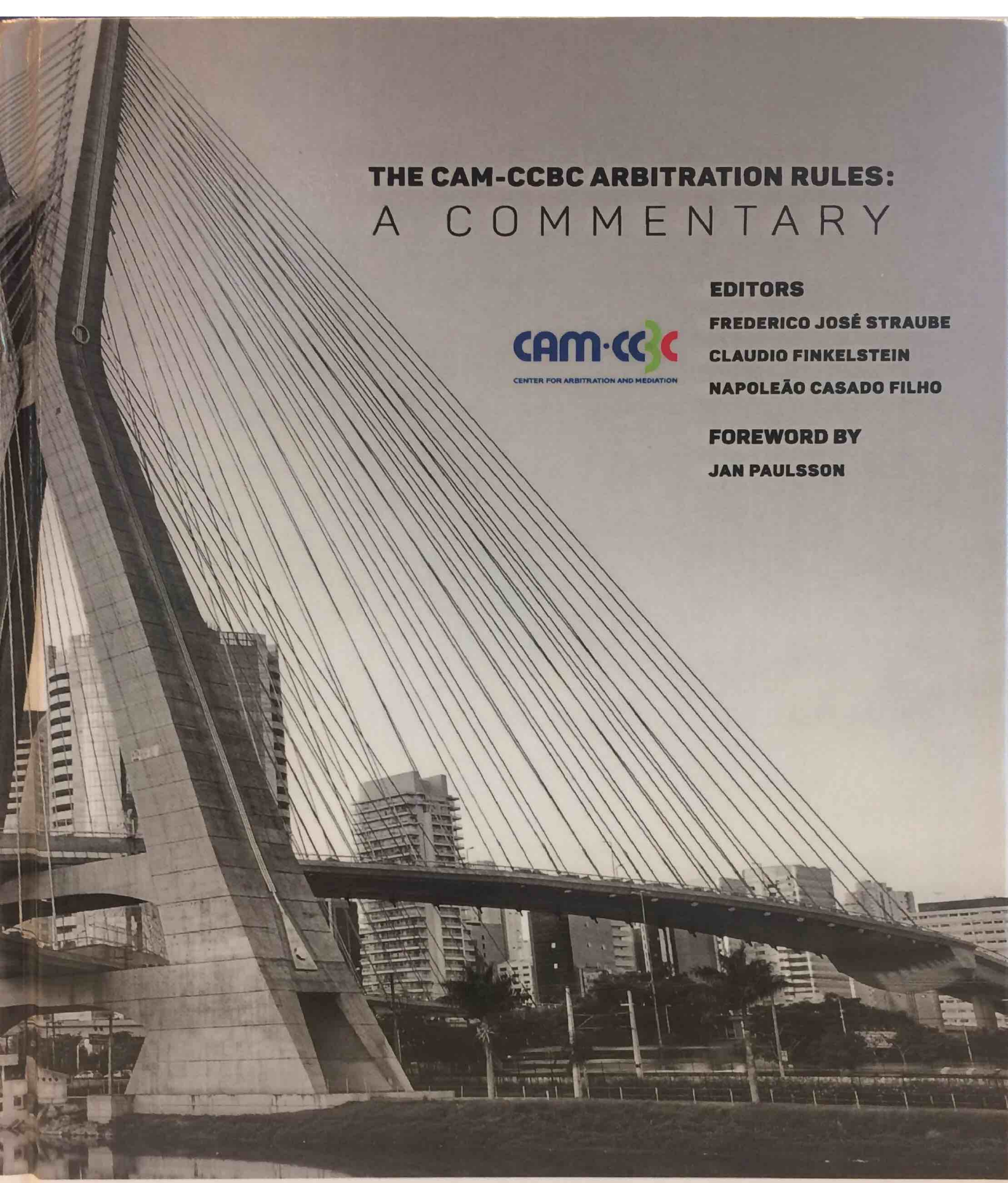

# THE CAM-CCBC ARBITRATION RULES: A COMMENTARY

CAM·CCBC
CENTER FOR ARBITRATION AND MEDIATION


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# Article 1 – Scope of Application of the Rules

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***1.1. These Rules are binding on parties who have decided to submit a dispute to the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada, which is abbreviated as CAM/CCBC.***
***1.2. Any variation to these Rules that may have been agreed to by the parties in their respective proceedings will apply only to the specific case and so long as it does not affect any provision regarding the administrative organization of the CAM/CCBC nor the conduct of its duties.***

## 1 Introduction

Arbitration in Brazil has made great strides[1] since the enactment of Law No. 9.307/1996 ("Arbitration Law"), and mainly since the law was declared constitutional by the Federal Supreme Court (STF) in 2001.[2] The country's accession in 2002 to the Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention),

1 A study conducted annually by Selma Ferreira Lemes shows that in 2013 there were 147 arbitration cases in the main chambers in the country, involving some R$ 3 billion, in comparison with only 21 cases involving claims worth R$ 247 million in 2005: "Arbitragens envolveram R$ 3 bilhões em 2013", Valor Econômico, 27 January 2014. Available at <www.valor.com.br/legislacao/3407430/arbitragens-envolveram-r-3-bilhoes-em-2013>, consulted on 27 June 2014.
This is also demonstrated by the statistics published annually by the International Chamber of Commerce (ICC): in 1996, the number of arbitrations administered by the ICC with at least one Brazilian party was only three, while in 2006 Brazil, with, ranked fourth in the world and first in Latin America in number of cases, a position that held steady in 2012 with 82 cases, only behind the United States (145), Germany (132) and France (124) (information available in the ICC International Court of Arbitration Bulletin for 1997, 2007 and 2013, respectively). Further on the matter: "If one were to consider the number of cases registered with the ICC in the last decade, the conclusion with regard to Brazil is clear: an enormous increase in the number of cases, leading to a corresponding growth in the number of arbitrations with Brazil as the place of arbitration and with the involvement of Brazilian arbitrators as never seen before." Roos, Cristian Conejero and Grion, Renato Stephan, Arbitrating in Brazil: The ICC Experience, in Muniz, Joaquim T. de Paiva and Basilio, Ana Teresa Palhares (eds.), Arbitration Law of Brazil: Practice and Procedure, Juris Publishing, New York, 2006, p. APP C-13.

2 STF, Foreign Award No. 5.206 (Regimental Appeal in Foreign Award, Kingdom of Spain), Reporting Justice Sepúlveda Pertence, *en banc* decision, issued 12 December 2001. Note: A regimental appeal (agravo regimental) is a motion for *en banc* reconsideration of a decision by the reporting judge. Cases at the appellate level are first assigned to a reporting judge, whose job is to summarize the case for the other judges of the panel/chamber/full court and write a leading opinion, which may or may not prevail in the final vote. The reporting judge, acting alone, can also issue certain interim rulings and remedies, subject to review by the full panel/chamber/court through the regimental appeal mechanism.

by means of Decree No. 4,311, also contributed to the advance of arbitration, along with the general support for the mechanism by the judiciary through wise interpretation and application of the Arbitration Law.[3]

Despite this success, an effort is afoot to further advance the use of arbitration in the country. In 2013, a special committee of jurists was appointed by the Senate for the purpose of modernizing the Arbitration Law.[4] That committee offered suggestions for amendment of the law, which led to the enactment of Law No. 13.129/2015.

The alterations promoted by Law No. 13.129/2015, for the most part, only formalized positions already urged in the doctrine from legal scholars and adopted in the jurisprudence from the courts, to expand the scope for use of arbitration.[5] The most important aspects are: (i) the possibility of entities of the direct and indirect public administration using arbitration; (ii) the tolling of the time bar by the act of requesting arbitration[6]; (iii) the possibility of rendering partial awards; (iv) the specification of rules on issuing urgent interim measures by the judiciary before commencement of arbitration and (v) the possibility of withdrawal of a dissident shareholder or partner (right of appraisal) in case of the inclusion of an arbitration clause in a company's bylaws or articles of organization.

This favorable scenario is also the fruit of the contribution of many professionals active in the field, through scholarly articles, presentations at conferences, teaching of classes on arbitration at law schools and participation at national and international moot competitions.

In this context, arbitration institutions have played a key role, acting to disseminate knowledge, encourage academic production and promote events and presentations. Besides this, the existence of competent institutions to administer cases efficiently has increased the trust of users in the mechanism.

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3 In this respect, Professor Albert Jan Van de Berg praised the Superior Tribunal of Justice for its application and interpretation of the Arbitration Law, at an event held in that court's auditorium in 2012. See "STJ ajuda o Brasil a consolidar confiança na arbitragem," available at the site <http://ns2.stj.gov.br/portal_stj/publicacao/engine.wsp?tmp.area=398&tmp.texto=107162>, consulted on 11 June 2014. Note: The Superior Tribunal de Justiça (STJ) is the highest court for nonconstitutional matters, with responsibility for harmonizing the interpretation of federal laws by the state and federal appellate courts. It also has original jurisdiction over recognizing foreign judicial and arbitral awards.

4 Called a Special External Committee, created by Request 702 of 2012 by Senator Renan Calheiros, for the purpose of "preparing a draft bill for a new Law of Arbitration and Mediation, within 180 (one hundred eighty) days."

5 As had been promised by the chairman of the committee, Judge Luís Felipe Salomão of the STJ, who was quoted in a story in the Valor Econômico newspaper: "There's no turning back, at least while I'm heading the work to draft the bill (...). The idea is to tighten the screws, to improve the mechanism and avoid problems of interpretation by the courts." Source: "Lei de Arbitragem poderá ser alterada." Valor Econômico, 3 April 2013. Available at <http://cbar.org.br/site/blog/noticias/valor-economico-lei-de-arbitragem-pode-ser-alterada>, Consulted on 8 March 2014.

6 There are two ways of tolling the statutory limitation period in Brazilian Law: interruption, which sets it back to zero, whence it immediately starts to run again (only possible once); and suspension, which holds it in abeyance for as long as the reason lasts (and can occur more than once).

The Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada ("CAM/CCBC" or "Center") is in the vanguard, having been created in 1979 when arbitration was still incipient in Brazil. Today it is among the best arbitration institutions in Brazil, and, indeed, in the world.[7]

To stay abreast of the evolution of alternative dispute resolution in the country, in 2012 the CAM/CCBC updated its rules, in line with the latest practices in the world. Therefore, in light of the growth of arbitration in Brazil and the standout position occupied by the CAM/CCBC, this book is a welcome addition to the literature on arbitration.

The task entrusted to us is to analyze from a practical and objective standpoint the first article of the CAM/CCBC Rules, which covers the field of application and the liberty of the parties to derogate from provisions of the Rules in arbitral proceedings managed by the Center.

Therefore, this analysis will cover: (i) differences between institutional and *ad hoc* arbitration; (ii) the choice of CAM/CCBC as the arbitration institution and the types of arbitration clauses ('full', 'empty' and pathological) and (iii) the limits on adopting procedural rules other than those of the CAM/CCBC in arbitrations managed by it.

## 2 INSTITUTIONAL AND AD HOC ARBITRATION

There are two ways to conduct arbitration: institutional and *ad hoc*. In the former, the procedure is governed and managed according to the rules of a specialized institution, defined in advance in the contract, while in the latter the parties make their own rules without any institutional support.[8]

Thus, the main functions of arbitral institutions are to administer and regulate arbitral proceedings.

The administrative duties include the secretarial work of receiving and sending submissions and generally intermediating in the flow of communications involving the parties, the arbitrators and experts; scheduling and organizing hearings; managing financial matters,

7 In 2013 it was announced that the rules to be used in The Willem C. Vis International Commercial Arbitration Moot – the most important arbitration competition in the world – would be those of the CAM/CCBC, recognizing the importance of this institution in the international scenario. "Em decisão inédita, Vis Moot terá regras do CAM-CCBC," available at <www.ccbc.org.br/default.asp?pag=news&entrada=1912>, consulted on 10 June 2014.

8 "'Ad hoc' is a phrase used to imply that something is for a particular situation or purpose. In selecting ad hoc arbitration, parties forgo the procedural support and supervision typically provided by an arbitral institution. Instead, the parties will have to make their own decisions, either before or after a dispute arises, about the procedures that are to govern the resolution of their dispute and how the costs of the dispute will be shared. The responsibility for running any arbitration accordingly lies with the parties and, once it has been appointed, the arbitral tribunal." Enock, Roger and Melia, Alexandra, Ad Hoc Arbitrations, in Lew, Julian D. M.; Bor, Harris, et al. (eds.), Arbitration in England, with chapters on Scotland and Ireland, Kluwer Law International, Alphen aan den Rijn, 2013, p. 89.

among other tasks.[9] The role of institutions is separate from that of the arbitral tribunal, and they do not exercise any influence over the judgment of the case.[10] In this respect:

> The institutions specialized in administering arbitral proceedings – and other extrajudicial forms of dispute resolution – must be considered service providers to the parties. As previously mentioned, these institutions offer technical and logistical support to users – managing the proceeding and accompanying all its acts, from the request for arbitration to the period following the delivery of the award to the parties – besides lending credibility to the proceeding through their reputation and acceptance in the legal and business communities. This is truly an activity that offers methods and organization for the correct development of the arbitral proceeding.[11]

Their regulatory function is particularly important in Brazil since the Arbitration Law sets out basic principles instead of detailed procedural rules. In this situation, the institutions' own procedural rules provide the essential framework for a predictable and secure procedure.[12] For example, the institutions provide rules on: (i) appointment of the arbitrators (some also have lists with suggested names); (ii) how challenges to the impartiality or qualification of arbitrators will be processed and decided; (iii) the procedure to obtain urgent remedies (some institutions' rules contain the figure of 'emergency arbitrator') and (iv) the formal requirements for validity of the award and the deadline for issuing it, among many others.

Hence, the chief advantages of institutional over *ad hoc* arbitration are legal security, predictability, efficiency and transparency.[13]

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9 The Center also stands out for its work in the area of mediation, but the focus in this paper is on arbitration.

10 "The arbitral institution does not interfere in the judgment of the dispute. Rather it collaborates so that the procedure is regular and speedy." Lemes, Selma M. Ferreira, Arbitragem Institucional e Ad Hoc, in Martins, Pedro Batista; Lemes, Selma M. Ferreira and Carmona, Carlos Alberto (eds.), Aspectos Fundamentais da Lei de Arbitragem, Ed. Forense, Rio de Janeiro, 1999, p. 324.

11 Neves, Flávia Bittar, Arbitragem institucional: fatores críticos na escolha da instituição arbitral, in Guilherme, Luiz Fernando do Vale Almeida (coord.), Aspectos Práticos da Arbitragem, Ed. Quartier Latin, São Paulo, 2006, p. 258.

12 "The number of arbitration centers is growing and the correct application of the rules precludes the danger, always latent, of obstruction of the parties or lack of zeal of the arbitrators, offering assurance that the arbitral proceeding will follow its normal course. (...) Institutional arbitrations continue to be preferred for their facility and predictability, such as the procedure in case of refusal of an arbitrator, ways established to submit the request for arbitration and the evidentiary procedure." Lemes, Selma M. Ferreira, op. cit., pp. 335 and 337.

13 "Nevertheless, it is important to make a preliminary evaluation during the drafting of the contract of the types of conflicts that can arise and the level of understanding of the parties to gauge what types of arbitration would be most suitable and appropriate. However, when opting for ad hoc arbitration, the parties should specify in the arbitration clause the number of arbitrators they want, how to choose them, the time frame for the proceeding, and so on. (...) Experience demonstrates that when there is dissention after a request

Furthermore, the choice of an institution's rules reduces the chances of the filing of 'parasitic' lawsuits. The reason is that in *ad hoc* arbitrations, if one of the parties refuses to participate or appoint an arbitrator and there are no provisions in this respect in the arbitration clause, it will be necessary to apply to the judiciary, through the action established in Articles 6 and 7 of the Arbitration Law.

Another important feature of institutional rules is that the case will go forward even in the absence of one of the parties,[14] and if one party fails to appoint an arbitrator, the institution will do so[15] (as allowed by Art. 13, §3, of the Arbitration Law), making the arbitral process faster and avoiding the need to seek recourse in the state courts.

Based on these considerations, choosing institutional arbitration is strongly advisable, as long as it is economically feasible. This seems to be the general consensus of the international business community, as reflected in a survey conducted by Queen Mary University of London in 2006, in which 76% of the respondents said they preferred institutional arbitration.[16]

Finally, the great contribution of institutions to the development of arbitration deserves mention. For example, since 2009 the CAM/CCBC has maintained working arrangements with peer entities around the world for exchange of experiences, conduct of studies and holding of seminars and other events.[17]

## 3 THE CHOICE OF THE CAM/CCBC, ITS RULES AND TYPES OF ARBITRATION CLAUSES

The choice of institution to manage resolution of a dispute should be made on the basis of various factors, such as the amount involved, the method of appointing arbitrators, whether the institution has a list of recommended arbitrators and whether the nature of

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for arbitration has already been filed, it's very hard for the parties to agree on the procedural rules." Lemes, Selma M. Ferreira, op. cit., p. 335.

14 According to Art. 4.19 of the CAM/CCBC Rules: "The absence of any of the parties regularly convened to appear at the initial meeting or its refusal to sign the Terms of Reference will not prevent the normal course of the arbitration."

15 According to Art. 4.12 of the CAM/CCBC Rules: "4.12. If either of the parties fails to appoint an arbitrator or the arbitrators appointed by the party fail to appoint the third arbitrator, the President of the CAM/CCBC will make this appointment from among the members of the List of Arbitrators."

16 "Online respondents were asked whether they generally opt for arbitration under the rules of an arbitration institution or whether they mutually agree their own (ad hoc) process. A clear majority, 76%, reported that they opt for institutional arbitration. (...) the 24% opting for ad hoc proceedings are primarily larger corporations with more experience of international arbitration." "International arbitration: Corporate attitudes and practices – 2006," available at <www.arbitration.qmul.ac.uk/docs/123295.pdf>, Consulted on 6 June 2014.

17 More information is available at <http://ccbc.org.br/default.asp?categoria=2&subcategoria=convenios>. Consulted on 16 June 2014.

the dispute requires specialized expertise of some type.[18] However, the most important factor in choosing the institution is the set of rules, because once the arbitration starts, the parties will be bound to those rules. Article 1.1 of the CAM/CCBC Rules is clear in this sense:

> These Rules are binding on parties who have decided to submit a dispute to the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada, which is abbreviated as CAM/CCBC.

Therefore, at the first moment the parties have broad leeway to choose the most suitable institution. But once this choice has been made, the applicable principle is *pacta sunt servanda*. In other words, the rules of the chosen institution become law between the parties, save for some derogations that can occur by mutual consent between the parties (as seen in title 4, "Alterations of the Rules and Flexibility of the Arbitral Procedure", below).

Furthermore, if the parties choose the CAM/CCBC Rules without mentioning the institution that will apply them – and without clear indication of *ad hoc* arbitration – the interpretation will be that the CAM/CCBC is responsible for administering the case.[19]

In most cases, the choice of institution is made in the arbitration clause, since after a dispute arises it will usually be hard for the parties to reach agreement on this matter. Therefore, just as important as the choice of institution is the clear wording of the arbitration clause, to avoid problems of interpretation at the start or during the proceeding.

Indeed, poorly written clauses can defeat the whole purpose of arbitration, which is to avoid the typically slow judicial process, because one or both parties will likely feel the need to go to court to obtain interim measures or engage in other sparring. Besides this, a sloppy arbitration clause can create problems during the arbitration; for instance, if the parties set out procedural rules in the clause that turn out to be incompatible with the rules of the chosen institution or are not suitable for the particular conflict. Therefore, investing in a well-drafted arbitration clause by consulting specialists can mean substantial savings in time and money in the future.

Depending on the elements contained in the arbitration clauses, Brazilian legal scholars in general classify them as 'empty' (*vazia*) or 'full' (*cheia*). Empty clauses lack sufficient

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18 In this respect, see: Neves, Flávia Bittar, op. cit.

19 In this sense: "In fact, adopting the rules of a determined institution for the procedure is the same, in our view, of attributing administration of the arbitral proceeding to that institution. This interpretation is in line with the interpretive principles good faith and useful effect, customarily utilized in analyzing arbitration clauses – especially because it does not appear to be coherent with good sense for the parties to rely on the rules of a determined institution while entrusting the administration of the arbitration to outsiders." Alvarenga, Maria Isabel de Almeida and Carvalho, Eliane Cristina, A cláusulas que se reporta às regras de um órgão arbitral institucional, in Guilherme, Luiz Fernando do Vale Almeida (coord.), Aspectos Práticos da Arbitragem, Ed. Quartier Latin, São Paulo, 2006, pp. 195-196.

details on how the arbitration will initiate. In the not uncommon situation of recalcitrance of the putative respondent, it will be necessary for the claimant to apply to the judiciary to supply the missing elements and order the respondent to sign the submission instrument, as per Articles 6 and 7 of the Arbitration Law.[20]

In contrast, full clauses either fully spell out all the necessary rules for the commencement of arbitration or indicate the institution that will administer the proceeding.

This latter action alone is generally sufficient to classify the clause as 'full,' because most institutions provide clear rules on the procedure for commencing arbitration.[21] However, this does not always happen. In certain situations, even when the institution is indicated it is possible to have an empty clause, such as when the parties (i) indicate an institution that does not exist or the indication is ambiguous; or (ii) they indicate one chamber and specify the rules of another.

There are also the so-called "pathological clauses," which may be caused by several reasons such as confusing mediation with arbitration, indicating arbitration as an optional procedure, stipulating defective mechanisms to choose the arbitrators.[22] At the extreme, such clauses can be totally invalid, when from their interpretation it is not possible to assess the will of the parties to choose arbitration,[23] or can require judicial interpretation for validity by supplying sufficient elements to commence the arbitration.

However, even if the pathological clause contains some defects, it is not always necessary to call on the judiciary to resolve the matter if, for example, it at least adequately specifies the form of appointing the arbitrator or tribunal. The reason is that once this has been accomplished, the arbitrators have the power to decide on their jurisdiction and fill in any

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20 "Nevertheless, Art. 7 is intended to regulate the establishment of the arbitration when there is an 'empty clause' or 'pathological clause', but this provision was created to regulate exceptional or anomalous situations, and it is the duty of legal practitioners to strive to reduce the occurrence of clauses of this nature. This means that precision and clarity are fundamental elements in the drafting of arbitration clauses. Therefore, only in this way will we be assuring that the expectations of the parties are effectively materialized." Nunes Pinto, José Emílio, A cláusula compromissória à luz do Código Civil, in Revista de Arbitragem e Mediação, Ed. RT, January-March 2005, p. 39.

21 "But for this, and even to be named as a full clause and enable reliance on the more direct effects, it is essential for the rules of the arbitral entity, be it institutional or specialized, to include the possibility of establishing the arbitration even when the other party is absent (remissive full clause) or that that mechanism be contemplated in the clause itself (dispositive full clause)." Martins, Pedro Batista, Apontamentos sobre a Lei de Arbitragem, Ed. Forense, Rio de Janeiro, 2008, p. 106.

22 The expression "pathological clauses" was coined by Frederic Eisemamm in an article published in 1974 called "Les clauses d'arbitrage pathologiques". Lemes, Selma M. Ferreira, Cláusulas Arbitrais Ambíguas ou Contraditórias e a Interpretação da Vontade das Partes, in Martins, Pedro Batista and Garcez, José Maria Rossani (coords.), Reflexões sobre arbitragem: in memoriam do Desembargador Cláudio Vianna de Lima, LTR, São Paulo, 2002, p. 188.

23 Such as when the parties use the title 'arbitration clause' but describe a procedure similar to mediation. Selma Lemes indicates some interpretive criteria that can be used to ascertain the desire of the parties to arbitrate, such as (i) interpretation according to good faith; (ii) principle of the useful effect of the arbitration clause, and (iii) rejection of the principle of strict or restricted interpretation. Lemes, Selma M. Ferreira, op. cit., pp. 196 and 200-202.

gaps, according the principle of *kompentenz-kompentenz*, established in Article 8 of the Arbitration Law.

### 3.1 *Indication of a Nonexistent Institution or Ambiguous Indication*

When finding an arbitration clause that names a nonexistent institution – such as the 'Chamber of the Brazilian Arbitration Committee'[24] – or that incorrectly or ambiguously identifies it – such as 'Center for Arbitration of the City of São Paulo'[25] – it will be necessary to interpret the desire of the parties. For this purpose, Selma Lemes states that analysis of the record of the precontractual negotiations and other documents is essential.[26]

If the institution indicated does not exist and the parties cannot agree on a solution, the clause will be empty and it will be necessary to apply to the judiciary. If, however, the name of the institution is ambiguous and the parties disagree over the choice, the interpretation of the clause will be up to the arbitral tribunal, once established. In this respect, if a request for arbitration is filed with the CAM/CCBC, the Center itself will conduct a *prima facie* analysis of the existence of a valid submission instrument. However, the final decision rests with the arbitral tribunal based on the *kompentenz-kompentenz* principle (Art. 4.5 of its Rules[27]).

When the arbitration clause is ambiguous, it is even possible for each party to seek arbitration from different institutions regarding the same dispute. In this case, there will be a conflict between arbitral tribunals established under the auspices of different institutions, with the possibility of contradictory decisions when both assume jurisdiction. When such an impasse arises, many commentators argue that only a judicial court will be competent to interpret the arbitration clause and decide on the competent arbitral tribunal/institution.[28]

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24 The Brazilian Arbitration Committee is a nonprofit association with the main purpose of studying arbitration and other nonjudicial methods of resolving disputes. It does not have a center that manages arbitration or mediation cases.

25 Although the city of São Paulo has many institutions that manage arbitration cases, there is no specific one with the name indicated above.

26 Lemes, Selma M. Ferreira, op. cit., pp. 203-207.

27 "4.5. Before the Arbitral Tribunal is constituted, the President of the CAM/CCBC will examine objections regarding the existence, validity or effectiveness of the arbitration agreement that can be immediately resolved, without the production of evidence, and will examine requests regarding joinder of claims, under Art. 4.20. In both cases, the Arbitral Tribunal, once it is constituted, will decide on its jurisdiction, confirming or modifying the decision previously made."

28 In this sense: "There can only be one arbitral court with jurisdiction over the dispute. For this reason, the first-instance judge, acting originally, who is a third party in relation to the arbitration under way, shall have natural competence to resolve the dispute (only in relation to definition of jurisdiction between the arbitral courts to hear the case), for which purpose the judge must observe the obligation to do assumed by the parties in the arbitration submission instrument." Rocha, Caio César Vieira, Conflito Positivo de Competência entre Árbitro e Magistrado, in Revista de Arbitragem e Mediação, No. 34, 2012, p. 273.

In this sense, in judging Conflict of Competence No. 113.260, the Superior Tribunal of Justice (STJ) held, by majority, that "In cases of interpretation of arbitration clauses in purchase and sale agreements, alleged conflicts of competence between arbitration chambers have to be resolved by the first-instance court."

Although that case did not originate from an ambiguous arbitration clause,[29] we believe the interpretation given by the STJ was correct and is applicable in such situations, by not considering a 'conflict of competence' to be present as defined in Article 105, I, "d," of the Brazilian Constitution, but still providing a practical solution to avoid parallel proceedings.

On the other hand, if the apparent conflict of competence is between an arbitral tribunal and a judicial court, the principle of *kompentenz-kompentenz* should prevail, with recourse to the judiciary only fitting after issuance of the arbitral award, through a suit for annulment.

### 3.2 *Indication of One Institution and Choice of Another Institution's Rules*

When the parties choose one arbitral institution but specify that this institution apply the rules of another one, it is first necessary to verify whether the institution chosen allows this practice. If so, the clause will be considered full, and the arbitration will go forward as agreed.

However, if the chosen institution does not permit this, it will probably refuse the case. That behavior is perfectly justifiable because institutions are private parties and third parties in the contractual relationship between the contenders, so they are not bound by the contractual provisions and thus not obliged to apply rules other than their own.[30] In the case of the CAM/CCBC, Article 1 of its Rules establishes that the choice of the Center requires application of those Rules.

In light of the above, it is possible to note the huge importance of knowing the rules of the institution to be chosen in the arbitration clause or submission instrument, because as of that moment, the parties may well be bound to its rules. Nevertheless, although the CAM/CCBC Rules are always applicable when the parties choose the Center as the institu-

29 In this case the arbitration clause indicated the FIESP/CIESP Arbitration Chamber as the institution. However, after filing the request for arbitration, the claimant failed to pay the costs, so the case was shelved. Then the claimant paid the fees, and the case was reactivated. However, in the meantime, the original respondent had filed its own arbitration request with the Arbitral Chamber of the Chamber of Commerce, Industry and Services of São Paulo (CACI-SP), under the allegation that the nonpayment of the costs implied desistance of the claimant from the intention to conduct the arbitration before the FIESP Chamber. The matter of conflict of competence was put to the STJ, which felicitously denied competence, holding that the dispute was merely one of contractual interpretation, something under the remit of the first-instance court.

30 "If contractual autonomy is just as much a source of law as the legislative intent, then contractual transactions and arbitration clauses are endowed with the same normative status as the law, of course with efficacy limited to the parties. As such, they possess coercive power and must be accepted by the parties." Silva, Eduardo Silva da, Código Civil e Arbitragem: entre a liberdade e a responsabilidade, in Revista de Arbitragem e Mediação, Ed. RT, April-June 2005, p. 61.

tion, this does not mean the parties cannot modify some of these provisions, as examined next.

## 4 ALTERATIONS OF THE RULES AND FLEXIBILITY OF THE ARBITRAL PROCEDURE

Arbitration has two characteristics of overarching importance. The first is that arbitration is based on the autonomy of will of the parties, while the second is that it is flexible in comparison with judicial resolution of disputes.[31]

The possibility of choosing the institution and rules is clearly one aspect of the autonomy of the will. On the other hand, the existence of a set of binding rules, although intended to provide greater legal security and predictability to the parties, can reduce the inherent flexibility of the arbitral procedure.

To combine predictability and legal security with flexibility, the CAM/CCBC allows parties to alter some provisions of its Rules to adapt them to the needs of the case. However, the modifications allowed by the CAM/CCBC are not broad and must be limited to assure the efficacy of the proceeding. In this respect, Article 1.2 of the Rules does not allow any modifications that would imply changes in its administrative organization:

> 1.2. Any variation to these Rules that may have been agreed to by the parties in their respective proceedings will apply only to the specific case and so long as it does not affect any provision regarding the administrative organization of the CAM/CCBC or the conduct of its duties.

In other words, the CAM/CCBC Rules can be said to contain 'entrenched clauses' that cannot be derogated from or altered by the parties. Although no exemplary or comprehensive list of these untouchable provisions is provided, some examples are: (i) Article 2, which covers the "name, head office, purpose and composition of the CAM/CCBC"; (ii) Article 3, on the organization of the List of Arbitrators and (iii) Article 12, on the costs and expenses of the arbitration.

The reason such provisions are immutable is that arbitral institutions are private entities that have the freedom to organize themselves in the way perceived best to pursue their economic activities. Therefore, although the arbitral institution is not responsible for judging the dispute, its greater or lesser efficacy will obviously reflect on the proceeding.

31 "The fundamental point of arbitration is the liberty of the parties to establish the way their disputes will be resolved. That freedom involves the procedure to be adopted by the arbitrators and the substantive law to be applied to solve the matter (...)" Carmona, Carlos Alberto, Arbitragem e Processo – um comentário à Lei 9.307/96, Ed. Atlas, 3rd ed., 2009, p. 64.

In this light, it is totally legitimate to establish a set of minimum rules that will assure the quality and effectiveness of the cases managed by the institution and, in the final analysis, its professional success.

Allowing the parties to derogate from any of the entrenched clauses could have a significant influence on the conduct of the proceeding and consequently the institution's credibility. It is even possible for the institution to be held civilly liable for damages caused to the parties in conducting the case[32]; hence, the importance of establishing minimum standards for fair administration of the proceeding.

Finally, having a set of 'entrenched clauses' serves to individualize institutions, distinguishing them from their peers and facilitating the choice of the parties, which can analyze which set of rules best suits their needs.

Therefore, if the parties choose the CAM/CCBC but stipulate alterations in the rules contained in the aforementioned articles, the Center can decline the case.

On the other hand, the rules contained, for example, in Article 6, regarding notices and time limits, as well as in Article 7,[33] on the procedure, are for the most part dispositive, and can thus be modified or derogated from by the parties.

As can be seen, choosing the CAM/CCBC as the institution responsible for administering the resolution of the dispute assures predictability and legal security along with good flexibility.

## 5 Conclusion

Arbitration has become firmly established in Brazil as a mechanism for faster and fairer resolution of certain types of conflicts, with firm legal security. This is a benefit to the country as a whole, because it strengthens the attraction of foreign investments that promote the economic growth.

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32 "Finally, still on the theme of civil liability, the situation of the arbitral institution must be addressed: will it also be liable for losses and damages in the situations seen above? There will be cases where this liability is patent because of the irregular exercise of the activities entrusted to the institution: failure to appoint arbitrators, appointment of arbitrators that are precluded from exercising the function, appointment of arbitrators that do not satisfy the technical qualifications agreed previously by the parties, etc., all leading to possible setting aside of the arbitral award or delay of the decision." Carmona, Carlos Alberto, Aspectos Fundamentais da Lei de Arbitragem, Ed. Forense, Rio de Janeiro, 1999, p. 266.

33 The current President of the CAM/CCBC, Frederico Straube, commented on the alteration made in Art. 7 in 2012: "The new article 7 can be characterized by its flexibility. Provisions that unnecessarily detailed the procedure were eliminated, facilitating understanding by the parties and arbitrators regarding the high degree of freedom afforded by the arbitral procedure." Straube, Frederico, Uma primeira análise do Novo Regulamento do CAM/CCBC, in Revista de Arbitragem e Mediação, Ed. RT, January-March 2012.

The development of the mechanism has been facilitated by the existence of solid and reliable arbitral institutions like the CAM/CCBC, which work to disseminate knowledge about alternative dispute resolution and to inspire confidence in users.

In choosing any institution to manage the proceeding, the parties should consider various factors, among which the set of rules stands out. The reason is that once the choice of institution is made, the parties will be automatically bound by the respective rules, although many institutions allow some modifications by the parties, as in the case of the CAM/CCBC.

Therefore, it can be stated that in choosing the CAM/CCBC, the parties will be relying on modern and solid rules that give security and predictability, but at the same time are adaptable to the particularities of the specific case, which is essential for a just resolution of the dispute.