Arbitration Guide
IBA Arbitration Committee

COSTA RICA

April 2012

Dyalá Jimenez*

DJ Arbitraje
Av. Vitacura 2939 - piso 10
Las Condes
Santiago
Chile
dyala.jimenez@djarbitraje.com

*The author wishes to acknowledge and thank María del Mar Herrera (BLP Abogados, Costa Rica) for her work in the preparation of this Guide.

Table of Contents

I. Background

(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?

Arbitration is used in commercial disputes, including to a large extent, banking. Unfortunately, there are no statistics in Costa Rica to provide numerical data in this regard.

The principal advantages to arbitration over court adjudication are its speed and the expertise of the adjudicators with respect to commercial matters.

A disadvantage is that there has been a perceived laxity with respect to the reasoning provided by some arbitrators in their awards. As a reaction, the parties' legal representatives generally request that detailed reasoning be provided in the decisions of the adjudicators so that the award is not later challenged on grounds of the lack of or deficient reasoning. Indeed, although ultimately most awards are upheld, arbitral awards rendered in Costa Rica are often attacked on this basis.

(ii) Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?

Most arbitrations are domestic and institutional and administered by the Costa Rican Chamber of Commerce, the Conciliation and Arbitration Center, the International Arbitration Center of AmCham and the Engineers and Architects Guild (*Colegio Federado de Ingenieros y Arquitectos*). Arbitrations in Costa Rica often involve the local subsidiaries of foreign companies.

There have been very few arbitrations seated in Costa Rica under the auspices of international institutions largely due to the lack of a "friendly" international arbitration statute. As will be discussed below, however, Costa Rica recently passed a special statute for international arbitration based on the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), which is expected will change this situation.

(iii) What types of disputes are typically arbitrated?

Disputes arising out of shareholders agreements, distribution contracts, infrastructure projects, sales contracts, trust agreements and project finance.

(iv) How long do arbitral proceedings usually last in your country?

Under statute, an arbitral award must be rendered within the time limit agreed by the parties. By reference, in cases of institutional arbitration, the time limit will be that as provided in the institutional rules, which vary depending on the arbitration centre. The time limits established by the local institutions generally vary between six to eight months. In *ad hoc* arbitrations, the time limit varies depending on what the parties have agreed.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

For domestic arbitrations that are not *ex aequo et bono* by the express agreement of the parties, arbitrators must be Costa Rican attorneys as specified in Articles 20 and 25 of Law 7727, the law that governs domestic arbitration. Before the law for international arbitration was enacted, this provision was also applied to international arbitrations. For example, in case No 177 of 2000, the First Chamber of the Supreme Court of Justice set aside the award that was rendered under the AAA Rules of Arbitration on the basis of Law 7727 because two of the three arbitrators were not Costa Rican attorneys. This case was severely criticised for going against Article 2 of the Inter-American Convention on International Commercial Arbitration which Costa Rica ratified. Since May 2011, with the new law on international commercial arbitration in force, it is clear that there is no such requirement for international arbitrations.

With respect to legal counsel, there is no limitation as regards to nationality in either domestic or international arbitrations. Article 45 of Law 7727 does establish that parties must be represented by attorneys. However, at least when the applicable law is Costa Rican, it is advisable to retain Costa Rican attorneys, since according to Costa Rican law, a lawyer must be admitted to the Costa Rican Bar Association lest he or she be penalised under the Criminal Code for "illegal practice of the profession".

II. Arbitration Laws

(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?

Since May 2011, Costa Rica has followed a dualist approach, which means that it has one regime for domestic arbitration and another for international arbitration. The former is governed by Law 7727 of 1997, which until May 2011 was also applied to international arbitration. Law 8937 of 2011 now governs international arbitrations seated in Costa Rica. It is based on the UNCITRAL Model Law, as revised in 2006.

(ii) Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?

The main differences are:

- Qualification of arbitrators: Under the domestic regime, arbitrators acting in arbitrations that are not *ex aequo et bono* must have been admitted to the Costa Rican Bar for at least five years. There is no requirement as to nationality or profession under the international regime.

- Applicable law: Under the domestic regime, when the parties have not agreed on the applicable law, Costa Rican law must apply. Under the international regime, when the parties have not reached agreement, the arbitral tribunal determines the applicable law.

- Language of the arbitration: Under Article 40 of Law 7727, the arbitration proceedings must be in Spanish, while there is no rule regarding language in Law 8937 for international arbitration.

- Enforcement of provisional measures ordered by the arbitral tribunal: The domestic regime is silent on this issue, while the international regime adopted Article 17 of the Model Law in its entirety.

- Recourse against the award: Setting aside and revision are two judicial recourses against the award available in domestic arbitration. With respect to international arbitrations, setting aside is the only judicial recourse, since requests for correction, interpretation or additional awards are presented to the arbitral tribunal directly. As regards to setting aside, the grounds in both statutes are almost identical, except the ground of rendering the award beyond the term agreed by the parties in the domestic regime, which does not exist in Law 8937 for international arbitration. As regards to judicial revision, this is a recourse available for domestic arbitrations. This recourse is governed by the Civil Procedures Code and is mainly applicable with respect to situations that become known to a party after the termination of the proceedings and, had they been known during the proceedings, could have resulted in the arbitrator rendering a different award (for example, when the award is based on documents that are subsequently declared false). This ground does not exist for international arbitrations per Law 8937.

- Confidentiality: Law 7727 provides that the arbitral hearings are private, while Law 8937 provides for the confidentiality of the entire proceedings.

Both statutes foresee the publication of the award unless the parties agree to the contrary.

(iii) What international treaties relating to arbitration have been adopted (eg New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

Costa Rica has adopted the New York Convention (1987), the Washington Convention (1993), and the Panama Convention (1978). The years in parenthesis correspond to the year of ratification.

(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Article 22 of Law 7727 establishes that, lacking the agreement of the parties regarding the applicable law, Costa Rican Law must by applied.

III. Arbitration Agreements

(i) Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?

Pursuant to Article 7 of Law 8937, the arbitration agreement must be in writing. The ´in writing´ requirement under the Law 8937 is met if its content is recorded in any form. Costa Rica chose "Option I" of the two Model Law optional languages for Article 7 on the arbitration agreement.

As regards to the validity and enforceability of an arbitration agreement, Article 8 of Law 8937 establishes that if the defendant invokes the arbitration agreement, the local courts must refer a dispute brought before the courts to arbitration unless it finds that such agreement is null, void or incapable of being performed. In this assessment, the courts apply general rules of civil law: (i) that the parties must have legal capacity; (ii) there must be an object; and (iii) there must be consent. Moreover, the arbitration clause should make clear the parties' intention to exclude the jurisdiction of the ordinary courts and also, the scope of the arbitration.

Article 23 of Law 7727 establishes as a sole requirement that the arbitration agreement be in writing, including as the result of an exchange of communications. It may be established as a contractual clause or provision or in a separate document.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an award will not be enforced?

While the First Chamber of the Supreme Court of Justice tends to guarantee the principle of *competence-competence* and therefore refer parties to arbitration on a prima facie basis, two caveats are important. The first is that it will scrutinise the language of the arbitration clause carefully. As such, if rapid enforceability is desired, care should be taken to: (i) make sure that arbitration is compulsory for the parties; (ii) ensure that the clause has a broad scope of application; and, in general (iii) that all the elements of the clause as required by law are accurately indicated.

Secondly, it will also scrutinise the arbitration clause that is the basis for the arbitrators' jurisdiction in the same detail at later stages, for example in setting aside proceedings. A relevant example is case 910-C-07 of 18 December 2007, where the First Chamber of the Supreme Court of Justice confirmed an award that rejected jurisdiction based on the defendant's objections that the arbitration clause conditioned the arbitration on a subsequent agreement of the parties. Indeed, the clause stated that the parties "may" seek arbitration "if the parties so agree".

(iii) Are multi-tier clauses (eg arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?

The law is silent on this matter. However, there is consistent jurisprudence of the First Chamber of the Supreme Court of Justice that confirms that the first tiers of multi-tiered clauses are not a condition to submit the dispute to arbitration. The Court has ruled that given negotiation and conciliation are voluntary processes, the parties may not be forced into them and rather, may use these processes to their benefit at any moment, before or during the arbitration.

(iv) What are the requirements for a valid multi-party arbitration agreement?

The law is silent on this issue however, the same rules that govern the validity of any arbitration clause apply. In this sense, the consent of the parties to submit a dispute to arbitration is an essential element in order to effectively attract numerous parties to the arbitral proceedings. As regards to the constitution of the arbitral tribunal, Law 8937 does not limit the number of arbitrators that parties may agree on, as long as it is an odd number. This means that theoretically, the situation where each party appoints an arbitrator could occur (with the odd-number limitation).

(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?

Although the law is silent on this issue, in the case 800-A-3 of 26 November 1987, the First Chamber of the Supreme Court of Justice found that conferring on one of the parties the right to initiate arbitration is not a clear manifestation of the intention of both parties to submit their disputes to arbitration. The Court set aside the decision of the arbitral tribunal which had found to the contrary.

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

The law is silent on this issue and the question is resolved on a case-by-case basis. The involvement of a party in the negotiation of documents that contain arbitration clauses and in the subsequent business or the assignment of a contract that contains an arbitration clause to a non-signatory will very likely mean that these non-signatories will be deemed parties to the arbitration.

In Costa Rican civil law, acceptance of an arbitration clause may also be implied by acts other than the execution of a contract.

IV. Arbitrability and Jurisdiction

(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?

Labour disputes cannot be submitted to arbitration. In addition, clauses that are incorporated in model-type agreements entered into with consumers will only be valid insofar as the consumer chooses arbitration. If the consumer chooses to go to the local courts, the arbitration clause will not be enforceable. Bankruptcy proceedings are also incapable of being arbitrated (the First Chamber of the

Supreme Court of Justice has stated that, aside from the fact that the Code of Civil Procedures provides for a special procedure for such instances, that in any case, these conflicts do not arise from the agreements that contain the arbitration clause).

In practice, both the arbitrator and the courts may decide on whether a matter is arbitrable. However, the First Chamber of the Supreme Court of Justice will have the last say. Lack of arbitrability is one of the grounds for setting aside the award and it is usually deemed a matter of jurisdiction, since it affects the validity of the clause (the object of the clause being invalid).

(ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?

Law 8937 provides that a party wishing to rely on the arbitration must object to the jurisdiction of the court in the first submission regarding the claim. Parties will be deemed to have waived their right to arbitrate if they carry on with the court proceedings without raising an objection.

(iii) Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?

Arbitrators may decide on their own jurisdiction per Article 16 of Law 8937. If such a decision is rendered in a partial award, as a result of bifurcation, parties will have 30 days to appeal this decision before the First Chamber of the Supreme Court of Justice. This procedure does not stay the arbitral proceedings unless the arbitral tribunal determines otherwise.

As mentioned, control over the tribunal´s jurisdiction is indeed exercised and the First Chamber of the Supreme Court of Justice carefully scrutinises arbitration clauses and decisions on jurisdiction taken by the arbitrators (although rarely disagrees with the arbitral tribunals' findings).

V. Selection of Arbitrators

(i) How are arbitrators selected? Do courts play a role?

In institutional arbitration, which is the most frequently selected type of arbitration in Costa Rica, arbitrators are usually selected by the institution, although some contracts include the procedure whereby each party appoints one arbitrator and the arbitrators appointed choose the presiding arbitrator. Institutions have lists of arbitrators. Since nearly 100% of arbitrators to date have been Costa Rican nationals and the lists include only Costa Rican arbitrators. However, with Law 8937, this will surely change.

Under the domestic regime, Law 7727 provides that in the instance where the parties or a third party that is supposed to appoint the arbitrator fail to do so, that the appointment will be made by the First Chamber of the Supreme Court of Justice, the Costa Rican Bar Association or any authorised arbitration centre. In practice, the First Chamber of the Supreme Court of Justice has never appointed an arbitrator, since parties tend to elect the other institutions.

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

Article 12 of Law 8937 establishes that potential arbitrators must disclose all circumstances that may generate any doubt regarding his or her impartiality or independence.

In *ad hoc* cases where the challenge procedure has not been agreed by the parties, Article 13(2) of Law 8937 provides for the arbitrators who are not challenged to decide any challenge. However, if the arbitrators decide to reject the challenge, this decision may be challenged before the First Chamber of the Supreme Court of Justice, with no appeal.

Article 31 Law 7727 is similar to Article 12 of Law 8937 and challenges are decided by the arbitrators who are not challenged. There is nothing that provides for appeal against their decision.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

There are no limitations under the international regime except that the arbitrator be independent and impartial. Under the domestic regime, arbitrators acting in arbitrations that are not *ex aequo et bono* must have been admitted to the Costa Rican Bar for at least five years. As regards to ethical duties, if the arbitrator is a Costa Rican lawyer he or she must abide by the Costa Rican Bar Association Rules of Ethics.

In addition, should the arbitrator serve under the Rules of Arbitration of the Centro de Conciliación y Arbitraje de la Cámara de Comercio de Costa Rica, he or she must abide by the Rules of Ethics of this institution. Generally, these rules relate to the duties of impartiality, confidentiality, disclosure, availability, ability to handle the case and prohibition to negotiate fees outside the schedule of the Centre. An arbitrator who fails to abide by such rules will be excluded from the Centre's list and also may be liable for damages to the parties and the Centre.

(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?

Article 11 of the Rules of Ethics mentioned above indicates the specific provisions regarding conflicts of interest. In addition, the same Centre as mentioned above, adopted a Guideline in May 2011 that obliges potential arbitrators to reveal potential conflicts of interest, in particular, whether he or she has been appointed by the same party, counsel or law firm of the counsel within the last five years.

VI. Interim Measures

(i) Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?

Since Costa Rica adopted the full version of the 2006 revised UNCITRAL Model Law, Articles 17 and 17A through 17I apply. This means that: (i) arbitral tribunals can issue a wide variety of interim measures; (ii) they can do so in the form of an order or award (there is however, silence on the required form); and (iii) the interim measures are enforceable in court. Further, should the circumstances be appropriate, arbitral tribunals may issue preliminary orders, which are granted through an *ex parte* request (although they are not enforceable in court).

(ii) Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following constitution of the arbitral tribunal?

Ordinary courts may grant provisional relief in support of arbitration, either before or during the arbitral proceedings, even if the arbitration is seated outside of Costa Rica. They will do so in accordance with the local procedural law that governs them.

(iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?

Article 27 of Law 8937 establishes that Costa Rican courts may provide support regarding the taking of evidence upon request from the arbitral tribunal or the parties, with the approval of the arbitral tribunal.

Article 52 of Law 7727 establishes the competence of local courts to grant provisional measures, further to the request of either of the parties or the arbitral tribunal. Although the said provision does not explicitly state the purpose of the measures that may be sought, it is reasonable to interpret that they may serve to protect evidence, for two reasons. The first is that Article 52 is included in the section regarding the conduct of the proceedings and, in particular, evidence. The second is that in Costa Rica, as in many other jurisdictions, provisional measures generally serve to ensure the outcome of the proceedings, protect the status quo, and protect evidence.

VII. Disclosure/Discovery

(i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?

In Costa Rica there is no disclosure or discovery. The only measure permitted in this sense is to order a party to produce the legal or accounting books of a company in cases where it is required.

(ii) What, if any, limits are there on the permissible scope of disclosure or discovery?

N/A.

(iii) Are there special rules for handling electronically stored information?

No. In practice, whenever a party wishes to produce electronically stored information, it will print out the relevant information and have a Notary Public certify the content and where it is stored (web page, files, etc.). In commercial cases, requests of orders to produce electronically stored information against a party are not common. In criminal cases, this is usually done by the intermediary of the Judicial Investigations Bureau (OIJ), which will sequester the relevant computers and carry out the expertise procedure.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

Article 38 of Law 8937 establishes that arbitration proceedings are confidential and that should the file be in the power of local courts, access will be given only to the parties and their counsel. The award, however, must be published unless the parties agree otherwise. The names of the parties and counsel will be redacted. It is not yet certain which authority will publish the awards and where.

Law 7727 does not impose confidentiality in the arbitration, but Article 51 establishes that hearings are private unless otherwise agreed by the parties. In contrast, Article 60 establishes that awards are public unless otherwise agreed by the parties.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

No, there are none. This issue is resolved on a case by case basis. For instance, some parties enter into specific confidentiality agreements when confidential information is presented in the proceedings.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

No.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

Arbitration in Costa Rica is mostly governed by institutional rules that do not include the IBA Rules on the Taking of Evidence in International Arbitration. These Rules are not yet well known or disseminated in the arbitration community in Costa Rica, so no, they are not common, as of yet.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

The general obligation of the tribunal to treat the parties equally and afford them a ´full opportunity´ to present their case also applies to the handling of the hearings.

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

Witness testimony is presented orally in one or more hearings scheduled for this purpose. There are no formal requirements established by law or the institutional rules. Usually the party who requested the testimony will question the witness first, followed by an interrogation made by the other party. Depending on the arbitrator, the parties may also be allowed to put further questions to the witnesses. Arbitrators will also usually question the witnesses.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

Anyone can appear as a witness. Witnesses provide their testimony under oath. Article 358 of the Civil Procedures Code is applied in this sense, because under Law 7727 the local procedural law applies where there Law 7727 is silent on procedural matters. It is likely that Costa Rican arbitrators will also apply this practice in international arbitrations as Law 8937 is also silent in this regard.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg legal representative) and the testimony of unrelated witnesses?

Under the Code of Civil Procedures the testimony of a person specially connected to the party offering the testimony, such as the principal of the company or the CEO, is called a confession. That person is perceived as less impartial and thus the counsel offering the "confession" is not permitted to interrogate such witness. If the witness is an unrelated person, that witness renders a "testimony" and he or she may be interrogated by the party offering such evidence. Given the above, if the same fact is affirmed in both "testimony" and "confession", adjudicators will give more weight to the former.

In contrast, in international arbitrations, parties may give testimony in the same way as unrelated witnesses do, so there is no distinction in the nomenclature or treatment among different witnesses. Also, the arbitral tribunal's freedom to weigh the evidence is accepted.

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

Although in domestic litigation the practice is to count on a sole expert appointed by the adjudicator, in arbitral proceedings parties are increasingly acquiring the practice of appointing their own independent experts in support of their case. In complex cases, it is possible to have party-appointed experts and tribunal-appointed experts.

Both, party-appointed experts and tribunal-appointed experts will issue a report in writing and may also be interrogated by the parties and the arbitral tribunal during the hearing, on the basis of their written report.

Although there is no express requirement regarding independence, independence will be certainly questioned by the opposing party.

(vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?

The tribunal only appoints experts upon the request of the parties.

(viii) Is witness conferencing (`hot-tubbing´) used? If so, how is it typically handled?

No. Witnesses present their testimony separately.

(ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?

Although there are no rules about the use of arbitral secretaries, the use of clerks is quite common. Among other secretarial tasks, the clerks make photocopies for the parties, coordinate translations, take notes during hearings and help with electronic devices such as recorders.

X. Awards

(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?

Awards must be reasoned. This has been made very clear by the First Chamber of the Supreme Court of Justice. Lack of reasoning is considered a violation of public policy unless it has been otherwise agreed by the parties under Article

31(3) of Law 8937. Awards must also contain the date and state the place of arbitration where it is deemed to have been made.

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

Punitive damages are not regulated by Costa Rican legislation. Arbitrators may award moral damages and simple interest. Compound interest is not permitted according to the Commercial Code.

(iii) Are interim or partial awards enforceable?

Yes, interim and partial awards are both enforceable.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

Under Law 7727, dissenting arbitrators must give reasons for their dissent, although the lack thereof does not invalidate the award. Under Law 8937, although there is nothing explicit on dissenting opinions, should an arbitrator not execute the award, reasons for the lack of his or her signature should be given in the award. In practice, arbitrators issue a dissenting opinion in a separate document.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

Awards by consent are permitted, as long as the arbitral tribunal is not opposed to issuing it. The form will be similar to an award rendered by the arbitral tribunal, and it has the same effects.

Per Law 8937, proceedings may be terminated if the claimant withdraws the case, unless the defendant objects to the withdrawal and the arbitral tribunal considers that the defendant has a right to have the case tried. Additionally, the arbitral tribunal may terminate the proceedings if it considers that pursuing the proceedings is unnecessary or impossible.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

Arbitrators may *ex officio* correct their award within 30 days from the date of issuance of the award. Also, parties may individually request a correction of the award within 30 days from the date of receipt of the award. Interpretation is possible only per the parties' agreement and the request may be jointly or individually submitted.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

This aspect will be determined by the arbitral tribunal in its award. Usually the unsuccessful party bears the costs – and indeed this is the general rule of some arbitral institutions – however, in some cases the parties are required to pay for their own costs. The good or bad faith demonstrated by the parties during the arbitration and the merits of the case are criteria taken into account by the arbitral tribunal.

(ii) What are the elements of costs that are typically awarded?

The elements of costs that are typically awarded are: the legal fees charged by the legal counsel of the winning party; the administrative costs of the arbitration centre; the fees of the arbitral tribunal; and other expenses related to the procedure (including for example, photocopies and fees charged by the diferent experts).

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

The law is silent regarding this point however arbitral tribunals determine the fees and costs in the award usually following the schedule of the corresponding arbitral institution. Parties are required to pay for the amount fixed for their respective case in advance. If futher expenses arise during the arbitration, the parties will be required to deposit these additional funds.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

Law 8937 is silent in this regard but institutional rules allow this.

Law 7727 provides in Article 58(g) that the award must include a decision on costs. Article 69 establishes that, if the award has not determined otherwise, the arbitrators' fees shall be borne by the parties in equal parts.

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

Not specifically, only insofar as the decision is challenged on one of the grounds for setting aside.

XII. Challenges to Awards

(i) How may awards be challenged and on what grounds? Are there limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?

Awards in international arbitration may only be challenged on the grounds of Article 34(2)(a) of Law 8937, the setting aside procedure. The party challenging the award must prove the grounds of such provision. The grounds of Article 34(2)(b), that is, that the award violates Costa Rican public policy or deals with matters that are not arbitrable, can be declared *ex officio* by the court. The authorised court to hear the challenges is the First Chamber of the Supreme Court of Justice.

A party has three months from the date of reception of the award (or the correction or interpretation thereof) to file for the setting aside of an award before the First Chamber of the Supreme Court of Justice. The average duration of such a procedure is six months.

Parties may request the stay of the enforcement procedure pending an annulment and the First Chamber of the Supreme Court of Justice will determine the convenience of ordering such a stay. The First Chamber of the Supreme Court of Justice may require the requesting party to post a bond for such order.

Article 67 of Law 7727 expressly establishes that a setting aside procedure does not stay the enforcement of the award.

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

No. Parties cannot waive the right to challenge an arbitration award.

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

In international arbitration, only partial awards on jurisdiction can be appealed, which may be reviewed by the First Chamber of the Supreme Court of Justice as provided for in Article 16(3) of Law 8937. Otherwise the only recourse against an award is annulment, or setting aside.

As stated initially, awards in domestic arbitration are only subject to revision and setting aside appeals, in accordance with Article 64 of Law 7727.

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

Yes. Under Article 34(4) of Law 8937, the First Chamber of the Supreme Court of Justice may remand an award to the arbitral tribunal. The powers will usually be indicated by the remanding court. Under the regime of Law 7727, the First Chamber of the Supreme Court of Justice has indeed exercised this faculty and remanded awards to the arbitrators.

XIII. Recognition and Enforcement of Awards

(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

The Code of Civil Procedures provides that the competent court in principle is the lower court in the jurisdiction of the domicile of the losing party. However, with respect to foreign awards it is the First Chamber of the Supreme Court of Justice which will proceed with the *exequatur* upon the request from a party. This is not established in Article 36 of Law 8937 but in the local procedural laws. In principle, one could say that Law 8937 supersedes the local procedural laws and that an *exequatur* is no longer needed but this has yet to be tested.

The grounds for opposing the enforcement of an award under Article 36 of Law 8937 are the same as those contained in Article V of the New York Convention. Article 36(2) of Law 8937 establishes that in the case of a pending or final decision of a setting aside request against the award, the court may, in its discretion, stay enforcement. *Contrario sensu*, it seems that no other ground for denying enforcement should produce a stay.

There is an outstanding question under Law 8937, which is the enforcement of an award rendered in Costa Rica. It is likely that in this instance, the parties will go directly to the lower courts for enforcement and not to the First Chamber of the Supreme Court of Justice. It is not clear however whether the lower courts of

enforcement will interpret Article 36 of Law 8937 or whether they will use the Code of Civil Procedures.

(ii) If an *exequatur* is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

Once *exequatur* is obtained, the party must appear before the lower court where the losing party is domiciled to seek enforcement.

(iii) Are conservatory measures available pending enforcement of the award?

Not expressly. However, under Law 8937, in order to guarantee compliance with an award, the First Chamber of the Supreme Court of Justice may order the party requesting a stay to post a guarantee.

As regards to conservatory measures, there is one case where the party requested the First Chamber of the Supreme Court of Justice to adopt a measure and was denied. In this case, No. 000387-E-08 of 6 June 2008, the Court found that it could not order something that was not provided for in the award, since the procedure was for *exequatur*. Although in theory parties should be able to request a conservatory measure from the competent lower court pending enforcement, this has not been tested and may not be advisable. Lower courts prefer to await the decision of the Supreme Court due to the judicial hierarchy.

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

The attitude of the First Chamber of the Supreme Court of Justice has been very positive towards enforcing foreign awards. As regards to awards set aside in the seat of arbitration, this has not yet occurred in Costa Rica.

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

The length of enforcement procedures depends entirely on the complexity of each case. As regards the time limit for seeking enforcement, it depends on the statute of limitations applicable to the underlying obligation, as there is no specific time limit in either Law 8937 or Law 7727.

XIV. Sovereign Immunity

(i) Do State parties enjoy immunities in your jurisdiction? Under what conditions?

Under Law 7727, State entities can submit their disputes to arbitration and often do. However, only disputes that pertain to the private faculties of the State may be arbitrated, not those dealing with the State's public powers, such as for example with respect to fixing tariffs, taxes or fines.

(ii) Are there any special rules that apply to the enforcement of an award against a State or State entity?

No.

XV. Investment Treaty Arbitration

(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?

Costa Rica is a party to the Washington Convention, the treaty that established the World Trade Organisation and the DR-CAFTA multi-lateral free-trade agreement in the region.

(ii) Has your country entered into bilateral investment treaties with other countries?

Costa Rica has entered into eight bilateral investment treaties. These treaties were signed with Canada, Chile, Mexico, Panama, The Dominican Republic, China, the Caribbean Community of States (CARICOM) and the DR-CAFTA, which includes a chapter on investment.

XVI. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

- A. Fernández López, *Derecho Arbitral Jurisprudencial*, Investigaciones Jurídicas (2009), Costa Rica.

- A. Fernández López, "Algunos criterios relevantes sobre el arbitraje en Costa Rica tras la Ley 8937 de 2011", *Revista de Arbitraje Comercial y de Inversiones*, 3 Iprolex (2011), Spain.

- S. Artavia Barrantes, *El Arbitraje en el Derecho Costarricense*, Sapiencia (2000), Costa Rica.

- V. Garita González, "Derecho comercial: el arbitraje, un nuevo horizonte para la búsqueda de una mejor justicia". *Convenio Corte-AID*, San José, Costa Rica, 1995.

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

Since 2007, there has been a Congress on International Arbitration held yearly, in February.

XVII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

Arbitration has definitely become the alternative to court proceedings in Costa Rica, especially since 1998 after the passing of Law 7727.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

There is no perceived preference towards other ADR procedures with respect to the resolution of commercial disputes. Although there are a number of specialised arbitration and conciliation centres in Costa Rica, they are sought mostly for their arbitration services. The centres are the following:

- Arbitration and Conciliation Center of the Costa Rican Chamber of Commerce;

- Arbitration Center of AmCham;

- Arbitration Center of the Costa Rican Association of Engineers and Architects;

- Arbitration Center of the Chamber of Real Estate Brokers;

- Latin American Center for Business Arbitration CLAE;

- CEMEDAR Arbitration Center;

- Arbitration Center of the Nesocon Espalne Group;

- Arbitration Center of the Doctors and Surgeons Association; and
- Labor ADR center.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

The most noteworthy development is the passing of Law 8937 in May of this year. This in turn will surely bring other developments in the field of arbitration as the international standards and practices will no doubt seep into the local arbitration community. For example, the local practice of giving priority to the time limit and not to the reasoning of the award is likely to subside. Parties often believe that they want a fast-track arbitration when they sign the arbitration agreement, but later realise that this binds them to what could be a procedure of a lesser quality (given that going beyond the time limit is grounds for setting aside the award).

A very positive aspect of Law 8937 is that it grants all judicial authority to a single court, the First Chamber of the Supreme Court of Justice (except with respect to the enforcement of provisional measures, where the Court may delegate its powers to other courts which, remains to be done). This allows for specialisation. Already, the Supreme Court has proved to be specialised and generally arbitration-friendly.