ALTERNATIVE DISPUTE RESOLUTION IN GUATEMALA

Alvaro Castellanos Howell

1.- HISTORY AND PRESENT UNDERSTANDING OF ALTERNATIVE DISPUTE RESOLUTION (ADR) MECHANISMS.

1.1 What is understood by ADR?

In the Guatemalan legal system, there is no express or official definition of Alternative Dispute Resolution methods or mechanisms. Therefore, the term "ADR" in Guatemala[1], which is actually used in certain laws, normally means, in practice, procedures that are legally recognized and that are handled in a "non-judicial" manner, in order to resolve disputes between two or more persons (natural persons or legal entities).

When the term ADR is used, either in any laws or in contracts or agreements between the parties, or even in works related to this topic, it normally encompass two main methods: Conciliation and Arbitration.

As there is no official definition as of today, it really depends on the parties involved in the use of an ADR method to define it, but certain limitations or restrictions apply to this "self-applied" definition.

Under article 202 of the Guatemalan Constitution, there is a general principle that it is the duty of the Judicial Branch of Government to administer justice and promote the enforcement of the judicial decisions. This constitutional provision adds that the duty of administration of justice is exclusively handled by the Supreme Court of Justice and the other courts or tribunals established by law.

In addition, article 29 of the same Constitution states as an individual or civil right, that any person has free access to the Courts of the State of Guatemala to exercise its rights or make any claims.

As a consequence of the above, for any form or method of non-judicial procedures to resolve disputes between parties, there must be a law supporting such procedures. This criteria is applied, of course, when a third party, and not the parties to the dispute themselves, render a resolution or determination resolving the dispute. That is the case of Arbitration. Therefore, regarding other methods, such as conciliation, strictly speaking, it is not necessary that a law supports the possibility of its use, as it is a party's "self-applied" method of resolving their dispute. In other words, this can be seen simply a consequence of the free will of the parties, perhaps, only limited to those matters or issues that import public policy provisions of the State.

[1] Or "MARCs" for the spanish abreviation of "Métodos Alternativos de Resolución de Conflitctos"

The above does not mean that our Constitution requires a law to allow parties themselves to resolve their dispute through direct negotiations before making formal claims in front of State Courts (hereinafter, referred only as "Courts") or Arbitral Tribunals, if there is an arbitral agreement. This right to direct negotiations is of course, limited only in those cases where the matter of dispute is a non-negotiable issue, such as, for example, causes for divorce, or the right of a minor children to receive alimony from its parents.[2]

As for the other traditional ADR method in Guatemala, that is, "Conciliation", the traditional or prevailing view is that it is a "método auto-compositivo" or a "self-applied resolution" between the parties, even though there is a Conciliator helping the parties to reach such resolution[3]. As a "self-applied" or "self-determined" resolution, again, article 202 of our Constitution should not be regarded as a limitation to the right of the parties to use the method of Conciliation. As mentioned before, the only possible limitation to the use of conciliation, as for the right for direct negotiations between the parties, is when the matter of the dispute is a "non-negotiable" matter or is regulated under public policy rules.

In any event, the brief discussion above, about the legality of using conciliation is somewhat "academic", as Decree 67-95 of Congress, which embodies the "Arbitration Law", expressly recognize Conciliation as an ADR method, in its articles 49 and 50.

In contrast to all of the above, what is not ADR is any legal procedure to resolve disputes between the parties, administered by the Courts of the State of Guatemala. In other words, any judicial procedures are not ADR methods.

Guatemala is recently entering into a "new era" on the use of ADR methods, as explained in some sections below, and therefore, the main challenge to overcome in order to use ADR in a more developed and wider manner is for the parties themselves, that is, the users of the different ADR methods, to take confidence on them as effective methods to resolve in a definite way their disputes. As it is going to be discussed below,

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[2] Article 2158 of the Guatemalan Civil Code contemplates the following: *"It is prohibited to make transactions or settlements: 1o.- On the civil status of individuals; 2o.- On the validity or anullability of marriage or divorce; 3o.- On the criminal liability; but settlements are allowed regarding the civil libility derived from crimes; 4o.- On the right to receive alimony; but on the amount or past due alimony it is alloed for parties to reach a settlement; and 5o.- On any matters included in a will, while the grantor of the will is alive"*

[3] Article 49 of theArbitration Law defines Conciliation as *"A mechanism or non judicial dispute resolution alternative by virtue of which the parties having a dispute of a commercial nature or any other nature, make an effort to resolve such dispute, with the active cooperation of an objective and impartial third party, whose basic function is to promote solution formulas proposed either by the parties or by him or her, and thus impeding that the conflict is finally determined thorugh judicial or arbitral instances "*

Decree 67-95 of Congress (hereinafter, referred to only as the "Arbitration Law") is of relatively recent enactment, and the previously applicable legal rules to arbitration per se, were not adequate or good enough to really promote a wide use and, therefore, a "culture" on the normal use of ADR.

1.2 History of ADR in Guatemala.

The possibility of using ADR methods in Guatemala, as an independent country, at least nominally speaking and in particular, using Arbitration, has been legally recognized almost since our date of independence from Spain[4]. The first codes of civil procedures, all of them had regulations on the right of parties to submit their disputes to arbitration when the subject matter was an "arbitrable dispute".

The notion of what is an arbitrable dispute, has been all the time those disputes in which the parties can waive any rights or in which they can reach a settlement agreement.[5]

The immediate legislative antecedent to the current Arbitration Law in Guatemala, was the Code of Civil and Mercantile Procedures (CCMP). CCMP, which is actually still in legal force for all the civil and commercial judicial procedures, was enacted in 1963.

Therefore, due to this simple fact related to the date in which Guatemala adopted legal rules applicable to Arbitration before the new "Arbitration Law", it can be said that, even though there was an express legal recognition for the parties to use Arbitration as an ADR method, the rules themselves were not adequate enough to promote the effective use of Arbitration. The main reasons for making such statement are:

The previous legal system applicable to arbitration, among other aspects:

a) required parties to sign an arbitral agreement know as "contrato de compromiso" at the time the dispute arose; even if the parties included an arbitration clause in their agreement when originally executed. The lack of one party to enter into this "contato de compromiso" created the duty on the party seeking arbitral proceedings to require assistance from a judicial Court, through procedures that could take even a year just to state the obligation of the other party to enter into the "arbitral agreement";

[4] Guatemala became an independent country on September 15, 1821. One of the first laws regulating Arbitration, was the Law of Regulation of Procedures of the Spanish Code of Commerce, of 1829, that was still in us in Guatemala, after its independence from Spain. This act was in place until the year of 1877, year in which the first Code of Commerce of Guatemala was enacted. This first Code of Commerce, in its article 252, clearly stated that all disputes derived from commercial agreements could be submitted to arbitration.

[5] Please, see footnote No. 2, as to what is not a negotiable matter or in which parties can not reach a settlement agreement.

b) any arbitral agreements, except for some few exceptions, were to be formalized in notarial instruments or "escrituras públicas". The lack of this formality rendered the arbitration agreement as null and void.
c) there was no express recognition of the notion or concept of "severability and autonomy" of the arbitral agreement;
d) there was no express recognition of the principle "kompetenz-kompetenz";
e) there was no express recognition on the right of the parties to select an institution to administer the arbitral proceedings or for the appointment of arbitrators or other supplementary services for "ad hoc" arbitrations;
f) all the arbitration procedures regarded as "arbitration in law" (in contrast to "arbitrations in equity" to be distinguished below) shall be handled as the CCMP mandated, so the parties did not have the right to decide on all the procedular aspects of the arbitration;
g) the final award was subject to a judicial review by the Supreme Court, through the extraordinary remedy knows as "cassation recourse", regulating causes for cassation normally applicable to more formalistic judicial procedures.

In addition to the rules contained in the CCMP that governed arbitration procedures until 1995, some very few rules were also found in the "Code of Private International Law" or "Bustamante Code" which is an Inter-American Convention on the subject matter signed on Febraury 13, 1928 in Havana, Cuba, by several American states, including Guatemala.

An interesting legal development in Guatemala towards the use of arbitration, can be identified at the moment the current Code of Commerce was enacted. This Code took legal effect back in 1970, and its article 1039 states that, for all the conflicts derived from the application of such Code, the judicial mean to resolve such disputes is the procedure know as "juicio sumario" which contains abbreviated terms in contrast to other judicial procedures, EXCEPT if the parties had entered into an arbitral agreement, which in this case, the arbitral procedure shall be the only way to resolve the disputes. Although this provision promotes the use of arbitration, it did not changed at that time anything on the procedural aspects contemplated in the CCMP, described as limitations, above.

The rules contained in this Code are nominally speaking still in legal standing[6] and, until the time Guatemala became a party to the Convention

[6] In some section below, reference is going to be made to the adherence of Guatemala to the "Convention of the United Nations on the Recongition and Enforcement of Foreign Arbitral Awards" or the "New York Convention".

of the United Nations on the Recognition and Enforcement of Foreign Arbitral Awards (or "New York Convention") such rules were the only ones that made reference to the possibility of international arbitrations and how to enforce arbitral awards issued by arbitral tribunals located in other member states.

It can be said that until the mid 80´s and the last decade, Guatemala and its business community started to experience a wider exposure to international transactions and more foreign direct investments and this, together with the new legislative trends in some neighboring countries (such as Mexico) on the subject matter of ADR, prompted the need to review the national legislation applicable to ADR methods based on two main aspects: first, the "old fashioned" rules applicable to arbitration, and second, the limitations and loopholes in such rules, that were not promoting at all a culture of confidence and wider use of ADR. Of course, as it is going to be described in the next chapter, it was not until 1994 that the an initiative containing a whole new law on Arbitration was prepared, initiative that, after the necessary discussions and legislative procedures, was formally enacted in October of 1995.

In the meantime, in addition to the factors mentioned in the preceding paragraph, the first Institution for the administration of Arbitration and Conciliation procedures was established in the mid 80´s[7], notwithstanding the fact that the "regulatory environment" for ADR had several deficiencies, some of those that had been already described herein.

Therefore, the opening of this ADR institution (CDCA) can be seen as one of the positive elements that "ignited" the consciousness about the need to implement more modern and up to date legislation in this area.

The Chamber of Commerce of Guatemala also started strong efforts in the early 90´s to establish a new Center for Arbitration and Conciliation, known today as CENAC. It started providing arbitration and conciliation services in 1992 and, together with the other ADR institution, the CDCA, joined forces in promoting in several ways a wider use of ADR. Still, the "regulatory environment" for ADR was posing practicable problems in many different ways, that did not helped in obtaining highly positive results.[8]

Besides the "institutionalization" of the ADR methods in Guatemala from the mid 80´s to the early 90´s, during the same period of time, Guatemala

[7] Founded by Mr. Rodolfo Rohromoser, Esq.; Mr. Roberto Aguirre Matos, Esq., and some other prominent members of the Guatemalan Bar Association, the "Centro Privado de Dictamen, Conciliación y Arbitraje – CDCA" - started operations in 1987.

[8] There is still another ADR institution in Guatemala as of today, known as CRECIG, organized by the Chamber of Industry of Guatemala, that was formed after the enactment of the Arbitration Law.

became a full member State of both the "New York Convention" of 1958, and the Inter-American Convention on International Commercial Arbitration" or "Panama Convention" of 1975.

This additional element, made it even clearer that it was the appropriate time to enact new rules for ADR methods, as the internal rules contained in the CCMP were not necessarily in line with some rules and provisions of these major international conventions related the commercial arbitration.

The description of the new legal framework is now developed in the following chapters.

2.- THE LEGAL FRAMEWORK OF ADR IN GUATEMALA.

2.1 Statutory and Regulatory Recognition.

On October 3, 1995, the Congress of the Republic of Guatemala enacted the new "Arbitration Law", contained in Decree 67-95.

If one would try to characterize the content and trend, and in general, the orientation of the Arbitration Law, it can be simply said that it is fundamentally based on the Model Law on International Commercial Arbitration prepared by the United Nations Commission for International Trade Law –UNCITRAL-, commonly known as the UNCITRAL Model Law on International Commercial Arbitration. The initiative took in consideration too, some details or features from the Spanish Arbitration Law of 1988.

The Arbitration Law left without legal effect almost all rules previously applicable to this ADR method contained in the CCMP, together with some other pre-existing legal rules contained in the Civil Code and other laws that were part of the pre-existing legal framework for Arbitration.

The Guatemala Congress decided to enact its national law on Arbitration, not limited to International Commercial Arbitrations. Therefore, it is applicable for both national and international arbitral proceedings, and to

any type of disputes that falls into the category of arbitrability matters, not restricted only to commercial matters.[9]

It has been said that the title of "Arbitration Law" of Decree 67-95 is a misnomer, due to fact that, at least in two of its articles, there is express recognition and few rules applicable to Conciliation procedures, and that, as a consequence, the law contained in said Decree should be knows as the "ADR Methods Law".

Notwithstanding those additional elements introduced in the initiative, it can be said that the Guatemalan Arbitration Law is substantially in the form of the Model Law, and that those elements were introduced, even following the options and comments provided by UNCITRAL itself when they provided this very useful tool to the international community as a mean to try to reach an harmonization of national arbitration rules through out the world, or at least in a substantial part of it.[10]

The Arbitration Law did in fact, caused a significant change in the legal tradition on this subject matter in Guatemala, as many of the issues or topics described in section 1.2 above as deficiencies or loopholes in our national legislation, were in fact corrected or expressly regulated.

In other words, since the enactment of the Arbitration Law:

a.- if an arbitration provision or "cláusula compromisoria" is included in an agreement, or is later on agreed between the parties, but before the legal dispute arises, once the dispute is a fact, the arbitration provision or arbitration clause is fully binding upon the parties, and there is no need to request any additional signatures or the entering into more formal arbitral agreements. That is, the arbitration provision, even as simple as it can be, is fully mandatory on the parties, and if one party does not want to comply with it, the whole arbitral proceeding can be handled "in absence" of such party ("rebeldía") provided, of course, that the guarantee of due process is fulfilled, with adequate and proper service of process to the party in default. Also, if a party that is subject to an arbitration provision, brings law suit in front of State Courts, the other party can present a defense of lack of jurisdiction ("excepción de incompetencia") and the Judge, once the arbitration agreement is presented to him or her, has to decline the case. This is in full line with article II of the New York Convention.

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[9] Again, under Guatemalan law and practices related to arbitration, what is "arbitrable" is any subject matter that does not falls into the matters contemplated under the Civil Code as non-negotiable or where the parties can not reach a settlement agreement. For more details, please see Footnote No. 2

[10] The Group that was charged with the preparation of the initiative that resulted in the Guatemalan current Arbitration Law, took into consideration comments and suggestions from international experts in the field, such as Mr. Alejandro Garro, a Professor from Columbia University School of Law.

b.- the arbiration provision or arbitral agreements are not subject any more to any special formalities, such as the requirement of formalistic notarial public instruments ("escrituras públicas"). They simply need to be in writing, without any type of special formal requirement. Our law even refers to any telecommunication means, that as of today, can include electronic means, such as "e-mail" communications.

c.- the autonomy or separability of the arbitral agreement is fully recognized in the Arbitration Law. Therefore, any dispute under such agreement, including the legal attacks on the legal validity of the main agreement, shall be resolved by the corresponding Arbitral Tribunal.

d.- the principle of "kompetenz-kompetenz" is also fully recognized in the Arbitration Law, so the arbitral tribunal has full legal ability to determine on their own jurisdictional matters.

e.- Together with the enactment of the Arbitration Law, the institutions in charge of administering services of ADR methods were fully recognized. In other words, there is now clear legal basis for the parties to determine if they want an "institutional arbitration" or an "ad hoc arbitration".

f.- The parties to the arbitral agreement have the right to determine basically all the details of the procedural aspects of the arbitration, except for the mandatory provisions in the law to secure due process and equal opportunities of defense through the process. Parties can also freely use the ADR rules that are provided by both national or international arbitration and mediation centers if they do not want to "tailor" their own arbitral rules, and there is legal recognition that the arbitral tribunal, once it is legally installed, can also determine the procedural aspects if the parties did not select any particular ADR rules or agreed on their own rules. All this is applicable to both "arbitrations in law" (arbitrajes de derecho) and "arbitrations in equity" (arbitrajes de equidad), thus, eliminating the previous limitation on this topic applicable to arbitrations in law.

g.- the final award rendered by the arbitration tribunal can be subject to requests for clarifications or rectifications, within a limited period of time, and during that period, the arbitral tribunal is still integrated. In addition to those remedies, the arbitral award can be subject to judicial revision ("recurso de revision") and the causes for claiming the annulment of the award are essentially those contemplated in the Model Law of Uncitral, which in turn, are the same causes contemplated under the New York Convention of 1958 for the legal opposition to the enforcement of an arbitral award.

h.- in addition, the Arbitration Law contemplates specific rules for the recognition and enforcement of both national and international arbitral awards, that are fully in line with the text and regulations of the same New York Convention, and provides for expeditious national judicial procedures for such goals. The corresponding chapter on enforcement, clarifies that those rules are applicable in the absence of an international treaty governing the subject matter. As it is briefly described below, when Guatemala signed and adhered to the New York Convention, it made the reservation allowed under such Convention that it should be applied only under the base of reciprocity.

i.- as it has been mentioned before, the Arbitration Law also contemplates some few rules on Conciliation as an ADR method, giving it full legal status. In general, this matter is defer to the agreement of the parties or to the use of conciliation rules available from ADR national or international institutions. The Arbitration Law provides that the agreement reached during a Conciliation shall have full effects as evidence in any further arbitral or judicial procedures. But if the parties to a Conciliation decides to document their agreement as a "Contrato de Transaccion" or Settlement Agreement, and if the matter of such agreement is not of a public policy nature, it can be enforced directly in a competent court of law.

In addition to the characteristics just described, there are some other elements that are regarded as positive improvements in our national legislation applicable to ADR, such as the legal recognition that the arbitral tribunals can decree or order interim measures to be fulfilled directly by the parties to the arbitration; and the possibility for the same arbitral tribunal to determine the applicable substantive law to the dispute, if the parties did not select the applicable law, and even the possibility to apply international commercial practices and uses established through other cases ("lex mercatoria").

It can be fairly said that the enactment of the Arbitration Law had a positive impact, in terms of improving a general perception of the ADR methods, in particular in the local business community, and in the society in general.

Even though, as going to be reported in the appropriate section of this article, the number of cases using ADR methods since 1995 is not an impressive record yet, what definitely is a fact is that an incredibly and increasing amount of parties to agreements, both national and international, have included and continue to include arbitration clauses or provisions. Therefore, notwithstanding that compared to other

jurisdictions, the number of ADR cases in Guatemala is relatively low, there are many "potential" cases to be initiated in the near future.[11]

But perhaps more important that the above is the fact that in many other sectoral laws that have been enacted after the Arbitration Law, are expressly recognizing the right of parties to arbitrate or submit to conciliation certain type of particular disputes. Such is the case in laws applicable to the issuance and negotiation of securities through local stock markets; in the Telecommunications Law, the General Electricity Law, the Foreign Investments Law, and it is also contemplated in some initiatives that are expected to be approved as law very soon on the subject matter of Intellectual Property, when, of course, in this type of disputes, the subject matter is arbitrable.

Of course, not everything in the Arbitration Law has been regarded as positive changes.

One of the main aspects that is not liked by several practitioners, is the several cases in which an arbitral tribunal has to request help or support from local State Courts, because such practitioners considered that arbitral tribunals should have more autonomy and coercive powers. The cases in which the Arbitration Law requires interaction with Courts, are exactly those contemplated in the Model Law of Uncitral, and this aspect is going to be developed in more detail in the final sections of this article.

Another negative element is that in article 3 of the Arbitration Law, a particular provision of the old rules in the CCMP was literally inserted, and by virtue of which it is declared as "non-arbitrable" subject matters, those cases in which a particular law or legal rule requires a specific form of procedure to substantiate and resolve a dispute. This apparently insignificant impediment has caused many limitations in certain contractual forms or areas where, notwithstanding the subject matter should be clearly regarded as arbitrable, it is not possible to submit such matter to arbitration, because the CCMP or some other laws specifies a determined judicial process for those type of cases[12]. One example, is the

[11] Although it is hard to refer to a specific number of cases or even an estimate of how many agreements are contemplating now arbitral provisions, the author of this article, though its private practice experience, has seen at least up to 100 agreements since 1995 that are now including national or international arbitration provisions, as the case may be. This personal experience is also shared by several other colleagues that have the opportunity to serve both national and foreign clients in matters related with commercial transactions, foreign investments, telecommunications, securities, and other areas of practice in Guatemala that, as the general rule now, use arbitration provisions in the agreements.

[12] The matters that could be regarded as non –arbitrable, based on this limitation are matters related to: a) unfair competition; b) cases in which a party has an obligation to render financial and administrative reports –rendición de cuentas- imposed by law or contract; c) the termination of co-ownership rights and any disputes arising out from co-ownership rights; d) disputes related with lease agreements; e) disputes related to specific performance obligations; and e) rescission of contracts.

disputes related to lease agreements. The matter is clearly of a contractual nature, where in general the free will of the parties prevails over legal rules, but conflicts arising from lease agreements can not be subject of arbitration provisions, because the CCMP provides that this type of disputes must be discussed and resolved through the summary judgment ("juicio sumario").[13]

Another "negative transplant" from old rules of the CCMP to the Arbitration Law, is a rule that bars the possibility of having third parties become parties to existing arbitration proceeding, even if such parties, of course, want to voluntarily submit to the same process. The "accumulation" of different arbitrations is also prohibited. This has been regarded as an impediment to complicated cases that can arise from construction agreements, where some times, sub-contractors need to be included in the arbitration procedures.

Finally, although there is no general consensus regarding the next issue as a negative aspect, some have criticized the complete lack of regulations on how to open and offer ADR services by ADR institutions. The Guatemalan Arbitration Law does not limit at all the right of private parties to create as many ADR institutions as the may please. This may pose a risk in the quality of ADR services, when there is no control at all from any governmental or judicial authority.

But as a form of summary, in general, there is a perception or criteria that the Arbitration Law has rendered more positive results towards the effective and real use of ADR methods, than creating limitations or problems. It can be fairly said that Decree 67-95 of Congress resulted in a qualitative improvement on the local ADR legal framework.

In addition to the Arbitration Law, and forming a type of "legal triangle" of adequate legislation in Guatemala applicable to arbitration, as mentioned before, Guatemala is a full member of the New York Convention of 1958 and the Panama Convention of 1975.[14]

Regarding the New York Convention, Guatemala adhered to it with the express reservations allowed by the same Convention, that it should be

[13] The initiative containing the new Intellectual Property Laws", has an article that, if approved as presented, will derogate or eliminate this limitation in general.

[14] The New York Convention of 1958 was approved by the Guatemalan Government by virtue of Decree-Law 9-84, and ratified by Governmental Accord 60-84. The Panama Convention of 1975 was approved by the Guatemalan Congress by virtue of Decree 35-86, and ratified by the Guatemalan Government by virtue of Governmental Accord of July 7, 1986.

applicable only under the base of reciprocity and only to commercial disputes.[15]

Finally, Guatemala has been actively involved during recent years in negotiating bilateral investment treaties and Free Trade Agreements that contains "Investment" chapters. In all these cases, there are sections regulating ADR methods, including arbitration procedures between foreing investors and the host nation of those investments.[16]

In this same trend, the Congress has already approved the Convention that creates the International Center for the Settlement of Investment Disputes –ICSID-, but such Convention is still pending to become effective, as the ratification from the Executive Branch of Government is not yet concluded.[17]

This international agreements or conventions, once fully implemented in the Guatemalan legal regime, will potentially open a whole new area of practice in this type of "sui generis" arbitrations, as normally they are handled as commercial arbitrations, but the parties involved are always a private party (the investor) and a Government or a Governmental agency.

2.2 The Impact of the ADR Legal Framework.

In general terms, the impact of the ADR new legal framework has been already described in the preceding section 2.1.

But if one wants to be more specific, it can be said that the relatively new legal framework has substantially helped in eliminating certain negative perceptions or "paradigmas" about the use of ADR methods. When the CCMP rules were in place, specially the legal professionals believed that

[15] Of course, based on the same text of the New York Convention, if the matter on which an arbitral award has been rendered, is a matter regarded as public policy in the country where enforcement is pursued, the enforcement can be bared. This may include a dispute that, although arbitrable in nature, was a dispute that under Guatemalan laws would have to be disputed in front of local courts and through certain type of judicial procedures, as described in Footnote No. 12.

[16] For example, a Bilateral Investment Treaty with Chile is in full force and effect and it clearly contemplates arbitration as the mechanisms to resolve disputes between the investors and the host country. More recently, Guatemala finally signed a Free Trade Agreement with México, that includes an "Investment" chapter also contemplating arbitration as the mean to resolve investments disputes. This Free Trade Agreement with Mexico is expected to be approved by Congress and ratified by the Government in a short period of time. Guatemala is also a party to a Free Trade Agreement with Republica Dominicana, that contemplates an Investment Chapter with arbitration provisions.

[17] Other Bilateral Investment Treaties negotiated by the Government of Guatemala that include alternative dispute resolution mechanisms are: a) pending to be presented to Congress for approval: with Canada, Korea, the Netherlands and Switzerland; b) presented to Congress already but pending of Congressional approval: with Taiwan; and c) already approved by Congress, but pending on final ratification by the Government: with Argentina, Cuba and France.

ADR methods were really not effective and as a consequence, there was a general lack of trust in these methods.

It can not be said that such perceptions have been completely eradicated, because only a significant practice in the field can really create an "ADR culture". Guatemala is still involved in generating such culture, but many believe that with the passage of time, it will be reached, not only because of the existing legal framework, but also because there is a current crisis in the administration of justice through the State Courts due to different internal and external factors.

Another way in which it can be seen a concrete and positive result after the enactment of the Arbitration Law is that several following laws have expressly included the right of the parties to use ADR methods in resolving disputes related with the subject matter under the scope of application of those laws. More details are going to be provided in section 3.1 below.

Also, another important positive effect is the constant inclusion of arbitral agreements in many type of national and international agreements. Before the enactment of the Arbitration Law, this was not the same. Therefore, there are many "potential" arbitration procedures that can be initiated in the future.

The creation of an additional ADR institution after the enactment of the Arbitration Law could also be seen as an indication of an impact of the ADR legislation. In the case of the Arbitration and Conciliation Center of the Guatemalan Chamber of Commerce, it has now received a very important and significant grant from the Inter-American Development Bank (IDB) that is fostering the improvement in the type and quality of services of such Center, that include divulgation and training campaigns for users, lawyers and individuals serving as arbitrators or conciliators.

Therefore, in the opinion of the author of this article, the enactment of the new legal framework applicable to ADR methods in Guatemala is having positive results in making the civil society adopt the use of such methods. Even, the very same Supreme Court of Justice, has initiated conciliation services through a special office or agency, with the philosophy of really trying to make the parties to a potential dispute to resolve their differences before ending in a judicial dispute. When appropriate, they even recommend parties that did not reach a settlement during the conciliation period, to submit their dispute to arbitral tribunals.

3.- HOW ADR WORKS IN GUATEMALA.

3.1 ADR in Specific Industries or Trades.

After the enactment of the Arbitration Law, several different laws, as mentioned before, are promoting the use of ADR methods instead of using traditional judicial means. As this laws are of relatively recent implementation, it can not be said that there is already an identifiable PRACTICE in using ADR methods in certain specific industries or trades.

Therefore, in this article, it can only be reported the regulatory matters about ADR methods in certain specific industries or trades, but with the hope that, again, with the passage of time, not only the rules to be described below are going to be of effective use, but also that there is going to be such practice.

3.1.1. "The Securities Act" (Decree 34-96)[18]

This law contemplates a somewhat curious or particular rule in its article 69. It states that the conflicts between the parties to stock market related agreements; between stock market agents and the parties to those agreements; between agents; or between agents and the stock markets, must be resolved, except for express agreement to the contrary, through arbitration in equity, and that such arbitration, if the parties involved in the dispute did not agreed differently, shall be substantiated applying the arbitration rules of the CDCA.

Based on this particular rule contained in the Securities Act, many players in the local stock markets, are including in their agreements and dealings express arbitration clauses, sometimes, selecting different arbitration centers or institutions, or even "ad hoc" arbitration proceedings.

Some members of the local forum has criticized this legal rule, as it is in certain way imposing the use of arbitration –getting close to the idea of a legally mandatory arbitration, an interesting issue to be discussed at the final sections of this article- and also imposing the use of a specific ADR institution, which is certainly not the best legislative technique.

3.1.2. "The General Telecommunications Law" (Decree 94-96)

Article 78 of this law provides the legal effect, first, that it declares in general, that disputes between operators of telecommunication networks, or disputes between such operators and any of its clients, can be resolved through ADR and then, clearly allows the use of ADR methods, including conciliation and arbitration procedures.

It is interesting to note that this legal provision refers in a more broader manner to ADR methods, including conciliation and arbitration. It can be

[18] "Ley del Mercado de Valores y Mercancías"

said that this rule could give legal ground to other methods of ADR that are not yet in use and that could be implemented if such methods do not violate mandatory Constitutional provisions that were described in Chapter 1 of this article.[19]

In practice, many important agreements related to the telecommunication sector in Guatemala do in fact include arbitration provisions. In addition, due to existing conflicts related with interconnection issues between the current dominant operator and some significant competitors in the sector, could trigger in the very near future, actual arbitration cases.

In addition to what is reported above in connection with the General Telecommunications Law, there is a more recently enacted Regulation on the International Long Distance Telecommunication Services. This regulation contemplates a very interesting article that actually include a mandatory arbitration when disputes arises between long distance carriers. Many practitioners believe that this article would not resist an unconstitutional attack, due to the considerations made in this same article in its final sections, but it is still legally effective and remains untested as of today.

3.1.3. The Procurement Law (Decree 57-92)[20]

It is very interesting to note that article 103 of this Law, as amended, allows the Government or Governmental agencies to submit themselves to arbitration procedures, in those cases where administrative agreements are entered into with private parties for the procurement of services or goods in their favor.

This legal principle is also supported by the same Arbitration Law.

As of today, we are not aware of any arbitration procedure initiated as a consequence of these legal provisions, but some legal advisors for Governmental agencies are not completely confident that this allowance to use arbitration as the ADR method to resolve disputes in administrative agreements is fully in concordance with certain provisions of our Constitution.

This issue remains as of today, as an academic issue, because no case have been tested so far.

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[19] Perhaps this is an appropriate place to clarify that, under current Guatemalan ADR practices, only conciliation and arbitration are commonly used or referred to. Other ADR methods that can bee seen in other jurisdictions, such as "mini-trials" or "abbreviated arbitrations" or even "on line" arbitrations, are not yet developed or identified by potential users or the ADR institutions.

[20] Ley de Contrataciones del Estado.

3.1.4 The General Electricity Law (Decree 93-96)

This final specific industry and its legal regulation regarding the use of ADR methods, is certainly "atypical".

Article 4 of this Law, that regulates the duties and powers of the regulatory body in the Electrical Sector (The National Commission of Electricity, or "NCE") states in its item "d" that the NCE shall settle disputes between parties engaged in electric service operations, acting as arbitrator, when such parties fail to come to an agreement.

This duty has caused the NCE to implement an ordinance in which it regulates how it will administer and resolve the disputes, as an "Arbitration Tribunal".

Many practitioners have severally criticized this ordinance, because it is said that the NCE, as a Governmental agency, can not be in fact an arbitral tribunal rendering arbitral awards, because the nature of its resolutions are always of an administrative nature, and therefore, if one or both of the parties to the dispute are in disagreement of what is resolved by the NCE, such resolution shall not be regarded as an arbitral award but as an administrative resolution, subject even to judicial review by competent state Courts.

The ordinance of the NCE in fact declares the NCE as an "Arbitration Institution" and considers that when they get to administer and resolve disputes, based on the legal rule under discussion, such arbitration is a "mandatory arbitration".

So far, this regulations have not been legally attacked, and in the meantime, the NCE has resolved, at least, two cases as an "arbitration tribunal", and the corresponding awards have been fulfilled by the corresponding parties.

3.2 Measuring Results.

What follows, is the only available information provided by some of the ADR Institutions in Guatemala.

3.2.1 Arbitration Cases administered by the Center of Arbitration and Conciliation (CENAC) of the Guatemalan Chamber of Commerce.[21]

a) Average number of cases by year:[22] 4

[21] Source: Board of Directors, Cenac, July 2000
[22] 1994: 3 cases; 1995: 2 cases; 1996; 3 cases; 1997; 3 cases; 1998: 8 cases; 1999; 5 cases

b) Average time to reach an award: 6 to 9 months

3.2.2 Mediation and Conciliation Center of the Supreme Court.[23]

a) Average number of conciliation (mediation) cases per month, during the first year of operations: 52
b) Average number of cases resolved through conciliation per month during the first year of operations 29
c) Average number of working sessions to reach an agreement, during the first year of operations: 2 sessions.
d) Number of cases, by subject-matter, resolved through conciliation in 1999:

d.1) Family cases: 170
d.2) Civil (contract) cases: 98
d.3) Commercial cases: 42
d.4) Labor cases: 9
d.5) Criminal cases: 27
d.6) Other cases: 2

e) Average number of conciliation (mediation) cases por month during January to May of 2000: 82
f) Average number of cases resolved through conciliation per month, during January to May, 2000: 39
g) Average number of working sessions to reach an agreement during January to May of 2000: 2 sessions.

h) Number of cases, by subject-matter, resolved through conciliation or mediation from January to May, 2000: (not available yet)

3.3 Resources for ADR Methods.

As briefly mentioned in some other sections of this article, there are, at this date, three (3) different institutions that administer ADR methods. In their order of creation or beginning of operations in Guatemala, they are:

a.- The "Centro Privado de Dictamen, Conciliacion y Arbitraje" (CDCA)
b.- The "Centro de Arbitaje y Conciliación" of the Guatemalan Chamber of Comerse (CENAC); and
c.- The "Comision de Resolución de Conflictos" of the Guatemalan Chamber of Industry (CRECIG).
d.- "The Mediation and Conciliation Center" of the Judiciary

[23] Information provided by Mr. Arnoldo Ralón Noriega, Coordinator.

The CDCA is organized as a corporation, formed by several attorneys that are considered as "pioneers" in advocating the use of ADR methods in Guatemala (Please see footnote No. 3)

The CENAC, as its own name describe it, is affiliated to the Guatemalan Chamber of Commerce, which is a well respected organization with over 100 years of existence. As of today, it seems that CENAC is not going to be just a simple division of the Chamber of Commerce, as they are looking into different ways to make it more autonomous in its legal standing, of course, always linked or supported by the Chamber of Commerce. CENAC has entered into several cooperation agreements with many Conciliation and Arbitration Centers around the world, and it has the Guatemalan representation of the Inter-American Commission for Commercial Arbitration –CIAC- for its title in Spanish. As briefly mention before, CENAC is also the only recipient as of this date, of a special grant from the IDB. With this grant, CENAC has to be fully institutionalized, improve its facilities so as to be capable of handling in a satisfactory manner both national and international arbitrations and conciliations, and foster the use of ADR methods through divulgation and education campaigns to all interested sector, including students at national law schools; lawyers, users; judges and individuals interested in becoming arbitrators or conciliators.

Finally, CRECIG is the one of most recent creation and is still in a period of final formation, but being a "branch" of the Chamber of Industry, which is very active and highly respected in Guatemala, it is expected that this other institution administering ADR methods, will see an increase in its activities, specially from some sectors of that Chamber that have expressed a strong interest in the use of ADR methods, such as the case of the Chamber of Construction.
[24]

In addition to these 3 private institutions that have as main purpose the administering ADR methods, as mentioned in some sections above, the Supreme Court of Justice opened in the year of 1999 their own "Mediation and Conciliation Center" of the Judicial Branch, in which they are not only training judges to serve as conciliators, but also to foster the use of conciliation before parties actually continue to further stages of their dispute, that is, in filing formally a law suit or ratifying it at the competent Court.

[24] Any assessments or comments made in this paragraph and the preceding paragraph of the text, are personal assessments or comments from the author, based on his former position as President of CENAC and his current permanent contact and relationship with directors of the two other ADR Institutions in Guatemala. There are no objective measures or assessments provided by third parties on this matter, but only those based on the experience of author and the research done in preparing this article, for which, the author presents an apology to the readers.

It has to be clarified that, under Guatemalan current regulations applicable to local judicial procedures, and in contrast to the legislation of some other jurisdictions, it is NOT LEGALLY MANDATORY to fully conduct and conclude a conciliation stage, before having the right to formally file a complain or law suit at a competent court. It is more an activity by the Supreme Court to foster in this manner, a creation of an ADR culture.

Different from these institutions that administer ADR methods, are two or three associations or foundations in Guatemala that advocate the use of ADR methods, through publications and courses. One is known as the "Asociacion Centroamericana de Promocion del Arbitraje y la Conciliacion" but as of this date, it does not seem very active.

Regarding the three "private" ADR institutions listed above, although CDCA is the oldest one, it can be said that CENAC is the one that has really achieved, so for, better results in its purposes or goals. Again, CRECIG is "younger" compared to the other ADR institutions.

Although CENAC is still officially a "branch" of the Chamber of Commerce, it offers its services, not only to members of that Chamber, but also to any individual interested in using such services, being or not a member of the Chamber. By virtue of a tradition or practice in several countries, it has been typical for the Chamber of Commerce of such countries to offer ADR administration services, so it is kind of "natural" for people in different countries to seek this type of services in such Chambers, and Guatemala is not an exception to this tradition.

As part of the IDB grant in favor of CENAC, there is a permanent and "in residence" foreign Consultant for the project, that has ample experience in the field and has worked in other ADR institutions abroad, such as the highly successful Center of Mediation and Arbitration of the Chamber of Commerce of Bogota, Colombia, which has been a model for interested parties in promoting ADR legislation and services in several countries in the region.

4.- MAKING USE OF ADR IN GUATEMALA

4.1 When, How and Where to use ADR in Guatemala and Choosing the Appropriate Method.

In general, it can be said that, if the subject matter of a controversy is legally possible to be resolved through ADR methods, specially, if the matter is "arbitable", the parties to such controversy should always opt to go for ADR methods instead of using the State Courts, if they can afford such services.

If for one reason or the other, the parties to such controversy do not feel confident with one or the other existing ADR institutions, they always have the right to use "ad hoc" ADR methods, instead of "institutionalized ADR methods.

The reason for a general inclination of the balance in recommending the use of ADR methods instead of judicial procedures, if they are legally viable and affordable, is because as in other countries in the region, Guatemala is also experiencing some crisis in its system of administration of justice.

The main reasons for such crisis, despite some very recent efforts from the highest authorities at the Judicial Branch to improve services to the community, are the limited number of Judges available to resolve all civil and commercial disputes, and in general (with very few exceptions) that those limited available Judges have a limited knowledge in many subject matters that can be regarded as "specialized" or sophisticated mercantile matters.

These two main factors, in addition with some others of perhaps lesser importance, render as a consequence that legal disputes presented before local State Courts remains unresolved during significant periods of time, and when resolved, in many occasions are not on the main issues or merits of the case, but on technicalities or procedurals details, thus, not serving the ultimate purpose of administering justice.

Of course, specially in a country such as Guatemala, in which the economic or cost factor is very important in order to have wider access to ADR methods, all three existing private ADR institutions have schedules of fees or rates for their services that can be regarded as reasonable or adequate, compared to other jurisdictions. [25] But even if the fees or rates

[25] In the case of CENAC, it has even reduced the rates or fees not only of CENAC itself, but also the fees that can be charged by the arbitrators and mediators, as a form of "democratizing" the access to ADR methods in Guatemala. The reduction was a determination of the Board of Directors, after receiving comments from

of the ADR institutions are low, compared to other jurisdictions, this cost factor has been regarded, in a more realistic way, as a factor that will always keep the use of ADR methods in Guatemala as a choice for some few sectors of our society only, but not to the main mass of users in unsophisticated and non-commercial disputes between individuals.

The Conciliation Center of the Judicial Branch is of course, providing conciliation services basically at no cost for the parties and this may, in the long run, cause a positive result in a wider manner in promoting a culture in using ADR methods.

We are not aware of any "pro-bono" activities held by any of the three private ADR institutions in Guatemala, but at least in the case of CENAC this possibility has been discussed a few times.

As explained very briefly in one of the footnotes in this article, in Guatemala there is not a wide variety of ADR methods as in other jurisdictions, such as the United States of America. The two main and basically, only known ADR methods in Guatemala, so far, are Conciliation and Arbitration.

Therefore, in general, it can be said that, if the subject matter of the dispute is "arbitrable", the recommendation should always be to first, use the conciliation method, and if not successful, then use the arbitration method. Only if the parties, at the moment the dispute arises, are in such a contradictory position and without and environment to even speak to the other, then arbitration should be the only option or choice.

A general trend, so far, in Guatemala, at least in sophisticated transactions in which arbitral provisions or clauses are included, is not in the line of fostering a wide use of conciliation, before entering into Arbitration. Many of these provisions normally does not even mention conciliation options, but before entering arbitration procedures, they mandate certain periods of direct and amicable negotiations between the parties in order to pursue self helped or self provided solutions for their dispute. A normal period of time for this purpose, is of 30 days, and simply with the passage of time, if no agreement has been reach by the parties, any of them can formally initiate arbitral proceedings.

In some few cases, specially in those where the agreements are highly technical, such as potential disputes on matters related with the electric or

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actual and potential users of its services about the level of its fees and costs. Cenac, currently has the financial support derived form a IDB grant, but if the number of cases increase in the future and while the IDB grant reaches its end, it can be expected that Cenac will be in the need to increase its fees again to a reasonable level to be self-sufficient.

the telecommunication sectors, for the controversies regarded as 'technical disputes" in contrast to differences in the legal interpretation of the agreement, for example, the parties agree that instead of an arbitral tribunal, a "Panel of Experts" shall be formed and whatever determination is made by such Panel, shall be binding upon the parties.

Some practitioners have considered this "Panels of Experts" as not being different from Arbitral Tribunals in arbitrations in equity, in which the arbitrator or arbitrators do not need to be lawyers.

On main difference between resolutions provided by Panels of Experts, in contrast of awards provided by Arbitration Tribunals in Arbitrations in Equity, is the procedural aspects before reaching such resolution or award, as in many cases, the Experts in technical disputes are not mandated to substantiate procedures before issuing their decision. The resolution of the Panel of Experts, in our view, does not have the same legal nature of an arbitral awards, and therefore, the enforceability of a resolution from such type of Panels, really remains a question of good faith between the parties.

No cases, to the extent of our knowledge, that could have been resolved through resolutions of Panel of Experts, have been tested so far in judicial reviews, but we believe that any provisions providing for this other potential type of ADR method should always include the right of proper defense and due process minimum guarantees, if it wants to have any chances to survive a judicial review.

5.- PROSPECTS FOR THE FUTURE OF ADR IN GUATEMALA.

5.1 Upcoming legislation.

As it has been described throughout the content of this article, the Arbitration Law of Guatemala, which is the main law within the legal framework applicable to ADR methods, is of relatively recent enactment and is substantially based on the UNCITRAL Model Law of International Commercial Arbitration.

Therefore, the need to change the old rules contained in the CCMP for ADR methods, leaving behind some very negative regulatory aspects that did not helped at all in the actual and effective use of ADR methods in Guatemala, has already been achieved.

But the first years of experience in the use of ADR methods in Guatemala has caused some of the ADR institutions to seek some reforms or amendments to the Arbitration Law, in order to improve, in their view, some of the results of this type of legislation.

In particular, CENAC has requested to some experts in the field, to prepare a document identifying issues or sections in the Arbitration Law that could be improved based on their actual experience in administering ADR methods, and then, prepared a draft of what could be the initiative with the actual amendment to the law.

At the time of preparing this article, we did not have access to this information, but as briefly informed before, the potential proposals for changes could be more direct to eliminate at all, whenever possible, the need to request help or cooperation from State Courts for certain situations or stages of the arbitration procedures, and give the highest level of autonomy legally possible to arbitral tribunals.

5.2 Recent Initiatives.

The only information that can be reported in this section, is that some other entities have been looking into the possibility of creating ADR institutions, such as the American Chamber of Commerce of Guatemala –AMCHAM- . Many has considered the AMCHAM as another natural "forum" for the provision of ADR services in Guatemala, specially taking into account that AMCHAM is not only one of the most active institutions of its nature in Guatemala, but also because, so far, foreign investments coming from the United States are still the most important in terms of total percentage of foreign direct investments in Guatemala.

But it seems at this time that, a fourth ADR institution could be an excess in the offering of ADR services for the Guatemalan community. Therefore, it is more probable that AMCHAM will finally enter into a cooperation agreement with one of the existing ADR institutions, but always with the idea of directly promoting the use of ADR methods among its membership.

5.3 Academic Studies.

It is not until very recent years, that some Law Schools in Guatemala are including in its regular courses, the subject matter of ADR. This does not mean that Law Schools themselves, have training centers for mediators and arbitrators. The courses are directed to law school students, in order to include now, on a regular basis, the study and analysis of the Arbitration Law.

In addition to courses being offered now by some of the available Law Schools in Guatemala, CENAC has been actively involved in special programs for the education on this subject matter, opening different seminars and courses every now an then, directed not only to law students, but also to lawyers, businessmen, judges and individuals to want to be qualified as arbitrators or mediators.

One could say that all these type of courses are effectively helping to promote ADR. Many law school students are now writing essays and graduation thesis on ADR methods, and in general, lawyers of recent graduation could be identified as involved in an ADR culture.

Perhaps, if one desires to be more critic on the type of courses offered more often on ADR methods, is that those are directed to lawyers and law students. What is more necessary now, is to implement more courses in training individuals in how to effectively serve as conciliators. The reason for this comment is that, not only conciliation is a more economic solution for countries such as Guatemala, but also the matters that can be resolved through conciliation are wider than the arbitrable matters.

5.4 ADR Current Hot Topics.

The issues that are now controversial regarding ADR methods in Guatemala and that remains unresolved, are essentially two:

A) can the arbitration tribunal have more coercive powers, so as to not need to request cooperation from the State Courts in ordering, for example, interim measures, or even, in enforcing its own arbitral awards?
B) Are “mandatory arbitrations” legally viable or feasible in Guatemala?

As to first question, although the intent is very positive in the line of fostering the use of ADR methods, many professionals and experts in the field in Guatemala, still believe that, at the current stage of development of the arbitration institution, there is no other way to handle in a realistic and effective way arbitration procedures than in obtaining the coercive powers from State Courts when necessary and that it is not possible yet to give coercive powers to arbitral tribunals in front of the parties to the arbitration and third parties.

Furthermore, the possibility for the very same arbitration tribunal to enforce its own awards, is even more distant in the spectrum of legal possibilities in Guatemala, without significant changes in our Constitution.

But some few practitioners believe that this should be possible, and that is the new trend on arbitration procedures, due to the fact that it has been reported that in Colombia, at least, this is now the case[26].

Finally, as to the second question, many practitioners are of the opinion that mandatory arbitrations are incompatible with Constitutional provisions in Guatemala, specially because it limits or restricts the civil right or individual human right contained in article 29 of the Guatemalan Constitution that secures free access to any individual to the State Courts for the request of administration of justice.

Notwithstanding this prevailing view, and as described before in this article, some mandatory arbitration provisions have been included in recent regulations in the telecommunication and electrical sectors.

Perhaps, if an update is needed on this article in the future, if such mandatory arbitrations are put in the meantime under a judicial scrutiny or review, we will be able to report who was right on this hot topic.

6.- APPENDIX.

[26] Based on an amendment introduced in 1991 to article 16 of the Colombian Constitution , arbitrators are invested of all jurisdictional powers, as judges of the State. Based on such Constitutional provision, thereafter, in July of 1998, Decree or Law 446 was enacted, which includes provisions allowing arbitrators to enforce their own resolutions or awards. (Source: Mr. Yessid Barrera, Colombian Economist, Head of the IDB Grant Program for CENAC, Guatemala)