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Is arbitration viable in Central America?

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DISPUTE RESOLUTION PROCESS AND ENFORCING THE RULE OF LAW: IS ARBITRATION A VIABLE ALTERNATIVE TO SOLVING DISPUTES IN CENTRAL AMERICA?

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I. INTRODUCTION

Central America has tremendous potential for economic growth and poverty alleviation. It remains a largely unexplored market with 40 million inhabitants and a recently approved comprehensive trade agreement with the United States. However, these vast opportunities in Central America for both foreign and local investors would be unavailable without a reliable judicial system. Investors would remain skeptical of conducting business in Central America and incur higher operating costs as a result. Moreover, the peaceful social climate that has developed in recent years also faces the risk of shattering if the living conditions of millions of impoverished Central Americans do not improve. A key to improving the Central American market for investment is to develop further its dispute resolution systems.

Specifically, in terms of business, commercial disputes must be resolved with greater efficiency, transparency, and cost effectiveness. Failure to do so creates significant disincentives to do business in general. As a result, foreign and local business will be stymied, jobs will not be created, and technology will not be transferred. Consequently, Central American economies will not grow and poverty rates will not decrease. With this potential scenario, the high expectations for the Central American Free Trade Agreement ("CAFTA-DR") will have been lost and the possibility of social unrest could reemerge.

Therefore, finding catalysts to solve commercial disputes is of the utmost importance. However, the judicial systems in Central American countries are in disrepair and these countries have largely failed to create strong business environments. Therefore, the following questions must be asked:

(1) Are there any alternatives to Central America's traditional judicial system for dispute resolution?
(2) If so, are any these alternatives viable solutions to the need to resolve disputes?
(3) By solving disputes through alternative disputes mechanisms, can Central American countries ensure that the investment climate will be enhanced and lead to greater economic growth and poverty alleviation?

1. For purposes of this article "Central America" refers to Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.
Part II of this Article provides an overview of the judicial systems in Central America, followed by a discussion of arbitration in Central America in Part III. In Part IV, the interaction between arbitration and the judicial system is explored. The usefulness of arbitration in Central America is the focus of Part V, followed by recommendations for increasing the strength and efficiency of arbitration in Central America, in Part VI. Lastly, Part VII provides the conclusion.

II. JUDICIAL SYSTEMS IN CENTRAL AMERICA

There is a strong international perception that the judicial systems of Central America, like many of those in Latin America, are weak, unsophisticated, and unreliable. This perception is reflected in various internationally recognized sources.

For example, in a study by The World Bank that analyzed six different dimensions ("governance indicators") of over 200 countries' governments, the Central American countries, with the exception of Costa Rica, all ranked below the fiftieth percentile on the rule of law rankings.2 Even Costa Rica, which ranked higher for its rule of law, was ranked below the Organization for Economic Co-Operation and Development's ("OECD")2 average, although it did have better rankings in the other governance indicators.4

Similarly, in the Global Competitiveness Report 2004/2005, the Judicial and Legal Effectiveness Index of the Corporate Corruption/Ethics Indices (which focused, inter alia, on questions of judicial independence, judicial bribery, quality of legal framework, property protection), also found that Central America's judicial systems were below the world's average, with Guatemala and Nicaragua at the lower end.5

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3. The Organization for Economic Co-Operation and Development (OECD) is an organization of thirty member countries sharing a commitment to democratic government and the market economy. With active relationships with some seventy other countries, NGOs and civil society, it has a global reach. Best known for its publications and its statistics, its work covers economic and social issues from macroeconomics, to trade, education, development and science and innovation; for additional information on the organization, see generally OECD, http://www.oecd.org (last visited Apr. 8, 2006).

4. Kaufmann, supra note 2, at 114, 117, 120, 123, 126, 129.

Under the Corruption Perception Index of Transparency International, which compiles ten of the world’s most respectable indicators on corruption including among others, The Economist, the United Nations, Freedom House and World Economic Forum and comprises issues such as corruption in courts, gave Central American countries the following scores (out of a possible high score of ten): Guatemala received a 2.5, Nicaragua and Honduras both received scores of 2.6, El Salvador and Costa Rica both scored at 4.2.6

Analyses of these statistics do not paint a rosier picture either. In regards to Guatemala, the 2004 Index of Economic Freedom of Heritage Foundation (2004 IEF)7 stated that the Economist Intelligence Unit (EIU)8 reports that Guatemala’s judicial system is “backlogged and often influenced by political machinations.” The Heritage Foundation also noted that according to the United States Department of Commerce, “[c]orruption in the judiciary is not uncommon.” As a result, Guatemala’s judiciary continues to show signs of weakness and a lack of independence despite repeated government promises of reform.

Regarding Honduras, the 2004 IEF quoted the EIU as stating that “the judicial system has long been criticized for its biases, inefficiency and lack of independence. It can take years to prosecute and pass judgment on a case, and the number of cases pending resolution has increased considerably over the past few years.”

In Nicaragua, the 2004 IEF reported that according to the EIU, “[t]he selection of magistrates and judges has always been political and judicial independence from executive and legislative pressures is

worldbank.org/wbi/governance/pdf/Kaufmann_GCR_101904_B.pdf (out of a possible score of 100, Guatemala received a 14.6, Nicaragua received a 16.3, Honduras received a 17.6, El Salvador received a 33.9, and Costa Rica received a 47.2).


7. The Index of Economic Freedom (IEF) is tool for policymakers and investors. It is a systematic, empirical measurement of economic freedom in countries throughout the world. The index strives to establish a set of objective economic criteria that are used to study and grade various countries for the annual publication of the Index of Economic Freedom; see generally IEF, http://www.heritage.org/research/features/index/index.cfm (last visited Apr. 8, 2006).

8. The Economist Intelligence Unit (“EIU”) is a comprehensive suite of global research and advisory services including analysis and forecasts on over 200 countries, nine strategic industries, and a full range of management functions; see generally EIU, http://www.eiu.com (last visited Apr. 8, 2006).


10. Id.

sight. [. . .] Corruption and influence-peddling in the judicial branch put foreign investors at a sharp disadvantage in any litigation or dispute.12

Furthermore, the United States State Department Report on Human Rights for 2004, referring to Nicaragua, stated:

Both the PLC and Sandinista (FSLN) parties used the judiciary for political purposes. The FSLN especially used its control of the judiciary to impede the resolution of property claims. In July, the Supreme Court evenly divided between Sandinista and Liberal magistrates because of a 2003 deal between two political parties, ended an 8-month deadlock over lower level judicial appointments and divided 16 appeals court positions among judges with political loyalties either to Arnoldo Aleman or to Daniel Ortega. As in the past, the Supreme Court ignored lists of experienced and politically neutral candidates proffered by civil society and the Bolaños Administration. Also in July, the FSLN-dominated judiciary dismissed all charges or threw out the defendants’ convictions in each of three different corruption cases against associates of former President Aleman. Both the media and government officials alleged that the verdicts were part of an ongoing deal between Aleman and Ortega.13

Additionally, the Nicaragua Country Commercial Guide, which is published by the United States Department of Commerce and republished by the Department of State and the United States Embassy in Nicaragua, stated that:

Overall, the legal system is weak and cumbersome. Many members of the judiciary, including those at high levels, are widely believed to be corrupt or subject to outside political pressures. Enforcement of court orders is uncertain and frequently subject to non-judicial considerations. Foreign investors are not specifically targeted but are often at a disadvantage in disputes against nationals with political connections. Misuse of the criminal justice system sometimes results in individuals being charged with crimes arising out of otherwise civil disputes, often in order to pressure those targeted into accepting a civil settlement.14

Therefore, strong evidence supports the common concerns regarding the reliability, independence, and efficiency of Central American judicial systems. This impression adversely affects the appeal that Central America might offer to foreign investors. Consequently, this translates into the creation of fewer jobs and less poverty alleviation within Central America.

In many cases, the judicial procedures are subject to forms of outside influence. In Nicaragua, for example, USAID reported in its 2004 Trade and Commercial Law Assessments of the CAFTA countries that lawyers who are friendly with judges are able to secretly present drafts of decisions for the judges to consider.15 Judicial processes are not only secretive, but they are generally slow and without uniform timeframes. For example, in El Salvador, one would be considered fortunate if a trial court decision was reached within two years.16 In Costa Rica, a ruling by a trial judge within three years could be viewed as a successful exception to the slow moving judicial system.17 In Guatemala, some cases were pending at the trial court for ten years.18

The problems of Central American judicial systems are not limited to issues of transparency. The lack of automation in Central America limits judicial systems’ already scarce resources because information is difficult to locate, procedures cannot be initiated remotely, and courts are unable to share information. Moreover, courts’ infrastructures are poor, judicial procedures are required to be conducted in writing, and oral hearings between the parties are uncommon. All of these factors only increase the sluggishness of litigation in Central America. In short, Central American courts lack the appropriate facilities, modern equipment, updated bibliography, and well-paid staff that are required for an efficient judicial system. Sadly, the costs of these inefficient judicial systems are borne primarily by local


businesses who can ill afford to have their assets tied up in unreasonably long and unpredictable court proceedings.

The funding problems cannot be understated. In El Salvador, for example, the cost of a trial, assuming a reasonably sized court administration staff plus a judge, ranges between $15,000 and $20,000 monthly.\(^{19}\) This is not an insignificant amount for that country. As a result, there is presently no budgeted money for new courtrooms or for increasing case capacity.\(^{20}\) By law, six percent of the national budget is devoted to the judicial system, but this quantity remains insufficient to manage the caseload.\(^{21}\)

Court administrative personnel and administrative intelligence are generally lacking as well. For example, in a typical Salvadorian court, the majority of resources are devoted to handling administrative matters.\(^{22}\) One court reported that during one month, there were 3,000 cases for which the court took some type of action.\(^{23}\) The same court reported that on average, it took 1,000 decisions per month that were purely of administrative nature, and issued 300 notices of action.\(^{24}\) While that may seem like a significant amount of activity, the true problem emerges when one realizes that the court only reached thirty-seven final merit-based decisions during that month (most of which had been lagging in the court for years).\(^{25}\)

Weak judicial systems also create significant implications for business. Business groups and foreign investors realize that there are ways to avoid weak judicial systems as well as ways to make them work for their own behalf. In some cases, instruments used for these purposes may be transparent, such as non-commercial risk insurance provided through bilateral or multilateral entities,\(^ {26}\) or unfavorable negotiations through expensive attorneys. In other cases, individual businesses may succumb to illegal practices such as bribery. In either case, avoiding weak judicial systems means costs - costs that lessen the value of the investment, make investment less profitable, and in many cases, weaken the country’s rule of law. Moreover, if the costs and

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20. Id.
21. Id.
22. Id.
23. Id.
24. Id.
25. Id.
26. Examples of non-commercial risk insurance provided through bilateral or multilateral entities include the Overseas Private Investment Corporation (OPIC) and The Multilateral Investment Guarantee Agency (MIGA).
risks of resolving commercial disputes through the courts are too burdensome, businesses will merely go elsewhere.

Weak and unreliable judicial systems also affect local investors. Most local businesses, which are small to midsize enterprises with limited assets, cannot afford the high costs of litigation. Consequently, local businesses remain small and do not flourish. Because local businesses cannot rely on their country’s judicial system, they avoid taking business risks at all, or they may use informal and extrajudicial dispute resolution mechanisms, including violence. In sum, the judicial systems of Central America are unable to provide cost-effective and first-rate mechanisms for resolving disputes, particularly commercial disputes, making the need for alternative and legal means of dispute resolution of great importance.

III. Arbitration in Central America

Alternative dispute resolution mechanisms, such as arbitration, mediation, and conciliation, can prove highly useful in countries with unreliable judicial systems. However, these mechanisms have important limitations. First, arbitration is only available for certain types of disputes. Specific disputes involving public order, such as antitrust or criminal law matters, are often excluded from arbitration by law. Second, a viable arbitration system also requires a legal framework with general principles concerning which disputes can and cannot be submitted to arbitration, as well as provisions that create arbitration centers and establish arbitration procedures. Third, and perhaps most important, arbitration is not a substitute for a weak judicial system. Arbitration is exactly as the larger title indicates an “alternative” method to resolving disputes. In fact, arbitration requires a robust and reliable judicial system because in many cases, the judicial system is needed to enforce the arbitral award.

All Central American countries generally have sound, if not relatively new, legal frameworks related to arbitration. Nicaragua is the most recent of the Central American countries to pass an arbitration law. The arbitration laws of Central American countries are largely based on the United Nations Commission on International Trade Law’s (UNCITRAL) Model Law on International Commercial Arbi-

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tration of 1985. This means that the parties themselves, in principle and in exercising their free will, are the ones who determine what procedures the arbitrator uses in resolving their disputes. Only in the absence of such an agreement would the procedural guidelines established in the national arbitration laws be applied.

Domestic arbitration laws provide the framework for institutional arbitration, that is, arbitration at established centers that manage the cases and where procedural rules are created. When *ad hoc* arbitration systems are used, cases are not managed by arbitration centers and parties must agree beforehand on, *inter alia*, procedures, timeframes, and costs.

Before Central American countries adopted specific arbitration laws, their civil procedure codes generally contained provisions that allowed parties to agree to arbitrate disputes. However, the Central American civil procedure codes failed to establish standard procedures for handling those arbitrations. Instead, arbitration procedures were left for parties to agree upon and the judges to make final decisions. This procedure was rarely followed however, and therefore, *ad hoc* arbitration procedures were uncommon even before the existence of arbitration laws.

In addition to recently adopting domestic legal frameworks supporting arbitration, Central American countries have approved the most relevant international instruments related to arbitration. The five Central American countries are all parties to the New York, Panama, and Washington Conventions. According to the Panama Convention, the signatory countries recognize the validity of the consent to submit commercial transaction disputes to arbitration. Likewise, the Central American countries are parties to the New York Convention on Recognition and Enforcement of Arbitral Awards.

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American countries are also signatories to the Washington Convention, which created the International Center for Settlement of Investment Disputes ("ICSID"), whereby investors from signatory States are entitled, under certain circumstances, to settle disputes with other signatory States.31 Lastly, the Central American countries have consented to investor-State arbitration in the context of CAFTA-DR32 and in many bilateral investment treaties ("BITs").33

There are several arbitration centers in Central America. In Guatemala, there are various permanent arbitration institutions in which individuals can submit disputes including the Arbitration and Conciliation Center (Centro de Arbitraje y Conciliación CENAC), the Dispute Resolution Committee of the Chamber of Industry of Guatemala ("CRECIG," the Spanish acronym), and the Private Center for Determinations, Conciliation and Arbitration ("CDCA").34 These institutions all have similar dispute resolution regulations and procedures.35 The main distinction between these institutions is in the different considerations they use for qualifying arbitrators, such as whether the arbitrator possesses knowledge on the subject matter, or whether the arbitrator has a high level of honesty that is recognized by all of the parties.36

These dispute resolution centers are not without challenges though. For example, knowledge of their existence is extremely limited and they are under-used as a result. The fees for these dispute resolution centers are also considered high. Furthermore, throughout Central America, "litigation tricks"37 are used to send disputes under


34. The Guatemala Assessment, supra note 18, at VII-4.

35. Id.

36. Id.

37. Amparo is a common example of these litigation tricks. Amparo actions exist in each of the Central American countries. Amparo is a legal action that is used whenever there is a violation of a constitutional right. It is not an appeal, but ampardo is available any time there is a
arbitration back to traditional courts, eviscerating any possible benefit of arbitration.37

In El Salvador, arbitration is an alternative to the court system as well. While ad hoc arbitration was possible in the past, it was rarely used, and only recently was an alternative dispute resolution law formally passed.39 Based on the new law, the Chamber of Commerce and Industry of El Salvador created an arbitration center40 that is meant to handle commercial disputes.41 Since its inception in 2003, however, the arbitration center has only received eight cases, of which only one has been decided.42 The public's lack of knowledge about alternative dispute resolution and the costs associated with arbitration are the primary reasons for the center's small caseload.43 Therefore, based on the newness of El Salvador's arbitration law and its arbitration center, plus the lack of effort to educate the public about arbitration in general, there has been little interest in arbitration up to this point.44

Due to the absence of reliable judicial systems and experienced arbitration centers in Central America, foreign investors take their disputes abroad whenever possible.45 In a case between a Spanish investor and the Salvadoran State, the Spanish investor filed an arbitration claim against the State before the International Center for Settlement of Investment Dispute (ICSID) in Washington, D.C.46

This cannot be considered surprising though because in the case of ad hoc arbitrations, the State will either refuse to comply with the arbitration award, or it will delay the amount owed due to a lack of financial resources.47 However, failing to comply with an unfavorable
ICSID ruling could result in El Salvador’s exclusion from the international legal and economic systems. Therefore, the State does not have a feasible non-compliance option in these situations.

In Honduras, after the 2001 Law on Alternative Dispute Resolution was passed, two arbitration centers were created, one in Tegucigalpa and one in San Pedro Sula. The center in Tegucigalpa is part of the local Chamber of Commerce and has been in place for three years. It has twenty-eight listed arbitrators and has handled eight arbitration cases and approximately twenty conciliations. Cases at this arbitration center are typically settled within three months. To date, no annulment procedure has been initiated against any arbitral award, lending hope to the notion that alternative dispute resolution is gaining firm footing in Honduras. The arbitration center in Tegucigalpa is expected to be fully operating in five years. While the center focuses more on national arbitration and arbitrator training, the center has the added benefit of being able to handle foreign language arbitrations, provided that awards are translated into Spanish.

The Nicaraguan Congress has only recently approved an arbitration law. Also, ad hoc arbitrations are permitted, but not common. Similar to the lack of awareness among other Central American lawyers, the availability and benefits of arbitration remain widely unknown to Nicaraguan practitioners. Further complicating matters is the fact that Nicaragua has no arbitration center. While the national chapter of the Nicaraguan Chamber of Commerce is presently working on founding a center, lawyers must refer contracts to arbitration centers abroad.

48. Id.
49. Id.
51. Id. at IV-4.
52. Id.
53. Id.
54. Id. at IV-4-5
55. Id. at IV-5.
56. Id.
58. The Nicaragua Assessment, supra note 16 at IV-4.
59. Id.
60. Id.
Comparatively, Costa Rica’s arbitration structure is more sophisticated than that of the other Central American countries. Contracts can be enforced through developed alternative dispute resolution mechanisms.\textsuperscript{61} There are already three arbitration centers with good reputations, strong arbitration staffs, and solid case management infrastructures.\textsuperscript{62} Parties can take contractual disputes directly and quickly to arbitration as opposed to traditional courts.\textsuperscript{63} Parties can also realize the benefit of efficient and fast arbitration either by contract, or by agreeing to arbitration after a dispute arises.\textsuperscript{64} However, the average Costa Rican remains largely unaware of the option of alternative dispute resolution. Despite the appropriate legal framework\textsuperscript{65} and sufficient resources to implement institutional arbitration, there remains a low demand for arbitration services in Costa Rica.\textsuperscript{66}

Several factors explain this common lack of familiarity with arbitration throughout the region. Neither arbitration nor its features and benefits are promoted as a preferred means to solve disputes. Thus, the majority of the region’s population remains ignorant of the concept of arbitration; let alone how to access arbitration and its benefits. In other cases, arbitration is only considered as something available or appropriate to big business and only for sophisticated disputes. Moreover, universities and chambers of commerce do not devote adequate time and resources to disseminate information regarding arbitration or other alternative dispute resolution mechanisms. Nor has the public sector actively encouraged the use of arbitration. In fact, government agencies that could set the example of consenting to arbitration chose either not to, or in the case of El Salvador, have reportedly instructed its officers against such practice.\textsuperscript{67}

In addition to the lack of knowledge of arbitration, there is also a lack of trust. Having only experienced a culture of litigation, citizens in general — and lawyers in particular — lack confidence in a mechanism to settle disputes that is not directly administered by the Government. The idea of having a private third party decide the fate of one’s rights in a dispute is a culturally difficult sell. Historically, Latin

\textsuperscript{61} The Costa Rica Assessment, supra note 17, at IV-5.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} There is a proposal to amend the arbitration law to introduce the possibility of valid arbitration in a foreign language with no need to translate into Spanish and the possibility of foreign lawyers being arbitrators at law. The Costa Rica Assessment, supra note 17, at IV-6.
\textsuperscript{66} See id. at IV-5.
\textsuperscript{67} Interviews in the field conducted in 2004, El Salvador Assessment, supra note 15.
Americans are used to the idea of a superior entity resolving their problems such as the Church, the Monarch, or the State. Thus, many believe that a solution to a dispute reached through arbitration would lack the legitimacy or “teeth” to be enforced.

Arbitration is also perceived as being expensive as compared to litigation. Parties to an arbitration proceeding need to pay the expenses associated with the case, including lawyers’ fees and also arbitrators’ fees. These costs can occasionally be very expensive. In traditional litigation, the general perception is that since only lawyers’ fees are paid, the costs of litigation are lower.

There is also a lack of technical arbitrators throughout Central America. Technical arbitrations involve disputes with issues distinct from the legal ones and they typically include arbitrators who are experienced in the field (e.g., construction), but who are not lawyers. These technical arbitrations often proceed according to equity, rather than law. This option reflects the recognition that certain cases are more appropriate for a technical expert than for a lawyer. However, very few Central American arbitration centers have developed comprehensive lists of such technical arbitrators.

Another disincentive to arbitration is the all too common interference of the courts. Some judges are weary of arbitration and expressly refuse to enforce arbitration awards. Others grant improper motions to dismiss or annul the awards. Under these circumstances, private parties typically believe that arbitration is not worth their time or money, especially when there is a chance that they still may end up having to litigate their case in court.68

These factors alone do not account for Central America’s lack of interest in arbitration though. Regionally, there are no arbitration centers that specialize in certain types of disputes. With the exception of Costa Rica, other Central American countries only offer general arbitration services through their local chambers of commerce. This lack of specialization makes using arbitration less effective, and therefore, less appealing. Costa Rica, however, has expanded its offering of arbitration services and has created an arbitration center for real estate disputes that has had modest but sustainable success.69 This Costa Rican example of an industry specific arbitration center should be expanded. More choices in arbitration centers will also enhance the public’s perception of arbitration as a practical choice because general

68. The Guatemala Assessment, supra note 18, at III-4.
69. The Costa Rica Assessment, supra note 17, at V-5.
arbitration centers sponsored by local chambers of commerce tend to be perceived as only being available for big business.

IV. Interaction Between Arbitration and the Judicial System

In general, arbitration requires interaction with its corresponding judicial system in order to be effective. The key is determining the right balance between the independence of arbitration and the involvement of the judicial system. The question becomes, to what extent can the judicial system interact with the arbitration process so that arbitration does not lose its essence and usefulness?

As previously noted, the interference of the Central American judicial systems with arbitration is significant. It is exemplified by the unlimited availability of annulment awards in many cases. In other cases, even if annulment provisions are limited, they are broadly interpreted, and therefore, they have the same practical effects. As a result, the losing party always has the incentive of filing an annulment action against the arbitral award. This has the effect of taking the dispute back into court after the parties already agreed to resolve the dispute outside of court. Judges who lack the basic knowledge of arbitration then, in turn, grant annulment requests. Through these actions, judges show their own lack of faith in the concept, fostering the already low trust that parties have in the arbitration process.

Similarly, parties in Central America always retain the option of filing an amparo, "a judicial procedure that aims at protecting constitutionally established rights from violation." In all Central American countries, an amparo action can be requested and granted whenever it is suspected that a constitutional right has been violated. Amparos can even be requested when the alleged violation of constitutional rights has occurred in the context of a legal process. As a result, amparos play an important role in arbitration. Many who lose arbitration cases submit an amparo request immediately after an arbitration award (laudo) has been reached alleging that there has been a violation of their constitutional rights.

Before the courts begin analyzing the merits of the case, they may impose preliminary measures to protect the interests of the parties during the ongoing proceedings. If amparo protection has been requested against an arbitral award, then a preliminary measure might be the temporary suspension of the award until the final decision on

70. The Guatemala Assessment, supra note 18, at VI-3.
the merits is reached. This delay can take substantial time. This again renders the arbitration process superfluous. Likewise, the costs, unpredictability, and time involved in the subsequent *amparo* litigation might be sufficient to dissuade a party to proceed with arbitration. As a result, a party that wins a case in arbitration might very well end up settling under disadvantageous terms due to an *amparo*.

In Costa Rica, the use of arbitration can offer partial relief to lengthy court delays. Alternative disputes resolution mechanisms, although provided for by law, are underutilized in general. Courts themselves require the parties to participate in a process of "conciliation" conducted by a judge who is untrained in alternative dispute resolution and puts little effort into resolving disputes in any way different from litigation. Similarly, Costa Rican courts do not encourage private alternative dispute resolution mechanisms either. The common viewpoint among the Costa Rican judiciary is that people prefer resolving their disputes in the courts despite the lengthy delays. Costa Rican lawyers also have varying opinions of alternative dispute resolution. Nevertheless, alternative dispute resolution mechanisms are being used more frequently. As businesses begin to realize the savings in their time and expenses, more will likely begin promoting the use of alternative dispute resolution. Additionally, Costa Rican arbitral awards are also routinely upheld in the courts. Problems still exist, however, as courts have refused to enforce awards because the award did not include all the elements of a court judgment. This is merely an issue of an over-reliance on formalism by the courts, however.

In some cases, it is legally mandatory that the courts support arbitration procedures, such as in the enforcement of an arbitral award. In other cases, the interaction between the arbitral procedures and the courts begins from the outset of the arbitral process, as when a party questions the arbitral consent or refuses to take part in an arbitration procedure. This occurs in many cases even when clear consent to arbitrate has been given. A party may seek to enforce a consent agreement before the courts, which can cause lengthy delays. This is

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72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
contrary to internationally accepted practice, as arbitral tribunals are generally granted the authority to determine whether there was a valid consent to arbitrate.

In many cases, there is great need for local courts to not only enforce the preliminary arbitration procedures, but also enforce the arbitral awards. Interaction with the judicial systems is almost inevitable in these areas. Despite often having de jure authority, arbitral tribunals lack the resources needed to make their judgments mandatory and enforceable. Furthermore, given the nature of the award in question, enforcing an arbitral decision is impossible without the court’s involvement. For example, judicial assistance is often needed for awards that either impose money judgments or require that monies be seized or assets attached. This includes when the enforcement of preliminary measures are required. Similarly, the arbitral law itself may require assistance from the court for specific acts, such as the hearing of testimony. In other instances, arbitration laws provide for the voluntary enforcement of the awards, something that the parties can agree to in the arbitration clause. However, dealing with a failure to comply requires judicial enforcement.

In those cases where the judicial system needs to assist arbitral tribunals, the judicial process must be quick, transparent, efficient, and well equipped. The benefits of arbitration become doubtful if an arbitral award requires a long procedure for enforcement, and corruption could affect its enforceability. Unfortunately, this is the case in Central America.

In El Salvador, the enforcement of arbitration decisions provides for expeditious court processes in theory. In practice, the reality is different. 79 By law, parties must automatically comply with arbitration decisions and awards since these decisions have the force of law. 80 Too often, this is not the case, and the matter is taken into the courts. 81 Understandingly, the conflicting parties see no incentive to pay for arbitration only to have the same matter put before the courts for enforcement. 82

Once in the courts, the prevailing party can seek enforcement of the judgment through a variety of means. These means include the attachment of property, a judicial auction, and other judicial mechanisms. The courts also have the power to skip various procedural

80. Id.
81. Id.
82. Id.
lected by both parties from a pre-established list of filtered arbitrators whose qualifications are carefully considered before being admitted to the list. In both institutional and *ad hoc* arbitration, the parties decide whether they want the arbitral tribunal to be composed by one or more arbitrators, and subsequently, determine the way they are to be appointed.89 In any event, given the fact that both parties scrutinize the potential arbitrators, the parties will presumably choose an arbitrator based on the individual’s independence, impartiality, and professionalism. As a result, the cooperative process of selecting an arbitrator provides arbitration with greater neutrality, transparency, and control than traditional litigation, which translates into greater trust in the case’s final outcome.

On a macro-level, countries with sound arbitration systems are more attractive to both foreign and local businesses. Knowing that disputes can be resolved relatively quickly, in neutral conditions with transparency, and in a binding manner are all incentives for companies to do business in a given country. While foreign investors consider several factors before conducting business in a foreign country, potential business opportunity is among the most important factors. If a country has, a weak judicial system with no alternatives means of resolving commercial disputes, foreign investors take the risk that their business costs will far exceed any potential benefit from the business opportunities. Foreign businesses will also look elsewhere to other countries to do business if such countries present similar opportunities and also provide greater protection for business investments. When foreign businesses decide not to conduct business in Central America because of the business risks, the region misses potential job growth, the transferring technology, and eventually, the chance of reducing poverty.

Although the judicial systems of Central America will take a significant amount of time to correct, strengthening and promoting, arbitration throughout the region can immediately help enhance the business environment and attract more foreign investment. Creating a stronger business environment would expand the economies of Central American countries, enable them to collect more taxes, and in turn, allow them to better provide for the well-being of their citizens through welfare or social services.

Another benefit of increased arbitration is that the caseloads of the Central American courts will be lessened, thus reducing the bur-

89. In some institutional arbitration cases, the number of arbitrators may be established in the internal rules of the arbitration center.
den on the courts. With smaller caseloads, the Central American courts will be more efficient and better suited to resolve cases in a faster and more professional manner. Encouraging arbitration could also save Central American governments money because the reliance on the commercial courts would be reduced. As a result, Central American governments could then reallocate these funds to other types of courts.

VI. RECOMMENDATIONS

Arbitration is intrinsically connected with the judicial system. Arbitration is an alternative to the courts, but cannot alone replace the courts. For this reason, in order for arbitration to serve as a useful tool in Central America, a greater emphasis must be placed on arbitration, in addition to radical transformations in the Central American judicial systems.

Problems with the Central American judicial systems, such as slow procedures, hidden costs, unfair biases, and unpredictable outcomes are incompatible with the concept of alternative dispute resolution mechanisms. For this reason, some have advocated that, "[w]henever consistent with fairness, [arbitration] systems should be structured so that they bypass the judicial system" for the purpose of becoming self-sufficient.90

Efficient processes, transparent decision-making procedures, experienced and well-trained judges, and court officers, independent and impartial courts, and proper physical infrastructures are all needed for an adequate judicial system. Unfortunately, Central American judicial systems lack many of these necessities. Until such changes are made to the judicial systems of the region, arbitration will likely remain at the edge of viability.91

However, changes can be implemented to foster the viability of arbitration in Central America while its judicial systems are being reformed. Because interaction with the judicial system is necessary during the early stages of implementing alternative dispute resolution systems, some legal mechanisms may be used to help make the interaction between the two systems as efficient and unobtrusive as possible. In this regard, arbitral tribunals should have the authority to decide their own competence and be able to review evidence on their

90. MARTHA A. FIELD & WILLIAM W. FISHER, LEGAL REFORM IN CENTRAL AMERICA: DISPUTE RESOLUTION AND PROPERTY SYSTEMS 164 (2001).
91. Id. at 173.
own. Similarly, courts should enforce preliminary measures only when voluntary compliance by the parties has failed.

Greater institutional strengthening efforts are also needed. For example, the abuse of annulment procedures against arbitral awards must cease. Legal provisions must clearly state all of the circumstances under which the annulment of an arbitral award is permissible. Likewise, the use of the amparo needs to be strictly limited to cases where actual constitutional violations have occurred and where no other remedy is available. Alternatively, statutory provisions must also clearly provide that if one believes that a constitutional violation has occurred during an arbitration proceeding, the proper remedy should be an annulment after the proceeding has ended, not an amparo. Moreover, judges and lawyers must limit their use, and abuse, of amparo with respect to arbitration cases. Limiting the abuse of amparo will not only provide greater credibility and authority for arbitration, but it will also protect the concept and authority of the amparo because it will not be perceived as a tool solely used for abuse. Judges must also be trained regarding the nature of arbitration, its principles, and its benefits. By increasing judges’ understandings of arbitration, they will be more inclined to support arbitration proceedings, rather than attempt to subvert the process.

Even with these changes, however, there still may be a low demand for arbitration for the simple reason that it is still a new concept in the region. Therefore, in addition to reforming the judicial systems, it is also necessary to promote the use of arbitration. Educational campaigns for lawyers, law students, and business people would play an important role in this area. In the same way that judges need to know about arbitration, lawyers, business people, and the greater community at large need to know about arbitration’s advantages and the details of how the system works.

Another key to promoting the concept of arbitration is to reform legal education in Central America. In order to keep up with the demands of the global economy, more practical and modern courses are needed within Central American legal education. Reforming legal and business education systems to focus not only on local law and business practices, but also on international best practices is required. With greater awareness and knowledge, businesses and institutions could be a means for bettering the administration of justice. By improving the fundamentals of Central American legal education, lawyers could also learn about alternative dispute resolution as a part of
their law school curriculum, allowing arbitration to become a stronger part of the business and legal environment.92

There are other useful means of improving the demand for arbitration as well. Marketing campaigns can help expand interest, knowledge, and demand for alternative dispute resolution. Pilot educational programs, where arbitration is taught in practical settings to businesspeople, can have a high impact. Likewise, diversifying the kinds of arbitration centers available can help in educating the public about arbitration. For example, specialized arbitration centers for construction, agriculture, or small business disputes are needed. Similarly, arbitration centers for small claims disputes and informal businesses can help make arbitration accessible to the general public and should be promoted. To make this successful, however, it is important that the costs of arbitration are made commensurate to the size of the disputes without sacrificing the quality and transparency of arbitration. Arbitration is, after all, only as good as the arbitrators involved.

In order to enhance the quality of arbitration and show commitment to transparency, Central American arbitration centers of should have codes of ethics for the conduct of arbitrators. The International Bar Association Guidelines on Conflicts of Interest in International Arbitration could be used as a model standard.93

The government can also play a significant role in promoting the use of arbitration: first, by recognizing the benefits of arbitration and financing promotional campaigns; second, by agreeing to arbitrate certain kinds of disputes, the government will set the example for others to use arbitration, giving parties the option to resolve disputes in a different forum; and third, by complying with the outcomes of arbitration procedures, the government will set a tone of trust needed for a well-established system of arbitration.

With the recent passage of CAFTA-DR, other considerations add further impetus to the need for reforming both the judicial and alternative dispute resolution systems in the region. As a result of the Agreement, Central America is bound to integration. As a single market, Central America will have a greater appeal to local and foreign investors. Thus, the demands of globalization call for world-class arbitration centers where sophisticated international disputes can be solved quickly and transparently. Singapore, Hong Kong, London,

92. Field & Fisher, supra note 90, at 165.
Numerous reforms, beyond those associated with the judicial system, are necessary to enhance the attractiveness of Central America to investors. Improvements are needed within the trade infrastructure (such as roads and seaports), trade law, and various areas of commercial law, such as bankruptcy, corporate law, contracts, real property, and secured transactions. Even with such changes, some of which are already being pursued, there is no guarantee that investors will come to Central America. Investors look for business opportunities and low cost. This is where a strong dispute resolution system plays a key role: it diminishes the transaction costs and creates a favorable atmosphere for investors – local and foreign – to do business in a safe and predictable environment.

Though arbitration is beneficial to the Central American economy, it cannot replace the courts. Arbitration can, however, assist the courts by lessening their caseload. This would particularly benefit regions where the courts are significantly overwhelmed.

Arbitration brings about the possibility of solving disputes quickly, transparently, professionally, and at a low cost. But, for a system of arbitration to succeed, assistance from the judicial system is inevitably required. Therefore, even when countries have developed sound systems of arbitration, and where the demand is high, judicial assistance is needed. Thus, reform of Central American judicial systems is essential for arbitration to be viable in the region.

While there is no magic recipe to fix the judicial systems of Central America, some of the recommendations presented herein have proved successful elsewhere. Though it could take many years and tremendous political will to reform Central America’s judicial systems, arbitration could start yielding positive results in the short term. But changes are needed. Of paramount importance are reducing the circumstances under which arbitration procedures and the courts are required to interact, as well as an increase in the demand for arbitration.

Lastly, regional approaches to arbitration are also important. Central America is a much more attractive market as an integrated region rather than five Central American countries standing alone. With a collective population totaling over thirty-five million persons, a Gross Domestic Product of over $140 billion U.S., and numerous regional, viable industries such as textiles and agricultural production, the region should be able to attract strong outside investment.97 Insti-

tutions that promote integration and make intra-region business easier for investors are bound to have the support and attention of the international community. In this direction, regional arbitration centers, or regional arbitration institutes, would be worthwhile options to consider.

Arbitration and alternative dispute resolution alone are not a panacea, but if pursued in tandem with legal and institutional reforms that enhance the respect for the rule of law in the region, Central America is more likely to achieve the goals of economic growth and poverty reduction.