

COSTA RICAN COMMERCIAL ARBITRATION RULES AND THE U.S. FEDERAL ARBITRATION ACT

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I. INTRODUCTION

Commercial arbitration is a method of alternative dispute resolution (ADR) that is being used around the world to avoid lengthy and costly legal appearances before judicial authorities. "In arbitration, the parties voluntarily agree to refer their existing or future disputes to a third party for determination and they agree in advance to accept the arbitrator's decision as final and binding."¹ National and international organizations and associations have recognized arbitration as an alternative dispute resolution method, including the United Nations Commission for the Development of International Trade Law (UNCITRAL),² the International Chamber of Commerce (ICC), the Inter-American Commission of Commercial Arbitration,³ the United Nations Economic Commission for

1. Zhaodong Jiang, *Federal Arbitration Law and State Court Proceedings*, 23 LOY. L.A. L. REV. 473, 474 (1990).

2. UNCITRAL was established in 1966 by the United Nations General Assembly to promote world harmonization of international trade law, and in 1985, 61 nations, including the United States, had adopted the UNCITRAL Model Law on International Commercial Arbitration. The Model Law was designed to establish a uniform procedure and practice for arbitration in international commercial transactions. UNCITRAL MODEL LAW art. 1 (1985).

3. The name in Spanish is *Comisión Interamericana de Arbitraje Comercial* (CIAC), and it was created in 1934 according to Resolution XIII of the VII Conference of the Organization of American States (OAS) in Montevideo, Uruguay, in 1933.

Europe,⁴ and the American Arbitration Association (AAA).⁵ The importance of commercial arbitration has also been recognized by many countries around the world through the approval and ratification of international arbitration conventions⁶ such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Arbitration Convention, June 10, 1958), and the Inter-American Convention on International Commercial Arbitration (Inter-American Convention, January 30, 1975).⁷

Costa Rica is beginning to accept arbitration as an important method of alternative dispute resolution. Although Costa Rica has ratified the New York Arbitration Convention and Inter-American Convention in addition to its own arbitration laws, arbitration proceedings and case law in this area are extremely scarce.⁸ There are several proposals to create centers of alternative dispute resolution in Costa Rica to promote arbitration and other methods of alternative dispute resolution.⁹ New

4. The Commission participated in the formation of the European Convention on International Commercial Arbitration of April 21, 1961; the Convention has been applicable since January 7, 1964.

5. The American Arbitration Association, with its main offices in New York City, is an institution which provides arbitrators for settlement of disputes; it has its own arbitration rules.

6. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, T.I.A.S. No. 6997 [hereinafter New York Arbitration Convention]. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter Inter-American Convention]. Another convention, related only to the settlement of investment disputes between States and nationals of other States, is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966, which was ratified by the United States and implemented in 22 U.S.C. §§ 1650-1650a (1966).

7. See New York Arbitration Convention, *supra* note 6.

8. All insurance disputes which involve the Costa Rican National Insurance Institute, except cases of professional risks, are solved through compulsory arbitration; insurance is, therefore, the primary area where arbitration is used for dispute resolution in Costa Rica.

The survey firm CID-GALLUP concluded in July 1994 that arbitration was not even considered by the surveyed as a means of alternative dispute resolution; only five percent agreed to take their conflicts to a mediator, and two percent indicated other alternative means, none of which included arbitration. Hernando Paris R., *Resolución Alternativa de Disputas* [Alternative Dispute Resolution], 91 IVSTITIA 5, 8 (1994).

In April 1995, CID-GALLUP executed a second survey and concluded that 38% of the surveyed accepted conciliation as an alternative dispute resolution method, 31% mediation, 16% arbitration, and 27% preferred the judiciary. Hernando Paris R., *Resolución Alternativa de Conflictos* [Alternative Resolution of Conflicts], 100 IVSTITIA 8, 11 (1995).

Lic. Hernando Paris R. is the Director of the Costa Rican Program for Alternative Resolution of Disputes.

9. One of the proposals is the Arbitration Center of the Costa Rican Chamber of Commerce, which was supposed to begin operating in May 1996, but has not done so. The Costa Rican Supreme Court, the Bogotá Chamber of Commerce, and the United States Agency for

arbitration regulations are being prepared by different authorities and a new commercial arbitration bill is being discussed and analyzed by the Costa Rican Congress.¹⁰

The United States of America has also recognized the importance of arbitration as a method of alternative dispute resolution. In 1925 the Federal Arbitration Act¹¹ was enacted to establish that arbitration agreements are valid, irrevocable, and enforceable, and to ratify the New York Arbitration Convention and the Inter-American Convention on arbitration.¹² All of the states in the United States have their own arbitration rules.¹³

The purpose of this paper is to study the Costa Rican arbitration rules which form part of the Civil Procedure Code and to recommend several amendments which are considered necessary. The Federal Arbitration Act of the United States of America will be used as a guide to propose amendments on confirmation, vacation, correction, modification, and enforcement of arbitral awards.

II. BASIC FRAMEWORK OF COMMERCIAL ARBITRATION IN COSTA RICA

Commercial arbitration in Costa Rica is recognized and regulated by the Constitution, Civil Code, Civil Procedure Code, the New York Convention, and the Inter-American Convention.¹⁴

International Development (A.I.D) have participated in the creation of the Arbitration Center, as well as in the creation of an arbitration center for family matters, which recently began operating.

10. The Costa Rican Supreme Court, Bar Association, Chamber of Commerce, and Bogotá Chamber of Commerce are preparing a bill that should be discussed and analyzed by the Costa Rican Congress in the near future. A bill proposed by Congressman Rodolfo Brenes Gómez and published in LA GACETA on Monday, February 12, 1996, is now being discussed and analyzed by the Costa Rican Congress. Brenes Gomez, LA GACETA, Feb. 12, 1996.

11. Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1996).

12. The New York Arbitration Convention came into force on December 29, 1970. New York Arbitration Convention, *supra* note 6. For its legislative history and purpose, see Pub. L. No. 91-338, 1970 U.S.C.C.A.N. 3601. The Inter-American Convention came into force in the United States on October 27, 1990. Inter-American Convention, *supra* note 6. Legislative history and purpose may be seen at Pub. L. No. 101-369, 104 Stat. 448 (1990).

13. George A. Davidson, *A Report of the New York State Bar Association International Litigation Committee, Commercial and Federal Litigation Section: The Uncitral Model Law on International Commercial Arbitration*, 23 N.Y.U. J. INT'L L. & POL. 87, 94 (1990).

14. LA CONSTITUCIÓN POLITICA DE COSTA RICA [hereinafter CONSTITUCIÓN POLITICA]; CODIGO CIVIL [CIVIL CODE] (Costa Rica); CODIGO PROCESAL CIVIL [C.P.C.] (Costa Rica); New York Arbitration Convention, *supra* note 6; Inter-American Convention, *supra* note 6. Costa Rica has also signed arbitration treaties with Switzerland (January 15, 1965), Italy (February 8, 1910), Nicaragua (June 28, 1989), Portugal (May 1914), and Republic of Italy

A. *The Constitution*¹⁵

The Constitution is the most important set of rules in the Costa Rican legal system. Among other things, it explains how the government is organized, including the division of executive, judiciary, and legislative branches; it indicates the rights and obligations of citizens and foreigners, and specifies who are citizens of Costa Rica.¹⁶

The Constitution recognizes the right of nationals and foreigners to settle their disputes with the aid of the judiciary and arbitration.¹⁷ Article 43 of the Constitution indicates that every person has the right to settle its economic differences through the use of arbitrators, including cases in which a judicial proceeding is pending.¹⁸

B. *Civil Code*¹⁹

The Civil Code provides the framework for private law. It recognizes and sets rules for obligations, contracts, real estate, chattels, rights of creditors and debtors, limitations, and others.²⁰

Under Costa Rican law, the Civil Code is preempted by the Constitution and by international treaties duly approved and ratified by Congress and the President.²¹

Book IV, title XII, chapter II, article 1386 of the Civil Code refers to the arbitration agreement; this article authorizes the parties to a dispute

(October 31, 1993). Fernando Bolaños Céspedes, *Arbitraje Comercial en Costa Rica* [Commercial Arbitration in Costa Rica], 48 REVISTA JUDICIAL 71, 87 (1989).

15. The Costa Rican Constitution became effective as of November 8, 1949.

16. CONSTITUCIÓN POLITICA.

17. *Id.* at art 43.

18. According to the C.P.C. art. 507, an arbitration agreement can be made by the parties before a judicial proceeding has begun or afterwards, but an arbitration agreement is not valid when a judge has entered a first instance judgment. On its face, it appears article 507 of the C. P.C. violates article 43 of the Constitution because the former limits or restricts arbitration as a means for solving economic disputes. I cannot see anything wrong with the parties in conflict requesting an arbitrator to decide their differences although a judge has already entered a judgment on the issue. Parties should be free to choose the means to solve their differences. Besides, the C.P.C. does not expressly indicate that an award is null and void if it is the outcome of an arbitration agreement that was made after a judgment had been entered. CONSTITUCIÓN POLITICA art. 43 (Costa Rica); C.P.C. art. 507 (Costa Rica). Article 1386 of the Civil Code of Costa Rica does not include a similar restriction as the one of the C.P.C., but since the C.P.C. was enacted after the Civil Code, it could be said the restriction of the C.P.C. implicitly amends the nonrestriction regulation of the Civil Code. CIVIL CODE art. 1386 (Costa Rica); C.P.C. art. 507 (Costa Rica).

19. The Civil Code of Costa Rica became effective on January 1, 1888.

20. CIVIL CODE (Costa Rica).

21. CONSTITUCIÓN POLITICA art. 7, 10.

to request arbitration.²² Article 1392 indicates that the regulations for the *transaction agreement*²³ will be applicable to the arbitration agreement, unless they are contrary to the nature of an arbitration agreement.²⁴

C. Civil Procedure Code²⁵

The Civil Procedure Code [hereinafter the Code] has regulations for different types of judicial proceedings, including arbitration.²⁶ Arbitration rules are located in different parts of the Civil Procedure Code,²⁷ although most regulations pertaining to arbitration are in chapter III of title IV of book II, articles 507 through 529. This chapter specifically refers to the arbitral process and defines it as a special process different from any other process included in the Code.²⁸ The third section

22. The literal translation of the agreement referred to by article 1386 is *Compromise* (Compromiso). For purposes of this research paper, we will refer to it as *arbitration agreement*. In the arbitration agreement, the parties agree on the terms of the arbitration proceeding, they indicate on what issues they agree and disagree, and they indicate what issues have to be settled by arbitration. In the agreement to arbitrate or in the arbitration clause, parties agree to submit present and future disputes to arbitration. See CIVIL CODE art. 1386 (Costa Rica).

23. The term used in Spanish is *contrato de transacción*. In this type of contract, the parties reach a final agreement to settle their disputes. The terms and conditions of the settlement are written down and usually each of the parties partially gives up on their expectations. According to Dr. Walter Niehaus-Bonilla, the *contrato de transacción* will be used to enforce the awards made by the arbitrators of the Costa Rican Chamber of Commerce while the Costa Rican arbitration rules are being amended to allow the Chamber of Commerce to settle disputes through arbitration. Once the awards are made, the parties will sign a document in which they accept the terms of the award and agree to comply with it. This document will be the *contrato de transacción*. If one of the parties does not comply with the agreement, then the other party will have the right to request a judge to enforce the agreement. Interview with Dr. Walter Niehaus-Bonilla, Appointed Arbitrator to the Costa Rican Chamber of Commerce, in San José, Costa Rica (Mar. 18, 1996).

24. CIVIL CODE art. 1392 (Costa Rica).

25. The C.P.C. was enacted by the Costa Rican Congress on July 21, 1989. It was ratified by the President on August 16, 1989, and was published in the official newspaper, *La Gaceta*, on November 3, 1989. LA GACETA, Nov. 3, 1989. The C.P.C. has been effective since May 3, 1990.

26. Arbitration is viewed by the C.P.C. as a judicial process, which means that judicial participation before and during arbitration proceedings is broad. C.P.C. bk. IV, ch. III (Costa Rica).

27. Articles 11 and 12, found in chapter I, title I of book I, refer to jurisdiction and to judicial aid for execution of arbitral awards and other resolutions. C.P.C. arts. 11, 12 (Costa Rica). Chapter IV of title I of book I refers to disqualification, recusation, self disqualification, and liability of judges, including arbitrators; second subsection of section II of this chapter IV, articles 76 to 77, specifically addresses the issue of recusation of arbitrators. C.P.C. arts. 76-78 (Costa Rica). Book III, titles I, II, and III, contains articles which refer to the enforcement of arbitral awards. Title IV of book III refers to the enforcement of foreign arbitral awards.

28. C.P.C. arts. 507-529 (Costa Rica).

of chapter I of title I of the second book, article 298, paragraph 5, refers to agreements to arbitrate and arbitration agreements as a procedural defense during judicial proceedings.²⁹

*D. New York and the Inter-American Conventions*³⁰

The New York Arbitration Convention applies to the "recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal."³¹ The convention includes rules regarding the grounds for the refusal of enforcement and recognizes agreements to arbitrate between parties.³²

Among other issues, the Inter-American Convention specifies that arbitration agreements between parties regarding differences which may arise or have arisen between them with respect to commercial transactions are valid.³³

29. C.P.C. art. 298 (Costa Rica). The literal translations for *cláusula compromisoria* would be *compromising or compromise clause* and *compromise*. For the purposes of this research, the wording used when referring to the defense will be *agreement to arbitrate* or *arbitration clause* and *arbitration agreement*, respectively. The wording of *compromising or compromise clause* can lead to confusion because it might imply that an agreement to arbitrate is not severable from the principal contract between the parties.

According to article 299, when a procedural defense has been alleged by the defendant, a judge, before informing the plaintiff of the defendant's answer, has to decide on the issue of the defense. If it is accepted, then the plaintiff has the right to appeal the decision and the procedure will be stayed pending the decision. If the judge does not accept the defense, the defendant has the right to appeal the decision, but the process will not be stayed. C.P.C. art. 299 (Costa Rica).

30. The New York Arbitration Convention was ratified by Costa Rica by Law 6157 on December 1, 1977. The Inter-American Convention was enacted by Costa Rica through the Law 6165 of December 2, 1977. Although the New York Arbitration Convention was signed in 1958, it was not until December 1, 1977, that it was ratified; only one day later the Inter-American Convention was ratified. Costa Rica ratified the conventions without making any reservation. This clearly shows one of the biggest problems of the Costa Rican Congress: conventions are ratified long after they were signed and more than one refer to determined issues. New York Arbitration Convention, *supra* note 6. Inter-American Convention, *supra* note 6.

31. New York Arbitration Convention, *supra* note 6, at art. 1.

32. *Id.* at arts. II, V.

33. Inter-American Convention, *supra* note 6, at art. 1.

III. BASIC FRAMEWORK OF COMMERCIAL ARBITRATION IN THE UNITED STATES

Commercial arbitration in the United States of America is legally regulated by the Federal Arbitration Act,³⁴ the New York Arbitration Convention, the Inter-American Convention, and state law.

A. The Federal Arbitration Act

The Federal Arbitration Act was enacted in 1925. It has three chapters, the first regarding arbitration rules in general, the second regarding the enactment of the New York Arbitration Convention, and the third regarding the enactment of the Inter-American Convention.³⁵

Chapter 1 of the Act has sixteen sections. Each section refers to a specific issue of arbitration, including scope, validity of agreements, stay of judicial proceedings, failure to arbitrate, appointment of arbitrators or umpires, applications to court, compelling of witnesses, proceedings for libel in admiralty and seizure of vessel or property, confirmation, modification, corrections and vacation of awards, notices, and inapplicability of the Act of State doctrine and appeals.³⁶

As indicated, the enactment of the New York Arbitration Convention is in chapter 2 of the Federal Arbitration Act. Chapter 2 begins with section 201 and goes up to section 208, regulating the enforcement of the convention, its scope, jurisdiction, venue, removal of cases from state courts, order to compel arbitration and appointment of arbitrators, jurisdiction and proceedings in the confirmation of an award, and residual application of chapter 1 of the Act.³⁷ The enactment of the Inter-American Convention is in chapter 3 of the Federal Arbitration Act.³⁸

34. Federal Arbitration Act, 9 U.S.C. §§ 2, 3 (1996).

35. 9 U.S.C. §§ 1, 2, 3.

36. 9 U.S.C. § 1.

37. When the New York Arbitration Convention was ratified, the United States made the following observations:

The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States The Convention applies to all of the territories for the international relations of which the United States of America is responsible.

9 U.S.C. § 201.

38. When the United States ratified the Inter-American Convention, the following observations were made:

B. State Regulations

Each of the fifty states has arbitration regulations applicable to intrastate commercial disputes.³⁹ Based on the Supremacy Clause of the United States Constitution, the Federal Arbitration Act preempts state arbitration rules if the states' rules are in opposition to the Act.⁴⁰

IV. THE COSTA RICAN ARBITRATION RULES OF THE CIVIL PROCEDURE CODE

As has been shown, arbitration is allowed and accepted by the Costa Rican Constitution, the Civil Code, and the Civil Procedure Code. The main regulations of the Civil Procedure Code are included in articles 507 to 529.⁴¹ In the following sections, I will study the arbitration rules of the Civil Procedure Code, including the arbitration procedure, the recognition and enforcement of arbitral awards, and the participation of the judiciary in an arbitration proceeding.

A. Arbitration Process

The Civil Procedure Code includes references to agreements to arbitrate, arbitration agreements, waiver of right to access the judiciary, judicial approval of arbitration agreements, appointment of arbitrators, and fees for arbitrators.⁴² The Code also provides for an arbitration procedure to be followed in case the parties have not agreed on one.⁴³

Unless there is an express agreement among the parties to an arbitration agreement to the contrary, where the requirement for the application of both the Inter-American Convention on International Commercial Arbitration and the Convention of the Recognition and Enforcement of Foreign Arbitral Awards are met, if a majority of such parties are citizens of a state or states that have ratified or acceded to the Inter-American Convention and are member states of the Organization of American States, the Inter-American Convention shall apply. In all other cases, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards shall apply. . . . The United States of America will apply the rules of procedure of the Inter-American Commercial Arbitration Commission which are in effect on the date that the United States of America deposits its instrument of ratification, unless the United States of America makes a later official determination to adopt and apply subsequent amendments to such rules. . . . The United States of America will apply the Convention on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another contracting state.

9 U.S.C. § 301 (1996).

39. Davidson, *supra* note 13, at 94.

40. U.S. CONST. art. VI.

41. C.P.C. arts. 507-529 (Costa Rica).

42. C.P.C. arts. 507-529 (Costa Rica).

43. C.P.C. arts. 507-529 (Costa Rica).

1. Agreement to Arbitrate and Arbitration Agreement

The Code indicates that an agreement to arbitrate grants each party the right to request the other party to the agreement to sign what the Code calls an "arbitration compromise" and if the other party does not comply with the request, that party will be responsible for money damages.⁴⁴ The judge with jurisdiction will draft the arbitration agreement in light of the refusal of the other party to commit to arbitration.⁴⁵

The arbitration agreement is considered extinguished in five different cases.⁴⁶ The first case is non-acceptance by the appointed arbitrators, unless the parties had previously appointed a substitute or had agreed on a procedure to appoint a substitute.⁴⁷ On its face, the Code indicates that a prior appointment of a substitute arbitrator or a previous procedure to appoint a substitute arbitrator is needed to avoid the extinction of the arbitration agreement.⁴⁸ There should be no problem with the proceeding if the parties are able to appoint post-facto a substitute arbitrator or agree on a procedure to appoint one. Nevertheless, the law

44. C.P.C. art. 509 (Costa Rica).

45. C.P.C. art. 509 (Costa Rica).

The translation into English of *compromiso arbitral* appears to be *arbitration agreement*; for purposes of this paper, we will continue to use the term *arbitration agreement*, see *supra* note 22.

According to article 510 of the C.P.C., the arbitration agreement must be signed by the parties as a private contract or must be notarized. The compromise will be addressed to the judge with jurisdiction, and it must be signed by an attorney. The arbitration agreement must include the following: 1) Clear and precise facts upon which the parties agree and disagree; 2) Petitions and requests; 3) Issues to be solved by the arbitrators; 4) Names and last names, occupation, and domicile of the arbitrators, or the procedure for their appointment; 5) Terms for the arbitrators to grant the award; 6) If the value estimation of the proceeding is of "high or low" quantity, according to the opinions of the Supreme Court; 7) Fees for the arbitrators and their helpers, including a limited amount for expenses. In case an arbitrator is a judge or other member of the judiciary, and the parties had chosen him because of his position, then he is not entitled to fees; 8) If the parties will deposit fees and costs before the judge and how much will be deposited; 9) Procedure to be followed. C.P.C. art. 510 (Costa Rica). If the parties do not indicate a procedure, then the one indicated in articles 521 through 524 will be followed; 10) If arbitration is in law or equity. If neither is indicated, then law arbitration will be presumed. C.P.C. arts. 521-524 (Costa Rica).

46. See C.P.C. art. 518 (Costa Rica); *supra* note 18.

47. Article 512 of the C. P. C. indicates that the arbitration panel is comprised only of one or three persons, except in cases where the arbitrators appointed is the Court of Cassation, C.P.C. art. 512 (Costa Rica). This has been acknowledged by the judiciary, *Sala Primera de la C.S.J.* [First Session of the Supreme Court], June 25, 1993 (Costa Rica).

I personally disagree with this provision, particularly considering that the free will of the parties is being extremely limited. The parties should be permitted to agree to an arbitration panel of more than three members, although there should always be an odd number of arbitrators.

48. C.P.C. art. 512 (Costa Rica).

clearly requires a prior agreement, and only the judiciary can interpret the law to not require a prior appointment or procedure to appoint.⁴⁹

Second, an arbitration agreement is considered extinguished by agreement of the parties. This provision acknowledges the importance of the parties freedom to enter into contracts.⁵⁰

The third case is the expiration of the term for the arbitrators to grant an award, except in cases where the arbitrators are judges or other members of the judiciary.⁵¹ The arbitration agreement should not be extinguished if the term for making the award has expired and the parties have agreed to extend or renew the term. On its face, paragraph 5 of article 518 does not allow extensions of the terms, but article 519 provides for an authorization of the parties to extend the term before it has expired.⁵²

The fourth case when the arbitration agreement is considered extinguished is at the death or incapacity of an arbitrator, except in cases where the parties appoint a substitute or agree on a procedure for their substitution. Contrary to the non-acceptance of an arbitrator to their appointment, this clause, on its face, does not require a prior appointment of a substitute arbitrator or procedure to appoint the substitute arbitrator.⁵³

The fifth case is when the procedural defense of the existence of an arbitration agreement is not alleged during a judicial proceeding.⁵⁴ This clause is directly related to article 298, which refers to the procedural defenses which defendant parties can file at the beginning of a judicial proceeding.⁵⁵

Oddly, the Code does not include any article or clause specifying the cases in which agreements to arbitrate are considered extinguished. It is not clear what happens when a defendant party does not file the procedural defense of an agreement to arbitrate during a judicial proceeding. Does that mean the agreement to arbitrate no longer exists?

49. C.P.C. art 512 (Costa Rica).

50. C.P.C. art 512 (Costa Rica).

51. C.P.C. art. 518 (1)-(4) (Costa Rica).

52. Article 519 also indicates that if the parties have not agreed on a term for the arbitrators to enter an award, the term is six months from the beginning of the arbitration proceeding. The article includes a very interesting provision regarding the authorized suspension or interruption of the term; it allows the proceeding to be stayed, just as in judicial proceedings, due to death or serious illness of the parties or their legal representatives, pending criminal proceedings that will affect the outcome of the arbitration, and agreement of the parties. C.P.C. arts. 518-519 (Costa Rica).

53. C.P.C. art. 518(4) (Costa Rica).

54. C.P.C. art. 1391 (Costa Rica).

55. C.P.C. art. 298 (Costa Rica).

Since paragraph 5 of article 518 of the Code expressly indicates that not alleging the exception of the existence of an arbitration agreement means the agreement is extinguished, the agreement to arbitrate is not extinguished if the exception of agreement to arbitrate is pleaded.⁵⁶ Nevertheless, if the exception of the existence an agreement to arbitrate and an arbitration agreement are not alleged, then the agreement to arbitrate and the arbitration agreement are extinguished.⁵⁷

2. Agreement to Arbitrate Means Waiver of Right to Judicial Relief⁵⁸

The Code expressly indicates that the agreement of the parties to arbitrate implies a waiver to their right to request the judiciary for a resolution, and requires consent that the parties will accept the arbitral award as final and binding.⁵⁹ During the proceedings before the arbitrators, no appeals can be filed or injunctions requested before the judiciary.⁶⁰ This does not mean the participation of the judiciary is banned from the arbitration proceeding since a judge will still be needed for the enforcement of an award, for requesting and compelling presentation of evidence, for seizure of moneys and other goods, and even for the approval of the arbitration agreement.⁶¹ Moreover, the parties in an arbitration proceeding may still agree not to continue with arbitration and to adjudicate their disputes through the judiciary.⁶²

56. C.P.C. art. 518 (Costa Rica).

57. C.P.C. art. 518(5) (Costa Rica).

58. Arbitration is based on the right to request a trustworthy person to settle disputes and to waive the right to petition the judiciary for the settlement of the same disputes. Osvaldo J. Marzorati, *Derecho de los Negocios Internacionales* [Rights of the International Businesses], 592 (1993).

59. C.P.C. art. 509 (Costa Rica); *see supra* note 18.

60. Tribunal Superior I Civil [First Civil Superior Court], Jan. 22, 1992 (Costa Rica).

61. C.P.C. arts. 507-533 (Costa Rica).

62. Section 7 of the Federal Arbitration Act enables the arbitrators to summon any person and to require evidence to be produced. A United States District Court even has the power to punish the witness for contempt in cases in which the witnesses do not appear before the arbitrators even though their presence was required only by the arbitrators. Federal Arbitration Act, 9 U.S.C. § 7 (1996). In Costa Rica, if arbitrators summon any person to appear and that person does not appear, the person is not subject to any penalty unless the court itself had issued the summons.

3. Judicial Approval of Arbitration Agreement and Appointment of Arbitrators

The arbitration agreement, once it has been signed by the parties and by an attorney, will be filed with a judge having jurisdiction.⁶³ If the arbitration agreement has any errors, omissions, or does not comply with the format required by article 510, the judge has the obligation and authority to request the parties to correct and modify the arbitration agreement.⁶⁴ When the arbitration agreement is approved by the judge, he will ask the arbitrators appointed by the parties to accept or decline their appointment.⁶⁵ If the parties did not appoint any arbitrators, but included in their agreement the method to appoint them, the judge will appoint the arbitrators and will ask them to accept or decline their appointment.⁶⁶

In case the parties did not appoint arbitrators or did not indicate a method for their appointment, or if the method suggested is not accepted by the judge, the judge can appoint the arbitrators.⁶⁷ If the arbitration is of *law*,⁶⁸ then the arbitrators will be appointed from a list of thirty distinguished Costa Rican attorneys.⁶⁹ If the arbitration is of *equity*, the judge will personally choose the arbitrators among *honorable people* capable and able to conduct the arbitration proceeding.⁷⁰

Once the arbitrators have accepted their appointment and once their fees and anticipated costs have been deposited before the judge, he will then authorize the arbitrators to begin the arbitration proceedings.⁷¹

63. C.P.C. art. 515 (Costa Rica); *see supra* note 18. The Code indicates that the jurisdiction and venue issues of judges involved in arbitration are the same as the general jurisdiction and venue provisions of articles 7 through 45. C.P.C. arts. 7-45 (Costa Rica).

64. C.P.C. art. 510 (Costa Rica).

65. C.P.C. art. 510 (Costa Rica).

66. C.P.C. art. 510 (Costa Rica).

67. C.P.C. art. 511 (Costa Rica).

68. Arbitration of *law* refers to awards made according to the law, as opposed to arbitration of *equity*, in which awards are made according to what the arbitrators feel and know justice is. C.P.C. art. 511 (Costa Rica).

69. The thirty attorneys are chosen by the Supreme Court in its first ordinary meeting of each year. The attorneys must also have practiced law during a period of ten years prior to their inclusion in the list. C.P.C. art. 511 (Costa Rica).

70. *See supra* note 68.

71. The deposit of fees and costs before the judge is only required if the parties had agreed to make the deposit. C.P.C. art. 510 (Costa Rica). Notwithstanding said provision, article 516 indicates that the file of the case will be given to the arbitrators once they have accepted their appointment and once the parties have deposited their fees and anticipated expenses before the judge. C.P.C. art. 516 (Costa Rica). There is an evident contradiction between these two provisions. Moreover, an arbitrator could condition his acceptance to the deposit of his fees before the judge, and thus a conflict would arise if the parties had not agreed to do so. This

4. Legal Fees of Arbitrators

If the parties do not agree on the fees of the arbitrators, Costa Rican law will provide the following amounts: 1) for arbitration proceedings estimated by the parties at \$100,000.00 or less, the fees will be ten percent if there is only one arbitrator, and five percent if there are three arbitrators, and 2) if the estimation is above \$100,000.00, each arbitrator is entitled to an additional three percent.⁷² Each party has to pay half of the legal fees, unless otherwise agreed, and the judge will not make the payment to the arbitrators until the arbitrators have returned the file to the judge.⁷³

5. Arbitration Proceeding Provided by the Civil Procedure Code

The Civil Procedure Code allows the parties to agree on the procedure which is to be followed by the arbitrators in order to conduct the arbitration proceeding and to enter an award.⁷⁴ If the parties did not agree on a procedure, they must follow the one provided by the Code in articles 522 to 524.⁷⁵ The steps of the proceedings are as follows:⁷⁶

First, in cases where the panel is made up of more than one arbitrator, a president must be elected.⁷⁷ The proceedings will be

would probably force the parties to agree to make the deposit in order not to delay the arbitration proceedings or, according to article 518 paragraph 1, not to have their arbitration agreement extinguished. C.P.C. art. 518 (Costa Rica). For the protection of the arbitrators, I believe that the parties should always deposit before the judge the fees and anticipated expenses of the arbitration process.

According to Dr. Walter Niehaus-Bonilla, judicial practice has always been to require the deposit of fees before the files are given to the arbitrators. See *supra* note 23.

72. C.P.C. art. 519 (Costa Rica).

73. The last paragraph of article 517 should be modified so that the fees are not paid to the arbitrators until the award is finally firm and unappealable. According to the actual reading of the last paragraph of article 517, arbitrators would be entitled to payment if they return the file without entering an award, or if they enter an award that was not made according to the arbitration compromise, or if they enter an award that has omissions, errors, or mistakes of any kind, including those that would make it null and void. C.P.C. art. 517 (Costa Rica).

74. C.P.C. art. 520 (Costa Rica).

75. C.P.C. arts. 522-524 (Costa Rica).

76. The proceeding is established in article 522, but it specifically addresses arbitration of *law*. C.P.C. art. 522 (Costa Rica). For arbitration of *equity*, the proceeding can be similar to the one of arbitration of *law*, but it must at least give the parties an opportunity to present their allegations and evidence. C.P.C. art. 524 (Costa Rica).

77. According to article 523 of the C.P.C., in procedural matters in which there is no majority vote, the president's vote will decide. If the panel authorizes the president to decide on all procedural matters, his decision is binding. C.P.C. art. 523 (Costa Rica). According to article 512 of the C.P.C., it is not clear why this article considers the possibility of not having a majority decision, since the panel can only be of one or three arbitrators. C.P.C. art. 512 (Costa Rica).

conducted in the agreed place of arbitration.⁷⁸ The arbitration panel can appoint a secretary, whose fees will be fixed in a reasonable form and will be deposited before the judge.⁷⁹

Second, the parties will have no more than one-fourth of the term given to the arbitrators to enter an award, to present their requests, and offer the necessary evidence.⁸⁰ One set of copies of all the documents must be submitted.⁸¹

Third, the parties have no more than one-fourth of the term given to the arbitrators to enter an award, to answer the claims of the other party, and to offer the necessary evidence.⁸²

Fourth, once the parties have answered the claims of each other, the arbitrators will order the reception of evidence during a term which cannot exceed one-fourth of the term for the arbitrators to enter the award.⁸³

Fifth, for the taking and reception of evidence and for service of notices which cannot be done by the arbitrators, the arbitrators can request the judge of the place where the arbitration is taking place for the necessary help and cooperation.⁸⁴

Rica). It is also not clear who elects the president. The president should be elected by the arbitrators themselves or by the parties.

78. C.P.C. art. 522(1) (Costa Rica). It is not clear who must decide the place of arbitration. There might not be any problem if the parties previously agreed upon a place for the arbitration. The problem might arise if the arbitrators decide on a place which is convenient for them and not for the parties, or if the parties agree (after acceptance by the arbitrators of their appointment) on a place which is not convenient for the arbitrators. The Code should provide an answer for these problems. The arbitration location should be part of the arbitration agreement, and if not, the judge should indicate where the arbitration will take place. Nevertheless, a better solution could be to permit the arbitrators to decide where the place will be and have the decision be final and binding.

79. It is not clear whether the secretary has to be part of the arbitration panel or if the secretary can be any outside person chosen by the arbitrators. The secretary should not be assigned functions common to arbitrators, especially the function of making decisions which should be made only by the arbitrators. The secretary has the duty to serve notices to the parties, witnesses, and authorities according to the procedure described in articles 173 to 185 of the Civil Procedure Code. C.P.C. arts. 173-185 (Costa Rica).

80. C.P.C. art. 522(2) (Costa Rica).

81. C.P.C. art. 522(2) (Costa Rica). It is not clear why the Code requires the parties to formulate their requests two times: the first being in the arbitration agreement and the second during the arbitration proceeding. This could allow the parties to modify their intentions and petitions, and this should not be permitted.

82. C.P.C. art. 522(3) (Costa Rica).

83. C.P.C. art. 522(4) (Costa Rica).

84. C.P.C. art. 522(5) (Costa Rica).

Sixth, arbitrators can give the parties a term to present their conclusions.⁸⁵

Seventh, after all evidence has been presented and after the parties have submitted their concluding statements, arbitrators can request any additional evidence deemed necessary.⁸⁶

B. Award and Appeal⁸⁷

1. Award

The award shall address all issues presented by the parties and must be entered during the term given for judgment.⁸⁸ According to article 525 of the Civil Procedure Code, the award must be written and entered according to a unanimous or majority decision and include any dissenting opinion.⁸⁹ There is no provision regarding other formalities of the award; specifically, if it should include issues of fact and reasoning or if it should only include the holding.⁹⁰

2. Grounds for Appeal or Vacation of Award

The only ground for appeal of an award is the nullity of the same, which cannot be waived by the parties.⁹¹ The one exception is the case where the arbitral panel is a Chamber of the Supreme Court of Justice

85. C.P.C. art. 522(6) (Costa Rica).

86. C.P.C. art. 522(7) (Costa Rica) (*citing to C.P.C. art 331*).

87. The C.P.C. uses *grounds of nullity* to refer to the *grounds for vacation of an award*. The term *appeal* will be used when a party has alleged a ground of nullity to vacate the award. C.P.C. art. 527 (Costa Rica).

88. C.P.C. art. 522 (Costa Rica); see *supra* note 18.

89. C.P.C. art. 525 (Costa Rica).

90. The second paragraph of article 525 of the Code provides a solution for cases in which the arbitrators are not able to reach at least a majority decision. This provision is unimportant since the arbitration panel must consist of one or three arbitrators, leaving no possibility for a tie. C.P.C. art. 525 (Costa Rica).

91. See C.P.C. art. 526 (Costa Rica). The parties should be allowed to deem the award of the arbitrators as final and binding and to waive their right to appeal. The parties could waive the right to appeal by not appealing the award within the term granted of fifteen days. If the non-waiver of the right to appeal is a public policy consideration, then what could happen if the party decides not to appeal, therefore renouncing its right? Should a party be obligated to appeal? The purpose behind article 526 is probably to prohibit parties from renouncing to the nullity appeal before the award has been granted.

since an award made by this court is not subject to nullity.⁹² An award is subject to nullity only on the following grounds:⁹³

First, if the award was entered after the expiration of the term of the proceeding, except in cases where the arbitrators are part of the judiciary.⁹⁴

Second, if the award included issues not submitted to the arbitrators.⁹⁵

Third, if the award did not include issues submitted by the parties to the arbitrators.⁹⁶

Fourth, if the award was granted by an arbitrator who was supposed to disqualify himself or if the request for disqualification or recusation was presented and wrongfully denied.⁹⁷

Fifth, if the arbitral proceeding was not according to the agreement of the parties, with evident prejudice for the appealing party.⁹⁸

The expiration of the term of the arbitration proceeding should be a ground for nullity only if the award was entered after the expiration of the term and the parties did not extend the term. Moreover, an award should be valid if it was entered after the expiration of the term, even though the parties did not extend it, and only if the parties agreed after the award was entered that the award was binding.

Regarding the second ground for nullity, it is clear the whole award is null because the arbitrators decided upon a matter not submitted to them.⁹⁹ Nevertheless, if the decision on such issues does not affect the matters submitted, then only the part of the award regarding matters not submitted to arbitration should be null and void. Moreover, if the matters submitted are affected by the decision regarding the matters not submitted, the Court of Appeals should be able to exclude the parts of the decision

92. C.P.C. art. 527 (Costa Rica). It explains which court acts as court of appeals and that an appeal has to be filed within fifteen days after the parties have been notified of the award.

93. C.P.C. art. 526 (Costa Rica). Public policy is not a ground for appeal or vacation of an award. I think public policy should be a ground for vacation of an award. Examples of systems which accept public policy as a ground for vacation of an award are the UNCITRAL Model Law, New York Arbitration Convention and Inter-American Convention. UNCITRAL MODEL LAW art. 34 (1985); New York Arbitration Convention, *supra* note 6; Inter-American Convention, *supra* note 6.

94. C.P.C. art. 526 (Costa Rica).

95. C.P.C. art. 526 (Costa Rica).

96. C.P.C. art. 526 (Costa Rica).

97. C.P.C. art. 526 (Costa Rica).

98. C.P.C. art. 526 (Costa Rica).

99. C.P.C. art. 526 (Costa Rica).

regarding the matters not submitted to arbitration, or to at least remand the award to the arbitrators for modification and correction.¹⁰⁰

If the arbitrators did not decide upon matters submitted to them, the whole award should not be null and void. The issues included in the award should not be declared null and void unless the merits of the decision will change the arbitrators award on all the issues submitted to them. The merits of the issues initially awarded should be binding unless the merits of the decision upon the issues not initially considered affect the original award.

The fourth ground for nullity should be limited to cases in which there is evident partiality or corruption of the arbitrator or arbitrators. This ground for nullity should not be limited to cases in which the arbitrator had to disqualify himself or in which a disqualification or recusation was requested and unjustly denied. Arbitrators could be partial or corrupt even though there is no ground for disqualification or removal. This ground for nullity should apply when there was evident partiality or corruption of the arbitrators.

I agree with the fifth ground of nullity; the award should not be annulled where a party has not been injured although the arbitrators did not follow the rules set for the arbitration proceeding.

An additional ground for vacation of an award should be violation of public policy. No award should be enforced if it violates public policy, even if the losing party has not alleged any ground of nullity.¹⁰¹ Although the concept is not easily defined, the judiciary should be in charge of the difficult task of determining Costa Rican public policy. Non-arbitrable issues should be included as part of the concept of public policy. A vacation of an award should even be permissible when no grounds of nullity were alleged by the parties if the award is contrary to public policy.

The Civil Procedure Code, in article 527, allows arbitrators to modify or correct the award without changing its merits.¹⁰² The arbitrators can modify or correct the award at any time before the parties have been notified.¹⁰³ After the parties are notified, they can request the modification

100. Article 617, paragraph 4, of the C.P.C. allows the court of appeals to annul awards granted in equity only with respect to the issues not submitted to arbitration. A similar rule should be established for arbitration of law. C.P.C. art. 617 (Costa Rica).

101. The New York Convention (article V.2) and the Inter-American Convention (article 5.2) recognize public policy as a ground for non recognition of an award by a country. New York Arbitration Convention, *supra* note 6, at art. V.2; Inter-American Convention, *supra* note 6, at art. V.2.

102. C.P.C. art. 527 (Costa Rica) (*citing to* C.P.C. art. 158, 161).

103. C.P.C. art. 527 (Costa Rica).

or correction of the award within the following three days.¹⁰⁴ In cases where there is an evident material miscalculation of figures or any other material mistake in the award, the arbitrators can correct or modify the award at any time.¹⁰⁵ Nevertheless, if the award is affected by any of the grounds of nullity, no correction or modification by the arbitrators would be permitted.¹⁰⁶

C. *Jurisdiction to Confirm and Vacate an Award*

The Civil Procedure Code does not clearly indicate what judge will confirm an arbitral award and on what grounds.¹⁰⁷ Based on the actual wording of the Civil Procedure Code, three possible answers to this problem exist:

1. Confirmation by the Appellate Court

The appellate court will confirm an award in cases where one of the parties has alleged any of the grounds of nullity and the appellate court determines that the award is not null, but valid.¹⁰⁸ The resolution of the appellate court confirming the award would make the award enforceable. If the appellate court considers the award null and void, then it would vacate the award.¹⁰⁹

2. Confirmation by the Arbitrators

In cases where the award has been entered by a Chamber of the Supreme Court acting as an arbitral tribunal, the award should be

104. C.P.C. art. 158 (Costa Rica); *see supra* note 18.

105. C.P.C. art. 161 (Costa Rica).

106. C.P.C. arts. 158, 526 (Costa Rica).

107. The C.P.C. does not even use the concept of confirmation or any other concept with a similar definition. Nevertheless, we consider that confirmation is implicitly included in the Code because an arbitration award cannot, or at least, should not be enforced without judicial approval. C.P.C. arts. 525-29 (Costa Rica).

The Code does not provide any answer regarding the time requirements for the confirmation and enforcement of an award; the Code does not indicate when a winning party has to request the enforcement of an award (when there are no grounds of nullity alleged or when a Court of Appeals has rejected any grounds of nullity alleged). The only possible solution could be the prescription terms or statute of limitations of the Civil Code and the Commerce Code, which may be of ten, four, or one year, depending on the dispute. The C.P.C. indicates in article 214; paragraph 6, that during the enforcement of arbitral awards, if property of the losing party has been seized and the enforcement is unreasonably stayed for more than three months, the enforcing judge must order the cancellation of the seizure. C.P.C. art. 214 (Costa Rica).

108. C.P.C. arts. 560, 563 (Costa Rica).

109. C.P.C. art. 570 (Costa Rica).

considered confirmed.¹¹⁰ The arbitrators themselves will confirm the award they entered by indicating that it is valid and enforceable, because no grounds of nullity can be alleged when there is no appeal made.

3. Confirmation by the Enforcing Judge

If a Chamber of the Supreme Court is not the arbitral tribunal and no grounds of nullity are alleged, then the confirmation of the award can only be made by the enforcing judge.¹¹¹ It is not clear under what grounds the award could be vacated or confirmed. The only way to vacate an award is to allege a ground of nullity within the fifteen day period.¹¹² Therefore, the enforcing judge cannot vacate an award if he receives the award after the fifteen day period.

The problem of confirmation of the arbitral award can be avoided only through a modification of the Civil Procedure Code. The best solution would be to grant the enforcing judge power to confirm and vacate awards; only one judge would be involved in the confirmation and vacation of the award and the confusion would thus be eliminated.

D. Enforcement of the Award

An award can be enforced only when it has been confirmed by a judge, since judicial participation is required for the enforcement of the arbitral award¹¹³. Once the award has been confirmed, it will be enforced by the proper judge, applying the same rules and regulations as ordinary judgments.¹¹⁴ The judge who enforces the award is the same judge who would have handled the case if the dispute had not been resolved through arbitration.¹¹⁵

V. PROPOSITION OF AMENDMENTS TO COSTA RICAN ARBITRATION RULES ACCORDING TO THE FEDERAL ARBITRATION ACT

The Federal Arbitration Act and American case law provide solutions for several of the problems of the Costa Rican arbitration rules,

110. C.P.C. art. 514 (Costa Rica).

111. C.P.C. art. 529 (Costa Rica).

112. C.P.C. art. 526 (Costa Rica).

113. See C.P.C. arts. 12, 529 (Costa Rica); *supra* note 18.

114. C.P.C. art. 529 (Costa Rica). The execution of judgments are specifically included in Title III of Book III of the C.P.C., articles 692 through 704, although the remaining articles of Book III could be applied in cases or situations not covered by articles 692 through 704. C.P.C. arts. 692-704 (Costa Rica). Title IV of Book III, articles 705 through 708 regulate the execution of foreign judgments and foreign arbitral awards. C.P.C. arts. 705-708 (Costa Rica).

115. See C.P.C. arts. 12, 515, 529, 629 (Costa Rica); *supra* note 18.

including judicial approval of the arbitration agreement, and confirmation and vacation of arbitral awards.¹¹⁶

A. Judicial Participation for Approval of Arbitration Agreement

A Costa Rican arbitration regulation which should be eliminated is that of judicial approval of the arbitration agreement in article 510 of the Civil Procedure Code.¹¹⁷ The arbitration agreement should not be approved by a judge when the parties to the arbitration proceeding are willing to submit their disputes to arbitration. The law must consider that the parties in an arbitration procedure know what they are doing, and if they do not, they will search for legal advice from a capable and knowledgeable lawyer.¹¹⁸ The law must also assume arbitrators are capable of conducting a fair arbitration procedure and have the knowledge to determine and approve the contents of an arbitration agreement. Arbitrators, not judges, should approve the arbitration agreement.

When an agreement to arbitrate exists between the parties, the arbitration proceeding should be initiated by the parties themselves through written notice. The party giving the notice should indicate to the other party the grounds of the controversy and the relief sought. The party receiving the notice should then agree to arbitrate under their agreement and should also state its position. Both parties would then agree on the arbitration proceeding, although the agreement on the terms of the proceeding could have been included in the previous agreement to arbitrate, or incorporated through the choice of a body of law or arbitration institution.

Lic. Víctor Garita González, a Costa Rican lawyer, considers the regulation of judicial approval of the arbitration agreement excessive. Lic. Garita suggests Costa Rican arbitration law should recognize the existence of institutional arbitration, and that the powers of the judge regarding the approval of the arbitration agreement should be limited to a legalization of

116. The Federal Arbitration Act and American case law provide guidance in other arbitration issues, including preclusive effects, manifest disregard of the law by arbitrators, awards contrary to public policy, sufficiency of proof, fair hearings, arbitral partiality or bias, provisional enforcement, judicial selection of arbitrators, deference to foreign law, severability, consolidation of arbitral proceedings, and mutual assent. Federal Arbitration Act, 9 U.S.C. § 2 (1996).

117. C.P.C. art. 510 (Costa Rica).

118. I agree with the requirement of the C.P.C. to have a lawyer sign the arbitration compromise. C.P.C. art. 510 (Costa Rica). Parties will be able to choose the lawyer who will best protect their interests, and the lawyer will assume his professional responsibility by signing and approving the arbitration agreement.

the actions of the arbitration institution, which would be in charge of approving the arbitration agreement.¹¹⁹

Although I agree with Lic. Garita's suggestion, I believe the approval of the arbitration agreement should not be limited to arbitration institutions; I would go further and allow ad hoc arbitrators to approve the arbitration agreement and to conduct the arbitration proceeding according to the agreement of the parties.

The Federal Arbitration Act does not regulate the arbitration agreement like the Costa Rican Civil Procedure Code. I believe the lack of regulation by the Federal Arbitration Act means arbitration agreements should not be reviewed or approved by the judiciary.¹²⁰ Moreover, the Act clearly indicates "an . . . agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable. . . ."¹²¹ This clause demonstrates the importance given to the agreements between parties, and it does not subject said agreements to judicial approval. The arbitration agreement can be approved by the arbitrators themselves and not by a court of law.¹²² If Congress had intended to have the judiciary approve the arbitration agreements of parties, it would have stated this intention in the Federal Arbitration Act.

Judicial participation at the beginning of an arbitration proceeding should be required only in cases where one of the parties to an arbitration agreement is not willing to arbitrate disputes, when parties are not able to agree on the arbitration proceeding itself, or when the parties have agreed on a procedure which is clearly against the interests of one of the parties. In cases where the parties have agreed to arbitrate their disputes and have agreed upon an arbitration procedure, then judicial participation should not be necessary. The idea is not to eliminate judicial participation during arbitration proceedings, but how judicial control can be efficient and less disruptive of arbitration.¹²³

119. Víctor Garita González, *Un Nuevo Horizonte para la Búsqueda de una Mejor Justicia* [A New Horizon for a Better Justice System], 1995 EL ARBITRAJE 10.

120. Federal Arbitration Act, 9 U.S.C. § 2 (1996).

121. 9 U.S.C. § 2 (1996); see also Zhaodong Jiang, *Federal Arbitration Law and State Court Proceedings*, 23 LOY. L.A. L. REV. 473 (1990); Janet Lee Harold, *Federal Preemption*, 54 MISS. L.J. 571 (1984); Robert Lawrence Co. v. Devonshire Fabrics Inc., 271 F.2d 402 (2d Cir. 1959); Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395 (1967); Perry v. Thomas, 482 U.S. 483 (1987); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

122. 9 U.S.C. § 2 (1996).

123. Víctor Manuel Garita, *Conceptual Basis For a New Arbitral Statute for Costa Rica: A New Approach in Latin America*, 65 TUL. L. REV. 1633, 1653 (1991).

B. Confirmation and Vacation of Award

The rules for the confirmation and vacation of arbitral awards of the Costa Rican Civil Procedure Code require immediate modification to avoid the confusion which they create.¹²⁴ The Federal Arbitration Act provides guidance on these issues.¹²⁵

1. Confirmation of Award

The Federal Arbitration Act provides that after an arbitration award has been made, "any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected. . . ."126 The Act also provides a term of one year for a party to request the confirmation of the award by a court of law.¹²⁷

Costa Rica has no clear rule regarding the confirmation of an arbitration award, except for the cases where the award was made by a Chamber of the Supreme Court of Justice or where no grounds of nullity were found.¹²⁸ In order to avoid any possible confusion, the Costa Rican Civil Procedure Code should include a rule similar to section 9 of the Federal Arbitration Act¹²⁹ to provide the winning party with a mechanism to confirm the award when the vacation of the award was not requested by the losing party. The confirmation of the award should be allowed only after the term for requesting the vacation of the award has expired.¹³⁰ This

124. C.P.C. arts. 525-529 (Costa Rica).

125. 9 U.S.C. § 9 (1996). See *First Options of Chicago v. Kaplan*, no. 94-560, 1995 U.S. LEXIS 3463 (May 22, 1995); *Western Employees Ins. Co. v. Jeffries & Co.*, 958 F.2d 258 (9th Cir. 1992); *Fertilizer Corp. of India v. IDI Management Inc.*, 517 F. Supp. 948 (S.D. Ohio 1981); *Kentucky River Mills v. Jackson*, 206 F.2d 111 (6th Cir. 1953); *Comprehensive Accounting Corp. v. Ruddell*, 760 F.2d 138 (7th Cir. 1985); see also *Wing v. J.C. Bradford & Co.*, 678 F. Supp. 622 (N.D. Miss. 1987); *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983); *International Standard Elec. Corp. v. Bridas S.A. Petrolera*, 745 F. Supp. 172 (S.D.N.Y. 1990).

126. Federal Arbitration Act, 9 U.S.C. § 9 (1996).

127. 9 U.S.C. § 9 (1996). Although the term of one year appears to be mandatory, case law has indicated that the term is permissive; an award can be confirmed even more than one year after it was granted, unless the award has already been vacated. See *Kentucky River Mills*, 206 F.2d at 111; *United Fuel Gas Co. v. Columbian Fuel Corp.*, 165 F.2d 746 (4th Cir. 1948); *Lehigh Structural Steel Co. v. Rust Eng'g Co.*, 59 F.2d 1038 (D.C. Cir. 1932).

128. C.P.C. arts. 514, 526 (Costa Rica).

129. The losing party should be served notice of the confirmation of the award and should be given the opportunity to have a hearing to comply with procedural due process. 9 U.S.C. § 9 (1996).

130. The term for the confirmation of the award should be reasonable. I think a term of three months should satisfy the interest of dispute resolution through arbitration. This term would begin the following day after the expiration of the term for requesting the vacation of the

would assure the winning party that the enforcement of the award will not be delayed under grounds of nullity of the award itself.

The judge with jurisdiction to confirm the award should be the same judge who would have enforced a judicial resolution; therefore, it should be the same judge who would have had jurisdiction to adjudicate the case.¹³¹

2. Vacation of Award

The Federal Arbitration Act also provides regulations regarding the vacation of an arbitral award. When an award has been made, a United States court may make an order vacating the award upon application of any party to the arbitration on four grounds, including where the award has been procured by corruption, fraud, or undue means, or where there was evident partiality or corruption by the arbitrators.¹³²

As was indicated above, the fourth ground of appeal of the Civil Procedure Code should be modified to allow the vacation of an award when the award was procured by corruption, fraud, or undue means, including partiality of the arbitrator, as indicated in the Federal Arbitration Act.¹³³ The fact that an arbitrator did not resign or that a request for his or her impeachment was unduly denied should not be enough to vacate the award. The award should be vacated only if there was evident partiality by the impeached arbitrator, or if the award was procured by corruption, fraud, or other undue means. The issues of impeachment or resignation of arbitrators alone should not be grounds for the vacation of awards.

Although I agree with the term of fifteen days given by the Civil Procedure Code for requesting the nullity of the award, the term could be even shorter. I consider a term of five days reasonable, because it is equal to the one given by the Code to appeal final judgments of the courts.¹³⁴

It should be made clear, if the losing party does not request the vacation of an award within the term, then it has lost all possibility of vacation of the award, even during the proceeding for the confirmation of the award.

award. When a request for vacation of the award has been presented, then a different problem arises. The winning party should be served notice of the request for vacation of the award and should be given the opportunity to request the confirmation of the award during the vacation proceeding. In this case, the period of three months would no longer apply.

131. See C.P.C. arts. 12, 515, 529, 629 (Costa Rica).

132. Federal Arbitration Act, 9 U.S.C. §10 (1996).

133. 9 U.S.C. § 10 (1996).

134. C.P.C. art. 559 (Costa Rica); see *supra* note 18.

The judge with jurisdiction to vacate the award should be the same judge who would have enforced a judicial resolution; it should therefore be the same judge who would have had jurisdiction to adjudicate the case.¹³⁵

C. Modification or Correction of Award

A ground for modification or correction of an award should be where the arbitrators have decided upon a matter not submitted to them, unless it is a matter which affects the merits of the matter under deliberation by the tribunal, in which case the award should be null and void. The fact that the arbitrators awarded on matters submitted to them and on matters not submitted to them should not make an award null. If the arbitrators make an award on the matters submitted to them, and by mistake or any other reason they also award on matters not submitted to them without affecting the merits of the award on the matters submitted, then I see no reason to have the award be null and void. This is the same position taken in the Federal Arbitration Act¹³⁶ and this should be the position of the Costa Rican arbitration rules.

VI. CONCLUSION

The Costa Rican arbitration rules must be amended in order to provide parties with unsettled disputes a safe alternative to judicial proceedings. Arbitration must be seen as an important device to avoid the long and costly appearance before courts to settle conflicts between parties. Costa Rican law must recognize the free will of the parties and must limit judicial intervention during arbitral proceedings. If judicial intervention is permitted during arbitral proceedings, arbitration will no longer be faster and more efficient than the judiciary. If the parties involved in a transaction do not feel comfortable with arbitration, its use as an alternative method for dispute resolution will continue to be limited.

Special emphasis must be given to confirmation, vacation, correction, and modification of arbitral awards. Although parties may be willing to arbitrate, they will not always be willing to comply with arbitral awards. Rules regarding the enforcement of awards should be very clear and precise in order to be trustworthy to the parties. The Federal Arbitration Act of the United States and its case law provide guidance on many arbitration issues, including enforcement.

Arbitration must be subject to an open debate among lawyers, judges, businessmen, and people in general. The Supreme Court, the Bar

135. See C.P.C. arts. 515, 529, 629 (Costa Rica).

136. Federal Arbitration Act, 9 U.S.C § 11 (1996).

Association, the Costa Rican Chamber of Commerce, the Bogotá Chamber of Commerce, and the United States Agency for International Development, are participating in this discussion and analysis of arbitration. This research paper is useful for the debate on arbitration. The opening of the Arbitration Center of the Costa Rican Chamber of Commerce and the proposals of new arbitration rules are clear examples of the new era for arbitration in Costa Rica. As discussions continue, as the arbitration centers operate, and as Congress realizes the importance of new arbitration rules, the public will accept arbitration as an important method of alternative dispute resolution.