases on this matter.

## 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?

Yes. Guatemalan AA follows strictly the Model Law in this aspect. Article 22 provides that, unless otherwise agreed by the parties, the arbitral tribunal may, by petition of any of the parties, order interim measures to a party to the arbitral proceedings that the arbitral tribunal considers necessary in connection with the purpose of the dispute. The arbitral tribunal may request from the party that have requested the interim measure, a guarantee sufficient to prevent its responsibility in regard to said measure. Likewise, unless otherwise agreed by the parties, the arbitrators or the parties may request to a competent national court that it issues or draws interim measures that must be fulfilled by third parties, or that, one of the parties shall coactively be forced to fulfil an interim measure awarded or granted previously by the arbitral tribunal in front of one of the parties to the arbitral proceedings.

#### 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?

Please see response to question 6.1. In addition, the Guatemalan AA provides that the fact that a party requests to a national court for an interim measure or relief, does not affect the jurisdiction of the arbitral tribunal (Article 12).

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

The national courts, in several cases, have demonstrated lack of adequate support to grant any interim relief sought by the parties to arbitration agreements. Article 35 of the Guatemalan AA provides for the specific procedure the national courts must follow in those cases where judicial assistance can be required, but in several cases the national courts have not responded adequately, but following traditional judicial procedures ("incidente judicial").

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

Yes it does.

## 7 Evidentiary Matters

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

As mentioned before, there are no specific rules of evidence. The arbitral tribunal has the liberty of determining not only procedural issues, but also issues related to the admissibility, pertinence and weighing of the evidence (Article 24).

#### 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)?

No, not under the Arbitration Act. But the notion of discovery is foreign to Guatemalan national courts. Regarding the disclosure of documents of third parties, the arbitral tribunal needs to seek judicial assistance, as third parties are not regarded as subject to the jurisdiction of the arbitral tribunal. It may request third parties to disclose documents or information relevant to the dispute, but if such third parties are not willing to cooperate, then the arbitral tribunal must follow the procedure for judicial assistance provided for in Article 35.

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

As derived from the previous answer, when a party to the arbitration proceeding is not cooperating, or a third party, not subject to the jurisdiction of the arbitral tribunal is not willing to provide the evidence, the arbitral tribunal or the interested party can seek the judicial assistance.

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

There is not sufficient information in this regard, as very few international arbitration proceedings have taken place in Guatemala. It really depends on the cooperation of the parties and the willingness of the arbitral tribunal to accept proceedings related to disclosure/discovery (but again, discovery proceedings are not part of the legal tradition in Guatemala). The IBA rules regarding the taking of evidence are becoming a possible standard for international cases (the few that the author can acknowledge).

#### 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?

The Guatemalan AA does not provide for specific rules on this matter. When the arbitration proceeding is governed by institutional rules, this is certainly common, as is the right for cross-examination and the need for the witness to be sworn before the arbitral tribunal. In ad-hoc arbitrations, this is common practice too.

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

Confidentiality is an essential characteristic of any arbitral proceedings. Privilege must be expressly waived, unless the information is public in nature or any competent authority requires the disclosure of said information.

## 8 Making an Award

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

Article 40 provides for the legal requirements of an arbitral award. In essence, it must be in writing and signed by at least the majority of the arbitral tribunal (describing why there is the lack of signature of the other arbitrator or arbitrators). In case of the sole arbitrator, his or her signature is mandatory. The award must be duly reasoned or motivated, and the date and place of issuance must be clearly indicated. Finally, unless agreed differently by the parties, the arbitral tribunal must address the issue of allocation of the costs of the proceedings. Dissenting opinions are expressly allowed.

## 9 Appeal of an Award

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

The Guatemalan AA follows strictly the bases for appeal as provided for in the Model Law of Uncitral. The causes or bases are exactly the same. Those that can be argued by the parties and those that can be used or argued by the appellate court “ex-officio”.

#### 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?

In principle, the answer is no. But taking into account the wording

of the text of Article 43, section 2, of the AA (that contain those bases) and some international cases in other forums, there could be room for interpretation in this regard.

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

No. Article 43 provides for the “only” grounds or bases for appealing. (In Guatemala the appeal is denominated “Recurso de Revisión”.)

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

As stated in part of Article 43 and in the entirety of Article 44 of the AA:

##### ARTICLE 43

- 3) The request for review may not be made after a month has passed starting from the date of the reception of the award or, if the request has been made pursuant to Article 42, from the date in which the request has been resolved by the Arbitral Tribunal.
- 4) The recurrent party that during the procedure of arbitration omits to establish a proposal or an opportune objection regarding the causes established in number 2) of this article, may not invoke subsequently the same cause as the motion to review.

##### ARTICLE 44 - Proceedings for the review.

- 1) Promote the review against an award, at which point a hearing will be granted to other interested parties, for a common term of two days.
- 2) If the review refers to matters de facto and it is necessary in order to commence the review to receive evidence, the parties must offer the individualised evidences to promote said remedy and withdraw from such hearing. In said case, the motion for review will be open to the offering of evidences for a period of ten days.
- 3) The Appeals Court will resolve the review established, without any other act, within the three days for the term of the hearing and if it has been opened to evidence, the resolution will be pronounced within an equal period, after the evidence period has concluded.
- 4) Against the resolutions of procedure or substance, that the Appeals Court issues in the substantiation of the motion to review, there is no remedy whatsoever against it.
- 5) The Appeals Court, when the review of an award is requested, may suspend the proceedings of review, when it corresponds and when one of the parties requests it so, for a term determined with the purpose of granting the Arbitral Tribunal the opportunity to renew the arbitral proceedings or of adopting any other measure that to the judgment of the Arbitral Tribunal eliminates the causes for the petition of the review. In this case, for what is compatible, the provisions contained in Article 42 will be applied.
- 6) After forty (40) days since the date of the presentation of the motion to review, if the Appeal Court has not pronounced upon the opposed award, it will be legally confirmed, and therefore, it will have the quality of a final judgment for the effects of its execution.

## 10 Enforcement of an Award

10.1 Has Guatemala 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. Guatemala has signed and ratified the New York Convention. It ratified it under the reservations of reciprocity and applicability only to commercial disputes. The Guatemalan AA includes provisions for recognition and enforcement that are equal to those of the New York Convention, following the Model Law. Therefore, in essence, there is a “uniform” system for the recognition and enforcement of international or foreign awards, notwithstanding if they were issued in another “New York Convention country” or not, and without regard if the subject matter is commercial in nature or not.

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

Yes: The Inter-American Convention on International Commercial Arbitration (“the Panama Convention”).

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

ARTICLE 48 - Procedure for the recognition and enforcement of the award.

The procedure of acknowledgment or execution of the awards will be subject to the following rules:

- 1) It must have passed the term of one month, indicated in Article 43 (3), without the award being complied, its forced execution might be obtained before a competent court, pursuant to Article 46(1), through the request of execution, to which the documents indicated in Article 46(2) will be accompanied.
- 2) Likewise, a certified copy of the judicial resolution upon which the revision remedy was resolved.
- 3) Of the execution filed, the court will give a three-day hearing to the executed, which will only be able to oppose the established execution, based upon any motion of review pending, as long as it is documentary credited with the opposition brief. In this case, the court will pronounce without any other procedure the suspension of the execution until the resolution regarding the motion for review is issued, and if said remedy prospers, the court, when presented with a certified copy of said resolution, will pronounce a judicial decree denying the execution.
- 4) Besides the foreseen in the abovementioned number, and if any of the causes established in Article 47 do not coincide, the court will pronounce a judicial decree ordering its execution, ordering the requirement of the obliged party and the embargo of property, if applicable.
- 5) Any resolution of procedure or of substance that falls in the procedure of acknowledgment and execution of an award is not susceptible to any other procedural remedy whatsoever.
- 6) In all that is not foreseen in the chapter herein, for acknowledgment and execution of awards, the legal provisions applicable to the execution of national judgments

will be applicable supplementary, as long as said provision is compatible with the celerity and efficiency with which an arbitration award must be executed with.

10.4 What is the effect of an arbitration award in terms of *res judicata* in Guatemala? 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 arbitral award has the same effects and consequences as a judgment. Therefore, once all possible attacks to an award have been used, the arbitral award produces the effects of *res judicata*. Therefore, no reopening of issues can be requested in front of national courts.

## 11 Confidentiality

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

As arbitral proceedings derive from arbitral agreements, both are regarded as confidential in nature, based on Constitutional provisions (Article 24 of the Constitution) as interpreted by our Constitutional Court. But in all rules of the locally available arbitration institutions, said rules expressly provide that the arbitral proceedings are confidential.

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

No, if the party that can claim confidentiality does not expressly allow for its disclosure.

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

Proceedings are not protected by confidentiality when the information used in those proceedings is not private or confidential in nature (Article 24 of the Guatemalan Constitution) or when a local authority with legal power to require such information, does so. For example in local courts and the Attorney General’s office - in these cases, the information can be disclosed but under reservation of confidentiality in front of third parties not related to the proceedings that originates such request.

## 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)?

No. There are no legal restrictions or limits, but “punitive damages” are foreign to the Guatemalan legal system.

12.2 What, if any, interest is available?

Interest is normally regarded as the form to cover damages. The Civil Code contemplates such remedy and in its calculation it refers to the average interest rate used by commercial banks in their active operations (lending) at the moment the interest must be calculated.

**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, parties can be entitled to recover fees and/or costs from the other party, specifically when the arbitral tribunal considers that the party that has to pay for such costs and fees litigated in bad faith. When no “bad faith” determination is found, normally fees and costs are distributed equally among the parties.

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

In principle, no. The potential tax could be a “stamp tax” applicable on the document containing the award. There is a little room for interpretation that the exemption on “judicial documents” exempted expressly under the Stamp Tax Law may not extend to arbitral documents, but so far the local tax authority has not issued any resolution regarding this matter.

**13 Investor State Arbitrations**

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

Yes, it has.

**13.2** Is Guatemala 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’)?

Guatemala has signed and ratified several BITs. Is not party to Multilateral Investment Treaties except for a regional or Central American Investment Treaty and in addition it has signed and ratified Free Trade Agreements with México, the United States of America, Chile and Panama, where their investment chapters contain similar provisions for ICSID arbitrations as in the BITs.

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

No. Guatemala does not impose or suggest any particular model language in investment treaties.

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

There is no practical experience so far in this regard. Guatemala was sued under an ICSID procedure in 2007 for the first time. So far, the proceedings have not yet commenced and the Government is pursuing an amicable resolution.

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

Again, there is no information available regarding this matter. But in general, there have been no cases in at least the last few decades where it has been publicly known that Guatemala could have used the defence of state immunity regarding jurisdiction and execution.

**14 General**

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

Recently, parties are submitting more to ad-hoc arbitration proceedings than to institutional arbitration proceedings. The three available local arbitration institutions are subject to some level of criticism. In a few cases where the arbitration proceedings were ex aequo et bono arbitrations, parties felt that the arbitrators may have abused such power. Certain disputes are normally referred to arbitration under Guatemalan parties, such as in the telecommunication, energy and stock market sectors. The specific laws for those economic sectors specifically allow for arbitration.

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

The abuse of the constitutional remedy known as Amparo has been an increasing concern. Not only has this remedy been used under malicious litigation during arbitral proceedings, but mostly in some notable cases where recognition and enforcement of foreign arbitral awards have been pursued in Guatemala (at least one case is becoming noteworthy).



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