ARBITRATION AGREEMENTS – COSTA RICA ARBITRATION AND CONFLICT RESOLUTION – By: Rogelio Navas Rodríguez, Costa Rica Litigation Attorney – It is very common nowadays to hear about arbitration as a more expedite and effective way to resolve conflicts. For some people, submitting conflicts to arbitration has become customary or even mandatory. However, one must be very careful when making such a decision since arbitration should not be used to resolve all kinds of matters. Although a dispute can be decided in a few months when submitted to arbitration, as opposed to the several years it would take in Court, arbitration is much more expensive than ordinary justice. Additionally, when submitting conflicts to arbitration is agreed, the arbitration clause must be drafted carefully as the parties are the ones who decide how the process must be handled until the conflict is ruled. Also, if the arbitration clause is vague or does not include the basic elements, enforcing it can become a limitation that may be difficult to sort out. As follows we provide information that is important to consider when drafting an arbitration clause or deciding about the convenience of such an agreement.

WHAT IS ARBITRATION? According with the International Chamber of Commerce, *"Arbitration is a flexible procedure that leads to a binding decision from a neutral arbitral tribunal (unless the parties settle during the arbitration, which is common)."* Under Costa Rican law, it is an alternative conflict resolution procedure, to which the parties submit voluntarily to obtain a decision from an arbitration tribunal on certain conflict or situation.

Arbitration allows the parties to obtain a solution to their conflicts in a prompt and effective way, thus, avoiding having to go to Court and waiting for several years for a decision.

Submitting to arbitration is completely voluntary; however, once a party has agreed to do so, it becomes mandatory.

As for the final decision from the arbitration tribunal, known as the "award", it is also mandatory, immediately enforceable and cannot be appealed. Article 67 of the Costa Rican Law on Alternative Conflicts Resolution and Promotion of Social Peace, number 7727, states that the nullity of the award can only be requested for certain specific reasons.

HOW IS ARBITRATION AGREED? As indicated above, arbitration is voluntary, but once the parties have agreed to submit a conflict to arbitration, said agreement becomes binding and mandatory. Arbitration is usually agreed by means of an arbitration clause, which can be included in certain contract or instrument, or executed

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separately. It is also mandatory to submit to arbitration and to comply with the award, when a party (plaintiff) calls the other (defendant) to arbitration, and the defendant, instead of opposing, continues with the process.

WHAT IS AN ARBITRATION CLAUSE? An arbitration clause is the express agreement by means of which the parties voluntarily decide to submit their conflicts to arbitration. In the arbitration clause the parties also decide what kind of conflicts should be taken to arbitration; the number of arbitrators and appointment procedure; the kind of arbitration (institutional or ad-hoc, arbitration of law or equity); choice of arbitral institution, term to decide the conflict; applicable procedural law, and substantive law under which the merits of the case should be decided.

WHAT SHOULD BE INCLUDED IN AN ARBITRATION CLAUSE? When drafting an arbitration clause, the parties must be very careful, so that the basic rules of the arbitration process through which they want their conflicts decided are clear. Also, keep in mind that arbitration is much more expensive than ordinary justice; therefore, the parties have to assess their options carefully. As follows we provide a few tips on how to draft a good arbitration clause:

The arbitration clause must indicate which conflicts, matters or situations are to be submitted to arbitration. Since deciding to go to arbitration is voluntary, the parties are not obliged to take all of their conflicts to arbitration, instead, they can agree to submit only certain matters and leave the rest to be decided by an ordinary court. This decision can be made, for instance, based on the complexity of the situation that may arise, the relevance of the situation vis. a vis. the relationship of the parties, the nature of the conflict, the subject matter being discussed or the amount of the claim.

If there should be any pre-arbitral procedures that the parties must undertake before going to arbitration, it must indicated. For instance, it is usual to find arbitration clauses stating that the parties must attempt to resolve their differences amicably, submit their conflicts to mediation, or give a term to cure before going to arbitration, all of which is completely valid.

The parties must also indicate the kind of arbitration they want to use to have their conflicts decided. Arbitration can be institutional or ad-hoc. When the parties decide that their arbitration process must be handled before and by certain arbitration institution, arbitration is considered institutional. When they decide they do not want any arbitration entity involved, arbitration is ad-hoc. Arbitration can also be of law or equity. In an arbitration of law the arbitrators must all be attorneys and the conflict will be decided according with the law. In an equity arbitration, arbitrators do not need to be attorneys and, although the conflict cannot be decided against the law and nothing illegal can be ordered, the situation is decided based on equity and justice.

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Should arbitration be institutional, the arbitration clause must also indicate the arbitral institution appointed to handle the process.

The procedural rules applicable must also be clearly identified. Although what is customary is to apply the procedural by-laws of the appointed arbitral institution, choosing application of other procedural rules is also possible. The parties can also agree on the application of certain procedural laws to supplement the main by-laws or procedural provisions.

In the arbitration clause the parties must also provide on the number of arbitrators and the procedure for their appointment. Depending on the complexity or kind of case, the parties can agree the arbitration tribunal to be composed of one, three or more arbitrators (always an odd number). Just remember: the more arbitrators you choose to have in the tribunal, the more expensive the arbitration process will be. Consequently, before deciding this very important matter, think about what conflicts are actually worth the cost of three or more arbitrators, and which should be decided by just one arbitrator.

The parties must also provide in the arbitration clause the term that the arbitration tribunal will have to decide the case and pronouncing the award. This term should never be of less than 15 days. The tribunal can extend the term if it should be deemed unreasonable based on the complexity, size or nature of the case.

Finally, a good arbitration clause must also indicate the substantive law under which the conflict should be decided.

Always remember that contractual provisions regulating how a conflict must be decided are as important as the ones related with the obligations of the parties. Never agree on an arbitration clause that is not clear, that does not include the basic elements or that does not make you feel comfortable. Arbitration is a legal remedy that should be used to avoid lengthy and complicated court proceedings, and never to limit the possibility of any of the contractual parties to have a neutral third party decide a conflict or situation.

If you should need further information or assistance on these matters, please contact us at: navas@costarica-law.com.

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