

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 Nicaragua?

Under Nicaraguan laws, the only requirement for an arbitration agreement is that it must be written. This can be in a document signed by the parties, an email, fax or even if by the exchange of letters in which a party says that there is a arbitration agreement and the other does not deny the same. The agreement can be in the contract or in a separate document. Only when the agreement is reached in the middle of a judicial procedure, the parties must submit a written petition signed by both parties and the parties signatures must be authenticated by a public notary.

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 aren't any special requirements if an individual person is a party to a commercial transaction which includes an arbitration agreement.

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

The arbitration agreement usually include aspects as number of arbitrators, place for the arbitration, if there is a entity that will administrate the procedures, rules of procedure applicable, substantive law applicable. In case that the parties do not include those provisions, then those aspects will be regulated by the law.

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

Despite the fact that the Law of arbitration and mediation is relatively new, (the law was enacted in 2005) there is a positive approach of the courts to the enforcement of arbitration agreements.

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

National courts are willing to enforce ADR agreements.

2 Governing Legislation

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

The enforcement of arbitration agreements is ruled in the "Ley de Mediación y Arbitraje" (Ley 540. published in La Gaceta, official journal on June 24 2005).

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

The mentioned law governs the national arbitration; in the case of international commercial arbitration, Nicaragua is signatory to the Panamá Convention and this is the applicable law to international arbitration proceedings.

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, both law 540 and the Panamá convention are based on the UNCITRAL Model Law.

3 Jurisdiction

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

The Nicaraguan law considers that all matters in which the parties have free disposition. The same law specifically establishes some matter that can not be subject to arbitration as family disputes, (alimony, divorce, nullity of the marriage etc.) criminal cases (cases in which the Public Ministry must be a party), any case in which the party can not represent by it self (due to incapacities) and labour cases. (Article 23 of the law.)

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

Yes, competent kompetenz apply.

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

In that case, the court must dismiss the procedures and to send the cause to arbitration upon the proper allegation by the defendant. If the defendant does not claim the existence of the arbitration agreement, then it is interpreted as a waiver of the agreement and the court will be competent to trial the case.

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

Only when one of the parties claim that the arbitration agreement is null, ineffective, or it is impossible to execute the same.

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

Nicaraguan law does not rule (neither in favour nor against) about the possibility of including in the arbitral proceeding individual or entities that have not agreed in the arbitration clause and this matter should be considered to be included in the competent competenz of the tribunal and can be solved on a case by case basis.

4 Selection of Arbitral Tribunal

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

There are no limits to the autonomy of the parties to select arbitrators. There are some incompatibilities to be an arbitrator; public officials can not serve as arbitrators.

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

Yes, if the mechanism agreed by the parties fails or if the parties have not designed a specific mechanism to appoint arbitrators or the arbitrators can not be appointed by any cause, the courts will have the powers to make the designation of arbitrators.

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

As said Courts act in default its arbitrators can not be appointed by the mechanism selected by the parties.

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

Arbitrators are supposed to be independent from the parties. The law provides that when appointed, arbitrators must reveal any circumstances that can affect the independence or impartiality. Law does not set a specific standard to measure the independence, or impartiality of the arbitrators.

5 Procedural Rules

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

The law provides that parties have freedom to set the rules that will apply in the arbitration proceedings. Parties can choose to adhere to rules issued by arbitral institutions or define they own set of rules. If parties fail to set rules, then the arbitral tribunal have the authority of select the procedural rules that will apply and if none of this happens, then the law set a few and general rules to govern the proceedings.

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

As said Nicaraguan laws follow the guidelines of Model Law of UNCITRAL and in procedural terms, there is no particular procedure required by law. The usual steps apply: request of arbitration, integration of the tribunal, presentation of the lawsuit, contestation of the defendant, evidence, arbitral award etc.

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

Unless the parties have agreed that hearings are mandatory, the laws give to the arbitrator panel the decision about need of conduct hearings and the only rule is that the hearing should be notified to the parties three days in advance.

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

Arbitrators have the power to order preventive measures in order to preserve the matter of the dispute, have the competence to determine their own competence, can decide on procedural issues, and obviously the power to issue a decision on the conflict.

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

The decision on procedural issues is conferred to the arbitrators, only a few decisions are given by the law to courts.

5.6 Are there any special considerations for conducting multiparty arbitrations in Nicaragua (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 is not special consideration to the multiparty arbitration in Nicaraguan law. The decision to consolidate different arbitration and allow third parties to intervene or join the proceeding must be decided in a case by case basis by the arbitrators.

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

National courts will hear an *ex parte* procedure only in case of the

petition of preventive measures required to protect the matter of the claim.

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?

Nicaraguan laws, allows arbitrators to grant preliminary awards and does not establish a list of relief that can be granted. In order to enforce any kind of award arbitrators must seek the assistance of courts.

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?

Nicaraguan laws give both court and arbitrators the capability to issue preventive measures to protect the matter of the claim. The request from a party to a court to issue those measures does not affect the jurisdiction of the arbitration tribunal.

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

It is usual that with the fulfilling of certain requisites, court grant the preventives measures in a case of arbitral jurisdiction.

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

No, the law only admit that arbitration tribunal or the arbitral institution orders the parties to provide the cost of the arbitration.

7 Evidentiary Matters

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

Arbitral proceedings have the great advantage that arbitrators can set the evidence rules in the proceedings provided that due process is observed.

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)?

Disclosure is not an institution considered in Nicaraguan procedural culture because our procedure is based in Civil Law and disclosure/discovery is usual in Common Law based procedures. It is important to note that arbitrators that are familiar with the disclosure/discovery are allowed to use that mechanism, provided that the arbitrators' panel is entitled to define the evidence rules that will apply to the specific procedure. Probably in some issues as bank records or protected information, arbitrators will face the limitation.

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

According to Nicaraguan laws, courts are not allowed to interfere with the procedural issues as scope of disclosure/discovery because those are issues in the powers of the arbitral tribunal.

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

As said, in Nicaragua having a system of Civil Law is not usual discovery/disclosure practice but there is not any legal prohibition for an international or domestic tribunal to use those procedural mechanisms.

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?

Again this matter is left to the arbitral tribunal but civil procedure rules will probably apply just because this is what arbitrators are used to do. Witnesses are sworn, then examined by the party that proposes and after that cross examined by the opposite party the tribunal can also question the witness.

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

Not only in arbitral proceedings but in any case, bank records are protected by the law, but parties can waive this protection by showing the records.

8 Making an Award

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

The first requirement is that the award must be written, signed by the arbitrators and should express the reasons (factual and legal) that lead to the decision unless parties have agreed otherwise. The award must be in the limits of the claims and counterclaims set by the parties in the proceedings and can not exceed those boundaries.

9 Appeal of an Award

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

There is a not appeal procedure against the arbitral award. As Nicaraguan laws follow UNCITRAL model law, the only recourse against the arbitral award if the petition to set aside the same due a list of causes as incapacity of a party, lack of due notice of the proceedings, the award include matters not subjected to arbitration etc.

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?

Saying again that appeal is not allowed in arbitral awards but the

recourse of petition of set aside; no, parties can not exclude any of the legal reasons to request the declaration of set aside established in the law.

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

Yes, but through arbitral agreement parties can establish procedures, times that in case of infringements can cause the set aside of the award.

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

The procedure for the petition of set aside is:

The losing party should go to Supreme Court of Justice (Civil Chamber) within 15 days after the notification of the award and provide evidence that:

- a) One party is affected by lack of capability at the time of the arbitral agreement, or the agreement is null according to the law applicable.
- b) The arbitration proceeding was not duly served and the party was not able to defend his rights.
- c) The award refers to a conflict not considered in the arbitral agreement or contains decisions not in the agreement.
- d) The integration of the tribunal or the procedure was not in accordance with the agreement by the parties.

Or when the Court considers that:

- a) According to the law the dispute is not a matter of arbitration. The award is contrary to Nicaraguan laws or was issued after the time conceded by the parties of the law.

10 Enforcement of an Award

10.1 Has Nicaragua 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?

Nicaragua signed and ratified the New York Convention on the recognition and enforcement of foreign arbitral awards with no reservations. The DECRETO No. 26-2002, Aprobado el 07 de Marzo del 2002.

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

Nicaragua have signed and ratified the Panama convention and the CAFTA DR.

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

The procedure to enforce an arbitration award is the same established for a final decision of any court. It means that the party must go to the competent court and ask the judge to order the enforcement of the award and if the debtor refuses to comply, then

the judge will enforce the decision.

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

The awards have the same effect as a judicial final decision and in this sense have the effect of *res iudicata* and the issues solved in the award must not be rehearsed in any court.

11 Confidentiality

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

Yes, the same law of mediation and arbitration establishes the confidentiality as one of the principles that must govern the procedures.

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

Yes, it can be used in other proceedings provided that law does not prohibit this use.

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

The law does not specifically regulate the matter.

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 limits on the type of remedies available in arbitration depends on the substantive law applicable but the Nicaraguan laws does not set limits in the possibility of applying a foreign substantive law.

12.2 What, if any, interest is available?

The interest depends on what the parties have agreed, if the parties have not agreed anything the medium rate of interest is published weekly by the Central Bank.

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?

The usual rule is that the prevailing party is entitled to recover all his expenses and costs but the arbitrator is entitled to determine in each case if each party will carry its expenses and costs usually based in the merits of the case.

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

There is not a specific provision taxing the awards but if the same fall

in any taxable category as income tax then regular legislation is applicable.

13 Investor State Arbitrations

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

Yes, Nicaragua signed the convention in 1994 and ratified in 1995.

13.2 Is Nicaragua 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)?

Nicaragua has several BITs with countries all around the globe and is party in the CAFTA.

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

Nicaragua uses the typical terms in BITs as fair and equitable treatment, most favoured nation, national treatment, full protection and security etc.

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

No disputes involving Nicaragua have been resolved by ICSID; the only dispute in which Nicaragua was part in ICSID was desisted by the plaintiff.

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

Our law allows a law suit to be brought against the State so there is not a general defense of immunity per se in cases involving the state; but the enforcement of monetary awards against the State is not enforceable through the attachment of State's assets or similar procedures and the only way to enforce a monetary award is through the inclusion by the government of the awarded amount in the national annual budget submitted for approval to the Assembly. Non-monetary awards are fulfilled by the voluntary performance by the competent officer although criminal accusations can be started against such officer who willingly refuses to comply with a court order.

14 General

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

It is our opinion that commerce disputes are starting to be resolved by arbitral procedures more often.

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

No, there are not.



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