



Arbitration Guide  
IBA Arbitration Committee

# **COSTA RICA**

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## I. Background

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

Costa Rica follows a dualistic legal approach: it has a law that governs domestic arbitration (“Law 7727”, of 1997) and a law that governs international arbitration (“Law 8937”, of 2011<sup>1</sup>), which is inspired by the UNCITRAL Model Law with the 2006 amendments. The First Chamber of the Supreme Court of Justice (“First Chamber”) is the judicial body in charge of arbitral matters under both legal bodies.

Art. 39 of Law 7727 establishes that any gaps will be supplemented by the Code of Civil Procedures of Costa Rica. A new Code of Civil Procedures (Law 9342<sup>2</sup>) will enter in force on October 9 2018.<sup>3</sup> There are no decisions yet under this new legal body. In this sense, it is important to mention that the new Code may adjust some of the current positions of arbitration in Costa Rica.

In domestic cases, the use of arbitration is in constant growth. Many factors account for this. The right to resort to arbitration is enshrined in Art. 43 of the Constitution<sup>4</sup> and has been reaffirmed by the Constitutional Court of the Supreme Court of Justice.<sup>5</sup> The First Chamber has generally adopted a pro-arbitration policy. During the last years, there has been a significant increase in the use of arbitration in the country.<sup>6</sup>

While arbitration proposes many advantages, the main ones are its expeditious handling (as opposed to civil and commercial litigation in Costa Rican courts which may take over ten years) and the expertise of the arbitrators in commercial matters, since not all courts have specialized judges. A major disadvantage is the delay in the arbitration proceedings as the parties may appeal the jurisdiction of the arbitral tribunal before state courts. This may cause a stay of proceedings of one or two years. Although most awards are ultimately upheld, arbitral awards rendered in Costa Rica are usually challenged which delays their enforcement.

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1 Before Law 8937 came in force on May 25 2011, the Code of Civil Procedures regulated both domestic and international arbitrations.

2 This Code will reform the previous Code of Civil Procedures (Law 7130) of August 16 1989.

3 See Official Bulletin No. 54 of April 8 2016. The Code will enter in force 30 months after its publication on the Official Bulletin, meaning on October 9 2018.

4 Art. 43 of the Costa Rican Constitution establishes that “all persons have the right to solve their economic disputes through arbitrators, even pending litigation”.

5 See Decision No. 2005-6851 of the Constitutional Court of the Supreme Court of Justice of June 1 2005.

6 In 2012, for example, 54 arbitrations took place, while in 2013 the numbers doubled to 102. The last available statistics show that 155 arbitrations were held in 2016. For more information concerning the statistics in ADR in Costa Rica see: <http://www.mjp.go.cr/viceministeriopaz/DepenDinarac?nom=centros>



**(ii) Are most arbitrations institutional or ad-hoc? Domestic or international? Which institutions and/or rules are most commonly used?**

Arbitrations are predominantly institutional. Ad-hoc arbitrations are rarely employed. There have been very few arbitrations seated in Costa Rica under the auspices of international institutions. There are over 15 arbitration institutions in Costa Rica. The following are the most commonly used<sup>7</sup>:

- Centre of Conciliation and Arbitration (“CCA”) of the Costa Rican Chamber of Commerce.  
Website: <http://camara-comercio.com/sobre-el-cca/>
- US–Costa Rican Chamber of Commerce, International Centre for Conciliation and Arbitration, AmCham (“CICA”).  
Website: <http://www.cica.co.cr>
- Centre of Conflict Resolution of the Federated Association of Engineers and Architects (“CFIA”).  
Website: <http://www.cfia.or.cr/centroRC.html>
- Mediation and Arbitration (“CAM”) of the Costa Rican Bar Association.  
Website: <https://www.abogados.or.cr/CAM>

**(iii) What types of disputes are typically arbitrated?**

Law No. 7727 adopted a broad approach to arbitrability in Costa Rica, referring to disposable rights. Arbitration is mainly used in commercial disputes, including to a large extent, banking.<sup>8</sup> Disputes arising out of shareholders agreements, real estate, distribution contracts, infrastructure projects, sales contracts, trust agreements and project finance are also referred to arbitration.

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

Without any delay, arbitration may last seven to eight months, depending on the complexity. However, since the parties may appeal before the state courts the arbitral tribunal’s decision on jurisdiction, a stay of proceedings of one or two years is likely to occur.

Domestic arbitration Law 7727 establishes that parties are free to agree and extend the term in which the arbitral tribunal should render the award. If the

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<sup>7</sup> These institutions are also capable of managing international cases.

<sup>8</sup> Arbitrations in Costa Rica often involve the local subsidiaries of foreign companies and foreign direct investors through local vehicles.



award is issued after the term agreed by the parties, the award can be set aside under Law 7727.<sup>9</sup>

International arbitration Law 8937 does not establish a term within which the award must be rendered. Thus, the term can be implied by the choice of institutional rules made by the parties in the arbitration agreement. Most institutional rules set a time frame for the arbitral tribunal, between six to eight months, to issue the award. In ad-hoc arbitrations, the time limit varies according to the agreement made by the parties.

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

Art. 25 of Law 7727 establishes that in domestic arbitrations any person unrelated to the parties or their representatives and attorneys, may act as arbitrator.<sup>10</sup> Furthermore, counsel representing a party in domestic cases must be admitted to the Costa Rican Bar Association or they will be exposed to a sanction for “illegal practice of the profession”.<sup>11</sup> Further, in *de jure* arbitrations, arbitrators must be attorneys with at least five-year membership to the Costa Rican Bar Association, which membership is obligatory. Therefore, foreign nationals who are attorneys under Costa Rican laws (and members of the Bar) are able act as arbitrators in domestic arbitrations.<sup>12</sup> The aforementioned is not required in *ex aequo et bono* nor in international arbitrations.

Regarding the nationality of legal counsel, Art. 45 of Law 7727 establishes that parties must be represented by attorneys under the same terms and conditions that apply for a power of attorney, which means that the power has to be in writing, signed by the party and authenticated by another attorney.<sup>13</sup> As regards international arbitrations, Law 8937 is silent on the matter.<sup>14</sup> However, Art. 2(a) states that regard is to be had to the international origin of this law, so it is

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9 See Art. 67(a) Law 7727.

10 See Art. 25 of Law 7727.

11 Art. 315 of Law 4573.

12 In order to become a member of the Bar Association the person has to be a lawyer graduated in Costa Rica or admitted to the Bar by application of international laws and agreements. See Art. 2 of the Organic Law of the Bar Association.

13 See Art. 20(3) of the new Code of Civil Procedures.

14 Before Law 8937 was enacted, Art. 25 of Law 7727 was applied to international arbitrations by the First Chamber despite going against Art. 2 of the Inter-American Convention on International Commercial Arbitration of 1975 (the Panama Convention). Pursuant to Art. 7(1) of the Costa Rican Constitution, international conventions have a higher hierarchy than national laws. In the Decision No. 177-A-BIS of June 2000, however, the First Chamber set aside an award that was rendered under the AAA Rules of Arbitration on the basis of Art. 25 of Law 7727, since two of the three arbitrators “were not Costa Rican lawyers”. This case was criticized for going against Article 2 of Panama Convention, which states that arbitrators can also be foreigners.



arguable that foreign attorneys may represent clients in international cases seated in Costa Rica, although this has not been tested to date.

## 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?**

As stated above, Costa Rica follows a dualistic approach. Even though Costa Rica adopted the version of the UNCITRAL Model Law as revised in 2006, it did not adopt the full text.<sup>15</sup> In this regard, Law 8937 deviates from the Model Law of 2006 in the following aspects:

- Scope of application: Unlike the Model Law, Art. 1 of Law 8937 provides that this law shall not apply to investor-state disputes regulated in international agreements.<sup>16</sup> Further, Art. 37 of Law 8937, which is an addition to the Model Law, provides that “disputes regarding matters, where the parties are free to agree, under the applicable civil and commercial law, can be submitted to arbitration”. Costa Rican courts have adopted a broad approach in terms of matters that can be resolved by arbitration and exclude non-commercial matters, such as criminal and family litigation, bankruptcy and inheritance disputes.
- Default number of arbitrators: The default number of arbitrators under Art. 10(2) of Law 8937 is one, whereas the default number of arbitrators under the Model Law is three. Costa Rica also deviated from the Model Law by adding that, in any case, the number of arbitrators should be odd.
- Form of an interim measure: Unlike the Model Law, Law 8937 does not refer to the form that the provisional measure must take but requires it to be reasoned. There are no reported cases on enforcement of provisional measures ordered by arbitral tribunals under Law 8937.
- Confidentiality of the proceedings and publicity of the award: Art. 38 of Law 8937, which does not exist in the Model Law, establishes that the arbitral proceedings are confidential. When the case is submitted under the First Chamber, only the parties and their legal representatives will have access to the file. Furthermore, unless otherwise agreed by the parties, once the award is final, it will be public, but in protection of the identity of

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<sup>15</sup> “La nouvelle loi costaricienne sur l’arbitrage commercial international du 25 mai 2011,” Rev. Arb. 2011 (3), p. 843

<sup>16</sup> In this sense, the provisions of Law 8937 do not replace provisions that foresee different procedures under International Investment Agreements.



the parties (citing their initials), only the arbitrators and attorney's names will be cited.

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

Yes. The main differences are the following:

- Qualification of arbitrators: Under Law 7727, arbitrators in *de jure* arbitrations must be members of the Costa Rican Bar for at least five years. There is no requirement as to nationality or profession under the international regime or Law 8937.
- 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 an agreement, the arbitral tribunal determines the applicable law.
- Language of the arbitration: Article 41 of Law 7727 sets the mandatory requirement that the language of the arbitration is Spanish, while there is no rule or restriction regarding language in Law 8937 for international arbitration.
- Provisional measures ordered by the arbitral tribunal: The domestic regime does not grant arbitral tribunals the power to issue provisional measures, which have to be sought before the local courts (either by the parties or by the arbitral tribunal). The international regime adopted Article 17 of the Model Law grants tribunals the power to issue provisional measures, unless agreed otherwise by the parties.
- Recourse against the award: Law 7727 establishes that the only available judicial remedy against the domestic award is setting aside and revision.<sup>17</sup> However, the decision on jurisdiction by the arbitral tribunal may be appealed.<sup>18</sup> In contrast, in international arbitration, according to Law 8937, setting aside is the only judicial recourse.<sup>19</sup> The grounds for setting aside are almost identical in both statutes, with the exception of the ground of

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<sup>17</sup> The remedy of judicial revision is governed by the Code of Civil Procedures and is mainly applicable in situations that became known to a party after the end 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).

<sup>18</sup> See Art. 38 of Law 7727

<sup>19</sup> Requests of correction, interpretation or of additional awards are directly submitted to the arbitral tribunal.



rendering the award beyond the term agreed by the parties in the domestic regime, which does not exist in Law 8937 for international arbitration.

- 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 (e.g. New York Convention, Geneva Convention, Washington Convention, Panama Convention)?<sup>20</sup>**

Costa Rica is a party to: (i) the New York Convention<sup>21</sup> (1987); (ii) the Washington Convention<sup>22</sup> (1993), and (iii) the Panama Convention<sup>23</sup> (1978).

**(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?**

Art. 22 of Law 7727 establishes that the arbitral tribunal shall apply Costa Rican law as the substantive law (with the conflict of law rules), unless otherwise agreed by the parties. In any case, the arbitral tribunal shall consider the applicable usages and practices that may prevail over the written law<sup>24</sup>.

In international arbitration, Art. 28 of Law 8937 establishes that falling any designation of the merits of the dispute by the parties, the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable. The tribunal shall only decide *ex aequo et bono* if the party have expressly authorized it to do so.

It is interesting to note that Costa Rica recently adopted the United Convention on Contracts for the International Sale of Goods (CISG) that will enter in force on 1 August 2018 (Bill No. 18121).

<sup>20</sup> The years in parenthesis correspond to the year of ratification.

<sup>21</sup> Costa Rica adopted the New York Convention in full without any reservations.

<sup>22</sup> Costa Rica made two reservations to the Washington Convention. Firstly, regarding Art. 26, Costa Rica requires the exhaustion of local remedies as a condition to its consent to arbitrate. Secondly, regarding Art. 42, unless otherwise agreed by the parties, the tribunal must apply Costa Rican legislation at the time of the conclusion of the arbitral agreement.

<sup>23</sup> Costa Rica adopted the Panama Convention in full without any reservations.

<sup>24</sup> Art. 28(4) of Law 8937 also establishes that in all cases the tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.



### 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?**

Art. 23 of Law 7727 provides that arbitration agreements must be in writing<sup>25</sup> and can be established as a contractual clause or as a provision in a separate document. It can also be introduced by any valid mean of communication between the parties, such as facsimile, telex, or others. As to the content of the arbitration agreement, parties may establish the terms and conditions that will govern the arbitration. The arbitration agreement may be complemented, modified or revoked by an agreement between the parties at any time.

In international arbitration, Costa Rica adopted “Option I” of Art. 7 of the Model Law. Therefore, the arbitration agreement must be in writing.<sup>26</sup> This requirement is met if its content is recorded in any form.<sup>27</sup> In regard to the validity and enforceability of an arbitration agreement, Art. 8 of Law 8937 establishes that if the respondent invokes the arbitration agreement in a case that is brought to a court, the court must refer the dispute to arbitration unless it finds that such agreement is null, void or incapable of being performed. In this assessment, courts should consider whether: (i) the parties have legal capacity; (ii) there is an object; and (iii) there is consent. Moreover, the arbitration clause should make the parties’ intention to exclude the jurisdiction of the ordinary courts clear and it should encompass the scope of the arbitration.

- (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 tends to guarantee the principle of *kompetenz-kompetenz* and therefore refers parties to arbitration on a *prima facie* basis, two caveats are important. The first is that it will scrutinize the language of the arbitration clause carefully. As such, if the parties want fast enforceability, care should be given to the following: (i) making sure that arbitration is compulsory for the parties; (ii) ensuring 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.

25 Similarly, Art. II(2) of the New York Convention establishes that: “the term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”. Art. I of the Panama Convention adopted a similar wording.

26 See Art. 7 of Law 8937.

27 The reference made in a contract to a document that contains an arbitration clause constitutes a written arbitration agreement if it can be implied that the clause forms part of the contract.



Secondly, it will scrutinize the arbitration clause that is the basis for the arbitrators' jurisdiction in the same detail at later stages, for example in setting aside proceedings. In general, the decisions have been reasonable. For example, the First Chamber confirmed an award that rejected jurisdiction based on the defendant's objections that the arbitration clause conditioned the arbitration to a subsequent agreement of the parties. Indeed, the clause stated that the parties "may" seek arbitration "if the parties agree so".<sup>28</sup>

- (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?**

Neither Law 7727 nor 8937 regulate multi-tier clauses. Tribunals have interpreted that there can be no requirements to resort to arbitration in Costa Rica, including tiered clauses.<sup>29</sup> The First Chamber has confirmed on several occasions that the first tiers of multi-tiered clauses are not a mandatory condition to submit the dispute to arbitration.<sup>30</sup> The Court has ruled that since 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. Hence, the clauses are generally unenforceable, irrespective of the language used in them.

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

There is no specific regulation in this regard, so a valid multi-party arbitration agreement requires consent to arbitrate. As stated above, arbitration agreements must also be in writing.

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

Although the law is silent on this issue, the First Chamber has found that arbitration cannot be imposed on the parties<sup>31</sup>, so there must be clear evidence that the real intention of both parties was to arbitrate.

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28 See Case No. 910-C-07 of the First Chamber of December 18 2007.

29 See Case No 798-C-S1-2008 of the First Chamber of December 4 2008.

30 See Case No. 602-F-21-2010 of May 13 2010 and Case No. 69-C-S1-2012 of January 26 2012, all of the First Chamber.

31 See Decision No. 174-C-2017 of the First Chamber



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

The question is resolved on a case-by-case basis. The First Chamber has stated that given the contractual nature of the arbitration agreement, the effects of the agreement should be applied to those who executed it and not to third parties.<sup>32</sup> Nevertheless, the First Chamber has also extended the arbitration agreement to non-signatories on the basis of implied consent<sup>33</sup>, subrogation<sup>34</sup>, assignment<sup>35</sup> and group of economic interest.<sup>36</sup> If the non-signatory has a significant involvement in the negotiation of documents that contain arbitration clauses and in the subsequent business it is likely that it will be joined to the proceedings.<sup>37</sup> In international arbitration, there is one reported case dealing with a non-signatory party under Law 8937<sup>38</sup> in which the First Chamber confirmed the decision of the arbitral tribunal to apply the arbitration agreement to a non-signatory.<sup>39</sup>

#### **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?**

Art. 18 of Law 7727 establishes that only disputes concerning disposable economic rights can be arbitrated, as long as they do not contravene mandatory rules. For instance, non-arbitrable matters are inherent powers of government<sup>40</sup>, criminal and family litigation, bankruptcy<sup>41</sup> and inheritance disputes.

Labor disputes of disposable rights can be submitted to arbitration according to the procedural reform of the Labor Code in Costa Rica that came into force in 2017.<sup>42</sup> In addition, standard clauses in consumer contracts will only be valid as

32 See Case No. 64-2012 of May 23 2012 and Case No. 1160-2011 of September 13 2011, all of the First Chamber in which it has held that the arbitral clause cannot encompass third parties by virtue of the principle of relativity of contracts.

33 Case No. 703-2000 of the First Chamber of September 22 2011.

34 See Case No. 200-2006 and No. 1678-C-S1-2012 of December 12 2012, all of the First Chamber.

35 See Decision No. 200-A-06 of April 2006 of the First Chamber.

36 See Decision No. 1565-A-S1-2010 of December 23 2010 of the First Chamber.

37 See Decision No. 127-F-2017 of the First Chamber.

38 In 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).

39 See Case No. 00280-2015 of the First Chamber.

40 See Decision No. 345-C-S1-2011 of the First Chamber of 31 March 2011.

41 See Decision 357-C-2007 of the First Chamber of 18 May 2007.

42 See Chapters XII and XIII of Law 9343.



long as the consumer chooses arbitration. Thus, a reference to general conditions with an arbitration clause will be valid if there is an actual and effective knowledge of the conditions of the contract.<sup>43</sup> If the consumer chooses to go to the local courts, the arbitration clause will not be enforceable.

In practice, both the arbitrator and the courts may decide on whether a matter is arbitrable. The First Chamber will still issue the final decision. Lack of arbitrability is a ground for setting aside 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?**

When a dispute is brought to court, according to the new Code of Civil Procedures in Costa Rica<sup>44</sup>, the other party may invoke an arbitration agreement until the statement of defense. If such a request is accepted, the judge will lose jurisdiction, stay the action and refer the parties to arbitration. If the claimant objects, the matter will be determined by the First Chamber and it will be only after such a decision that the arbitration, if confirmed, may proceed.

If the parties, however, carry on with the court proceedings without raising an objection, they will be deemed to have waived their right to arbitrate and the court will assume jurisdiction over the case.

Art. 8(1) of Law 8937 provides that a court, when seized of an action in a matter which is subject to an arbitration agreement, shall, at the request of a party which is made not later than when submitting its first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

- (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?**

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<sup>43</sup> See Art. 42 and 58 of the Law for the Promotion of Competition and Effective Defense of the Consumer, Law 7472 of 20 December 1994.

<sup>44</sup> Art. 37(3) of the new Code of Civil Procedures of Costa Rica.



Although Art. 37 of Law 7727 recognizes that arbitrators decide on their own competence<sup>45</sup>, in practice, as mentioned, when a lawsuit is brought before a lower court first and the respondent moves to refer the case to arbitration, the lower court refers the validity of arbitration clause to the First Chamber, rather than to the arbitral tribunal.<sup>46</sup> The situation differs when the dispute is brought first to arbitration and then a party contests the arbitration agreement. In those cases, the First Chamber reviews arbitral awards regarding jurisdiction only after the arbitral tribunal has rendered its decision.<sup>47</sup>

Arbitrators may also decide on their own competence per Art. 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 carefully scrutinizes 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?

According to Law 7727, the parties generally select arbitrators; courts may, however, play a role in certain cases. When a sole arbitrator has to be nominated<sup>48</sup>, each party will propose the names of the persons that may be selected as arbitrators. If no agreement can be reached within fifteen days after the submission of the request of arbitration<sup>49</sup>, the parties may request the General Secretariat of the Supreme Court of Justice, the Costa Rican National Bar or any authorized arbitration center to appoint the arbitrator from a list.<sup>50</sup>

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45 This provision goes further than article 16(1) of Law 8937, since it states that arbitral tribunals have 'exclusive jurisdiction' to decide objections regarding its jurisdiction and the arbitration agreement.

46 See Decision No. 98-2010 of the Second Civil Court of San Jose of March 17 2010.

47 Most of these cases deal with the validity of arbitral clauses that derive from appeals against jurisdictional decisions of arbitrators.

48 See Art. 26 of Law 7727.

49 Law 8937 follows a similar approach to Law 7727 in this regard, with the exception that the time periods if the arbitrators do not act are larger (thirty days instead of fifteen days).

50 In the recent decision No. 11421-17 of the Constitutional Court of July 21 2017, the Court ordered the Supreme Court to issue, within three months, the list of arbitrators that Art. 26 makes reference to (which has currently not been issued). In that case, such a list was necessary as the arbitration center closed and does not exist anymore. Thus, the originally institutional arbitration was transformed into an ad-hoc arbitration and the parties currently need a list so that the appointing authority can nominate the arbitrator.



When appointing three arbitrators<sup>51</sup>, each party shall appoint one and the two appointed arbitrators will choose the third, who will act as president. If the parties or the appointing authority fail to appoint an arbitrator, the First Chamber, the Costa Rican Bar Association or any authorized arbitration center will proceed with the appointment. In practice, the First Chamber has never appointed an arbitrator, since parties tend to elect the other institutions.

In institutional arbitration, arbitrators are selected according to the rules of the relevant institution, unless the parties agree otherwise.<sup>52</sup> Institutions have lists of arbitrators. As stated above, in *de jure* domestic arbitrations, arbitrators must be attorneys with a minimum of five years membership to the Costa Rican Bar Association. Law 8937 establishes that nationality cannot be a relevant factor when becoming an arbitrator.<sup>53</sup>

**(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?**

Art. 31 Law 7727 states that the arbitral tribunal will decide on challenges of an arbitrator<sup>54</sup>, without the participation of the challenged arbitrator. The decision on the challenge has no appeal.

Art. 12 of Law 8937 establishes that potential arbitrators must disclose all circumstances that may raise doubts to their impartiality or independence. There is a similar requirement under the rules of most arbitration institutions.

In *ad hoc* cases where the challenge procedure has not been agreed by the parties, Art. 13(2) of Law 8937 establishes that the arbitral tribunal shall decide on the challenge, unless the challenged arbitrator withdraws from office or the other party agrees to the challenge. If the arbitrators decide to reject the challenge, this decision may be challenged before the First Chamber.

**(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 should be independent and impartial. Under the domestic regime, as arbitrators

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51 See Art. 28 of Law 7727.

52 The CICA for example appoints three arbitrators if the arbitration agreement does not establish an appointment method. See Art. 16 of the CICA Rules.

53 Article 33 of the Costa Rican Constitution guarantees an equal treatment to nationals and foreigners.

54 Art. 16 of the CCA Rules establishes that arbitrators should accept their nomination within two days by declaring, in writing, any circumstances that may raise doubt to their impartiality or independence. In case that the arbitrator remains silent and does not accept the nomination after the time period of two days, a new nomination to another arbitrator shall be made.



acting in *de jure* arbitrations must have been admitted to the Costa Rican Bar, they will be subject to the Costa Rican Bar Association Rules of Ethics.

Additionally, several institutional arbitration rules<sup>55</sup> contain a set of Rules of Ethics which bind arbitrators serving under such rules. 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 may also be liable for damages to the parties and the Centre under general civil law.

**(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?**

Art. 31 of Law 7727 states that arbitrators are under an obligation to disclose in writing to the parties all circumstances that may lead to justified doubts as to his or her impartiality and independence. In case of doubt, the arbitrator may be challenged.<sup>56</sup> Art. 12 of Law 8937 is similar in this regard.<sup>57</sup>

As regards the IBA Guidelines on Conflicts of Interest in International Arbitration, some arbitral institutions follow them or advocate for their principles. In this regard, Article 53 of the CFIA Rules expressly states that an arbitrator may be challenged on the grounds established by the IBA. Further, the CCA 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 within the last five years.

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<sup>55</sup> See Rules of Ethic of the CCA, CICA, CFIA, amongst others.

<sup>56</sup> Art. 13 of Law 7727 also provides that conciliators and mediators have the duty to remain impartial to all interested parties and to decline to intervene when conflicts of interest exist.

<sup>57</sup> Art. 12(2) of Law 8937 specifies that parties can only challenge arbitrators on grounds that were known to them after the appointment.

## 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?**

In domestic arbitration, the arbitral tribunal does not have power to issue interim measures directly. The parties or the arbitral tribunal can request instead any kind of interim relief from the judicial authority.<sup>58</sup>

In international arbitration, Costa Rica adopted the text of Art. 17 of the 2006 revised UNCITRAL Model Law. 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 but it is stated that the order should be reasoned); 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?**

If requested, courts may grant provisional relief in support of arbitration, before or during the arbitral proceedings<sup>59</sup>. Art. 8(4) of the new Code of Civil Procedures establishes that if an interim measure is requested in relation to a national or international arbitration, the court of first instance in which the award will be enforced will have jurisdiction to grant provisional relief.

- (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?**

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58 According to Art. 52 of Law 7727 the parties may request, at any stage of the proceedings, interim measures from the courts. The arbitral tribunal may also voluntarily, or by the request of a party, request the interim measures it deems necessary from the competent authority. The request of interim measures to the state courts is compatible with the arbitral proceedings and should not interfere with the arbitration agreement.

59 See Decision No. 1297-F of the First Civil Court from December 18 2007 in which the court stated that parties in an arbitration can request interim relief to the state courts even before the beginning of the arbitral proceedings.



Arbitrators can obtain information or assistance through judges.<sup>60</sup> Under Law 7727, the arbitral tribunal has the power to request judicial assistance from the state courts, which encompasses measures that serve to protect evidence. 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 consent of the arbitral tribunal. Arbitral tribunals are usually asked to seek aid from the courts in order to execute the provisional measures as, unlike the judges, they lack “imperium”, which is needed to execute the measure.

A common measure that is requested is the “preparatory” evidence, which is produced before the arbitration begins, just like in the civil proceedings.<sup>61</sup>

## VII. Disclosure/Discovery

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

Law 7727 is silent on discovery.<sup>62</sup>

Local attorneys have a Roman-civil-law education background and are not familiarized with this concept as, traditionally, in commercial matters, judges do not seek to find the real truth but decide according to what the parties submitted. However, this has changed with the modification of the Code of Civil Procedures, which now establishes that parties must cooperate in the production of evidence, following a principle of “shared burden of proof”.<sup>63</sup>

Parties have always been able to request production of documents.<sup>64</sup> The judge is in charge of ordering such a measure and to receive the documents. Tribunals

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60 See Art. 172 of the Organic Law of the Judicial Power and Art. 13(3) of the new Code of Civil Procedures.

61 Art. 49 of the new Code of Civil Procedures establishes that before the claim is submitted, any type of evidence can be admitted and produced as long as it cannot await a later stage of the proceedings or even if it may be presented later on, it will lose its effect by then. If the request of the preparatory evidence is not justified, the requesting party will pay the costs thereof.

62 Costa Rica is not a signatory of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters from 1970.

63 Art. 41(1) of the new Code of Civil Procedures states that parties who make a statement have the burden of proving the facts that created their right. Paragraph (2) states that parties who oppose to a claim, have the burden of proving the preventive, amending or extintive facts concerning the claimant’s right. When applying this, regard is to be had to the availability and convenience that every party has in providing such evidence

64 Art. 45(4) of the new Code of Civil Procedures establishes that parties will be ordered to produce documents, reports, books or any other type of evidence as long as the evidence is under the parties’ domain, it refers to the subject-matter of the dispute, and it is relevant for the requesting party. The production of documents is mandatory and if it is not presented, the statements made by the other party concerning the document will be accepted. If a third party has a document that needs to be produced for



have interpreted this power restrictively by concluding that parties only have the possibility to request the production of a legal or accounting book of a company, but this has been broadened in the new Code of Civil Procedures.

**(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?**

Not specifically. In practice, whenever a party wishes to produce electronically stored information, it will print out the relevant information and a Public Notary will 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.<sup>65</sup> It is interesting to note that, starting in 2017, the CCA works with an online secure file, and the CICA is expected to follow suit.

## VIII. Confidentiality

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

Law 7727 provides that arbitral hearings are private and that the award is public unless otherwise agreed by the parties.<sup>66</sup> Under Law 8937<sup>67</sup>, the entire arbitration proceedings are confidential. When the case is submitted before the First Chamber, only the parties and their legal representatives will have access to the file.

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

Not in domestic arbitration, although in practice some parties enter into specific confidentiality agreements when confidential information is presented in the proceedings.<sup>68</sup> Under Art. 17 of Law 8937, the arbitral tribunal may take measures to protect confidential information.

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

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the process, it will be requested to submit it as long as it does not affect him/her. Public officials cannot refuse to produce the documents that concern their duties.

65 In criminal cases the intermediary of the Judicial Investigations Bureau (OIJ) will seize the relevant computers and carry out the expertise procedure.

66 Art. 60 of Law 7727.

67 Art. 38 of Law 8937.

68 In the case of conciliation, Art. 13(d) of Law 7727 states that the conciliator has the duty to maintain the confidentiality of the information.



Not in the arbitration regimes, but client-attorney work is in principle protected by Art. 41 of the Legal, Moral and Ethical Rules of Legal Professionals.<sup>69</sup> In case of breach, the attorney will be exposed to a sanction.<sup>70</sup>

## 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?**

Although the IBA Rules are not mastered in the arbitration community in Costa Rica, they are increasingly referred to as guidance for arbitral tribunals.

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

During the hearings, tribunals have to respect due process, treat the parties equally and afford them a full opportunity to present their case.<sup>71</sup>

- (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?**

Under Law 7727, witness testimony is presented orally in one or more hearings scheduled for this purpose. There are no established requirements. Tribunals are free to determine how the witness will be questioned. The requesting party will usually question the witness first, followed by the other party and by the tribunal. This is similar under the international law.

It is not usual practice to submit witness statements, so examination begins with direct examination by the party who offers the witness.

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

Anyone who does not have a direct interest in the dispute and is capable of declaring about the facts of the case can appear as a witness, including relatives of the parties. An evaluation of the credibility of the witness who provides its testimony under oath will be made. Art. 43 of the new Code of Civil Procedures fills the gap of Law 7727, which is silent on this matter. It is likely that Costa

<sup>69</sup> Pursuant to Art. 1, this set of Rules is binding to every authorized member by the Bar Association.

<sup>70</sup> See Art. 84 of the Legal, Moral and Ethics Rules of Legal Professionals

<sup>71</sup> See Art. 39 of Law 7727.



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 (e.g. legal representative) and the testimony of unrelated witnesses?**

Under Art. 42 of the new Code of Civil Procedures persons directly involved in the outcome of the proceedings have a duty to declare about the facts of the case.<sup>72</sup> Their statements fall under a different category than a regular witness and if they admit a fact, it will be considered as true and will constitute evidence for the opposing party.<sup>73</sup> If the person is unrelated to the outcome of the proceedings and does not have a direct interest, it will be referred to as a witness<sup>74</sup>. The offering party may interrogate witnesses.

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 amongst witnesses. The tribunal's freedom to weigh evidence is accepted.

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

Parties usually appoint their own independent experts in support of their case. In complex cases, it is possible to have party-appointed experts and tribunal-appointed experts who will issue a report in writing and may also be examined 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, it will usually be 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?**

Under Art. 53 of Law 7727, the arbitral tribunal can appoint experts to seek written advice on specific matters determined by the arbitrators. In this sense, the tribunal determines the powers and fees for the experts and notifies the parties

<sup>72</sup> In the case of legal entities, their legal representative will give the declaration.

<sup>73</sup> With the previous Code of Civil Procedures, adjudicators considered as “full proof” (“plena prueba” in Spanish) the statements confessed by a party against his/her own interest. This rule came from the previous system in Costa Rica in which the probative value of the evidence was given *a priori* to the judge by law (“prueba tasada” in Spanish). Currently, adjudicators should have discretion to weigh the evidence.

<sup>74</sup> See Art. 43 of the new Code of Civil Procedures which states that any person can be a witness.



accordingly. Once the expert gives his/her opinion, the parties may examine the document and express their arguments for or against it. On a case-by-case basis the tribunal will decide any difference between one of the parties and the expert.

Art. 26 of Law 8937 also gives the tribunal the power to appoint expert unless otherwise agreed by the parties. Some arbitral institutions have a list of experts that have to meet certain requirements such as professional experience in their area of expertise.<sup>75</sup>

**(viii) Is witness conferencing (‘hot-tubbing’) used? If so, how is it typically handled?**

Witnesses and experts usually present their testimony separately. Hot-tubbing may be allowed, as there is no prohibition against it.

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

There are no rules, but the use of clerks is very common. Among other secretarial tasks, the clerks coordinate translations, take notes during hearings and help with electronic devices such as recorders. Usually, staff of the arbitration center acts as clerks.

## **X. Awards**

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

Art. 58 of Law 7727 establishes that all awards must be reasoned unless otherwise agreed by the parties.<sup>76</sup> The First Chamber has set this as a requirement for the award to be considered valid, and Law 8937 reinforces this requirement.<sup>77</sup>

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

Arbitrators can award moral damages, and simple interest.<sup>78</sup> Compound interest is not allowed<sup>79</sup> and courts have been reluctant to award punitive damages<sup>80</sup>.

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<sup>75</sup> See CFIA Rules

<sup>76</sup> Art. 58 of Law 7727 regulates the content of the award that will include: the names of the parties, the date and place of the arbitration, a description of the dispute, the statement of facts, the prayer of relief stated by the parties, the decision of the tribunal and the process to enforce the award. Similarly, Art. 31(3) of Law 8937 states that the date and place of the arbitration will be stated in the award.

<sup>77</sup> See Art. 31(3) of Law 8937.

<sup>78</sup> See Decision No. 943-N-2007 of the First Civil Court of December 14 2007 and Art. 496 of the Commercial Code (Law 3284).



**(iii) Are interim or partial awards enforceable?**

Yes, interim and partial awards are both enforceable under national laws as well as the New York and Panama Conventions.<sup>81</sup>

**(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?**

Yes, according to Art. 59 of Law 7727 arbitrators are allowed to issue dissenting opinions. In that case, the dissenting arbitrator must justify the reasons of its dissent in the award. However, even if the dissenting opinion is not reasoned, the award will be considered as valid.

Law 8937 is silent on the issue of dissenting opinions.<sup>82</sup>

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

Yes, according to Art. 63 of Law 7727 an award by consent may be issued upon joint request by the parties to the arbitral tribunal and must be signed by the arbitrators. Similarly, Art. 30 of Law 8937 establishes that the proceedings may be terminated by joint agreement. This award will have the same effect as any other award issued by the tribunal.

Proceedings can also be terminated if the claimant or, in the case of counterclaims, both parties, withdraw their claims. Withdrawal of claims may occur for a variety of reasons, including of course a (partial or total) settlement between the parties, without the request to have the settlement issued as an award by consent.

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

According to Art. 62 of Law 7727 the parties may request for corrections or clarifications of the award within three business days after the date of receipt of

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79 See Art. 505 of the Commercial Code of Costa Rica. There are, however, some contractual modalities (like the system of complementary pensions) that are based on the compound interest.

80 See Decision No. 41 of the First Chamber of June 1993 cited by F. Torrealba Navas, *Responsabilidad Civil* (2011). Art. 427 of the Commercial Code could be seen as a trait of punitive damages in Costa Rica.

81 Nevertheless, none of the arbitral laws in Costa Rica establish a difference between the different types of awards.

82 Article 31(1) of Law 8937 states, however, that if an arbitrator does not sign the award, reasons for the lack of his or her signature should be given in the award and that it will still be valid if the majority of the members of the tribunal sign the award. In practice, arbitrators issue a dissenting opinion in a separate document.



the notice of the award. If applicable, arbitrators should add, clarify or correct the mistakes within ten days after the request. Silence of the arbitrators will not be interpreted as an acceptance of the request.

Art. 33 of Law 8937 also establishes that the parties may request within thirty days to the tribunal to correct any mistake in the award. Parties may also request the tribunal to interpret a specific part of the award. Arbitrators may *ex officio* correct their award.

## **XI. Costs**

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

In most institutional rules in Costa Rica the unsuccessful party bears the costs of the arbitration. The tribunal will determine the costs and will take into account the behavior of the parties during the arbitration. For *ad hoc* cases, the same ‘costs follow the event’ rule is usually followed. Article 17(G) of Law 8937 does not deal with this matter.

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

The following costs are typically awarded: attorney’s fees; administrative costs of the arbitration center; fees of the arbitral tribunal; and other costs of the procedure including, for example, translations, copies and experts’ fees.

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

Yes, the arbitral tribunal has jurisdiction to decide on its own costs and expenses according to the schedule of the corresponding arbitral institution or alternatively, pursuant to the formula set out in Art. 68 of Law 7727.

Law 8937 is silent on the matter.

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

Yes. Law 7727 provides 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.<sup>83</sup> Law 8937 is silent in this regard.

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83 See Art. 58(g) of Law 7727.



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

No. Courts cannot review matters that are reserved for the arbitral tribunal.<sup>84</sup>

## **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?**

Article 67 of Law 7727 sets out the limited grounds on which an award can be challenged. In this sense, the First Chamber can only set aside an award if: (a) the award is issued after the agreed timeframe, (b) a matter that depends on the efficiency and validity of the arbitration is omitted, (c) the decision grants more than what was submitted to arbitration; this part will be annulled and the rest of the award will be preserved, (d) the subject matter was incapable of being submitted to arbitration, (e) violation of due process<sup>85</sup>, (f) violation of public policy<sup>86</sup> or of a mandatory regulation, and (g) lack of jurisdiction of the tribunal. The setting aside procedure does not stay the enforcement. The First Chamber has decided on several occasions that it may not review the merits of the dispute but just the grounds that are stated in Art. 67.<sup>87</sup>

In international arbitration, Law 8937 refers to the application for setting aside as the sole recourse against the award.<sup>88</sup> The court can set aside the award on its own initiative if it finds that the award: (i) deals with non-arbitrable matters or (ii) violates public policy. A party has three months after the reception of the award (or the correction or interpretation thereof) to request the setting aside application to the First Chamber. The First Chamber may suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

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84 See Decision No. 248-F-2004 of the First Chamber from April 14 2004.

85 See Decision No. 1201-F-S1-2013 of the First Chamber from August 18 2013.

86 See Decision No. 664-F-S1-2010 of the First Chamber stated that a violation to public order occurs when there is an unequal treatment or an abuse to one of the parties. Further, Case No. 594-F-S1-2011 stated that procedural regulations encompass public order.

87 See Decision No. 1075-F-S1-2010 of the First Chamber from September 9 2010; Case No. 635 of the First Chamber from September 19 2008.

88 Art. 34 of Law 8937 adopted an identical version of the 2006 amendments of the UNCITRAL Model Law. See Decision No. 2015-280 of the First Chamber from March 5 2015.



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

- (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.

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

According to Art. 58 of Law 7727 the award will have no appeal.<sup>89</sup> In international arbitration, only partial awards on jurisdiction can be appealed, which will be reviewed by the First Chamber.<sup>90</sup>

- (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. The remanding court will indicate the powers of the tribunal in relation to the remanded award. Under domestic arbitration, as long as the violation can be repaired, the First Chamber has sent back the award to the arbitral tribunal so that the arbitrators will issue a new award correcting the mistake.<sup>91</sup>

As mentioned, Article 34(4) of Law 8937 states that the First Chamber may suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

### **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?**

<sup>89</sup> As stated above, awards in domestic arbitration are only subject to revision and setting aside in accordance with Art. 64 of Law 7727.

<sup>90</sup> See Article 16(3) of Law 8937

<sup>91</sup> See Decision No. 332-F-S1-2012 of the First Chamber of 8 March 2012. This faculty is known as "reenvío" in Spanish and there are some dissenting opinions within the judges of the First Chamber as they state that this Chamber cannot order the arbitral tribunal to issue a new award.



Art. 99(3) of the new Code of Civil Procedures states that the First Chamber is the competent court for receiving requests dealing with the recognition and enforcement of awards. The requesting party shall provide the original award or an authentic copy and an official translation.<sup>92</sup> The procedure begins with a hearing in which all of the arguments and evidence will be presented after which the First Chamber will render a final decision. If the recognition is granted, the First Chamber will notify the lower court of the domicile of the losing party for enforcement. If the losing party has its domicile abroad, the requesting party can choose the competent national court.<sup>93</sup>

This procedure will be applied in international cases as well, since the New York Convention refers to local law for procedural aspects, and Law 8937 is silent on the specifics.

Art. 58 of Law 7727 gives the effect of *res judicata* to the arbitral award.<sup>94</sup> Art. 35 of Law 8937 says that, regardless of the country in which the award was made, it shall be recognized as binding and, upon application in writing to the court, it shall be enforced.

In order to oppose enforcement and pursuant to Article 36 of Law 8937, the party against whom an award is invoked has to prove the same grounds that are stated in Art. V of the New York Convention.<sup>95</sup> In the case of a pending or final decision of a setting aside request against the award, the First Chamber may, in its discretion, stay enforcement.<sup>96</sup>

**(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?**

The First Chamber will proceed with an *exequatur* upon the request from a party.<sup>97</sup> Once the *exequatur* is obtained, the party must seek enforcement before the lower court in which the losing party is domiciled, as explained above.<sup>98</sup>

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92 Art. 35 of Law 8937 states that the party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court *may* request the party to supply a translation.

93 This procedure (“proceso incidental”) is regulated in Arts. 99(3) and 114 of the new Code of Civil Procedures.

94 Art. 99(1) of the new Code of Civil Procedures also gives this effect to arbitral awards

95 As Law 8937 is the *lex specialis* dealing with arbitration, the grounds that are stated in this law shall apply for the recognition and enforcement of foreign awards.

96 See Art. 36(2) of Law 8937 and Art. 99(2)(4) of the new Code of Civil Procedures, which adopted the same version.

97 Art. 99(3) of the new Code deals with the *exequatur* procedure. In this process, the Court will not review the merits of the case unless there is a violation of international public order. Therefore, the First Chamber should only safeguard the procedure and the formalities stated in this provision. See Decision

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

Although Law 7727 is silent in this regard. However, since according to Article 58 the award produces the same effects as court decisions, awards are enforceable immediately before the competent courts, which means conservatory measures are not necessary.

As regards foreign awards, according to Art. 36(2) of Law 8937, the First Chamber may order the party claiming recognition or enforcement to provide appropriate security in order to guarantee compliance with an award. In the case of other measures, there is only one case where the First Chamber denied a request to order the freezing of assets, for a variety of reasons.<sup>99</sup> In any case, there is no reason to state that competent courts cannot order conservatory measures during the enforcement phase (after the recognition of the award by the First Chamber).

**(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?**

Art. 99(1) of the new Code of Civil Procedures states that foreign awards will be recognized in Costa Rica. No decisions regarding the enforcement of a foreign award set aside by the courts at the place of arbitration are known.

**(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. In regards to 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.

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No. 33 of December 1989 and No. 63-E-14 from January 2015 of the First Chamber under the previous Code.

98 For an analysis of the provisions that govern exequatur under the new Code of Civil Procedures, see D. Jiménez, *Ejecución de Laudos Extranjeros en el contexto del Nuevo Código Procesal Civil de Costa Rica*, Revista Judicial No.121 (2017), Costa Rica.

99 See Case No. 387-E-08 of the First Chamber of 6 June 2008 under the previous Code. This was a case of enforcement of a foreign court decision, not an arbitral award.



#### XIV. Sovereign Immunity

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

Law 7727 provides that public persons, including the state, may submit their disputes to arbitration and often do.<sup>100</sup> However, only matters concerning the *ius gestioni* of the State may be arbitrated, and not those dealing with the State's public powers, such as for example tariffs, taxes or fines.<sup>101</sup>

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

The State's assets that are allocated to a sovereign activity ("bienes demaniales" under the jurisprudence of the Constitutional Court<sup>102</sup>) are subject to a different regime and are protected by law.<sup>103</sup> The assets that are allocated to the *ius gestioni* of the State are not protected by such immunity.

Costa Rica is also a member of the Washington Convention, which establishes in Art. 54 that parties seeking recognition or enforcement of an award shall furnish to a competent court of the State a copy of the award certified by the Secretary-General. The enforcement of the award shall be governed by the laws governing the enforcement of judgments in force in the State in whose territories such enforcement is sought.

#### 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?<sup>104</sup>**

Yes, Costa Rica is a party of the Washington Convention<sup>105</sup> and has been an active and generally successful party in the Investor-State-Dispute Settlement (ISDS) proceedings.<sup>106</sup> Costa Rica has also been an active player in the

100 See also Art. 27(3) of the General Law of the Public Administration.

101 See Case No. 345 C-S1-2011 of the First Chamber of 31 March 2011.

102 See the landmark Decision No. 2306-91 of the Constitutional Court from November 6 1991.

103 See Art. 262 of the Civil Code and Art. 169 of the Procedural Code of the Public Administration (CPCA).

104 The years in parenthesis correspond to the year of ratification.

105 Costa Rica has been a member state of the International Centre for Settlement of Investment Disputes (ICSID) since 27 May 1993.

106 Costa Rica has been a respondent state in 10 proceedings under several investment treaties. For an overview of the cases, see D. Jiménez Figueres and P. Grané Labat, *Global Arbitration Review: Costa Rica*, The Arbitration Review of the Americas (2018)



multilateral trading system, particularly after the establishment of the World Trade Organization in 1995. Costa Rica is also a party to over a dozen Free Trade Agreements (FTAs), several of which contain an investment chapter, including DR-CAFTA (2004), CARICOM (2004), Central America and Mexico (2011), Colombia (2013), Peru (2011), Singapore (2010) and Chile (1999).<sup>107</sup>

**(ii) Has your country entered into bilateral investment treaties with other countries?**<sup>108</sup>

Costa Rica has entered into fifteen bilateral investment treaties (BITs) with Argentina (1997), Canada (1998), Chile (1996), China (2016)<sup>109</sup>, Czech Republic (1998), France (1984), Germany (1994), Republic of Korea (2000), the Netherlands (1999), Paraguay (1998), Qatar (2010), Spain (1997), Switzerland (2000), Taiwan Province of China<sup>110</sup> (1999) and Venezuela (1997).<sup>111</sup>

## 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 (2012), 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.
- D. Jiménez Figueres and P. Grané Labat, *Global Arbitration Review: Costa Rica*, *The Arbitration Review of the Americas* (2018)
- D. Jiménez Figueres, *Ejecución de Laudos Extranjeros en el contexto del Nuevo Código Procesal Civil de Costa Rica*, *Revista Judicial* No.121 (2017), Costa Rica.

107 See <https://www.procomer.com/es/acuerdos-comerciales-costa-rica>

108 The years in parenthesis correspond to the year of ratification.

109 [http://www.centralamericadata.com/docs/Proyecto\\_Proteccion\\_de\\_Inversiones\\_Costa\\_Rica\\_China.pdf](http://www.centralamericadata.com/docs/Proyecto_Proteccion_de_Inversiones_Costa_Rica_China.pdf)

110 All of the BITs and FTAs Costa Rica has signed can be found on the United Nations Conference on Trade and Development (UNCTAD) Investment Policy Hub website, available at: [http:// investmentpolicyhub.unctad.org/IIA/CountryBits/49#iiaInnerMenu](http://investmentpolicyhub.unctad.org/IIA/CountryBits/49#iiaInnerMenu), last accessed 28 December 2017.

111 See <http://www.comex.go.cr/tratados/index.aspx>



- D. Jiménez Figueres, “*La Nueva Ley de Arbitraje Comercial Internacional de Costa Rica, una Visión Siempre Optimista*”, Revista El Foro No. 13 (2012), Costa Rica
- M. Filloy Zerr, *National Report for Costa Rica (2014) in ICCA International Handbook on Commercial Arbitration*, Kluwer International Law (2014), Costa Rica.
- S. Artavia Barrantes, *El Arbitraje en el Derecho Costarricense*, Sapiencia (2000), Costa Rica.

**(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 have been eight editions of the Congress on International Arbitration organized by the International Chamber of Commerce national committee (ICC Costa Rica). This conference takes place in San José on an annual basis, usually in February, and was declared as a matter of national interest by the Ministry of Justice. Local centers, as well as ICC Costa Rica and the local chapter of the Spanish Arbitration Association, regularly organize seminars and workshops in order to promote arbitration.

## **XVII. Trends and Developments**

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

Arbitration has become an oft-used mechanism for dealing with commercial disputes since the 1990s in Costa Rica. The potential of arbitration as an alternative to the traditional proceedings before local courts, however, has not been completely realized. Practitioners still resort instinctively to litigation instead of taking full advantage of the flexibility and efficiency that arbitration offers. That, however, is expected to change. The modern legal framework for international arbitration adopted by Law 8937, as well as the new Code of Civil Procedures, provide an opportunity to introduce current arbitration practices to the local culture.

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

From 2012 on, more mediations than arbitrations were registered every year in Costa Rica.<sup>112</sup> Last year, some arbitration institutions implemented an online mediation system with the use of videoconference and digital signature.

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<sup>112</sup> See the statistics of ADR in Costa Rica on:



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

Besides the implementation of Law 8937, Costa Rica recently adopted the CISG (Bill No. 18121)<sup>113</sup> and joined in 2016 various Hague Conventions such as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Law 9314) and the Taking of Evidence Abroad in Civil or Commercial Matters (Law 9323).

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<http://www.mjp.go.cr/viceministeriopaz/DepenDinarac?nom=centros>

113 As stated above, the CISG will come into force on August 1 2018.