

THE NEW YORK LAW AS THE CHOICE OF LAW IN CENTRAL AMERICA CONTRACTS

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The central American lawyers prefer to choose New York law because it is the most popular city for arbitration in the United States of America. In addition to, New York is the cultural capital of the world and has several professionals with all the expertise in dispute resolution services and in the business practices and commercial aspects and in all areas of law. New York has a legal framework and strongly supports international arbitration.

Also, New York's laws have a wide structure in arbitration culture and have the presence of leading arbitral institutions, outstanding international professionals and organizations and a wide list of universities with high quality of experts in international arbitration.

Therefore, the businessmen and industries also preferred to choose New York Law because of the wide experience that the New York experts in international arbitration has and to avoid uncertainties and complications.¹

CENTRAL AMERICAN COUNTRIES AND THE NEW YORK LAW

Historically, Central America consists of the Countries of Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica. This article refers to these jurisdictions and does not cover Panama or Belize. In the first case, because the Panamanian legal system has had more influence from the United States system than the rest of the geographical region of Central America, and in the second case because of its proximity to the British system of laws.

All Central American Countries have certain common characteristics with the submission of foreign laws, by generally allowing such submission except for matters of Public Policy. For Arbitration, Central American Countries have in Common Arbitration laws based on UNCITRAL Model Law, impossibility to arbitrate labor, family or inheritance matters, allow for recognition and enforcement of foreign arbitration awards, and are signatories to the New York Convention for the enforcement of foreign arbitration awards, and the Panama Convention on enforcement of foreign arbitration awards.

¹ <https://nyiac.org/new-york/>

The acceptance in Central America of the New York Convention, Panama Convention and Washington Convention, was in the following years for each country of Central America:

Country	New York Convention	Panama Convention
Guatemala	1984	1986
El Salvador	1998	1980
Honduras	2001	1979
Nicaragua	2003	2003
Costa Rica	1998	1978

CENTRAL AMERICAN COUNTRIES AND THE NEW YORK LAW

Notwithstanding the common characteristics of the Central American countries:

About the acceptance of International Arbitration for Government:

- Guatemala does not accept international arbitration for government contracts, except for the cases of Investor-State Arbitration (ICSID), or with approval of Congress;
- Costa Rica does accept International Arbitration for Government contracts.

There are twenty-five arbitration Centers in Central America, 3 centers in Guatemala, 2 in Honduras, 2 in El Salvador, 3 in Nicaragua and 15 in Costa Rica.

SUBMISSION TO NEW YORK LAW AND NEW YORK ARBITRATION IN CENTRAL AMERICAN CONTRACTS

Applicable Law is always an issue for discussion in Contracts all around the world. It tends to be confused with issues regarding submission to courts. Even though typically these are joined subjects, the venue and the applicable law may be separate issues.

When specialized matters are subject matters of contracts, Arbitration clauses become in many cases the venue accepted for the parties. This article considers from the viewpoint of Central American Law, some of the most important issues related to New York Law and the Arbitral Venue of New York.

WHY CHOOSE NEW YORK LAW?

Lawyers prefer to suggest to their clients that they opt for New York law because it brings stability and has a good track record in Rule of Law, and also New York has neutral Courts that enforce Arbitration Agreements and Awards, and has well known Arbitral Institutions, Lawyers, Mediators and Arbitrators, and count with an outstanding infrastructure. In large contracts, New York Arbitration is the preferred venue.

In specialized areas of the law, such as Banking, New York Law is well settled and one of the two preferred venues for contracts.

Submission to local laws and venues is not preferred by foreign parties in contracts due in some cases to Rule of Law issues, in other cases because of the duration of the average litigation. Enforcement of arbitration awards in the local jurisdiction is another important issue to consider. However, on this latter issue, all central American Countries are signors of the New York Convention for the Enforcement of Arbitral Awards, and of the Interamerican Convention for the enforcement of Arbitral Awards.

Investment Disputes by operation of Law is subject to the Arbitration in Honduras, allowed in all other countries, and Arbitration is an allowed or required in all Central American Jurisdictions for the purpose of resolving distribution agreement disputes.²

As with all arbitration matters, the most important limit to arbitrability are matters of public policy. The definition and extent of matters of public policy are subject to the interpretation of the courts. The following article will touch upon issues related to case law regarding arbitrability issues in Central America.

WHAT ARE THE REIGNING PUBLIC POLICY CONCERNS IN YOUR REGION?

- Constitutional rights issues. Most challenges to the rulings will be based on violations in due process or constitutional rights issues.

In Guatemala, the only means of refutation regarding a matter of public policy that can be filed against an arbitration award is the “Recursos de Revision” Case law states that any matter of public policy cannot be presented in defense against enforcement of Arbitration Awards, but in the place of arbitration as the local remedy against enforcement.³

Prohibitions of law are other important matters for consideration in issues related to arbitrability due to public policy matters.

In Honduras this is done through motions to void or nullify ruling, because the arbitration law in Honduras establishes that against the decisions of the arbitrators, it is allowed the motion to void, except in those cases in which in the related law permit the nullify ruling. On the other hand, against the arbitral award, the nullify ruling may only be filed within seven (7) days following the notification of the arbitral award, or the notification that clarified, corrected or complemented the arbitral award.

- ILO 169 issues in construction and project finance related cases. The efforts of construction companies that work independently by creating a large supply of skilled labor they have only had limited success. By this, the development for the entire construction and project finance companies, in Centro America level, had to execute their projects in accordance with the international standards and principles of the ILO 169, and that becomes a cumbersome and delayed process of compliance and makes companies feel unmotivated to invest in the Central American region.
- Corruption cases related. Corruption is one of the central issues on the public agenda, the effectiveness of efforts to combat it is very low and very rarely end in convictions.

² Decree No. 914.- Of the Legislative Assembly of The Republic Of El Salvador And Its Amendments-Mediation Law, Conciliation and Arbitration,

Decree No. 480.- Of the Legislative Assembly of The Republic Of El Salvador - Foreign Currency Exchange Case Law-

Honduras Conciliation and Arbitration Law (Decree 161-2000)

Article 291 Of the Decree of Congress Number 2-70 The Congress of The Republic of Guatemala - Guatemala Commerce Code and Its Reforms

³ Decree No. 67-95 Of the Congress of the Republic of Guatemala -Arbitration Law

Arbitration and Government. Violation of Constitutional Provisions Investor-State Arbitration. In The arbitration process in Central America, must prevail the guarantees inherent in the process (right of defense, hearing, equality of parties), the impartiality of the Arbitration Board, the right to appeal against the award and, finally, to be entitled to execute what is resolved by the arbitrators, which constitutes the necessary bases to build solidly the arbitration institution

When the State, directly or through one of its entities, violates any of the provisions established in an international investment agreement and it generates an economic injury to an investor, a dispute may arise between the affected investor and the State. If the dispute is not resolved amicably, the investor may sue the State before an International arbitrament Court, if that is what the parties established in the agreement and that generates a great economic cost for the investor and for the State.

- Honduras case.
 - The arbitrator selected by a single party.
 - Voidance of Arbitration agreement.

REASONS TO SET ASIDE ARBITRATION AWARD IN COSTA RICA

To illustrate this last point, of more than 40 setting aside proceedings that were decided by the First Chamber between 2015 and early 2017, only 5 awards were completely or partially set aside. In reading the decisions, there appears to be consistency on behalf of the First Chamber, which set aside awards based on the following grounds:

- To admit and rely on evidence submitted by one party without hearing the other party;
- To decide the dispute arising out of a contract that was not covered by the arbitration agreement and extend the decision to a company that was not part of the arbitration;
- To breach public policy by failing to state the reasons for the award;
- To award damages in excess of what was claimed (annulled in that part only); and
- Finally, by rendering the final award without having decided of the exception on jurisdiction submitted by one of the parties.