

7-1-1989

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## Recommended Citation

Luis Nelson Segovia, *Commercial Arbitration in El Salvador*, 20 U. Miami Inter-Am. L. Rev. 775 (1989)  
Available at: <http://repository.law.miami.edu/umialr/vol20/iss3/13>

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# COMMERCIAL ARBITRATION IN EL SALVADOR

LUIS NELSON SEGOVIA\*

## I. ARBITRATION IN SALVADORAN PRIVATE LAW

### A. *Legal Recognition of Arbitration*

Notwithstanding the formal recognition of arbitration in Latin America, most of their systems adhere to an outdated notion of judicial sovereignty, thus making it difficult to enforce foreign judgments and arbitral awards. Although El Salvador has formally recognized arbitration as a means of solving disputes, most disputes continue to be settled by the courts of law.

### B. *Recognition of the Role of Party Autonomy*

The Code of Civil Procedure of El Salvador ("C.P.C."), which became effective on January 1, 1882, regulates with some detail arbitration proceedings. The arbitration rules included in the C.P.C. have not been substantially altered in this century.

At the time the C.P.C. was enacted, its approach to arbitration and the role given to party autonomy in the arbitral process was progressive. The traditional approach had been that jurisdiction is first circumscribed to the territorial competence of each court, and that no decision rendered by a foreign court should be readily enforced in El Salvador. This explains why the drafters of the nineteenth century C.P.C. accepted the idea of jurisdictional power based on the roles of the parties, which signified an important advance at that time. However, the formal recognition of party autonomy was never given a chance to develop because it was not considered acceptable in El Salvador to refer the settlement of a domestic dispute to foreign tribunals.

Previously, referring a dispute to foreign arbitrators was considered an impermissible prorogation of jurisdiction which was in conflict with the sovereignty of the country. However, increasing

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\* Member of the Salvadoran Bar Association. Translated by Alejandro M. Garro.

cooperation, communication and interdependence among different countries have made dispute resolution a matter of international jurisdiction. Thus, foreign awards are no longer considered a violation of sovereignty. This change in perception about the scope of international jurisdiction is the result of the inability of settling a complex dispute with international elements within the exclusive and restrictive boundaries of domestic law.

### C. Arbitration in El Salvador

#### 1. Nature and Types of Arbitration

The C.P.C. provides that arbitral proceedings are those submitted to arbitrators, whose appointment is left to the will of the parties. There are two types of arbitration: *de jure* arbitration, which is to be conducted pursuant to the rules of law; and the *amiable composición*, or equitable arbitration, to be conducted by *amiables compositeurs*, who decide disputes according to their conscience without being bound by the rules of law.

#### 2. Qualifications of Arbitrators

*De jure* arbitrators, as well as *amiables compositeurs*, may be nationals or foreigners, but they are required to be more than twenty-one years old, must be residents of El Salvador, and must know how to read and write. In 1961, as the result of an arbitration case involving the government of El Salvador, the law was amended with respect to the qualifications of arbitrators. Under the law in force at the time the case was started, foreign arbitrators were allowed to settle a dispute, as long as they were able to travel to the place where the arbitration was being conducted. The court in *El Aguila v. Government of El Salvador* held that foreign arbitrators must reside in the country in order to render an arbitral award. In this particular case, the amendment was introduced in order to avoid the appointment of a third foreign arbitrator, who had already drafted a decision. This arbitrator's decision was in disagreement with the other two arbitrators, and was not favorable to the interests of the government of El Salvador.

#### 3. Arbitration Agreement

The agreement to arbitrate must be submitted to the arbitra-

tors in writing and it must also be formalized in a public notarial deed of submission. The deed of submission must specify the arbitrable issues, the appointment of the arbitrators, and the powers granted to the arbitrators. The omission of this information nullifies the submission.

#### 4. Arbitrable Issues

The C.P.C. permits all issues to be the object of a settlement (*transacción*), except the following:

1) All disputes involving tax matters and public entities, unless those issues have been expressly submitted to arbitration by the parties. The El Salvador Constitution of 1983 specifically addresses the legal capacity of the State to submit to arbitration.

2) Charitable issues.

3) Disputes involving divorce actions.

4) Disputes involving gifts and testamentary dispositions concerning alimony, lodging and dressing.

5) Disputes involving the civil status of persons.

6) Disputes involving physical or legal persons who lack the capacity to appear in legal proceedings.

#### 5. Arbitral Proceedings

The deed of submission must be submitted by any of the parties to a court of competent jurisdiction. The court shall give notice as to the appointment to appear before the court.

Arbitral jurisdiction is considered to be an exception to the general rule that jurisdictional powers are exclusively vested in the judiciary. However, both judges and arbitrators seek the goal of administering justice, thus arbitral tribunals are equivalent to the courts of law insofar as their jurisdictional powers are concerned, except in matters expressly addressed by statute. The courts shall furnish the arbitrators all assistance that they may need to perform their functions.

#### 6. Arbitral Award

The time limit for rendering the arbitral award is forty days from the date on which the arbitrators took the oath of office or

formally accepted their appointment. The deed of submission may provide otherwise. The award shall exclusively address the issues submitted to arbitration.

#### 7. Appointment of the Third Arbitrator

The arbitrators appointed by the parties may appoint a third arbitrator. If, however, the parties fail to agree, the appointment shall be made by the court.

#### 8. Formalities of the Award

The arbitral award must be in writing and must also be documented on stamped paper as provided by law.

#### 9. Enforcement of the Award

Once the award has been rendered, the arbitrators shall transfer the record of the proceedings to the court. The court shall notify the parties of the award and shall decide the appeals filed by the parties. Upon request, the court shall confirm the award and order its enforcement. The confirmation of the award is practically automatic, as the judge cannot review the merits of an arbitral award.

#### 10. Recourses Against the Award

In the deed of submission the parties may expressly reserve the right to appeal from the arbitral award or they may waive their right to bring an appeal. The Law of Cassation of El Salvador provides that the recourse of cassation shall lie against an arbitral award rendered by the *amiables compositeurs*. For cassation, such award must have been rendered beyond the time limit set forth in the deed of submission, or must have been rendered without authority as provided by the parties in the deed of submission.

#### *D. The Practice of Arbitration in El Salvador*

As commercial disputes require fast and effective means of dispute resolution, arbitration is an important development of commerce. Arbitration avoids the formalities of legal proceedings, which are generally slow, cumbersome and bureaucratic.

To the extent that parties voluntarily waive their right to resort to the courts of law by submitting their disputes, arbitration has a contractual nature. Most modern legal systems agree in that the jurisdiction of the ordinary courts may be displaced by arbitral tribunals.

The Commercial Code of El Salvador was enacted in 1970, and became effective in 1971. In 1973 Congress promulgated the Commercial Procedure Act (*Ley de Procedimientos Mercantiles*), which came into force on January 1, 1974. This statute sets forth a special procedure for arbitral proceedings for disputes involving corporations. However, the rules in this area have many gaps.<sup>1</sup>

## II. INTERNATIONAL COMMERCIAL ARBITRATION

International arbitration may be an efficient mechanism to avoid the use of adhesion contracts in which one of the parties lacks bargaining power. At times it has been argued that commercial arbitration may turn into a powerful tool for the exclusive benefit of industrialized countries. In order to safeguard basic procedural guarantees, Latin American legal systems impose strict governmental controls over arbitral proceedings. Instead of resisting arbitration, the developing countries' lack of bargaining power should be addressed through sophisticated rules adopted by arbitral institutions.

Years ago, the possibility of resorting to international arbitration and the establishment of arbitral tribunals on an equal footing with national courts was almost unthinkable. There are very few cases of international commercial arbitration in El Salvador. Among those cases are: *Construction Co. v. Gobierno de El Salvador*, which involved the building of the Puente de Oro, which was subsequently destroyed by terrorists; *Salzgitter v. CEPA*, involving the building of the port of Acajutla; and *S.A. de C.V. v. Estado de El Salvador*, involving the construction of a highway in El Salvador. *S.A. de C.V.* is perhaps the most well-known case of international arbitration in El Salvador because of the government's reluctance to abide by the laws of arbitration which were in force at that time.

According to the laws of arbitration in force at the time of

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1. This issue is discussed by Professor Bernal Silva. See Bernal Silva, *Arbitration in Salvadoran Commercial Legislation*, 20 INTER-AM. L. REV. 765 (1989).

*S.A. de C.V.*, there was no need for foreign arbitrators to reside in El Salvador; in fact, it sufficed for them to move to El Salvador at the time the arbitral proceedings were conducted. However, the government of El Salvador prompted the enactment of an amendment in order to avoid the participation of the foreign arbitrator. This third arbitrator was a well-known Central American legal scholar and President of the Central Bank of Honduras at the time. It was known that he had already drafted an opinion which was considered to be against the interests of the government. He requested permission to travel to El Salvador and the government refused to grant him a visa. The reluctance of the Salvadoran government to abide by the arbitration agreement, and the terms of the deed of submission badly hurt El Salvador's international credibility and prestige.

El Salvador has ratified many international conventions on commercial arbitration. The Convention on Private International Law, signed at Havana on February 20, 1928, better known as the Bustamante Code, was ratified by El Salvador on November 16, 1931. One chapter of the Bustamante Code specifically provides for the enforcement of judgments and awards rendered by foreign tribunals. El Salvador also ratified the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which became effective in El Salvador in August, 1977. El Salvador ratified the Interamerican Convention on International Commercial Arbitration, signed on January 30, 1975 at the Specialized Interamerican Conference on Private International Law held in Panama. This convention was ratified on August 11, 1980 by Decree No. 236, published in the Official Gazette of May 17, 1980. Before the ratification of the Interamerican Convention, a group of Salvadoran lawyers submitted for consideration of the Ministry of Interior the bylaws of the National Section of Interamerican Commission on Commercial Arbitration. These bylaws were approved by Resolution No. 274, April 11, 1978 and published in the Official Gazette of May 3, 1978.

El Salvador is ready and willing to arbitrate disputes arising in international commerce. The main reason for the rare use of arbitration in El Salvador has been the lack of information on both the applicability of international conventions on arbitration, and the use of the arbitral proceedings, and a lack of understanding in El Salvador about the crucial role played by arbitration in the development of international commerce.