Article 4 – Commencement of the Arbitration

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4.1. The party desiring to commence an arbitration will notify the CAM/CCBC, through its President, in person or by registered mail, providing sufficient copies for all the parties, arbitrators and the Secretariat of the CAM/CCBC to receive a copy, enclosing:

(a) ***A document that contains the arbitration agreement, providing for choice of the CAM/CCBC's to administer the proceedings;***

(b) ***A power of attorney for any lawyers providing for adequate representation;***

(d) ***A summary statement of the matter that will be the subject of the arbitration;***

(d) ***The estimated amount in dispute;***

(e) ***The full name and details of the parties involved in the arbitration; and***

(f) ***A statement of the seat, language, law or rules of law applicable to the arbitration under the contract.***[1]

Article 4.1 of the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM/CCBC) rules deals with the commencement of an arbitral proceeding. Assuming an arbitration agreement signed by the parties, whenever a dispute arises out of such contractual relationship, the damaged party should notify the CAM/CCBC's President, requesting the commencement of an arbitration. Such a notification must contain all the information and documents listed in Article 4.1. Having said this, there are specific issues that deserve closer analysis, as follows.

Naturally, under the provision set forth by Article 4.1(c), the claimant may determine and describe the scope of the dispute at his own will; however, regard must be given to the minimum level of information that the claimant must provide to ensure the validity of his notification.

According to Professors Lew, Mistelis and Kröll, such notification must clearly inform all the parties involved in the dispute that a specific dispute is being submitted to arbitration. In other words, the respondent(s) must be able to make an informed choice whether it (they) agree(s) to arbitrate the dispute or not. Thus, the respondent(s) must be sufficiently informed about the nature of the dispute and not solely that a dispute has been initiated.[2]

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1 Comments by Eduardo Ono Terashima and Rafael Villar Gagliardi.

2 See more in Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, Comparative International Commercial Arbitration, The Hague: Kluwer Law International, 2003, p. 515.

In CAM/CCBC's proceedings, the request for arbitration must also contain a copy of the arbitration agreement specifically appointing CAM/CCBC as the arbitral institution responsible for the administration and management of the procedure. This is of paramount importance since, without such an evidence, the CAM/CCBC will not be able to take the measures needed to commence arbitration, resulting in undesired delays.

It is worth noting that the amount involved in the dispute is useful information to the respondent. It is a fact that in many cases the claimant will not have enough elements to calculate the amount involved in the claim when filing the request for arbitration. However, the claimant shall provide at least an estimate of such an amount to assist the respondent in making an informed choice as to whether to arbitrate or not.

Besides that, according to Article 4.1(f), the request for arbitration must contain express reference to "the seat, language, law or rules of law applicable to the arbitration." Such provisions, in most cases, may be obtained directly from the arbitration agreement or the contract itself. Nevertheless, in view of its great importance to the arbitration, CAM/CCBC Rules requires the claimant to make a clear statement about such issues at the outset of the arbitration.

Finally, a valid request for arbitration gives rise to different legal consequences.[3] For instance, once an arbitration has commenced, the claimant will not be entitled to withdraw his claim without the prior consent of all the parties involved in the dispute. Besides that, many arbitrators use the commencement of arbitration as the date the interest described in the award should accrue.

Another legal consequence that arises from the request of arbitration is its impact on time limits issues. As one is aware, in most countries, the request for arbitration stops the running of time limits applicable to the claim (statutory and contractual). This means that a valid and timely request for arbitration is capable of setting aside the time limit issues. Furthermore, ensuring that the request for arbitration is timely filed guarantees that the arbitral tribunal will render a valid and enforceable decision on the merits of the case. On the other hand, when problems regarding the validity of the request for arbitration arises, the time limits issues may be relevant. For example, the claimant sends a notice requesting the commencement of an arbitration without the copy of the arbitration agreement. It is his last day before his claim is barred by a limitation period. Even if days later the claimant amends his request for arbitration, he will be running the risk of having an arbitral award declaring that the claim is statute barred under the applicable law.

4.2. The party will attach proof of payment of the Registration Fee together with the notice, in accordance with article 12.5 of the Rules.[4]

3 See more in Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, op. cit., pp. 506-514.

4 Comments by Eduardo Ono Terashima and Rafael Villar Gagliardi.

Arbitration constitutes a private dispute resolution method, by which parties remove from the Court Systems the power to ultimately decide a certain dispute on the merits. Although it certainly bears a jurisdictional element,[5] the fact remains that it is private and arbitration institutions and centers provide private services – of paramount importance – when they administer arbitration proceedings.

As one should expect, this service comes at a price, payable by the parties, each one initially bearing its own expenses, which may be allocated by the arbitral tribunal later on in the award. Article 4.2 of the CAM/CCBC Rules dictates that the claimant must attach proof of payment of the Registration Fee to the Notice that is to be sent to the President of the CAM/CCBC, according to the terms of Article 4.1 of the Rules, requesting commencement of the arbitration proceedings. Payment of the Registration Fee must be made in accordance with Article 12.5 of the Rules and the Table of Expenses. The Registration Fee is not subject to setoff nor shall it be reimbursed.

The provision serves yet another purpose, which is that of discouraging manifestly inappropriate requests. For instance, a party might wish to misuse arbitration, such as starting frivolous proceedings merely to reach a good settlement, perhaps taking advantage of a delicate position of the respondent, such as being a listed company that will be affected by the news of the existence of the dispute, or undergoing a merger process that may also have a material adverse effect in the evaluation of the target price.

4.3. The Secretariat of the CAM/CCBC will send a copy of the notice and respective documents that support it to the other party, requesting that, within fifteen (15) days, it describe in brief any matter that may be the subject of its claim and the respective amount, as well as comments regarding the seat of arbitration, language, law or rules of law applicable to the arbitration under the contract.[6]

Displaying strict adherence to the due process of law clause, Article 4.3 dictates that the Secretariat of the CAM/CCBC shall send a copy of the notice of commencement of arbitration, as described in Article 4.1 of the Rules, to the respondent(s). The notice shall be accompanied with copies of all the supporting documents delivered to the CAM/CCBC by the party that requested commencement of the arbitration. This is designed to allow respondent(s) to be fully aware of the state of the proceedings until receipt of the notice.

The notice must also invite respondent(s) to make a brief description of any matters that may be subject to counterclaim(s) and the corresponding amount(s). In addition and within the same term, respondent(s) shall be invited to make any comments regarding

5 A discussion about the nature of arbitration, either contractual, jurisdictional or even a third way, would not within the scope of the Commentary to this provision. It suffices to say that, whatever its nature, the jurisdictional element is a strong one in arbitration.

6 Comments by Eduardo Ono Terashima and Rafael Villar Gagliardi.

indication of seat of arbitration, language, law or rules of law applicable to the arbitration under the contract, which comprises the exact content of Article 4.1(f) of the Rules. Naturally, the aim of this last part of the provision is to maintain balance in the proceedings, as respondent(s) must be given the opportunity to object or to put forward any dissenting positions regarding these specific and crucial elements of any arbitration.

4.4. The Secretariat of the CAM/CCBC will send both parties a copy of these Rules and the list of the names of the members of the List of Arbitrators, inviting them to, within fifteen (15) days, each appoint one (1) arbitrator and, optionally, one (1) alternate to constitute the Arbitral Tribunal.

4.4.1. The parties can freely appoint the arbitrators who will constitute the Arbitral Tribunal. However, if a professional who is not a member of the List of Arbitrators is appointed, the appointment must be accompanied by that person's résumé, which will be submitted for the approval of the President of the CAM/CCBC.[7]

After the notice of arbitration is sent to the respondent(s) (see Art. 4.3), there are two paths the proceedings may take: (1) if the parties raised any objections to the existence, validity or effectiveness of the arbitration agreement, then such questions shall be submitted to the President of the CAM/CCBC for a *prima facie* decision (see Art. 4.5); (2) if no such objections are made, then the parties may proceed to the appointment of arbitrators.

At this stage in the proceedings, one important question must be raised: *have the parties agreed that the arbitration proceedings should be conducted by a sole arbitrator?*

If the answer is affirmative, then the process for appointment of the sole arbitrator must be observed (see Art. 4.13). However, if the parties expressly opted for the arbitral tribunal to be formed by three arbitrators, or if they were silent as to the number of arbitrators in their arbitration agreements, then the process established in Article 4.4 is initiated.

The rules provide no express solution in case the parties chose a multiple number of arbitrators different than three. If Brazil is the seat of arbitration, Brazilian Arbitration Law provides a default rule that an arbitral tribunal must be formed by an odd number of arbitrators.[8] Whenever parties have agreed on an even number of arbitrators, those arbitrators are entitled to appoint another arbitrator and, failing such appointment, the State courts may be called upon to appoint this arbitrator.[9]

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7 Comments by Bryan Longo and Napoleão Casado Filho.

8 Brazilian Arbitration Law (Law No. 9.307/1996) – Art. 13, §1: "The arbitral Tribunal shall be composed of an uneven number of arbitrators. The Parties are free to appoint substitute arbitrators."

9 Brazilian Arbitration Law (Law No. 9.307/1996) – Art. 13, §2: "When parties have agreed on an even number of arbitrators, the arbitrators are deemed to be entitled to appoint an additional arbitrator. Failing such agreement, the parties shall request the State Court which originally would have jurisdiction to hear the case to appoint such arbitrator, following to the possible extent, the procedure foreseen in Article 7 of this Law."

It is, however, arguable whether CAM/CCBC would undertake to administer arbitration proceedings where the number of arbitrators is different than one or three. In our view, this would have to be decided on a case-by-case analysis under Article 2.6(f), or under Article 4.5, if a party raises such question as a matter of validity or effectiveness of the arbitration agreement (which would include questions of arbitration agreements that are allegedly "inoperative or incapable of being performed" under Article II.3 of the 1958 New York Convention).

The same *rationale* would apply if the parties have chosen a different method for the selection of the arbitrators.

In the silence of the parties, however, after the respondent(s) reply to the notice of arbitration, the parties will then be asked to appoint an arbitrator and, optionally, an alternate.

There is no obligation, under CAM/CCBC Rules, that the party-appointed arbitrator must be a member of the List of Arbitrators. Nonetheless, if a party appoints an arbitrator whose name is not in the List of Arbitrators, the appointment must be accompanied by the arbitrator's *resumé*, and the appointment shall be submitted to the President of CAM/CCBC for approval.

So although there is a wide range of freedom in appointing an arbitrator under CAM/CCBC Rules, this freedom is governed by the rules and controlled by the Center.

Actually, it is expected that the party-appointed arbitrator shall be somebody "with flawless reputation and recognized legal expertise," as all the members of the List of Arbitrators are.

Thus, the appointment is submitted to an approval process that is meant to ensure that only arbitrators with a good knowledge of arbitration proceedings and the trust of the parties will conduct all arbitration proceedings administered by CAM/CCBC.

It is important to state that the President's decision on approving a party-appointed arbitrator does not mean that the other party may not challenge the arbitrator in the proper moment (see Art. 4.8).

However, the decision that does not approve the appointment of an arbitrator is final and binding, and the party shall be invited to appoint another arbitrator, preferably from the List of Arbitrators. It is understood that this second appointment should occur within ten days, in analogy to Article 4.10.

We may imagine a hypothetical situation where a party insists on appointing an Arbitrator who has already been rejected by the President or who appoints subsequent arbitrators who are not in the List and who do not possess "flawless reputation and recognized legal expertise."[10]

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10 It should be clarified that the requirement of "flawless reputation and recognized legal expertise," which is considered to be fulfilled by every member of the List of Arbitrators, according to Art. 3.1, is a general

We submit that this conduct shall be interpreted by the President of CAM/CCBC as abusive and he/she must continue with the proceedings, appointing the arbitrator in place of the defaulting party (see Arts. 4.12 and 4.16).

The appointment of an alternate arbitrator is not mandatory, but it is advisable, especially when the parties are appointing arbitrators who are not members of the List. In this scenario, in case the parties' first choice is rejected by the President of CAM/CCBC, it may directly proceed to the analysis of the party's second choice, in a more time-efficient manner.

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 article 4.20. In both cases, the Arbitral Tribunal, once it is constituted, will decide on its jurisdiction, confirming or modifying the decision previously made. [11]

The prima facie *exam of the arbitration agreement and the modulation of the competence-competence principle: Article 4.5 of the CAM/CCBC new Arbitration Rules*

1 INTRODUCTION

Some readers may be surprised at the use of the expression "modulation of the competence-competence principle" in the title of this article. Nevertheless, we do not intend to weaken or reduce the importance of this key principle and its essential role in the Brazilian arbitration system. Instead, we aim at analyzing some situations in which the competence-competence principle may not be applied.

In this article, we make a nonexhaustive analysis of situations in which the facts or circumstances of the case may justify a modulation of the competence-competence principle, adopting the *prima facie* exam of the arbitration agreement as the starting point and emblematic example of this discussion. The new Arbitration Rules of the CAM/CCBC, in force since 1 January 2012, expressly provide for this mechanism in its Article 4.5, in a particularly pioneering initiative in Brazil.

We will demonstrate that the CAM/CCBC, by including this provision in its new Arbitration Rules, adopted a constructive and premier approach vis-à-vis not only the

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requirement that must be fulfilled by *any* arbitrator under the CAM/CCBC rules. The requirement of *legal expertise*, however, may be set aside in exceptional cases, in which a different expertise is required, and such requirement is justified to the President of the CAM/CCBC at the time the appointment is made.

11 Comments by Arnoldo Wald, Ana Gerdau de Borja and Maíra de Melo Vieira.

arbitral proceedings that it administers, but also the arbitration system set forth in the Brazilian Arbitration Law (Law No. 9.307, of 1996), especially with regard to the apparently absolute character of the competence-competence principle in Brazil.

2 THE POSITIVE AND NEGATIVE EFFECTS OF THE ARBITRATION AGREEMENT AND THE COMPETENCE-COMPETENCE PRINCIPLE IN BRAZILIAN LAW

It is widely known that the arbitration clause ("*cláusula compromissória*") and the submission to arbitrate ("*compromisso arbitral*") are both different types of the arbitration agreement ("*convenção de arbitragem*") through which the parties submit any present or future disputes to arbitration (Arts. 3,[12] 4[13] and 9[14] of Law No. 9.307, of 1996).

The arbitration agreement has both a positive and a negative effect. The positive effect corresponds to the obligation of the parties to submit any disputes to arbitration, thereby preventing (at least *a priori*) any recourse to State courts. The negative effect consists in the lack of jurisdiction of State courts to decide the dispute in light of the existence of an arbitration agreement, so that any lawsuit brought by any of the parties before State courts must be immediately terminated without a ruling on the merits.

Both effects of the arbitration agreement are key elements of the competence-competence principle, and are expressly set forth in the Brazilian Arbitration Law.

With regard to the positive effect, according to Law No. 9.307, of 1996, whenever there is an arbitration agreement, any disputes arising between the parties shall be resolved through arbitration. In case of a "blank" arbitration clause,[15] any of the parties may resort to State courts in order to enforce it and oblige the resisting party to submit the dispute to arbitration (Art. 7 of Law No. 9.307, of 1996).[16]

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12 Art. 3, Law No. 9.307, of 1996: "The interested parties may submit the settlement of their disputes to an arbitral tribunal by virtue of an arbitration agreement, which may be in the form of either an arbitration clause or a submission to arbitration (acte de compromis)."

13 Art. 4, caput, Law No. 9.307, of 1996: "The arbitration clause is the agreement whereby contracting parties oblige themselves to settle through arbitration all disputes that may arise relating to the contract."

14 Art. 9, caput, Law No. 9.307, of 1996: "The submission to arbitration is the judicial or extrajudicial agreement through which parties submit a dispute to arbitration by one or more persons."

15 The Brazilian Supreme Court ("Supremo Tribunal Federal", "STF") used the expression "'blank' arbitration clause" when deciding the constitutionality of Law No. 9.307, of 1996. The "blank" arbitration clause does not contain all the elements necessary for the immediate constitution of the arbitral tribunal (Art. 5), so that the execution of a submission to arbitrate ("compromisso arbitral") (Art. 6) or a lawsuit seeking the enforcement of the "blank" arbitration clause (Art. 7) is necessary. See: STF, Plenary, AgRg-SE 5.206-7/ES, Rep. Justice Sepúlveda Pertence, decided on 12 December 2001.

16 Art. 7, caput, Law No. 9.307, of 1996: "If there is an arbitration clause but resistance as to the commencement of the arbitral proceedings, the interested party may request the Court to summon the other party to appear in Court so that the submission to arbitration may be signed; the Judge shall order a special hearing for this purpose."

The negative effect of the arbitration agreement completes the positive one. Article 267, VII of the Brazilian Code of Civil Procedure[17] provides for the dismissal of a lawsuit without a ruling on the merits at the request of any of the parties in light of the existence of an arbitration agreement.[18]

As a rule, Brazilian courts have strictly applied both effects of the arbitration agreement, either by dismissing lawsuits brought before State courts without a ruling on the merits (Art. 267, VII, of the Code of Civil Procedure), either by enforcing a "blank" arbitration agreement, in case of resistance of any of the parties to submit the dispute to arbitration (Art. 7 of Law No. 9.307, of 1996),[19] or by acknowledging conflicts of jurisdiction arising between different arbitral institutions.[20]

The positive and negative effects of the arbitration agreement are applicable, in principle, even in case of doubts about its existence, validity or effectiveness, from both objective and subjective perspectives (respectively relating to *what* type of dispute can be submitted to arbitration and *who* could and should be a party to the arbitral proceedings).

This is so because the arbitrator has a chronological priority to decide about those issues, regardless of the jurisdiction of State courts to address them *a posteriori*, i.e., in case of arbitration seated in Brazil, by means of a lawsuit seeking to set aside the arbitral award

17 Art. 267, VII, Brazilian Code of Civil Procedure: "The case is dismissed, without resolution of merits: (...) VII - for arbitration agreement"

18 The negative effect of the arbitration agreement has also been adopted in Brazil through the ratification of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') (Decree No. 4,311, of 2002). However, differently from the Brazilian Arbitration Law, the New York Convention expressly provides for an exception to this rule, which occurrence shall be verified on a case-by-case basis through a *prima facie* exam of the arbitration agreement. We will analyze this provision in detail infra.

19 See, for instance: Superior Court of Justice ("STJ"), 4th Panel, Special Appeal ("REsp") No. 1,082,498/MT, Rep. Justice Luis Felipe Salomão, decided on 20 November 2012; STJ, 2nd Panel, REsp No. 606,345/RS, Rep. Justice João Otávio de Noronha, decided on 17 May 2007, Official Gazette ("DJ") of 8 June 2007; STJ, 2nd Panel, REsp No. 612,439/RS, Rep. Justice João Otávio de Noronha, decided on 25 October 2005, DJ of 14 September 2006; STJ, 1st Section, Writ of Mandamus ("MS") No. 11,308/DF, Rep. Justice Luiz Fux, decided on 9 April 2008, DJ of 9 April 2008; Court of Appeal of São Paulo ("TJSP"), Special Chamber of Business Law, Appeal ("AC") No. 0015713-69.2008.8.26.0152, Rep. Judge José Reynaldo, decided on 27 September 2011; TJSP, 27th Chamber of Private Law, AC No. 9125681-12.2009.8.26.0000, Rep. Judge Berenice Marcondes Cesar, decided on 29 May 2012; Court of Appeal of Minas Gerais ("TJMG"), 16th Chamber of Private Law, AC No. 1.0521.08.078470-0/001, Rep. Judge José Marcos Vieira, decided on 21 January 2011; Court of Appeal of Rio de Janeiro ("TJRJ"), 15th Chamber of Private Law, Interlocutory Appeal ("AgIn") No. 2009.002.27205, Rep. Judge Celso Ferreira Filho, decided on 25 August 2009; TJRJ, 6th Chamber of Private Law, AC No. 28808/2001, Rep. Judge Gilberto Rêgo, decided on 30 April 2002; Court of Appeal of Rio Grande do Sul ("TJRS"), 17th Chamber of Private Law, AC No. 70036347342, Rep. Judge Elaine Harzheim Macedo, decided on 15 July 2010; TJRS, 15th Chamber of Private Law, AC No. 70034593863, Rep. Judge Niwton Carpes da Silva, decided on 6 July 2011.

20 See the Dissenting Opinion of Justice Nancy Andrighi, which Justice Luis Felipe Salomão followed, in STJ, 2nd Section, Conflict of Jurisdiction ("CC") No. 113,260/SP, Rep. Justice (for the prevailing Opinion) João Otávio de Noronha, decided on 8 September 2010, DJ of 7 April 2011, Revista de Arbitragem e Mediação, No. 27, Oct./Dec. 2010, p. 337 et seq.

or to challenge its enforcement (Art. 33 of Law No. 9.307, of 1996), or, in case of an arbitration seated abroad, in the context of a request for recognition and enforcement of the foreign arbitral award. This is the competence-competence principle (*kompetenz-kompetenz*), which is a corollary of the severability of the arbitration agreement,[21] almost universally accepted in comparative law (with some variations from country to country)[22] and enshrined in Articles 8, sole paragraph,[23] and 20 of Law No. 9.307, of 1996.[24]

Those legal provisions expressly provide for the 'chronological priority' of the arbitrator to decide on any issues or objections relating to the arbitration agreement. Therefore, as **Pedro Batista Martins** points out, the arbitrator is "the first judge to decide on his/her own jurisdiction."[25] Like the arbitration agreement, under Brazilian Law, the competence-competence principle also has a positive and a negative effect, both imposing the priority and exclusive jurisdiction of the arbitrator to decide any issues relating to the existence, validity and effectiveness of the arbitration agreement until the rendering of the arbitral award.[26]

As a rule, Brazilian Law does not provide for any exceptions to the competence-competence principle, so that the latter has a general character and is "directly and automatically applicable," in accordance with a recent decision of Justice **Luis Felipe Salomão** of the STJ.[27]

The purpose of this rule and the intention of the lawmakers when establishing it are crystal clear: to guarantee legal stability and efficiency, both of which are pillars of the

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21 Art. 8, caput, Law No. 9.307, of 1996: "The arbitration clause is autonomous from the contract in which it is included, meaning that the nullity of the latter does not necessarily imply the nullity of the arbitration clause" (providing for the severability of the arbitration agreement in relation to the underlying contract).

22 See Gary B. Born, International Commercial Arbitration, Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2009, p. 854 et seq. (on the universality of the competence-competence principle in international and comparative law and the several local particularities).

23 Art. 8, sole paragraph, Law No. 9.307, of 1996: "The arbitrator is competent to decide, ex officio or at the parties' request, the issues concerning the existence, validity and effectiveness of the arbitration agreement, as well as of the contract containing the arbitration clause."

24 Art. 20, caput, Law No. 9.307, of 1996: "A party wishing to raise issues as to the jurisdiction, suspicion or impediment of an arbitrator or arbitrators, or as to the nullity, invalidity or ineffectiveness of the arbitration agreement, must do so at the first possible opportunity after the commencement of the arbitral proceedings."

25 Pedro Batista Martins, Apontamentos sobre a Lei de Arbitragem, Rio de Janeiro: Forense, 2008, p. 137 (free translation from the Portuguese original).

26 See Emmanuel Gaillard, "O efeito negativo da competência-competência", Revista Brasileira de Arbitragem, No. 24, Oct./Dec. 2009, pp. 220-222 ("In its positive effect, such principle [competence-competence] provides the arbitrator with jurisdiction to decide any objections in relation to his/her own jurisdiction (...). In its negative effect, the competence-competence principle applies to State courts. It is a continuation of the negative effect of the arbitration agreement, preventing State courts from deciding, at the request of one of the parties in a dispute, any issues relating to the existence or to the validity of the arbitration agreement before the arbitrators do it, in spite of the existence, at least prima facie, of an arbitration agreement.") (free translation from the Portuguese original).

27 STJ, 4th Panel, REsp No. 1.278.852/MG, Rep. Justice Luis Felipe Salomão, decided on 21 May 2013, DJ of 19 June 2013.

effectiveness and success of arbitration. It would be nonsense to request the parties to spend years litigating before State courts in order to enforce an arbitration agreement previously executed in good faith to eventually arbitrate the dispute, when the future arbitral award will possibly have already lost part or all of its utility.[28]

Brazilian courts have also strictly applied the legal provisions concerning the competence-competence principle, thereby affirming the chronological priority of the arbitrator or arbitral tribunal to decide on any issues regarding his/her own jurisdiction in light of any doubts on or challenges to the arbitration agreement, before or after the commencement of the arbitral proceedings, and without prejudice to their later analysis by State courts, pursuant to Article 33 of Law No. 9.307, of 1996.[29]

3 The *Prima Facie* Exam of the Arbitration Agreement: Modulation of the Competence-Competence Principle

As noted above, Brazilian Law provides for the absolute jurisdiction of the arbitrator or of the arbitral tribunal to decide on any issues regarding its own jurisdiction over the case, with chronological priority and exclusivity until the end of the arbitral proceedings, with no exceptions. Nonetheless, there might be some heterodox situations in which an extensive construction of the law may be justified, in order to achieve more efficiency in the resolution of the dispute. Moreover, the applicable arbitration rules may also provide for a modulation of that rule.

Such extensive construction of the law or modulation of the competence-competence principle allows State courts or the institution administering the arbitration (as the case may be) to analyze and decide objections to the existence, validity or effectiveness of the arbitration agreement before the arbitrator or the arbitral tribunal does so, or even after

28 See Francisco González de Cossío, "La Ironía de Competénce-Compétence", in Miguel Ángel Fernández-Ballesteros and David Arias (Eds.), Liber Amicorum Bernardo Cremades, Madrid: La Rey/Wolters Kluwer, 2010, pp. 522-523.

29 See, for instance: STJ, 4th Panel, REsp No. 1,278,852/MG, Rep. Justice Luis Felipe Salomão, decided on 21 May 2013, DJ of 19 June 2013; STJ, 3rd Panel, REsp No. 1,302,900/MG, Rep. Justice Sidnei Beneti, decided on 9 October 2012, DJ of 16 October 2012; STJ, 3rd Panel, REsp No. 1,288,251/MG, Rep. Justice Sidnei Beneti, decided on 9 October 2012, DJ of 16 October 2012; STJ, 3rd Panel, REsp No. 1,279,194/MG, Rep. Justice Sidnei Beneti, decided on 9 October 2012, DJ of 16 October 2012; STJ, 3rd Panel, REsp No. 1,327,820/MG, Rep. Justice Sidnei Beneti, decided on 9 October 2012, DJ of 16 October 2012; STJ, 3rd Panel, REsp No. 1,311,597/MG, Rep. Justice Sidnei Beneti, decided on 9 October 2012, DJ of 16 October 2012; STJ, REsp No. 1,283,388/MG, Rep. Justice Ricardo Villas Bôas Cueva (monocratic decision), decided on 22 October 2012, DJ of 26 October 2012; STJ, REsp No. 1,327,085/MG, Rep. Justice Ricardo Villas Boas Cueva (monocratic decision), decided on 22 October 2012, DJ of 26 October 2012; STJ, Interim Measure ("MC") No. 14,295/SP, Rep. Justice Nancy Andrighi (monocratic decision), decided on 9 June 2008, DJ of 13 June 2008; STJ, MC No. 17,868/BA, Rep. Justice Paulo de Tarso Sanseverino, decided on 6 June 2011, DJ of 1 July 2011; STJ, 1st Section, MS No. 11,308/DF, Rep. Justice Luiz Fux, decided on 9 April 2008, DJ of 9 April 2008.

that, but before the end of the arbitral proceedings. The main mechanism for that is the *prima facie* exam of the arbitration agreement by State courts, the arbitral institution or one of its instrumentalities.

3.1 *The* Prima Facie *Exam of the Arbitration Agreement by State Courts*

Brazilian scholars and State courts have sustained a modulation of the competence-competence principle in Brazil in some special cases, in order to allow State courts to decide on objections to the existence, validity or effectiveness of the arbitration agreement before the arbitrator or the arbitral tribunal. In such special cases, State courts are entitled to decide on those objections, as well as on any challenges to the independence or impartiality of the arbitrator(s), immediately following the arbitrator or arbitral tribunal's decision on the issue and before the rendering of the arbitral award, or even before the commencement of the arbitral proceedings.[30]

We understand that this possibility must be limited to a *prima facie* exam, so as to allow State courts to immediately verify, at the request of one of the parties, any ostensive or manifest defect or illegality regarding the existence, validity or effectiveness of the arbitration agreement.[31] Evidently, an ostensive or manifest defect or illegality is one that can be verified independently of the production of any evidence (or even of the evidence already produced). Otherwise, the alleged defect or illegality will not be ostensive or manifest, and cannot be subject to State courts by means of a *prima facie* exam.

Although the *prima facie* exam of the arbitration agreement by State courts is not expressly set forth in Law No. 9.307, of 1996, it has been admitted in Brazilian Law through the ratification of the New York Convention. Pursuant to Article II(3) of the New York Convention, "[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[32]

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30 See, for instance: Alexandre Abby and André Luís Monteiro, "Da relativização do Princípio da Kompetenz-Kompetenz", Revista de Direito da Associação dos Procuradores do Novo Estado do Rio de Janeiro, vol. XVIII, 2006, p. 205 et seq.; Welber Barral, A arbitragem e seus mitos, Florianópolis: OAB/SC, 2000, pp. 33-34; Ana Tereza Palhares Basílio and Joaquim de Paiva Muniz, "Pedido de suspensão de procedimento arbitral. Extinção do processo sem julgamento do mérito. Interposição de agravo de instrumento e de recurso de apelação. Respeito à Lei de Arbitragem. Atividade jurisdicional do Tribunal Arbitral", (comentário de jurisprudência), Revista de Arbitragem e Mediação, No. 2, May/Aug. 2004, p. 272 et seq.

31 See also: Arnoldo Wald, "A interpretação da Convenção de Nova Iorque no direito comparado", Revista de Direito Bancário, do Mercado de Capitais e da Arbitragem, No. 22, Oct./Dec. 2003, p. 360 e 366.

32 Art. 8(1) of the UNCITRAL Model Law (which has inspired the Brazilian Arbitration Law, even though the latter did not adopt this specific rule) contains a similar provision ("A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when

The New York Convention does not use the expression '*prima facie*' or any other equivalent to that. Nevertheless, most Brazilian and foreign scholars (despite some exceptions, resulting from the more restrictive position adopted in some countries[33]) understand that Article II (3) shall not be construed broadly. Instead, it would be limited to a *prima facie* analysis of the arbitration agreement, aiming at really manifest and obvious defects that unequivocally evidence that the arbitration agreement does not exist or that it is null and void, ineffective, inoperable or incapable of being performed.[34]

It is noteworthy that **Albert Jan Van den Berg** has adopted this limited approach in his draft revised text of the New York Convention, also known as the Dublin Convention (because it was first presented to the public during the ICCA Conference in Dublin in 2008). The revised New York Convention would make clear that the exception currently set forth in Article II(3) is limited to a *prima facie* verification of the arbitration agreement; otherwise, its negative effect shall prevail.[35]

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submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed").

33 For instance, the United States and Germany, where State courts have a larger power of interference with regard to any objections to the existence, validity or effectiveness of the arbitration agreement, even before the issue is brought before or decided by the arbitrator or arbitral tribunal. See C. Ryan Reetz, "The limits of the competence-competence doctrine in United States courts", Dispute Resolution International, Vol. 5, No. 1, May 2011, p. 5 et seq.; George A. Bermann, "Le rôle respectif des cours et des arbitres dans la détermination de la compétence arbitrale", Revista de Arbitragem e Mediação, No. 31, Oct./Dec. 2011, p. 155; Carmen Tiburcio, "O princípio da kompetenz-kompetenz revisto pelo Supremo Tribunal Federal de Justiça alemão (Bundesgerichtshof)", in Selma Ferreira Lemes, Carlos Alberto Carmona and Pedro Batista Martins (Eds.), Arbitragem: estudos em homenagem ao Prof. Guido Fernando da Silva Soares, in memoriam, São Paulo: Atlas, 2007, p. 425 et seq. See also Gary B. Born, op. cit., vol. 1, p. 877 et seq. (in general, for the particularities applying to the competence-competence principle in other jurisdictions, including with regard to the *prima facie* exam, such as the UK, Canada, Switzerland, India, Australia, New Zealand and Hong Kong).

34 See, among others: R. Doak Bishop, Wade M. Coriell and Marcelo Medina Campos, "The 'null and void' provision of the New York Convention", in Emmanuel Gaillard and Domenico di Pietro (Eds.), Enforcement of arbitration agreements and international arbitral awards – The New York Convention in practice, Londres: Cameron, May 2008, pp. 283-285; Pedro Batista Martins, "Artigo II(3): arbitrabilidade e as ressalvas constantes do artigo II(3), da Convenção de Nova Iorque", in Arnoldo Wald and Selma Ferreira Lemes (coord.), Arbitragem comercial internacional: a Convenção de Nova Iorque e o Direito Brasileiro, São Paulo: Saraiva, 2011, p. 127 et seq., and "Poder Judiciário – Princípio da autonomia da cláusula compromissória – Princípio da competência-competência – Convenção de Nova Iorque – Outorga de poderes para firmar a cláusula compromissória – Determinação da lei aplicável ao conflito – Julgamento pelo tribunal arbitral", Revista de Arbitragem e Mediação, No. 7, Oct./Dec. 2005, p. 173 et seq.; José Emílio Nunes Pinto, Rodrigo Garcia da Fonseca, "Convenção de Nova Iorque: atualização ou interpretação?", Revista de Arbitragem e Mediação, No. 18, Jul./Sep. 2008, pp. 56-59.

35 The proposed revised text reads as follows:
"Art. 2 – Enforcement of Arbitration Agreement
1. If a dispute is brought before a court of a Contracting State which the parties have agreed to submit to arbitration, the court shall, at the request of a party, refer the dispute to arbitration, subject to the conditions set forth in this article.
2. The court shall not refer the dispute to arbitration if the party against whom the arbitration agreement is invoked asserts and proves that:

Hence, as **Pedro Batista Martins** once more properly notes, in his commentaries to Article II(3) of the New York Convention, "it can be stated that the occurrence of any of the situations comprehended in the exception at hand cannot be subject of a broad and unlimited exam by State courts. Instead, the analysis is narrow, since it concerns a legal situation which is evident at first sight. In other words, one shall prove the allegation of lack of arbitral jurisdiction with data and elements which are evident and convincing at a glance. We are the field of a sovereign probability."[36]

The strict interpretation of Article II(3) of the New York Convention is also adopted in other legal systems with a stronger arbitration tradition, such as in France. French Law provides for a *prima facie* exam of the arbitration agreement by State courts, which can immediately acknowledge any manifest defects regarding the existence, validity or effectiveness of the arbitration agreement.[37] In this case, there is a modulation of the competence-competence principle, which has, in France, the same chronological nature provided under Brazilian Law.

According to French courts, a defect is manifest only where it can be verified through an ordinary *prima facie* analysis of the arbitration agreement by the judge, without an in-depth examination of any evidence or complex issues of merits. Otherwise, the arbitrator or arbitral tribunal shall decide with priority on any jurisdictional matter, without prejudice to an ulterior analysis by the State courts, after the rendering of the arbitral award,[38] as it is in Brazil.

Carlos Alberto Carmona summarizes the subject in light of Law No. 9.307, of 1996 as follows:

(a) the other party has requested the referral subsequent to the submission of its first statement on the substance of the dispute in the court proceedings; or
(b) there is prima facie nor valid arbitration agreement under the law of the country where the award will be made;
(c) arbitration of the dispute would violate international public policy as prevailing in the country where the agreement is invoked.
(...)" (Albert Jan Van den Berg, "Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards", available at <www.arbitration-icca.org>, last access on 15 July 2013).

36 Pedro Batista Martins, op. cit., p. 130.

37 Art. 1448 of the French Code de Procédure Civile (as modified by Decree No. 2011-48, of 13 January 2011, revising French Law on arbitration), reads as follows: "Lorsqu'un litige relevant d'une convention d'arbitrage est porté devant une juridiction de l'Etat, celle-ci se déclare incompétente sauf si le tribunal arbitral n'est pas encore saisi et si la convention d'arbitrage est manifestement nulle ou manifestement inapplicable."). The same rule already existed before 2011, derived from multiple court decisions on the matter. See Matthieu de Boissésson, "La nouvelle convention d'arbitrage", in Thomas Clay (Dir.), Le nouveau droit français de l'arbitrage, Paris: Lextenso, 2011, pp. 86-87; Dominique Vidal, Droit français de l'arbitrage interne et international, Paris: Gualino/Lextenso, 2012, pp. 65-66; Gary B. Born, op. cit., 2009, pp. 900-904, especially pp. 901-902.

38 See Philippe Fouchard, Emmanuel Gaillard and Berthold Goldman, Traité de l'arbitrage commercial international, Paris: Litec, 1996, pp. 421-422; Bertrand Moreau, "Chronique de jurisprudence française", Revue de l'arbitrage, 2004/4, p. 933.

> Scholars so far do not have a firm position on the identification of what exactly are the limits of the investigative powers of the judge regarding the invalidity of the arbitration agreement. Emmanuel Gaillard suggests that the judge shall only declare the invalidity of the arbitration agreement where the defect is recognizable prima facie, i.e., immediately, with no need for further examination. It seems that the honorable Parisian professor is right, since the limitation of the cognitive powers of the judge exclusively to those aspects which can be detected immediately, without further inquiry (thus, summary cognition), is compatible with the kompetenz-kompetenz principle under Brazilian Law. In that case, the judge could declare the invalidity of an arbitration agreement lacking any of its essential requirements, or the impossibility to enforce an arbitration agreement relating to a dispute involving an inalienable right; but [the judge] shall not order the production of evidence to verify the scope of the arbitration agreement or to assess whether any of the contractors would have been forced or induced to enter into the arbitration agreement.[39]

The Court of Appeal of the State of São Paulo (TJSP) has expressly affirmed this position in a case opposing construction and insurance companies with regard to losses that occurred during the construction of the Jirau Hydroelectric Power Plant, in the Brazilian State of Rondônia. In the case, the insurance companies initiated arbitral proceedings in London, based on a clause of the insurance policy providing for arbitration seated in London. In turn, the construction companies filed a lawsuit before Brazilian State courts, seeking to set aside the arbitration clause and the stay of the arbitration, since the arbitration agreement did not obey Brazilian Law, applicable pursuant to the choice of law clause set forth in the contract.

The first degree judge granted interim relief in order to stay the arbitration in London until a final judgment was rendered in Brazil on the validity of the arbitration agreement, which was confirmed, by majority, by the Court of Appeal. The Judge Rapporteur **Paulo Alcides** expressly acknowledged the admissibility of the *prima facie* exam of the arbitration agreement by State courts in his prevailing majority opinion, as an exception to the competence-competence principle, in line with **Carlos Alberto Carmona**'s scholarly writing quoted earlier. According to him, this would justify, in the case at stake, the suspension of the arbitration proceedings in London until Brazilian courts definitively rule on the issue.[40]

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39 Carlos Alberto Carmona, Arbitragem e processo, 3rd ed., São Paulo: Atlas, 2009, p. 177, free translation of the Portuguese original.

40 TJSP, 6th Chamber of Private Law, AgIn No. 0304979-49.2011.8.26.0000, Rep. Judge Paulo Alcides, decided on 19 April 2012 (concluding, after quoting Carlos Alberto Carmona: "[The] flaws in the contractual provisions, as noted above, give rise to more than reasonable doubt, sufficient to eliminate the effects of the so-

Also recently, the STJ held that the State courts shall not intervene whenever there is a 'full' arbitration clause with no ambiguities.[41] On the other hand, the STJ admitted that whenever there is a jurisdictional conflict between a State court and an arbitral tribunal, any of the interested parties can file a motion before the STJ to resolve the conflict (*"conflito de competência"*).[42] In some countries, this position has already been considered contrary to arbitration. Nevertheless, in Brazil, even though it can also represent a modulation of the competence-competence principle, it actually aims at preserving the arbitration against undue interferences of judges, who are often sitting outside of the major cities and have little knowledge of arbitration.

3.2 *The* Prima Facie *Exam of the Arbitration Agreement by the Arbitral Institution*

The *prima facie* exam of the arbitration agreement can also be an assignment of the arbitral institution, in the exercise of a power expressly provided for in its arbitration rules, which the parties have adopted to regulate the arbitral proceedings. The *prima facie* exam of the arbitral institution aims at appraising, through a previous analysis, the existence of a valid arbitration agreement, so that, once requested, the institution can proceed with the arbitration.

The *prima facie* exam of the arbitration agreement by the arbitral institution, following the request for arbitration and before the constitution of the arbitral tribunal, is traditionally provided for in the arbitration rules of important international institutions, such as the

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called 'negative effectiveness of the arbitration agreement', and exceptionally justify the moderation of the competence principle set forth in Art. 8, sole paragraph, of Law No. 9.307 of 1996, according to which the arbitrator shall decide on his/her own jurisdiction" [free translation]). See the decision and commentaries of Arnoldo Wald, Revista de Arbitragem e Mediação, No. 34, Jul./Sep. 2012, pp. 407-423. See also: Arnoldo Wald, Ana Gerdau de Borja and Maíra de Melo Vieira, "Brazil as 'Belle of the Ball': The Brazilian Courts' Pro-Arbitration Stance (2011-2012)", The Paris Journal of International Arbitration/Les Cahiers de l'Arbitrage, 2013/2, pp. 394-395. The insurance companies filed a complaint ("Reclamação") against this decision before the STJ, which dismissed it without prejudice and affirmed the dismissal in appeal (STJ, Special Court, AgRg-Reclamação No. 9.030, Rep. Justice Ari Pargendler, unanimous, decided on 20 March 2013).

41 STJ, 4th Panel, REsp No. 1,278,852/MG, Rep. Justice Luis Felipe Salomão, decided on 21 May 2013, DJ of 19 June 2013. This decision provides an important nuance, by noting that the competence-competence principle and the negative effect of the arbitration agreement are applicable whenever in presence of a 'full' arbitration clause. On the other hand, in case of a 'blank' arbitration agreement, as well as in other exceptional cases, such as the conflict of jurisdiction between State courts and arbitral tribunals, noted supra, the competence-competence principle may not be applicable (in favor of Art. 7 of Law No. 9.307, of 1996) or may be modulated (respectively, as the case may be). See: Maíra de Melo Vieira, "Execução específica de cláusula compromissória vazia e competência-competência: revisitando regras elementares à luz da decisão do STJ no REsp n° 1.082.498/MT", Revista de Arbitragem e Mediação, No. 38, Jul./Sep. 2013 (printing).

42 STJ, Special Court, CC No. 111,230/DF, Rep. Justice Nancy Andrighi, decided on 8 May 2013. Justice Luis Felipe Salomão followed the opinion of the Reporting Justice. Their opinions will be published in Revista de Arbitragem e Mediação, No. 39. The full decision has not been officially published to this date.

International Court of Arbitration of the International Chamber of Commerce (ICC)[43] and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).[44]

As with regard to the *prima facie* exam by State courts, in the context of those institutions, there have also been doubts about what should be the scope and limits of the *prima facie* exam of the arbitration agreement. Again in the latter case, a liberal position has prevailed, according to which the arbitration shall proceed, except in case of inexistence or manifest defect of the arbitration agreement (for instance, the arbitration agreement provides for *ad hoc* arbitration or for arbitration administrated by another institution). In all other cases, the arbitrator or arbitral tribunal shall decide on the matter.[45]

The prevalence of this position is explained and justified in view of the impact of this decision on the jurisdiction of the arbitrator(s) and on the competence-competence principle. Indeed, in case the arbitral institution decides not to proceed with the arbitration, in light of the inexistence or of a manifest defect of the arbitration agreement, the issue will not even be submitted to the arbitral tribunal.

In such a case, the only alternatives available to the party who initiated the arbitration would be either to resort to State courts in order to obtain a decision on the merits of the dispute or to file a suit in order to affirm the existence, validity or effectiveness of the arbitration agreement and the arbitral institution that shall administer the proceedings. This hypothesis emphasizes the exceptional character of the *prima facie* exam by the arbitral institution in relation to the competence-competence principle.

Although the matter has not been further examined in Brazil so far, it has been subject to an important debate among scholars and in State courts in other countries, especially in France, particularly in light of the ICC Arbitration Rules, regarding the powers of the arbitral institution to do the *prima facie* exam of the arbitration agreement and make such a decision.[46] As noted, the main reason for those debates was the fact that, besides modu-

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43 See Yves Derains and Eric A. Schwartz, A guide to the new ICC Rules of Arbitration, The Hague/London/Boston: Kluwer Law International, 1998, p. 79 et seq. (about the prima facie exam by the ICC).

44 See David Ramsjö and Siri Strömberg, "Manifest lack of jurisdiction? A selection of decisions of the Arbitration Institute of the Stockholm Chamber of Commerce concerning the prima facie existence of an arbitration agreement (2005-2009)", Stockholm International Arbitration Review, 2009/2, p. 55 et seq.; Felipe Mutis Tellez, "Prima facie decisions on jurisdiction of the Arbitration Institute of the Stockholm Chamber of Commerce: towards consolidation of a 'pro arbitration' approach", available at <www.sccinstitute.com/filearchive/4/45022/Felipe%20Mutis%20Tellez_Paper%20on%20SCC%20Challenges%20on%20Jurisdiction.pdf>, last access on 19 July 2013 (about the prima facie exam by the SCC). The Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings of the International Centre for Settlement of Investment Disputes ("ICSID") also provide for a type of *prima facie* exam of the arbitration agreement by the institution, allowing the Secretary General to refuse to proceed with the arbitration in cases where the dispute is "manifestly outside the jurisdiction of the Centre" (Art. 6(1)(b)).

45 Id. (see footnotes 32 and 33).

46 See Philippe Fouchard, "Les institutions permanentes d'arbitrage devant le juge étatique (à propos d'une jurisprudence récente)", Revue de l'Arbitrage, 1987/3, pp. 225-274; Isabelle Hautot, "Les pouvoirs de la Cour d'arbitrage de la CCI de décider ou non d'organiser l'arbitrage", ASA Bulletin, vol. 8, 1990/1, pp. 12-31; Eduardo Silva-Romero, "Les apports de la doctrine et de la jurisprudence françaises à l'arbitrage de la

lating the competence-competence principle, such decision could have a jurisdiction nature and, as such, could be made only by the arbitrator(s). The role of the institution, on the other hand, would be merely administrative.

Nowadays, it is widely accepted that the *prima facie* decision by the arbitral institution has an administrative and discretionary nature, since it concerns the power of the arbitral institution to administer the proceedings (from both subjective and objective perspectives).[47]

In this context, French courts have defined the role of the arbitral institution and of its arbitration rules. Both the *Cour de Cassation* and the French courts of appeal have held that the ICC only organizes and administers the proceedings, providing a proper structure for the arbitration to run efficiently, in accordance with the procedural rules chosen by the parties.[48] Moreover, international scholars recognize that arbitral institutions are not actors in the arbitration. They only provide the structure and prepare the stage for the real actors (the arbitrators).[49] They do not have any jurisdictional powers and do not intervene in the arbitrators' role.

In turn, the relationship between the arbitral institution and the parties to the arbitration is deemed to be that of an organization, service rendering, representation or even collaboration agreement. The arbitral institution practices administrative acts, acting as the 'police of the arbitral proceedings' and ensuring their proper functioning.

Therefore, in the event that the arbitral institution decides that the arbitral proceedings shall not continue, this decision is final and not subject to judicial review. Hence, an ulterior lawsuit seeking the enforcement of the arbitral award shall necessarily point to a different arbitral institution to administer the proceedings.

Further, from a practical standpoint, the arbitration efficiency and legal stability would justify the *prima facie* exam by the arbitral institution, as well as other powers assigned to the latter as the administrator of the proceedings (for example, the power to decide any challenges to the independence or impartiality of an arbitrator).

This debate has influenced the revision of the ICC Arbitration Rules in force since 2012. Differently from the 1998 ICC Rules, the 2012 ICC Rules, although not eliminating the *prima facie* exam of the arbitration agreement by the Court, have considerably limited the cases in which the latter will take place. Currently, the Secretary General acts as a 'gatekeeper,' being the first to analyze any jurisdictional objections based on the existence,

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Chambre de commerce internationale", Revue de l'Arbitrage, 2005/2, pp. 420-437; Mizère Philippe, "Les pouvoirs de l'arbitre et de la Cour d'arbitrage de la CCI relatifs à leur compétence", Revue de l'Arbitrage, 2006/3, pp. 591-616.

47 See Id.

48 See Id. See also: Yves Derains and Eric Schwartz, op. cit., p. 84; Cour de Cassation, 1e civ, de Prémont c. Société Trioplast AB, j. 11 March 2009, Revue de l'Arbitrage, No. 1/2009, pp. 240-241.

49 Charles Jarrosson, "Le rôle respectif de l'institution, de l'arbitre et des parties dans l'arbitrage international", Revue de l'Arbitrage, No. 2/1990, p. 394.

validity or effectiveness of the arbitration agreement (Art. 6(3), 2012 ICC Rules[50]). Only in the cases where the Secretary General considers that the objection may be grounded will he submit the issue to the Court for a *prima facie* exam. In any case, the 2012 ICC Rules make clear that the Court will not step into the merits of the allegations of any party to the dispute when making this assessment (Art. 6(4), 2012 ICC Rules[51]).

This change, besides giving more efficiency to the arbitral proceedings, evidences that the rule, which is clear in the reading of new Article 6(3) and in line with the established practice of the Court, is to proceed with the arbitration, so that the arbitral tribunal decides any objections on jurisdiction. Only in exceptional cases, where the *prima facie* exam reveals a serious doubt regarding the choice of the parties for the ICC arbitration, will the Court be called to analyze the matter and can eventually decide to terminate the proceedings.[52]

The particularly limited scope of the *prima facie* exam by the Court also evidences its exceptional nature and, more importantly, that of the decision not to proceed with the arbitration. It suffices that the Court be convinced of the 'possible existence' of an ICC arbitration agreement to proceed with the arbitration (same rule provided in the 1998 version). This is obviously a particularly low threshold, once it does not even require any certainty about the existence of an ICC arbitration agreement. The mere possibility of its existence is enough for the arbitration to proceed.

The new ICC Rules thus reinforce that only evident and unequivocal cases of inexistence of an ICC arbitration agreement can justify a decision of the Court not to proceed with the arbitration. Such attitude mitigates the exceptionality of the *prima facie* exam by the

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50 Art. 6(3), 2012 ICC Rules: "3. If any party against which a claim has been made does not submit an Answer, or raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4)."

51 Art. 6(4), 2012 ICC Rules: "In all cases referred to the Court under Article 6(3), the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is prima facie satisfied that an arbitration agreement under the Rules may exist. In particular:
(i) where there are more than two parties to the arbitration, the arbitration shall proceed between those of the parties, including any additional parties joined pursuant to Article 7, with respect to which the Court is prima facie satisfied that an arbitration agreement under the Rules that binds them all may exist; and
(ii) where claims pursuant to Article 9 are made under more than one arbitration agreement, the arbitration shall proceed as to those claims with respect to which the Court is prima facie satisfied (a) that the arbitration agreements under which those claims are made may be compatible, and (b) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration. The Court's decision pursuant to Article 6(4) is without prejudice to the admissibility or merits of any party's plea or pleas."

52 See Jacob Grierson and Annet van Hooft, Arbitrating under the 2012 ICC Rules, Alphen aan den Rijn: Kluwer Law International, 2012, pp. 7-10; Nathalie Voser, "Overview of the most important changes in the revised ICC Arbitration Rules", ASA Bulletin, vol. 29, 2011/4, pp. 787-791; Pierre Mayer, "Le nouveau règlement d'arbitrage de la Chambre de commerce internationale (CCI)", Revue de l'Arbitrage, 2011/4, pp. 902-907.

institution vis-à-vis the competence-competence principle and the powers of the arbitrator or arbitral tribunal to decide on any jurisdictional issues.

4 ARTICLE 4.5 OF THE 2012 CCBC ARBITRATION RULES

One of the main innovations of the 2012 CAM/CCBC Arbitration Rules is precisely the provision that empowers the President of the CAM/CCBC to do a *prima facie* verification of the arbitration agreement, before the constitution of the arbitral tribunal, whenever respondent raises any objections related to its existence, validity or effectiveness. Article 4.5 of the new CAM/CCBC Arbitration Rules reads as follows:

> 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 article 4.20. In both cases, the Arbitral Tribunal, once it is constituted, will decide on its jurisdiction, confirming or modifying the decision previously made.

This is a pioneering provision among Brazilian arbitral institutions, and represents an important step in the process of sophistication and internationalization of the CAM/CCBC. It also brings the CAM/CCBC arbitral procedure even closer to those already consolidated in international arbitral institutions, such as the ICC and the SCC, aside from providing more certainty and efficiency to CAM/CCBC arbitration.

The fact that Law No. 9.307, of 1996, does not expressly provide for the *prima facie* exam or any other type of modulation of the competence-competence principle (by State courts or the arbitral institution) also highlights the innovative essence of this provision. In Brazil, discussions regarding the scope and limits of this exam are still relatively incipient, and Article 4.5 of the 2012 CCBC Arbitration Rules will certainly contribute to this debate.

Indeed, the CAM/CCBC is one of the main and most used arbitral institutions in Brazil. As a result, studies and debates concerning the *prima facie* verification of the arbitration agreement under Brazilian Law and institutional rules tend to multiply. The inclusion of this provision in the 2012 CCBC Arbitration Rules has, thus, a very positive impact, not only on CAM/CCBC arbitration, but also, more broadly, on arbitration doctrine and practice in Brazil as a whole.

The *prima facie* verification by the President of the CAM/CCBC has a relatively large scope: it is not limited to the mere verification of the existence of an arbitration agreement with an unequivocal choice of CAM/CCBC as the institution administering the arbitration. On the contrary, it encompasses any objections related to the existence, validity or effec-

tiveness of the arbitration agreement. Hence, CAM/CCBC has adopted a rule similar to that already consolidated in the ICC. The latter has deviated from its initially restricted purpose when first providing the *prima facie* exam in order to allow a broader verification by the Court, encompassing several types of flaws that could taint the arbitration agreement, including that with regard to subjective and objective arbitrability.[53]

The wording of Article 4.5 of the 2012 CCBC Arbitration Rules is unclear about the treatment to be afforded to the arbitration in the event that the President of the CAM/CCBC concludes that there really is a defect totally or partially tainting the arbitral proceedings and preventing them from moving forward as initially requested (for instance, there is not an unequivocal choice of CAM/CCBC as the institution administering the arbitration; one of the respondents did not sign the contract containing the CAM/CCBC arbitration clause; the claims submitted to arbitration relate to two or more contracts, one or more of which does/do not provide for a CAM/CCBC arbitration agreement).

In that latter case, one may question whether the express provision in Article 4.5 of the new CAM/CCBC Arbitration Rules shall prevail, so that the arbitral tribunal will be constituted in any case and readdress the matter, regardless of the flaws tainting the arbitration agreement; or, alternatively, whether the CAM/CCBC will adopt the same practice already consolidated in the ICC and in the SSC and immediately terminate the proceedings (even if termination is only partial, related to one or more parties or claims).

In our opinion, the former solution mentioned above would deprive the *prima facie* verification of the arbitration agreement by the President of the CAM/CCBC of any real purpose. In all cases, the arbitration would continue, and the matter would be subject to the analysis and decision of the arbitral tribunal. Therefore, in such a scenario, it would be much more efficient for the arbitral tribunal to directly decide on those issues and eliminate the *prima facie* verification by the institution.

Consequently, it seems to us that it was not the intention of the new CAM/CCBC Rules, so that, similarly to the ICC practice, the President's decision according to which the arbitration shall not proceed shall be final and immediately lead to the (total or partial) termination of the proceedings. As a result, the matter will not be submitted to the arbitral tribunal at this point, even though it might be submitted to State courts at the request of one of the parties.

At any rate, it is likely that, in practice, the President of the CAM/CCBC will, in most cases, decide that the arbitration shall continue and any complex aspects of the dispute, related to either jurisdiction or arbitrability, end up readdressed and effectively decided by the arbitral tribunal, as already occurs in the ICC and the SCC. This is actually the rule arising out of Article 4.5 of the new CCBC Arbitration Rules (similarly to Article 6(3) of

53 See Yves Derains and Eric Schwartz, op. cit.; Pierre Mayer, op. cit.; Philippe Fouchard, op. cit.

the new ICC Rules), which affirms the competence-competence principle in all but exceptional cases.[54]

Likewise, also similarly to the ICC, although the *prima facie* verification by the President of the CAM/CCBC has a relatively broad scope, it must be generic, i.e., it is limited to "matters that can be resolved instantly, needlessly of production of evidence" (Art. 4.5). As a consequence, any other matters that depend on the production of evidence or further debate shall, in principle, be submitted directly to the arbitral tribunal.

One last issue under Brazilian Law, particularly in light of our considerations *supra* on the competence-competence principle and the possibility of a *prima facie* verification of the arbitration agreement by State courts: where the arbitration rules chosen by the parties to regulate the proceedings (such as the CAM/CCBC Rules) provide for the *prima facie* verification of the arbitration agreement by the arbitral institution, would there still be room for a similar exam by State courts?

Where there is a 'full' arbitration agreement and there are no ostensive illegalities, State courts shall not interfere, except to grant interim relief before the constitution of the arbitral tribunal or in the context of a lawsuit seeking to set aside the arbitral award. In case of doubt, it is advisable that the parties respect the authority of the arbitral institution – in this case, of the President of the CAM/CCBC – to decide about the continuation of the arbitration.

5 Concluding Remarks

In view of the considerations above, it is doubtless that Article 4.5 of the 2012 CCBC Arbitration Rules is a remarkably important device for the modernization and internationalization of CCBC arbitration, besides providing it with more legal certainty and efficiency. Furthermore, it also prevents the waste of time and resources in cases where there is a clear and undeniable defect related to the existence, validity or effectiveness of the arbitration agreement.

As French scholars and courts have already repeatedly acknowledged, these advantages justify and legitimate the *prima facie* verification by the arbitral institution, regardless of the modulation of the competence-competence principle that it represents. A serious and rigorous verification will, as a rule, favor, whenever possible, the powers of the arbitral tribunal to address any matters involving its jurisdiction and the arbitrability of the dispute, and will eventually contribute to a solid and flawless arbitration.

It is, therefore, an important and pioneering innovation that, as stated before, tends to enrich the arbitral practice not only in the context of CAM/CCBC, but also in Brazil.

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54 See also Frederico José Straube, "Uma primeira análise do novo Regulamento do CAM/CCBC", Revista de Arbitragem e Mediação, No. 32, Jan./Mar. 2012, pp. 239-240.

4.6. The Secretariat of the CAM/CCBC will inform the Parties and the arbitrators of the appointments made. At the same time, the arbitrators who are appointed will be asked to fill out CAM/CCBC's Conflict of Interest and Availability Questionnaire, referred to simply as the Questionnaire, within ten (10) days.

4.6.1. The Questionnaire will be prepared by the CAM/CCBC's Executive Committee, together with the Advisory Committee. Its purpose will be to gather information about the arbitrators' impartiality and independence, as well as time availability and other information related to their duty of disclosure.[55]

It is a duty of the Executive Secretariat to inform the parties and the arbitrators about appointments that have been made. This is made through a Notice of Appointment.

The Notice of Appointment sent to the Arbitrators is accompanied by the *CAM/CCBC's Conflict of Interest and Availability Questionnaire* ('Questionnaire'), which is intended to assess, through the arbitrators' answers, their independence and their impartiality. (The full Questionnaire is available in Annex I.)

These are key issues in arbitration, especially in international ones. In theory, the arbitral tribunal should be formed by neutral third parties, which should have no relationship with the parties. However, as the arbitration practice is still formed by a 'small world' of practitioners and arbitrators, it is quite common to verify some relationship between arbitrators, parties and/or their lawyers.

When a relationship is identified, we must assess whether there is a conflict of interest.

A conflict of interest in an arbitration proceeding, in general terms, constitutes a fact or a circumstance in which a party who is in the position of deciding a case has a material interest in the outcome of the case. This can be an actual conflict of interest – i.e., the arbitrator holds the majority of the shares of a company that is party to the arbitration; or a conflict inferred by the circumstances.[56]

For this reason, before filling the Questionnaire, the appointed arbitrator has an obligation to read the CAM/CCBC Code of Ethics and to commit himself to observing it. It is also expected that he/she should disclose any circumstance that may impact his/her independence and impartiality, or any fact that may be considered a conflict of interest.

As there are a wide variety of situations that could amount to a conflict of interest, it is expected that at least a situation inserted in either the Red List or the Orange List of the

55 Comments by Bryan Longo and Napoleão Casado Filho.

56 Leela Kumar, The Independence and impartiality of Arbitrators in International Commercial Arbitration. Electronic copy available at: <http://ssrn.com/abstract=2428632>. Access on 20 June 2015.

IBA Guidelines on Conflict of Interest in International Arbitration[57] should be disclosed by the arbitrator when answering the Questionnaire.

This obligation is related to the common understanding that the arbitrator shall not only be independent and impartial but also seem independent and impartial.[58]

Another issue of utmost importance is the time availability of the arbitrator, especially in the Brazilian context.

In some countries, one of the expected benefits parties desire when they choose arbitration as the mechanism for their dispute resolution is to avoid the time-consuming and never-ending procedures of their national courts. Actually, there is a general expectation that arbitration proceedings shall run in a time-efficient way, avoiding unnecessary costs to the parties and solving, as soon as possible, their conflict.

Thus, arbitrators shall commit themselves to the proceedings, affirming that they have "time and effort required to satisfy the expectations of the parties, thereby warranting celerity in processing the proceeding and preventing the unduly increase of expenditures." This time availability is one of the prerequisites for performing the role of arbitrator under the CAM/CCBC Code of Ethics (Provision 2).

Lastly, it should be understood that failure to fill out the Questionnaire would constitute a refusal by the arbitrator of his/her appointment. In this case, and if no alternate arbitrator has been chosen, the party that appointed the arbitrator (or the party in the name of whom the appointment was made) would be granted ten additional days to make a new appointment, analogously to Article 4.10.

4.7. The answers to the Questionnaires and any material facts will be sent to the Parties, after which they will have ten (10) days to submit comments.[59]

After the arbitrators answer the Questionnaires, those answers, accompanied by all material facts provided by the arbitrators, are sent to the parties. Most importantly, the résumés of

57 An important difference between those Guidelines and the Questionnaire is that the second does not provide a time limit for disclosure, meaning that relevant information that extrapolates the IBA Guidelines' 3-year period must also be revealed to the parties.

58 We suggest the reading of: Emilio Cárdenas and David W. Rivkin, "A Growing Challenge for Ethics in International Arbitration", in Gerald Aksen, Karl-Heinz Böckstiegel, Michael J. Mustill, Paolo Michele Patocchi and Anne Marie Whitesell (Eds.), Global Reflections on International Law, Commerce and Dispute Resolution – Liber Amicorum in Honour of Robert Briner, Paris: ICC, 2005, p. 195. You may also refer to: Julian Bordacahar, "The Double Requirement that the Arbitrator Be Independent and Impartial", in Global Arbitration News, 27 February 2015 – available at: <http://globalarbitrationnews.com/the-double-requirement-that-the-arbitrator-be-independent-and-impartial-20150227/>. And also: Caroline Verbruggen, "The Arbitrator – As a Neutral Third Party", in Young ICCA Blog, 22 January 2011 – available at: <www.youngicca-blog.com/the-arbitrator-as-a-neutral-third-party-by-caroline-verbruggen/>. Access on 20 June 2015.

59 Comments by Bryan Longo and Napoleão Casado Filho.

the appointed arbitrator from outside the List of Arbitrators are also submitted to the parties.

Article 4.7 establishes the parties' right to comment on the Arbitrators' Questionnaires.

It is important to note that such right to comment is broader than the right to object to the arbitrator's appointment. Comments would include requests for clarifications or corrections that the parties deem useful for an informed decision on the acceptance of the arbitrators.

For this reason, the parties may choose to comment, even if they do not have any intention to object to the appointment of one arbitrator.

Failure to comment, however, would constitute a failure to object, and clearly amount to a full acceptance by the silent party. For this reason, it must be noted that, although comments are not limited to objections, they definitely include those objections.

Once the comments are received by CAM/CCBC, they will be then submitted to the arbitrators for response, which will be made through a supplementary filling of the Questionnaire, which would again be submitted to the parties according to Article 4.7.

According to the revised answers to the Questionnaire, the parties may choose to make new comments or even to object to the appointment of an arbitrator.

It must be noted that the party's failure to comment on the first Questionnaire submitted by an arbitrator does not preclude the same party from commenting on new information presented at the second Questionnaire.

When it is clear that the party's comments (not including objections) are being used as delaying tactics, however, the President of CAM/CCBC should then refuse to submit those comments to the arbitrators, continuing with the proceedings under the authority of Article 2.6(f).

4.8. If the parties raise an objection related to the independence, impartiality or any material issue in regard to an arbitrator, the arbitrator involved will have ten (10) days to submit comments, after which the parties will have ten (10) days to present any challenge, which will be processed under article 5.4.[60]

After the arbitrators answers the Comments/Objections made by a party, the party will have another ten days to submit a challenge to the arbitrator's appointment. Any challenge based on the facts that have been known by the parties through the Questionnaire and the subsequent comments/objections shall be made within this time limit.

Failure to do so would constitute an acceptance of the arbitrator, and of all the relevant facts presented by him/her, by the defaulting party.

60 Comments by Bryan Longo and Napoleão Casado Filho.

However, if the arbitrator does not disclose a relevant fact and the parties only gain knowledge of it after the expiration of the time periods in Articles 4.7 and 4.8, the general rule for challenging an arbitrator set forth under Article 5.4 of the CAM/CCBC Rules applies, and the party will have fifteen days from the awareness of the fact to challenge the arbitrator.

In any case, a Special Committee shall decide the challenge, in accordance with Article 5.4.

Another important aspect of Article 4.8 is that it provides the right to make objections related to "any material issue," which, in our view, includes the question whether the arbitrator possesses "flawless reputation and recognized legal expertise."

For this reason, even if a person who is not a member of the List of Arbitrators has his/her appointment approved by the President of CAM/CCBC, this would not preclude the other party from raising an objection related to the arbitrator's reputation and/or legal expertise.

4.9. Upon expiration of the time periods in articles 4.7 and 4.8, the Secretariat of the CAM/CCBC will notify the arbitrators appointed by the parties, who must, within fifteen (15) days, choose the third arbitrator from among the members of the List of Arbitrators, to act as President of the Arbitral Tribunal.

4.9.1. The expression 'Arbitral Tribunal' applies without distinction to a Sole Arbitrator and an Arbitral Tribunal.

4.9.2. On an exceptional basis and based on a reasoned justification and approval of the President of the CAM/CCBC, the arbitrators chosen by the parties can appoint a person who is not a member of the List of Arbitrators as President of the Arbitral Tribunal.[61]

Article 4.9 establishes the time period of fifteen days for the Co-arbitrators to appoint the President of the arbitral tribunal (the arbitrator also commonly referred to as *Chair* or *Presiding Arbitrator).*

If no appointment is made within this time period, Article 4.12 applies, and the President of CAM/CCBC shall appoint such an arbitrator.

As a rule, the Presiding Arbitrator must be a member of the List of Arbitrators.

A person from outside the list may be chosen, however, as long as this appointment is approved by the President of CAM/CCBC, after it receives, from the arbitrators or from the parties, a reasoned justification on the need for such an appointment. Notwithstanding, it is understood that the President of the arbitral tribunal should have legal expertise, especially to guarantee that any award rendered would be enforceable under the relevant applicable laws.

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61 Comments by Bryan Longo and Napoleão Casado Filho.

In this case, Article 4.4.1 shall also apply, and a résumé of the President of the arbitral tribunal will also be submitted to the parties, together with the Questionnaire, as established in Article 4.11.

Finally, Article 4.9.1 provides an important interpretation rule, applicable to all Articles of the CAM/CCBC Rules. In other words, the rule states that the expression 'arbitral tribunal' should be replaced by the expression 'sole arbitrator' whenever the arbitration proceedings are to be conducted by a single person.

For this reason, it is understood that every Article applicable to arbitration proceedings under an arbitral tribunal shall also be applicable to proceedings under a sole arbitrator, with the exception of Article 4.4 and Articles 4.6 and 4.7, to the extent that those Articles deal with the appointment of Co-Arbitrators. (The Questionnaire/Comments mechanism shall apply normally.)

4.10. In the event of a successful challenge to or the resignation of an appointed arbitrator, the Secretariat of the CAM/CCBC will notify the party to make a new appointment within ten (10) days.[62]

Article 4.10 is very clear and straightforward. It establishes the time period for the appointment of a substitute arbitrator by the party whose chosen arbitrator has been successfully challenged.

Question may arise whenever such party had previously appointed an alternate arbitrator. In our view, the alternate arbitrator choice remains effective throughout the entire arbitration proceeding.

For this reason, the Executive Secretariat would first proceed with the procedure of Articles 4.6 through 4.8 with the alternate arbitrator and, only if this person is not confirmed as a party to the arbitral tribunal would Article 4.10 apply.

4.11. The Secretariat of the CAM/CCBC will inform the Parties and the arbitrators regarding the appointment of the arbitrator who will act as President of the Arbitral Tribunal, requesting that the appointed arbitrator state his or her acceptance in the manner and by the time provided for in article 4.6.[63]

The appointment of the President of the arbitral tribunal is subject to the same procedure to which the appointment of the Co-Arbitrators is submitted.

Although Articles 4.7 and 4.8 are not expressly referred to in Article 4.11, it is quite clear that those are part of the "manner and time provided for in article 4.6."

62 Comments by Bryan Longo and Napoleão Casado Filho.

63 Comments by Bryan Longo and Napoleão Casado Filho.

To this extent, the President of the arbitral tribunal shall not only fill the Questionnaire under Article 4.6, but shall also be subjected to comments by the parties under Article 4.7 and may be challenged by any party under the same reasoning of Article 4.8.

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.[64]

Article 4.12 provides a default rule that applies whenever there is a failure on the appointment of an arbitrator in an arbitral tribunal (the rule for Sole Arbitrator is established in Art. 4.13), regardless of whether it is a Co-Arbitrator or the President of the arbitral tribunal.

It should be noted that this rule is quite different than the rule provided in Article 4.16 of the Rules, as Article 4.12 applies only in arbitration proceedings between two parties – one claimant and one respondent.

For this reason, there is no doubt that an award rendered through the application of Article 4.12 would be fully recognizable and enforceable, despite the fact that only one party actually appointed its own arbitrator.

First, no connection could be made between this hypothetical case and the famous Dutco case.[65] Not only did Dutco deal with a complex arbitration, with multiple parties appearing as respondents, but also the court decision that set aside Dutco's award was not based on the presumption that each party had to have the right to appoint its own arbitrator, but actually came to the conclusion that the parties should receive "equal treatment" throughout the formation of the arbitral tribunal (see Art. 4.16 for more insight on the Dutco case).

Article 4.12 provides no unequal treatment. It provides a default rule that allows the arbitration to proceed whenever a party fails to appear in the proceedings or when a party fails to appoint an arbitrator under Article 4.4.

Furthermore, if the parties agreed on the CAM/CCBC rules, then the Rules are a part of their own arbitration agreement. For this reason, giving effect to Article 4.12 is the same as giving effect to the parties' will, expressed in their agreement.[66]

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64 Comments by Bryan Longo and Napoleão Casado Filho.

65 Cass. 1e civ., 7 January 1992, *B.K.M.I v. Dutco*, 1992 Bull Civ. I; English translation available at XVIII Y.B. Com. Arb. 140 (1993); 7 Int'l Arb. Rep. B1 (Feb. 1992).

66 As Gary Born states, while dealing with the hypothesis of an arbitration agreement that allowed the other party to nominate both Co-arbitrators in case the opposing party failed to appoint his own arbitrator, "such arrangements grant both parties the same opportunities to appoint an arbitrator, subject to the same consequences if they fail to do so" (International Commercial Arbitration, Kluwer Law International, 3rd Ed., 2014, p. 1691).

Apart from an allegation that the party was not duly notified of the arbitration proceedings, and that therefore Article 4.12 was unduly applied, no argument may be raised that Article 4.12 provides unequal treatment to the parties.

4.13. If the arbitration agreement states that the arbitration proceedings will be conducted by a sole arbitrator, the sole arbitrator must be appointed by agreement between the parties, within fifteen (15) days from notification by the Secretariat. Upon expiration of this time period, if the parties fail to appoint the sole arbitrator or to agree on his or her appointment, the President of the CAM/CCBC will appoint the sole arbitrator, with observance of article 4.12.

4.13.1. The parties can freely appoint the sole arbitrator. However, if a person who is not a member of the List of Arbitrators is appointed, the appointment must be accompanied by the person's résumé, which will be submitted for the approval of the President of the CAM/CCBC.

4.13.2. The commencement and conduct of an arbitration with a sole arbitrator will follow the same procedures under these Rules as for an arbitration conducted by an Arbitral Tribunal.[67]

As established by Article 4.13.2., the commencement of the Arbitration with a sole arbitrator shall follow the same procedures under the Rules as it would be followed in a case with an arbitral tribunal. Of course, some adjustments must be made.

First and foremost, Article 4.13 provides a substitute version of Article 4.4 for cases where parties have agreed on a sole arbitrator. Instead of notifying both parties so that each party appoints its own Co-arbitrator, the parties shall be notified under Article 4.13 to jointly appoint the sole arbitrator.

If they successfully do so, then the procedure goes directly to Article 4.11. In any event, the parties' right to an independent and impartial arbitral tribunal is safeguarded by Article 5.4.

This does not mean, however, that the President of CAM/CCBC must confirm the arbitrator jointly appointed by the parties. Whenever the sole arbitrator is selected from outside the List of Arbitrators, the President of CAM/CCBC must approve such appointment.

As stated in the Comments for Article 4.4, the freedom of arbitrator selection within the CAM/CCBC Rules is governed by the Rules and controlled by the President of CAM/CCBC, in an effort to provide a guarantee of quality to the arbitration proceedings.

If the parties' appointed arbitrator is not approved, parties should have another chance at choosing their sole arbitrator.

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67 Comments by Bryan Longo and Napoleão Casado Filho.

Only if the parties do not agree on a name for their sole arbitrator, regardless of whether it is their first round of selection or their fifth, may the President of CAM/CCBC intervene and directly select the sole arbitrator under Article 4.13.

Arbitration is a creature of contract, fully based on party autonomy. Therefore, while the parties are in agreement, their agreement should be observed to the maximum possible extent. Under these rules, this should mean allowing them an extra round of arbitrator selection.

In exceptional cases, however, where the parties keep on insisting on nonapprovable arbitrators, the President of the CAM/CCBC should, in our view, select the arbitrator and submit such selection to the parties. Of course, this is a clearly hypothetical scenario.

Proceeding to the next step, whenever the President of CAM/CCBC selects the sole arbitrator, Articles 4.6 to 4.8 shall apply.

Not only does this guarantee that the parties are fully informed on the relevant facts about their arbitrator, but it is also more time efficient to have a possible challenge made before the actual proceedings begin, rather than halting them further down the road to analyze the arbitrator's independence and impartiality.

4.14. The Secretariat will notify the arbitrators to sign the Statement of Independence within ten (10) days, which will demonstrate formal acceptance of the arbitrators' duties, for all purposes, and the parties will be notified for the preparation of the Terms of Reference.[68]

The signature of the Statement of Independence is a very important step in the Arbitral proceedings under CAM/CCBC Rules. After this document is signed, the arbitrator is formally committed to the proceedings and to the CAM/CCBC Code of Ethics.

The legal consequence of this document is that the arbitrator assumes his/her duties, and, from then on, the relevant steps from the proceedings will be conducted by the arbitrators themselves, with the assistance of CAM/CCBC's Secretariat.

It should be noted that under the Brazilian Arbitration Act, the acceptance by the arbitrators is considered to be the actual moment when the arbitration proceeding is commenced, which may be relevant for matters of time limitations.[69] For arbitrations seated in Brazil, and administered by CAM/CCBC, this step would occur with the signature of the Statement of Independence.

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68 Comments by Bryan Longo and Napoleão Casado Filho.

69 Brazilian Arbitration Act (Law No. 9.307/1996), Art. 19: "The arbitration shall be deemed to be commenced when the appointment is accepted by the sole arbitrator or by the arbitrators, if several."

4.15. In proceedings in which one of the parties has its head office or domicile abroad, either of them can request that the third arbitrator be of a nationality different from those of the parties involved. The President of the CAM/CCBC, with the Advisory Committee being heard, will evaluate the necessity or convenience of granting the request in each particular case.[70]

The provision of Article 4.15 is very important to the internationalization process the Center has passed through in the last ten years. It may be noted that there was no such provision in the 1998 CAM/CCBC Rules.

Nationality, by itself, is not a valid *criterion* for undermining the parties' confidence on the independence and impartiality of the arbitrators. However, some parties may not trust an arbitrator from the same nationality as one of the opposing parties.

Although such a request is submitted to the President of the CAM/CCBC (with prior hearing from the Advisory Committee), it is highly probable that the appointment will be directed to an arbitrator from a nationality different from that of the parties involved.

After all, if nationality is an important issue to that party, the arbitration center shall make every effort to give confidence to the parties and legitimacy to the arbitral tribunal.

Considering the CAM/CCBC List of Arbitrators, this should not be a difficult task, as there are plenty of highly respected international arbitrators from over fourteen different nationalities.

4.16. In arbitration cases with multiple parties as claimants and/or respondents, if there is no consensus regarding the appointment of an arbitrator by the parties, the President of the CAM/CCBC shall appoint all the members of the Arbitral Tribunal, designating one of them to act as President, with observance of the requirements of article 4.12 of these Rules.[71]

Article 4.16 of the Rules deals with the issue of multiparty arbitration, i.e., cases in which there are two or more named parties on either one or both sides of the dispute. About this subject, it has been said that "irrespective of the attention that the topic has already received, it continues to fascinate and to challenge practitioners, courts and arbitral institutions ... [in part because] multiparty arbitration is not a single subject but a multiplicity of different and continually evolving topics."[72]

Of all the different topics that may arise on the subject of multiparty arbitration, Article 4.16 deals specifically with the constitution of the arbitral tribunal in such cases. In fact,

70 Comments by Bryan Longo and Napoleão Casado Filho.

71 Comments by Eduardo Ono Terashima and Rafael Villar Gagliardi.

72 Eric A. Schwarts, "Concluding Remarks", in Bernard Hanotiau and Eric A. Schwartz (Eds.), ICC Dossiers VII: Multiparty Arbitration, Paris: ICC Services Publications Department, 2010, p. 235.

one fundamental aspect of the subject of multiparty arbitration is that of the constitution of the arbitral tribunal. It is a matter that challenges scholars, practitioners, arbitrators and arbitral institutions and, until this date, has yet to be given an acceptable comprehensive solution.

On 7 January 1992, the French *Cour de Cassation* issued a ruling that reverberated worldwide. With the clear intention to create a precedent, it set aside an award resulting from proceedings initiated by Dutco against B.K.M.I. and Siemens, the three of them having participated in a consortium to build a cement factory.

Dutco initiated arbitration proceedings and appointed one arbitrator, according to the applicable ICC Rules. Respondents were ordered by the ICC to jointly appoint one arbitrator, in spite of the parties' objections, based on the view that their interests were not aligned and that this would entail an unbalanced treatment to the parties, since Dutco had the opportunity to appoint one arbitrator. The arbitral institution appointed the Presiding Arbitrator. The tribunal later confirmed the decision of the ICC, holding that it had been validly constituted.

B.K.M.I. and Siemens challenged the award before French courts, arguing that nothing in the applicable rules forced them to be involved in multiparty proceedings and that the arbitral institution's decision, confirmed by the decision of the arbitral tribunal, deprived them of their fundamental right to participate in the constitution of the tribunal, treating parties unequally in connection with such right.

Although the lower court did not, the *Cour de Cassation* agreed with the claimants and set aside the award. It framed the rule that "the principle of equality in the designation of the arbitrators is a matter which concerns public policy, which can only be waived after the dispute has arisen."[73]

The Dutco case, as it came to be known and referred to internationally, called the attention of the arbitral community to the matter of multiparty arbitration, a phenomenon that is increasingly common in arbitration, in view of the growing complexity of global and business relations, directly reflected in agreements that provide for arbitration as the dispute resolution method.

However, as Fouchard, Gaillard and Goldman indicate, some aspects of the Dutco case decision must be borne in mind. The institution administering the proceedings had alternatives to the decision of ordering both respondents to jointly appoint an arbitrator.[74] It could have ordered the claimant to segregate its claims and to start proceedings against each of the respondents separately, thus avoiding the need for a joint appointment. It could also have asked the claimant to waive its right to appoint an arbitrator, so that the institution

73 Cass. 1e civ., 7 January 1992, *B.K.M.I v. Dutco*, 1992 Bull Civ. I; English translation available at XVIII Y.B. Com. Arb. 140 (1993); 7 Int'l Arb. Rep. B1 (Feb. 1992).

74 Emmanuel Gaillard and John Savage (Eds.), Fouchar Gaillard Goldmand on International Arbitration, The Hague: Kluwer International, 1999, p. 547.

itself could appoint the three arbitrators that would seat in the tribunal. Both alternatives would have found support in the applicable rules.[75] Moreover, contrary to some criticism made over the last years, the Dutco ruling did not establish that each party in arbitration had to have the right to appoint 'its' own arbitrator. There is no such conclusion in the written opinion of the French High Court. The *Cour de Cassation* established the rule that parties must be given absolute equal treatment when it comes to the constitution of the tribunal and that any waiver to the right to participate in the constitution of the tribunal must be exercised after the dispute has arisen.[76]

This is the principle framed by Article 4.16 of the CAM/CCBC Rules. It determines that, upon the presence of more than one party on either the claimant's and/or the respondent's side, the parties will be given the option to agree in the appointment of the arbitrators. If such an agreement is not possible, it will then be incumbent on the President of the CAM/CCBC to appoint all the members of the tribunal, also indicating the one that will serve as President.

The President will do so subject to the provisions of Article 4.12 of the Rules, meaning that the arbitrator(s) will be chosen from the List of Arbitrators of the CAM/CCBC.

In case the arbitration agreement provides for a sole arbitrator, the same principle will apply, as it stems from the joint interpretation of Articles 4.13 and 4.16. Parties will be given the right to jointly and in agreement appoint the sole arbitrator. Should they be unable to do so for any reason, it will be incumbent on the President of the CAM/CCBC to appoint the sole arbitrator, selecting from the List of Arbitrators of the institution.

Redfern and Hunter make reference to the risk of an award issued by a tribunal constituted for the parties, rather than by the parties, being refused recognition and enforcement abroad under Article V(1)(d) of the New York Convention, according to which exequatur may be refused on proof that "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."[77]

The argument would be that, according to the principle laid on the Dutco case, the agreement of the parties referring to the right to appoint an arbitrator and, failing the agreement of the parties, the automatic loss of such right, that would pass on to the arbitral institution, would be contrary to public policy, as it could be construed as a waiver exercised before the dispute had arisen.

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75 The case was subject to ICC Rules that, at the time, required the International Court of Arbitration to make every effort "to make sure that the award is enforceable at law" (Art. 26).

76 Emmanuel Gaillard and John Savage, op. cit., p. 548.

77 Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, Redfern and Hunter on International Arbitration, Oxford: Oxford University Press, 2009, pp. 151-152. The Model Law has a similar provision, Art. 36(1)(A)(iv).

Persuasive as it may be, it seems that the international public policy that is referred to in the New York Convention comprises critical issues that are, to a certain level, common to the global community and that reflect paramount values highly regarded worldwide. Therefore, it would not encompass the issue of validity of the waiver of the right to appoint an arbitrator before the dispute has arisen.

Lex arbitrii may also play a relevant role in this context. The validity and enforceability of the contractual provision by which the parties would transfer the right to appoint the members of the arbitral tribunal to the arbitral institution, i.e., the President of the CAM/CCBC, may be analyzed through the content of the *lex arbitrii*.

In Brazil, Federal Act 9.307/96, the Brazilian Arbitration Act (BAA), does not seem to support the argument of the invalidity of an arbitration agreement provision reflecting the rule provided for in Article 4.16. Much to the contrary, Article 5 of the BAA states that

> If the parties, in the arbitration agreement, make reference to any institutional arbitration body or specialized entity, the arbitration will be instituted and processed according to its rules, and parties can likewise determine in the agreement itself or in a separate document, the agreement mechanism for the institution of the arbitration.[78]

In addition, Article 13, §3, of the BAA, provides that "parties may agree to determine the process to choose the arbitrators or adopt the rules of an institutional arbitration body or specialized entity."[79]

This view was confirmed in *CEC III v. CCCO, EIT, Energ and Themag*, decided by the Court of Appeals of the State of Rio de Janeiro (*CEC III Case*).[80] The case will be reviewed in more detail later on, in the commentary to Article 4.20. However, the judgment by the lower court and the written opinion by the Court of Appeals of the State of Rio de Janeiro take the view that the right to participate in the constitution of the arbitral tribunal is not absolute and that, therefore, it would be subject to being waived, even before the dispute arises.

Both provisions support the conclusion that parties may, before the dispute has arisen, agree to transfer the right to appoint the arbitrators to the arbitral institution, failing an

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78 In the original Portuguese version: "Art. 5º Reportando-se as partes, na cláusula compromissória, às regras de algum órgão arbitral institucional ou entidade especializada, a arbitragem será instituída e processada de acordo com tais regras, podendo, igualmente, as partes estabelecer na própria cláusula, ou em outro documento, a forma convencionada para a instituição da arbitragem."

79 Free translation of the original Portuguese version: "Art. 13 (...)
§3º As partes poderão, de comum acordo, estabelecer o processo de escolha dos árbitros, ou adotar as regras de um órgão arbitral institucional ou entidade especializada."

80 Case No. 0301553-55.2010.8.19.001, Court of Appeals of the State of Rio de Janeiro, 9th Civil Panel, 21 May 2013.

agreement to have an appointment that would preserve party autonomy and the principle of equality in the constitution of the arbitral tribunal.

4.17. The parties will sign the Terms of Reference together with the arbitrators, a representative of the CAM/CCBC and two witnesses.[81]

Articles 4.18 and 4.19 of the Rules deal with the substantial matters concerning the Terms of Reference. Article 4.17 only regulates the formal requirements of this document.

One important aspect of Article 4.17 is the legal nature of a contract signed by two witnesses under Brazilian Law. Brazilian Code of Civil Procedure characterizes such a contract as an enforceable instrument.

For this reason, having two witnesses' signatures on the Terms of Reference guarantees that the obligations of each party will be observed, as performance of such obligations may be directly requested by State courts.

4.18. The Terms of Reference will contain:

(a) ***Name and details of the parties and arbitrators;***
(b) ***Seat of arbitration;***
(c) ***The transcription of the arbitration agreement;***
(d) ***If applicable, authorization for the arbitrators to decide ex aequo et bono;***
(e) ***The language in which the arbitration will be conducted;***
(f) ***Subject matter of the dispute;***
(g) ***Applicable law;***
(h) ***The claims of each of the parties;***
(i) ***Amount in dispute;***
(j) ***Express acceptance of liability for the payment of the administrative costs for the proceedings, expenses, experts' fees and arbitrators' fees upon request of the CAM/CCBC.***[82]

Definition and functions of the Terms of Reference. The Terms of Reference is the core document of an arbitration since it defines and sets forth the subject matter and the rules to the whole arbitration proceeding.

The Terms of Reference does not replace the arbitration agreement; instead, it offers parties the chance to reaffirm its will to submit their claim to an arbitral tribunal. In fact, generally, the Terms of Reference is a more specific document than the arbitration agreement.

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81 Comments by Bryan Longo and Napoleão Casado Filho.
82 Comments by Eduardo Ono Terashima and Rafael Villar Gagliardi.

In this sense, the Terms of Reference offers the parties the opportunity to fill in possible legal gaps, which may not be expressly addressed in the applicable law or in the CAM/CCBC Rules.

The Terms of Reference, by providing a strict provisional timetable, stipulating dates to virtually all the submissions of the parties, assures the adequate flow of proceedings, which shall be fast and efficient. As one is aware, flexibility and time are important issues that parties look for in arbitration,[83] a circumstance that highlights the role that the Terms of Reference has been playing within international arbitration proceedings. As already stated, the Terms of Reference is a means employed by arbitral tribunals to ensure fast and efficient development of the arbitration.

The execution of the Terms of Reference. At the outset of an arbitration, parties must submit their request for arbitration, and arbitrators must confirm their impartiality and independence to appear and act on the proceeding. Thereafter, the arbitral tribunal triggers the discussion upon the signing of the Terms of Reference by requesting the parties to submit a draft of such a document with their preliminary comments regarding the main issues discussed in the arbitration. During such negotiation, parties to the Terms of Reference will have the opportunity to discuss issues related to the subject matter of the arbitration, the rules and procedural issues applicable to the case, the language, the seat, costs involved, among others.

After this negotiation stage, the arbitral tribunal consolidates a preliminary version of the Terms of Reference and schedules a specific meeting for its signing by mutual consent of the parties and the arbitral tribunal.

Mutual consent of the parties is of particular importance since it increases the likelihood of recognition and enforcement of the award. In other words, by signing the Terms of Reference, parties ratify their consent to arbitration itself, confirming the party autonomy principle. At this stage, more importantly, parties confirm that all the acts executed by the parties, the arbitral institutions and the arbitral tribunal so far, strictly comply with the law.

This context favors the arbitral award since parties, after signing the Terms of Reference, would be precluded from challenging the validity of the arbitral award in the future on such grounds. For instance, assuming that the arbitral tribunal fully complied with the Terms of Reference, a party could not allege that it did not have the opportunity to present its case or that the arbitral tribunal breached the due process of law.

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83 See more in Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, op. cit., pp. 31-43.

4.19. 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.[84]

Article 4.19 of CAM/CCBC Rules is clear and sets forth an important principle of international arbitration, the party autonomy principle. In this context, once the parties have signed a valid arbitration agreement, expressly opting to have any dispute arising from their main agreement resolved by an arbitral tribunal, they will not be entitled to resile from it and will have to comply with a final and binding arbitral award.

It is interesting to note that Article 4.19 of CAM/CCBC is clear when referring to a "party regularly convened," in accordance with the Article V, I (b) of the New York Convention.[85] Such a provision authorizes national courts to refuse the enforcement of an arbitral award in case the party against whom the enforcement is sought was not given proper notice of the arbitration proceeding.

Another issue raised by Article 4.19 of CAM/CCBC is the comparison between the Terms of Reference and the arbitration agreement. In this sense, although the Terms of Reference is more specific than the arbitration agreement, when drafted correctly and duly signed by all the parties involved, the arbitration agreement alone suffices to bind parties to arbitration. In other words, the party who executed a valid arbitration agreement does not have to sign the Terms of Reference to be bound to arbitration.

Naturally, when a party is absent from the arbitral proceeding or has refused to sign the Terms of Reference, for the sake of the validity of the award, the arbitral tribunal must strictly follow the procedural rules applicable to the case. The arbitral tribunal must also carefully analyze the case, especially the evidence and arguments submitted by the party, to assure the rendering of a valid arbitral award at the end of the arbitration.

4.20. If a request for the commencement of an Arbitration is submitted and has the same purpose or same cause of action as an arbitration currently proceeding at the CAM/CCBC or if the same parties and causes of action are present in two arbitrations, but the subject matter of one, because it is broader, includes that of the others, the President of the CAM/CCBC can, upon request of the parties, up to the time the Terms of Reference are signed, order joinder of the proceedings.[86]

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84 Comments by Eduardo Ono Terashima and Rafael Villar Gagliardi.

85 Art. V, I: "Recognition and Enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:"
(...)
"(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."

86 Comments by Eduardo Ono Terashima and Rafael Villar Gagliardi.

The problem of multiparty arbitration is dealt with in Article 4.16, and consists in facing two or more parties on either one or on both sides of the dispute. A different and more complex issue arises from the existence of different proceedings that may or may not involve the same parties and that may stem from the same contracts or even from connected or interdependent contracts.

Consolidation is generally understood and dealt with in terms of merging, under the authority of one single arbitrator or tribunal, two or more different proceedings, initiated separately and that share, to a certain extent, issues of fact and/or law. This is the meaning given to the term in Article 10 of the ICC Rules.[87] It entails the issue of determining whether and when it is desirable or even possible to consolidate parallel arbitration proceedings under one single procedure, presided by one single arbitral tribunal, that would have the authority to decide all the claims asserted by the parties. Nonetheless, Bernard Hanotiau points out that consolidation may also have a broader meaning, namely in the United States of America. In that country, consolidation also deals with the hypothesis of merging claims deriving from different contracts into one 'consolidated' arbitration procedure. As it becomes clear, there is some overlap with the notion of group of contracts.[88]

On the other hand, reunion of proceedings entails preserving each independent and separate procedure as originally filed, but submitting all of them to the authority of one single arbitrator or tribunal. It represents a middle ground solution between the perils of consolidation, as explained later in this section, and the threats posed by allowing related arbitration proceedings to be entertained and decided by different tribunals, generating loss of efficiency and mainly the risk of having conflicting decisions that may cause further discussions and challenges before national courts.

It is submitted that Article 4.20 refers to joinder of proceedings with the meaning of reunion, as described above. It differs from the use of the term joinder by other rules, such as the ICC Rules. According to Article 7.1 of the ICC Rules, joinder refers to the application made by a third party not formally named in the arbitration agreement to join an ongoing

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87 "Art. 10: Consolidation of Arbitrations. The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:
a) the parties have agreed to consolidation; or
b) all of the claims in the arbitrations are made under the same arbitration agreement; or
c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.
In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed. When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties."

88 Bernard Hanotiau, Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions, The Hague: Kluwer Law International, 2005, p. 179.

arbitration. For the purposes of ICC proceedings, "it means the situation where there is an arbitration underway and a party to that arbitration seeks to add a new party, that is to say, a party that was not named as such in the original request for arbitration."[89]

It is increasingly common to find disputes that do not fall within the traditional structure of one party against the other, discharging claims against each other. This is all the more true in arbitration, which tends to attract the most complex transactions and deals, which also means attracting the most structurally complex disputes as well. Construction projects constitute a clear example of such complexity. Disputes that may involve the owner, contractor, subcontractor and even insurance companies and that may or may not be better served if heard together are far too numerous to be treated as exceptional.

Unfortunately, parties often fail to deal with this issue when drafting arbitration agreements and, when they do deal with it, the number of possible situations that would need to be dealt with is so overwhelming that it would be difficult, if not impossible, to draw one single general principle or rule. Also unfortunately, it does not take long until (at least) one party realizes that it will be better off if joinder is denied or if proceedings are not consolidated, by reasons of either cost or strategy.

In all such cases, there is a general and even intuitive understanding that having all the claims resolved in one single dispute or at least by one single jurisdictional body would be more efficient in terms of time and costs. This understanding comes from the fact that, ordinarily, concentrating different claims in one single dispute tends to reduce attorney fees, arbitrators' fees, witness preparation and document collation efforts, travelling and lodging expenses, etc. Additionally, it would have the perceived advantage of avoiding the risk of conflicting decisions.[90]

However, consolidation and joinder pose disadvantages as well. First of all, reducing the number of arbitration proceedings may be cost and time effective in general. However, this does not hold true, for instance, for the party that has one single claim against one single party. For this specific party, the proceedings held with multiple claimants and/or respondents and multiple claims tend to generate a more complex, expensive and time-consuming dispute. Not only that, this more complex dispute creates the challenges germane to multiparty arbitrations, as pointed out in the commentary to Article 4.16, especially regarding the constitution of the arbitral tribunal.[91] There is also the matter of confidentiality, which may be breached, even on a small scale, if different parties are allowed to

89 Simon Greenberg, José Ricardo Feris and Christian Albanesi, "Consolidation, Joinder, Cross-Claims, Multiparty and Multicontract Arbitrations: Recent ICC Experience," in Bernard Hanotiau and Eric A. Schwartz (Eds.), ICC Dossiers VII: Multiparty Arbitration, Paris: ICC Services Publications Department, 2010, pp. 36 and 172.

90 Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, op. cit., p. 149; Gary B. Born, "International Arbitration: Law and Practice". The Hague: Kluwer Law International, Alphen aan den Rijn, 2012, p. 221.

91 Gary B. Born, op. cit., 2012, p. 222.

participate in a specific dispute that is being entertained in a confidential manner. Finally, parties and arbitrators involved in consolidated proceedings are commonly required to deal with harmonization of issues like seat of arbitration, applicable rules of law and allocation of costs.

National courts do not have to deal with this type of obstacles and with the dilemmas and conflicts that stem therefrom. There are many reasons that could justify this difference. Among them, two seem to stand out. First, contrary to arbitration, litigation in national courts is not based on party autonomy. It does not depend on consent.[92] Second, unlike what happens in arbitration, national courts are usually organized hierarchically and, therefore, access to one higher level with the superior authority necessary to resolve conflicts of jurisdiction between two equally empowered jurisdictional bodies is available. This was actually pointed out by the Court of Appeals of the State of Rio de Janeiro in the *CEC III* Case decision[93]:

> Whereas, in the concrete case, there are controversies that may involve a constitution of more than one arbitral tribunal (or panel), because there is no hierarchy or pre-established rules that may present solutions for the resisted issues, the definition of criteria that make it possible to assure that the parties are not deprived from their rights is imperative.

Before national courts, subject to limitations specifically provided for in each domestic legislation, it is generally possible to join additional parties or to consolidate separate sets of proceedings.[94] Procedural legislation provides, as a rule, mechanisms to avoid or mitigate the risks of conflicting decisions on the same issues of law or fact.[95]

In arbitration, consolidation and joinder constitute more challenging matters, because of the reasons pointed out above. This is why it is possible to find so many different views among scholars and different principles set forth in judicial precedents.

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92 The traditional notion of consent may be subject to be updated and adjusted to the needs of modern contract practice and global trade. For examples of such updated readings, see Bernard Hanotiau, "Consent to Arbitration: Do We Share a Common Vision?", in Arbitration International, vol. 27, No. 4, The Hague: Kluwer Law International, 2011, pp. 539-554.

93 Case No. 0301553-55.2010.8.19.001, Court of Appeals of the State of Rio de Janeiro, 9th Civil Panel, 21 May 2013. Free translation of the Portuguese original as follows: "Existindo, no caso concreto, controvérsias que podem envolver a constituição de mais de um tribunal (ou painel) arbitral, por inexistir hierarquia ou regras pré-estabelecidas que possam apresentar soluções para as questões resistidas, impõe-se a definição de critérios que possam garantir que as partes não sejam prejudicadas nos seus direitos."

94 Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, op. cit., pp. 149-150.

95 Brazilian Federal Rules of Civil Procedure ("Código de Processo Civil", Federal Act No. 5.869/73), dedicates several articles to the issue, inter alia: 103 through 106, 109, 265, IV, 267, V.

The UNCITRAL Model Law is silent on these issues, which it does not address. Therefore, the rule of thumb goes back to the matter of compatibility with the agreement to arbitrate.

National laws have dealt with the issue by generally empowering tribunals and, more commonly, national courts with the authority to order consolidation or joinder of proceedings. Although solutions given in each specific case may vary, there is a certain degree of uniformity in requiring the parties' agreement to order consolidation or joinder.[96]

The English Arbitration Act (1996) modified the Model Law to provide for the possibility of consolidation by order of tribunals, if parties have agreed to it.[97] The same rule applies to requests for concurrent hearings.

Hong Kong[98] and New Zealand[99] have also enacted legislation dealing with the matter. The same holds true for the Netherlands. Article 1.046 of the Dutch Code of Civil Procedure provides that

> If arbitral proceedings have been commenced before an arbitral tribunal in the Netherlands concerning a subject matter which is connected with the subject matter of arbitral proceedings commenced before another arbitral tribunal in the Netherlands, any of the parties may, unless the parties have agreed otherwise, request the President of the district Court in Amsterdam to order a consolidation of the proceedings.

Contrary to what came to be decided in both *The Government of the United Kingdom v. The Boeing Company* and in *Glencore, Ltd. v. Schnitzer Steel Products Co*, the leading cases that overturned the early tendency of the US Case Law to allow consolidation even absent consent of the parties, Dutch Law allows consolidation by the court even in such situations. Courts are not allowed to order consolidation only if the parties have expressly agreed to exclude consolidation of arbitration proceedings. It has been submitted by a minority of scholars[100] that in such cases, there may be an issue with enforcement of the arbitration award in foreign jurisdictions, under the 1958 New York Convention, because of the wording of Article V(1)(d), according to which recognition and enforcement of an award may be refused on proof that

96 Gary B. Born, op. cit., 2012, p. 223.
97 Section 35.
98 Hong Kong Arbitration Ordinance, Schedule 2, 2(1).
99 New Zealand Arbitration Act, Schedule 2, §2.
100 Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, op. cit., p. 158.

> the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

However, so long as parties have at least agreed to arbitration and to the same arbitral jurisdiction, there is solid and strong support for an award to be recognized and enforced by a foreign court.[101] Additionally, this issue will not arise if the arbitration agreement, either directly or by reference to rules chosen by the parties, provides for appointment of all members of the arbitral tribunal by the arbitral institution administering the proceedings, since this is the underlying issue when it comes to consolidation: in general, parties are deprived of the right to appoint an arbitrator, even though equal treatment remains unaltered, as none of the parties keeps such right, if the issue is properly managed by the administering institution.

Taking a more liberal view, certain states' statutes in the United States provide for consolidation regardless of consent of the parties and even when parties have expressly agreed to exclude such possibility, creating a type of public policy limit that would prevent parties from excluding the possibility of consolidation (and severance) of arbitration proceedings. This is the case of the State of Massachusetts:

> A party aggrieved by the failure or refusal of another to agree to consolidate one arbitration proceeding with another or others, for which the method of appointment of the arbitrator or arbitrators is the same, or to sever one arbitration proceeding from another or others, may apply to the superior court for an order for such consolidation or such severance. The court shall proceed summarily to the determination of the issue so raised... No provision in any arbitration agreement shall bar or prevent action by the court under this section.[102]

It is submitted that this approach is preempted by the United States' Federal Arbitration Act, which requires enforcement of the parties' arbitration agreement in accordance with its terms. It is also contrary to the 1958 New York Convention on Recognition and Enforcement of International Arbitration Awards, which contains the same requirement in Article V(1)(d), allowing the court of the country in which recognition and enforcement of a foreign award are being sought to deny such application in case the constitution of the arbitration tribunal or the arbitration procedure was not in accordance with the arbi-

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101 Albert Jan van den Berg, "Consolidated Arbitrations and the 1958 New York Arbitration Convention", Arbitration International, No. 2, 1986, p. 367; Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, op. cit., p. 158.

102 Mass. Gen. Laws Ann., C. 251, §2A. See Gary B. Born, op. cit., 2012, p. 226.

tration agreement or, in the absence thereof, of the law of the seat of the arbitration. Supporting this view, Stephen R. Bond emphasizes that

> while the policy-oriented goals of effective and efficient dispute resolution are highly appropriate from a systemic perspective, in a case-specific context they must yield to the clearly expressed will of the parties. To conclude otherwise is to make the best the enemy of the good and to threaten the foundation of consent upon which the international commercial arbitration system is based.[103]

It is established, at this point, that consolidation or joinder of parallel proceedings may be ordered by the court, as a result of an application made to that end. Courts of the State of New York have a long tradition of granting applications for consolidation of parallel proceedings that raised the same issues of fact or law.[104] Nonetheless, more recent precedents from the federal district courts seem to indicate that consent by the parties would be essential for a court to grant consolidation. This was the decision of the Court of Appeals of the State of New York, reversing the decision rendered by District Court for the Southern District of New York, disallowing consolidation. It held that consolidation of arbitration proceedings stemming from separate agreements was not permissible absent consent of the parties, regardless of the fact that such proceedings addressed the same issues of fact or law.[105]

Brazilian Case Law reveals one relevant precedent dealing with the issue of parallel arbitration proceedings, known as the *CEC III* case,[106] which has already been referred to in the commentary to Article 4.16 of the Rules.

Consórcio Empreendedor Corumbá III, was the owner of a power plant to be built in Brazil by a consortium of three companies – EIT (Empresa Industrial Técnica S.A.), Energ Power S.A. and Themag Engenharia e Gerenciamento Ltda. Three different arbitration

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103 Stephen R. Bond, "Dépeçage or Consolidation of the Disputes Resulting from Connected Agreements: The Role of the Arbitrator", in Bernard Hanotiau and Eric A. Schwartz (Eds.), ICC Dossiers VII: Multiparty Arbitration, Paris: ICC Services Publications Department, 2010, p. 36.

104 Hanotiau, Bernard, op. cit., p. 185.

105 The Government of the *United Kingdom v. The Boeing Company*. 998 F.2d 68 (2nd Cir. 1993). See also *Glencore, Ltd. v Schnitzer Steel Products Co.* 189 F.3d (2nd Cir. 1999). In this case, the court went to the point of considering that, in the absence of an agreement between the parties allowing consolidation, it lacked authority even to order joint hearings. The court reasoned that procedural rules that allowed such measure for "actions pending before the court" would not be applicable to arbitration proceedings.

106 Case No. 0301553-55.2010.8.19.001, Court of Appeals of the State of Rio de Janeiro, 9th Civil Panel, 21 May 2013. For a transcription of the lower court judgment, see Revista de Arbitragem e Mediação (RArb) n. 38, Jul-Set/2013, São Paulo: Revista dos Tribunais, pp. 426-434. For a detailed analysis of the *CEC III v. CCCO, EIT, Energ and Themag*, please see Camila Biral Vieira da Cunha, "Algumas reflexões sobre a decisão judicial que trata da reunião de procedimentos arbitrais multiparte em um mesmo painel arbitral da lavra da 7ª Vara Empresarial – TJRJ (caso CEC III vs. CCCO, EIT, Energ e Themag)" in Revista de Arbitragem e Mediação (RArb) No. 38, jul-set/2013, São Paulo: Revista dos Tribunais, pp. 425-442.

proceedings related to the EPC agreement were initiated. Two of them were multiparty arbitrations, and the remaining one was not. In the first two cases, parties were not able to appoint an arbitrator, as the whole tribunal would be appointed by the arbitral institution, according to the applicable rules. This meant that the cases would end up having different tribunals, for in the third case, parties were allowed to appoint arbitrators and, in all its appointments, the arbitral institution would not appoint arbitrators that had already been appointed by either one of the parties in any of the related proceedings, as this could generate allegations of unequal treatment or lack of impartiality.

CEC III applied for joinder of proceedings before the arbitral institution. The application was denied. Upon constitution of the second arbitral tribunal, CEC III applied for an injunction before Brazilian courts, in order to stay the proceedings. As for the merits of the case, CEC III requested that the Court order the reunion of the different proceedings (not their consolidation, which would entail merging three proceedings into one single procedure) that were to be heard by one single arbitral tribunal, the members of which were to be appointed by the arbitral institution.

The claim was granted by the Lower Court of the City of Rio de Janeiro, primarily on the grounds that the reunion sought by CEC III would avoid conflicting decisions and, therefore, would preserve the arbitration proceedings. The Court also held that the party's right to appoint an arbitrator is not absolute, because the Brazilian Arbitration Act (Federal Act #9.307/96) itself provides for situations in which it is incumbent on the court to appoint the arbitrator(s), as did the very rules chosen by the parties. The ruling was later upheld by the Court of Appeals of the State of Rio de Janeiro, which emphasized that, had CEC III sought to obtain consolidation, the claim would be inadmissible; the relief sought by CEC III was granted because it requested simply that the court order all the different proceedings to be heard before one single arbitral tribunal, to be appointed by the arbitral institution.[107]

Albeit some dissenting opinions and precedents, the requirement of agreement by the parties is in line with the general views of courts and scholars that have dedicated time to study the issue at hand. Given that consent is necessary, how can it be proven? What kind of consent must a party give? What is the applicable test to determine whether or not consent has been given (at an earlier stage, for instance) or even whether the legitimate expectation that consent would not be denied was created by the behavior of one of the parties or the relevant circumstances of the case?

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107 CEC III Case decision: "Lower Court judge drew a distinction between consolidation of arbitral proceedings (what would prevent intervention by the courts) and reunion of proceedings for judgment by the same arbitral tribunal (what would render the request by the plaintiff admissible by the courts)." Free translation of the Portuguese as follows: "Magistrado de primeiro grau que diferencia união dos procedimentos arbitrais (o que vedaria a interferência do Judiciário), de reunião de procedimentos para julgamento pelo mesmo painel arbitral (o que tornaria o pedido do autor possível de apreciação pelo Poder Judiciário)."

Naturally, the relevant facts and the conduct of the parties in each case will be important to allow a conclusion regarding whether or not consent was given (or ought to be given). This notwithstanding, some general comments are still necessary. Consent may be given either before or after the dispute arises – in the first case, by reference to the issue in the arbitration agreement or by simple reference to rules that deal with consolidation and/or joinder, and in the second case, by agreeing to or not opposing a request for consolidation or joinder, when called upon specifically to agree to or oppose such a request.

Consent may also be express or implied, as "there is no reason, however, that agreement to consolidation (or joinder/intervention) cannot be implied."[108] This peculiar situation raises the issue put by one court as follows: "the court may have 'no power to order consolidation ... if the parties' contract does not authorize it... but in deciding whether the contract does authorize it the court may resort to the usual methods of contract interpretation."[109] There will be a solid and convincing argument for an application for consolidation or joinder of claims based on the same arbitration agreement, inserted in the same underlying contract. Under normal circumstances and unless any specific issue arises, the fact that the parties' rights, obligations and claims stem from one and the same agreement may not imply an automatic authorization for consolidation or joinder in any situation, but it surely suggests that the tribunal has the power to rule on issues of consolidation and joinder.

Even application of substantive law would support the foregoing suggestion, by way of the application of rules such as the implied covenant of good faith and *venire contra factum proprium* doctrine (in legal systems with a Roman Law inheritance) and estoppel in its various forms (in Common Law countries). It is perfectly understandable that parties to one single underlying agreement containing one single arbitration agreement hold a legitimate expectation to have all of the claims arising out of such agreement decided jointly (inversely, a party cannot be said to be caught by surprise by consolidation or joinder in such a situation), and it is incumbent on the law to ensure, to the extent possible, that such an expectation is not lightly frustrated, i.e., that it does not conflict with a higher legal value or principle.

When the parties execute different underlying contracts containing different arbitration agreements, the situation is less clear. If the different arbitration agreements are identical or share at least the key elements of the dispute (number of arbitrators, seat of arbitration, applicable law, applicable institutional rules), there remains a strong argument in favor of an implied consent to consolidation and joinder. If, on the other hand, the same key issues differ between the various arbitration agreements, the stronger view would appear to be that parties indicated an implied exclusion of consolidation and joinder. After all, had it

108 Gary B. Born, op. cit., 2012, p. 225.

109 Connecticut Gen. Life Ins. Co. v. Sun Life Assur. Co. of Canada, 210 F.3d 771 (7th Cir. 2000).

been their common intent to allow consolidation or joinder, parties would have at least drafted similar arbitration agreements. Naturally and as already mentioned, these are guidelines that will be heavily influenced by the specifics of each case.

Article 4.20 empowers the President of the CAM/CCBC to grant applications to order joinder of proceedings in the following situations: (a) a new arbitration procedure commences, and it has the same scope or cause of action of a preexisting CAM/CCBC arbitration procedure; (b) parties to two or more existing CAM/CCBC arbitration proceedings and the cause(s) of action thereof are the same, but the scope of one is broader than the scope of the other(s), in such a way that claims asserted in the latter are contained in the framework of the former(s).

The cause of action comprises the fact or facts and the legal grounds upon which a certain claim is based. They constitute the foundation for the reliefs sought and, conversely, such reliefs, which reveal the scope of the claim, are the frame that must accommodate the award. Identifying the cause of action of a certain claim entails finding the answers to the following questions: why is such relief sought? What is the basis for such prayer for relief?

It is beyond any doubt that the scope of Article 4.20 consists in avoiding, so far as possible, the risk of having conflicting decisions and providing parties to parallel arbitration proceedings with a mechanism to expeditiously obtain joinder of such proceedings and enjoy the efficiency to be gained with such joinder, so long as the other requirements set forth in such a provision are also met.

For an application to be granted under Article 4.20, all the involved arbitration proceedings must be administered by the CAM/CCBC. The Rules do not provide for joinder of proceedings administered by different arbitration institutions, because such provisions would lack enforceability over any other institution. The same requirement can be seen in Articles 9[110] and 10[111] of the ICC Rules.

Another requirement consists in the fact that reunion by the President of the CAM/CCBC is admissible only if the Terms of Reference have not been signed in any of the proceedings. The reason for such a limitation is twofold. First, it stems from the fact that, upon execution of the Terms of Reference, the Tribunal has already been constituted and the dispute is stabilized, meaning that the claims have been asserted by the parties and procedural ground rules (i.e., the rules of engagement) have already been agreed upon. For the same reason, Article 4.21 of the Rules allows only for changes, modifications or amendments to the claims and causes of action until the Terms of Reference are executed.

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110 "Article 9: Multiple Contracts. Subject to the provisions of Articles 6(3)–6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules."

111 "Article 10: Consolidation of Arbitrations. The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where: (...)."

Second, and also in line with Article 4.21 of the Rules, once the Terms of Reference are executed, the authority of the President of the CAM/CCBC to decide requests for joinder, consolidation or reunion of proceedings ceases to exist, since the arbitral tribunal has already been constituted and empowered by the parties, also for the purposes of such applications, if admissible in the specific case. Therefore, such requests are to be decided by the arbitral tribunal, exercising its jurisdiction over the dispute. Only occasionally, when such matters arise early in the proceedings (i.e., before execution of the Terms of Reference), are they to be dealt with by the President of the CAM/CCBC.

As already mentioned, different problems arise in cases of consolidation, joinder or reunion, especially when a respondent joins an ongoing arbitration procedure with a constituted tribunal. The same issue arises where an arbitration between two parties is already in place, with a constituted tribunal, and it is consolidated with a new arbitration between one of the parties of the first one and another party, with the tribunal of this new arbitration yet to be constituted. Both cases illustrate scenarios in which the principle laid down in the Dutco case pose serious problems in terms of securing equality of treatment for all the parties when dealing with the constitution of the arbitral tribunal in consolidated cases or in the event of joinders. Article 4.20 deals with this issue in such a manner that it limits the authority of the President of the CAM/CCBC to hear and grant applications for joinder of proceedings to cases in which the Terms of Reference are yet to be executed, meaning that the constitution of the tribunal has not taken place or at least has not been concluded.

Article 4.20 of the Rules also provides for additional requirements for an application made under its terms to be allowed. First of all, there must be an application made to the President of the CAM/CCBC.[112] It cannot be ordered *ex officio*, without request from the parties. Further, it must have the consent – either express or implied, according to what was stated above regarding this matter – by the parties, indicating that all parties must agree with or, at least, not oppose the application made, namely, that one or more arbitration proceedings be joined to the first one.[113]

112 Article 10 of the ICC Rules contains the same requirement.

113 Consent is also required for consolidation under the ICC Rules, according to Art. 10(a), (b) and (c). It is submitted that consent is considered to be implied when parties initiate different proceedings based on the same underlying contract or based on the same legal relationship with different but compatible arbitration agreements.

4.21. The Parties can change, modify or amend the claims and causes of action until the date the Terms of Reference are signed.[114]

Article 4.21 of CAM/CCBC Rules once more highlights the importance of the Terms of Reference as the core document of the arbitration proceeding.

As already mentioned, the main purposes of the Terms of Reference are to fix the subject matter of the arbitration, to specify the claims of the parties and to organize the arbitration.

In this sense, once parties and arbitrators sign the Terms of Reference, they will be bound by the scope and limits of that specific arbitration. This means that the parties will not be able to modify their claims under that specific arbitration. Naturally, parties are allowed to commence new arbitration proceedings, in case they understand that the Terms of Reference did not encompass a certain issue.

It is worth mentioning that the Terms of Reference is also binding upon the arbitral tribunal, which will have to comply with the provisions therein defined by the parties during the arbitration. If the arbitral tribunal takes action against the Terms of Reference, its award will be subject to a challenge within national courts.

114 Comments by Eduardo Ono Terashima and Rafael Villar Gagliardi.

Article 8 – Provisional Measures

Clávio Valença Filho and Isabela Lacreta

8.1. Unless the parties have otherwise agreed, the Arbitral Tribunal can grant provisional measures, both injunctive and anticipatory, that can, at the discretion of the Arbitral Tribunal, be subject to the provision of guarantees by the requesting party.
8.2. If there is an urgent matter and the Arbitral Tribunal has not yet been constituted, the parties can seek provisional or injunctive measures from the competent judicial authority, if another manner has not been expressly agreed by them. In this case, the parties must inform the CAM/CCBC of the decisions.
8.3. As soon as the Arbitral Tribunal is constituted, it will have the authority to uphold, amend or revoke the previously granted measures.
8.4. A request made by one of the parties to a judicial authority to obtain these measures, or the enforcement of similar measures granted by an Arbitral Tribunal, will not be considered a violation of, or waiver to, the arbitration agreement and will not interfere with the jurisdiction of the Arbitral Tribunal.

1 Interim and Provisional Measures in Arbitration Proceedings: An Analysis of Article 8 of the CAM/CCBC's 2012 Arbitration Rules

Article 8 of the Center of Arbitration and Mediation of the Chamber of Commerce Brazil Canada's (CAM/CCBC) 2012 Arbitration Rules helps to understand the respective roles of judges and arbitrators faced with a request for urgent measures.

It is widely accepted that arbitrators have the jurisdiction to grant interim or provisional measures.[1] Its effectiveness may, however, depend upon the intervention of the courts, whenever the situation requires the use of *imperium merum*[2]; also, when the urgency of the case obliges them to prevent a denial of justice.

1 Cf. Art. 22, of the Brazilian Arbitration Act (Law No. 9.307/1996).

2 There is a misconstrued notion that only state courts have *imperium*. Although it might be true that arbitral tribunals cannot order parties to execute their final decision, they do have the power to grant interim and provisional measures. This is because the absence of *imperium* is not absolute. The arbitrator remains with the *imperium mixtum*, the part of the *imperium* that is intrinsically connected with the *jurisdictio*. The *imperium merum*, the hard core of the *imperium*, remains solely with the state courts. See Charles Jarrosson, Reflexions sur l'imperium, in *Etudes offertes à Pierre Bellet* (Lousanne: Faculté de droit de Lousanne) 1991, p. 245 et seq.

Although the parties or the institutional procedural rules chosen to regulate the arbitral proceedings may be free to impose limits to the arbitrator's jurisdiction, neither the parties nor the said rules are empowered to inflict limits to the jurisdiction of national courts without the consent of his own national legal system.[3]

The prudent arbitrator will necessarily have in mind such interrelation between the powers he is given to grant or revoke interim and provisional measures and the intensity of the negative effect of the arbitration agreement regarding the judge of urgencies in each national legal system. In a situation where an arbitrator has to interact with a Brazilian state court, the legal framework featured by the Brazilian Court of Appeals and recently consolidated by a Superior Court of Justice[4] will be applicable. In this scenario, the introduction of Article 8 in the new CAM/CCBC's Arbitration Rules comes as a timely answer.

The Brazilian legal system knows three categories of urgent measures: the *cautelar*, the *cognição sumária satisfativa*, and the *antecipação de tutela*. While a *cautelar* measure does not enter into the merits of the controversy, which approximates it to 'interim measures' in countries featuring Anglo-American legal systems, the two other types – *cognição sumária satisfativa* and *antecipação de tutela* – allow the anticipation of certain aspects of the merits and thus resemble Anglo-American 'provisional measures.'

Under Brazilian law, arbitrators have the jurisdiction to grant both interim and provisional measures. These powers derive from statutory provisions contained in Article 22 of the Brazilian Arbitration Act[5] and are commonly the basis of rulings of arbitrators acting pursuant to Brazilian law.[6] Courts must intervene if necessary to ensure the enforcement of interim and provisional measures rendered by arbitrators.[7]

The difference between the *cognição sumária satisfativa* and *antecipação de tutela* provisional measures is that the *cognição sumária satisfativa* may be brought only if it is linked to a related action, either future or current, upon which the merits are discussed in

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3 For example, under Italian law, the arbitrator is not allowed to grant interim or provisional measures, as set forth in Art. 818 of the Italian Civil Procedure Code.

4 The *Superior Tribunal de Justiça* (STJ) is a superior court that is responsible for the uniformization of the application of federal law; it is the Brazilian equivalent to the French *Cour de Cassation*.

5 Cf. Art. 22, of the Brazilian Arbitration Act.

6 Brasil. *Tribunal Regional Federal da 2ª Região. Agravo de Instrumento* n. 2003.02.01.010784-6. 1st Chamber. *Comercializadora Brasileira de Energia Emergencial – CBEE v. Companhia Energética de Petrolina – CEP.* Reporting Judge: Carreira Alvim, 26 de october, 2004. *Revista Brasileira de Arbitragem 7* (2005): 166 e *Revista de Mediação e Arbitragem* 6 (2005): 218, commented by D. Armelim. Available at <www.trf2.jus.br>: *'I – admite-se o recurso à justiça estatal apenas quando ainda não instituída a arbitragem, dado o caráter urgente da medida. II – Havendo convenção arbitral, é competente o tribunal arbitral para apreciar o mérito do litígio, cabendo-lhe, igualmente, decidir se antecipa ou não os efeitos da tutela antecipatória. III Agravo parcialmente provido'*. In this sense, C. Alberto Carmona, *'Arbitragem e Processo: um comentário à Lei nº 9.307/96' Page 271 'Se apenas o árbitro está autorizado a proferir provimento final, toca também a ele – e apenas a ele – decidir se antecipará ou não algum, alguns ou todos os efeitos que sua decisão irá produzir! Não haverá necessidade de encontrar na convenção de arbitragem autorização para que os árbitros antecipem tutela, pois tal autorização está implícita (...)'*.

7 Cf. Art. 22, 4º, of the Brazilian Arbitration Act.

depth, while with the *antecipação de tutela*, arguments addressing the provisional remedy and the final decision on the merits must be brought in the same lawsuit. The jurisdictional authority is charged with deciding whether to anticipate the merits of the case through a provisional measure and its further final adjudication. In this regard, this type of provisional measure has features similar to the *référé-provision* procedural measure under French and Belgian laws.[8]

Unlike the treatment given to provisional measures in Anglo-American courts, where a grant of provisional relief is subject to a balancing of equities, Brazilian law imposes other standards to be met on a *prima facie* basis.

First, *periculum in mora* must be found: the object of the litigation must be at risk of perishing before a final decision on the merits can be rendered. Second, the existence of *fumus boni juris* must be found, defined as the 'appearance of good law.' It is necessary to persuade the jurisdictional authority that the party has a reasonable claim on the merits, as derived from the arguments and evidence produced at the moment the urgent measure is requested. These two requirements are Brazilian judicial standards and are commonly reproduced by arbitrators acting under Brazilian law.

They are not, however, sufficient to confer jurisdiction upon Brazilian courts if jurisdiction has previously been granted to the arbitrator, through the stipulation of an arbitration agreement. In *Itarumã Participações S.A. v. PCBIOS*,[9] the *Superior Tribunal de Justiça* (STJ) ruled that the negative effect of the arbitration agreement on the jurisdiction of Brazilian courts to grant urgent matters also requires a momentary lack of arbitrator or his incapability:

> [....]
>
> 2. Pending the constitution of the arbitral tribunal it is admitted that the party seeks state courts to issue an interim measure to ensure a positive outcome of the arbitration.
>
> 3. As soon as the temporary circumstances that justified the emergency intervention of the state courts are overcome, considering that the entering into of the arbitration agreement implies the derogation of the State jurisdiction, the court's records must be promptly forwarded to the arbitral tribunal so that it can take over the process, maintaining, changing or revoking the granted measure.

8 See Emmanuel Gaillard and John Savage (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration (The Hague: Kluwer Law International, 1999).

9 Brasil. *Superior Tribunal de Justiça*. Special Appeal (*Recurso Especial*) No. 1,297,974 – RJ (2011/0240991-9).

> 4. In situations where the arbitral tribunal is momentarily unable to manifest itself, the rules of jurisdiction are not provisionally observed. In such situations, the request for interim or provisional measures shall be submitted to the judicial court. However, such jurisdiction is precarious and shall not be extended, subsisting only to the examination of the request of the measure. [...]

This ruling is well reflected in Article 8 of the new CAM/CCBC Arbitration Rules, as it may be presented as the private counterpart of the STJ ruling. While the wording of the ruling is mostly directed to regulate the actions of Brazilian courts, the addressee of the rule contained in Article 8 is the arbitrator. For instance, while item 2 of the ruling states that courts have jurisdiction on urgent matters before the arbitrator is empowered, Article 8.2 establishes that such jurisdiction belongs to the arbitrator after the arbitrator is empowered. Applying the same logic, while item 3 of the ruling states that court's records of urgent measures must be promptly forwarded to the arbitral tribunal so that it can take over the procedure as soon as the arbitrator is in conditions to perform its duties, allowing the arbitrator to reanalyze the granted measure, Article 8.3 states merely that the arbitrator has the jurisdiction to revoke urgent measures granted by national courts.

This complementary feature of the texts contained in Article 8 and the wording of the STJ's decision in the *Itarumã* case is in harmony with the idea that jurisdiction may belong to the arbitrator or to the courts and never to both of them, as it can be found in some legal systems affiliated to the recommendations from the UNCITRAL Model Law, which is grounded upon the idea of concurrent jurisdiction between the arbitrator and the court, as imported from classic French law, where the interested party had absolute freedom of choice between the arbitrator and the *juge de référé*.[10,11]

The allocation of duties between the arbitrator and the court is a matter that must be decided pursuant to the rules on the negative effects of the arbitration agreement. It is not a matter of identifying the competent authority, but of identifying who is the authority:

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10 The said model, so-called concurrent competences, is recommended by Art. 8 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law. 'It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.' Before the STJ decision in *Itarumã* at least two second instance decisions accepted the model of concurrent competence: *(a)* Brasil. *Tribunal de Justiça de São Paulo.* 2nd Chamber AI No. 285.741-4/6, *Altran do Brasil S/A v. José Fernando Parra e outro. (b)* Brasil. *Tribunal de Justiça de Minas Gerias.* 5th Chamber, No. 393.297-8, *GMK Equipamentos Industriais LTDA. v. Daimler Cryler do Brasil Ltda,* Reporting Judge: Mariné da Cunha, 15 May 2003, in Revista *Brasileira de Arbitragem,* No. 7 (2005): 134.

11 The new French Civil Procedure Code has modified this model of attribution of competence, assigning a more defined competence to the new figure of the *juge d'appui* when faced with interim and provisional measure, cf. Arts. 145 and 1449 of the Code. Emmanuel Gaillard, 'Le nouveau droit français de l'arbitrage interne et internacional', <www.shearman.com/~/media/Files/NewsInsights/Publications/2011/01/Le-nouveau-droit-franais-de-larbitrage-interne-e__/Files/View-the-full-articleLe-nouveau-droit-franais-de__/FileAttachment/IA0121110Lenouveaudroit.pdf>.

the arbitrator or the courts. If there is no arbitration agreement, the courts will be the competent authority, while in the presence of such agreement, the arbitrator will be the competent authority. Nevertheless, the risk of a denial of justice may, under exceptional circumstances, justify the return of jurisdiction over urgent matters from the arbitrator to the courts.

The rationale behind the exceptional retreat of jurisdiction from the arbitrator to the courts is the possibility of a denial of justice.

Denial of justice may occur in the event an urgent situation arises before the arbitrator is impaneled. This happens due to the fact that conferring jurisdiction upon an arbitrator requires two steps: first, court jurisdiction is set aside as a negative effect of the arbitration agreement; second, the arbitrator is only invested with jurisdiction akin to that of a court when the arbitral procedure is initiated. Anything to occur between these two steps could not be redressed: there would be neither court nor arbitral jurisdiction available to rescue a plaintiff. Where the urgency of a situation is such that the parties to a dispute do not have time to initiate an arbitration, the courts must intervene, or the interested party will be denied justice.

At least two Brazilian appellate courts have confirmed this view. First, the Court of Appeals of the State of Rio Grande do Sul (*Tribunal de Justiça do Rio Grande do Sul*) so ruled in order to justify an interim measure.[12] Second, the São Paulo Court of Appeals compelled performance of a distribution agreement based on a report presented by Honorable Reis Kuntz: according to Article 19 of the Brazilian Arbitration Law, "the arbitration shall be considered initiated when the arbitrators accept their nomination." Before that moment, there is no arbitral jurisdiction. It would be unlawful to refuse the interested party access to the courts, as this would violate the constitutional principle of universal access to the courts (Art. 5, XXXV, Brazilian Federal Constitution).[13]

Following this rationale, Article 8.2 seems to draw a timeline to allow the parties to search for judiciary relief only to the extent that there is no arbitral tribunal impaneled. In this particular aspect, the new Article 8.2 might become a source of disharmony.

The courts' authority to grant interim or provisional measures does not necessarily end at the moment that the arbitrator is impaneled, as it is not sufficient to fully prevent a denial of justice. This situation may occur if the arbitrator lacks jurisdiction to intervene in an effective manner, as, for instance, where arbitral proceedings have been suspended or the arbitrator is incapacitated or absent for some reason. It may also be the case if the

12 Brasil. *Tribunal de Justiça do Rio Grande do Sul. Agravo de Instumento* No. 70004506424. 2nd Civil Chamber. *AES Uruguaiana Empreendimentos v. Companhia Estadual de Energia Elétrica.* Reporting Jusge: Teresinha de Oliveira Silva, 13 November 2002 <www.tj.rs.gov.br>, 27 February 2008.

13 Brasil. *Tribunal de Justiça de São Paulo. Agravo de Instrumento* No. 245.257-4/4. 1st Chamber of Private Law. *Akzo Nobel Ltda v. Distrivet Ltda.* Reporting Judge: Reis Kuntz, 31 October 2002. in *Revista Brasileira de Arbitragem* 7 (2005): 123 & *Revista de Mediação e Arbitragem 1* (2004): 215, commentaries by C. A. da Silveira Lobo and R.M. Ney.

effectiveness of the remedies resulting from the provisional or interim measure requires the intervention of third parties not bound by the arbitration agreement, or if it directly affects the rights of such third parties. Finally, the court has the authority to grant interim or provisional measures where the urgency of the situation does not allow one to wait for the rendering of a hybrid remedy granted in two phases: one, before the arbitrator, and another, of an enforceable nature, before the courts, as provided in Article 22, §4° of the Brazilian Arbitration Act.[14]

This opinion is also shared by Justice Sidney Benetti of the Superior Court of Justice, who has spoken of "the suitability of precautionary pre-trial measures and, exceptionally, incidental ones, during arbitral proceedings as being justified by the Brazilian Code of Civil Procedure (Art. 796 et seq.) and the Federal Constitution (Art. 5, XXXV),"[15] as affirmed by the Courts of Appeals – a court that has jurisdiction over relevant seats of arbitration within Brazil.

In this sense, the impaneling of arbitrators did not prevent the Minas Gerais Court of Appeals from confirming an order to compel discovery of accounting documents and company records.[16] São Paulo Court of Appeals has also addressed the matter on at least three different occasions. In the first case, the court confirmed an order to seize a company's

14 In this regard see, Arnoldo Wald, '*Affectio Societatis* na Sociedade de Pessoas e no Acordo de Acionistas. Rompimento. Resolução do Acordo de Acionistas. Aprovação do Quotista. Direito de Bloqueio. Ofensa à Lei 8.884/94. Direito de Preferência. Cabimento de Medida Cautelar Preparatória Perante o Poder Judiciário Antes de Instaurado Juízo Arbitral. Competência do Juízo', in *Revista de Mediação e Arbitragem* 4 (2005): 220.

15 Sidney Benetti, "*Arbitragem e tutela de urgência*", *Revista do Advogado*, Ano XXVI, n. 87, 2006, p. 100. '*São cabíveis a tutela cautelar preparatória e, em casos excepcionais, a incidental, durante o procedimento arbitral, por fundado direto do CPC (arts. 796 e segs.) e na Constituição Federal (CF, art. 5°, XXXV)(...)*'.

16 Brasil. *Tribunal de Alçada de Minas Gerais. Agravo de Instrumento* No. 273.072-3. 11th Civil Chamber c/c Agravo de Instrumento No. 262.252-4. *Sociedade Hospitalar de Uberlândia LTDA. v. Ademar Margonari de Carvalho e outro*. Reporting Judge: Edílson Fernandes, 24 February 1999. Free translation: "thus, the relative lack of competence argued by way of a motion to deny jurisdiction disrespects Art. 5°, XXXV, Federal Constitution, that guarantees the access to the Judiciary Power for the submission of issues concerning hard or threat to associates right to refuse the exhibition of files, mail and documents of the company, all necessary to the assessment of its assets, as well as the precautionary measure to the arbitral or the judicial procedure, or even to secure its rights before a further installment of an arbitral procedure." <www.tjmg.gov.br>, 27 February 2008.

share capital[17]; in the second, it ordered the discovery of accounting documents[18]; and in the third, it compelled a party to continue the performance of a commercial distribution agreement until the arbitral tribunal's final decision.[19]

The limited nature of the court's jurisdiction was noted by the Regional Federal Tribunal for the second Region in the case of *Companhia Energética de Petrolina (CEP)* and *Comercializadora Brasileira de Energia Emergencial (CBEE)*. In that case, the first instance court refused to decide a request for a preliminary interim measure on the grounds that only the arbitrator had the authority to issue a ruling. On appeal, the court noted that no arbitrator had been impaneled at the moment the motion for an interim measure was filed and that preventing the interested party from seeking judicial recourse would lead to a denial of justice. The court then referred the case to the first instance court with orders to rule on the motion. The interim was then granted.

Appealing the second ruling from the first instance court, the affected party argued that an arbitrator had been impaneled before the case was referred to the first instance court and, therefore, that there was no denial of justice. The court then noted that the presence of paneled arbitrators divested the court of jurisdiction and ruled that the arbitrator was the only one with jurisdiction to hear the case, the jurisdiction of the court for urgent matters being extremely tenuous compared with that of an arbitrator.[20]

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17 Brasil. *Tribunal de Justiça de São Paulo. Agravo de Instrumento* No. 285.741-4/6. 2nd Chamber of Private Law. *Altram do Brasil Ltda. v. José Fernando Correa Parra e outro.* Reporting Judge: Boris Kauffmann, 29 April 2003. <www.tj.sp.gov.br>, 18 December 2004: *'Cautelar. Interesse Processual. Constituição Federal. A existência de processo de arbitragem não exclui da apreciação do Poder Judiciário eventual lesão ou ameaça a direito. Preliminar Inconsistente. Sequestro – Quotas sociais alienadas e não pagas pelos compradores a ensejar, em tese, a aplicação da cláusula resolutória expressa – Presença do fumus boni iuris e periculum in mora que justificam a concessão da laminar para impedir a alienação a terceiro e garantir a preservação do bem em caso de sucesso na ação principal, evitando-se, ainda, que políticas estratégicas possam ser usadas por eventuais terceiros adquirentes das quotas em litígio'.*

18 Brasil. *Tribunal de Justiça de São Paulo. Agravo de Instrumento* No. 090.709-4/4. 3rd Chamber of Private Law. *Campari do Brasil Ltda. v. Distillerie Stock do Brasil LTDA.* Reporting Judge: Ênio Santarelli Zulianni, 01 December 1998. <www.tj.sp.com.br>, 24 October 2006: *'A medida cautelar de produção de provas pode ser requerida paralelamente ao processo base, especialmente quando o processamento deste sofre percalços com a marcha natural, como a extinção (precipitada e incorreta) sem julgamento do mérito. Pressupostos legais encorajadores da perícia presentes'.*

19 Brasil. *Tribunal de Justiça de São Paulo. Agravo de Instrumento* No. 089.522/4-0-01. 7th Chamber of Private Law. *Converse Network Systems v. Computel Computadores e Telecomunicações S.A.* Reporting Judge: Júlio Vidal, 02 September 1998 in *Revista de Mediação e Arbitragem* 3 (2005): 209, commentaries by D. Armelim. *'Juízo arbitral instaurado no exterior por força de cláusula contratual pactuado pelas partes para julgar a lide cujo objeto é o mesmo da cautelar, por si não impede a apreciação da matéria pelo Poder Judiciário face ao disposto no art. 5º, XXXV da Constituição Federal, tendo em vista que a decisão proferida por juízo arbitral, sem a devida homologação...'*, in *Revista de Mediação e Arbitragem* 3 (2005): 209, commentaries by D. Armelim.

20 BRASIL. *Tribunal Regional Federal da 2ª Região.* 1ª T. Agr. Inst. 2003.02.01.010784-5 *Companhia Energética de Petrolina – CEP v. Comercializadora Brasileira de Energia Emergencial – CBEE.* Rel. Carreira Alvim, j. 22 June 2004, *Revista Brasileira de Arbitragem 7* (2005): 166 e *Revista de Mediação e Arbitragem* 6 (2005): 218, commented by D. Armelim. Also see: Brasil. Tribunal de Justiça de São Paulo. 6ª C. Dir. Priv. Agr. Inst.

If a court hearing urgent matters has jurisdiction due to public order concerns (specifically, due to the risk of a denial of justice, which is a paradigm of Brazilian public order), notwithstanding the existence of an arbitration clause, the unstable nature of such jurisdiction is merely a reflection of the principle of *"atualidade"* (current thinking) that guides notions of public order. As it becomes less likely that justice will be denied, the risk of infringing public order policies diminishes and the motive for returning jurisdiction from the arbitrator to the courts likewise loses force.[21]

Since the jurisdiction of courts cannot be waived or delegated for certain proceedings such as the direct enforcement of remedies, denial of justice may also come from this need of *imperium merum*.

The direct enforcement of remedies by the courts ensures the enforcement of jurisdictional decisions, irrespective of any action by the affected parties. In this sense, if the effectiveness of a remedy granted through a provisory measure so requires, the action of the sovereign substitutes that of a reluctant party. Requests for information of real estate registries, seizures, impoundment, search and seizure procedures, and precautionary measures to compel discovery, among others, are examples of remedies that may require the assistance of courts in order to be effective.[22]

245.257-4/4. *Akzo Nobel Ltda. v. Distrivet Ltda. Reis Kuntz*, j. 31 October 2002: '*Ora bem: interpretando-se teleologicamente as disposições do inc. VII, do Art. 267 do CPC, conclui-se inarredavelmente que a extinção do processo, sem julgamento do mérito, no caso de ação cautelar preparatória de procedimento arbitral, é medida que se impõe somente após a efetiva instituição desse referido juízo. Pois, como mencionado, até a efetiva instituição da arbitragem, não seria razoável nem mesmo juridicamente admissível obstar ao interessado a formulação de pedido urgente de natureza cautelar, cuja apreciação, na falta de árbitro, incumbe ao órgão do Poder Judiciário que seria, originariamente, competente para julgar a causa. Essa a interpretação que decorre da análise dos art.s 796 e 800, do CPC, em consonância com o art. 22, §4°, da Lei de Arbitragem*', *supra* note, at 215, commented by C.A. da Silveira Lobo e R.M.R Ney.

21 Regarding the possibility of tacit waive the submission of this specific dispute to arbitration, without, however, fully waiving the arbitration agreement, see the following decision: BRAZIL. Tribunal de Justiça de São Paulo. 4ª C. Dir. Priv. Agr. Ins. 406.570-4/5. *Top Sports Ventures v. TV Ômega LTDA.* Rel. Enio Zulian, j. 18 August 2005, *Revista de Medição e Arbitragem* 8 (2006): 250, with comments of Martin Della Valle. See also, BRAZIL. Tribunal de Justiça do Rio de Janeiro. 4ª C. Civ. Ap. Civ. 15960/4. *El Paso Rio Claro LTDA. v. Inepar S/A Indústria e Construções.* Rel. Sidney Hartung, j. 05 October 2004 in *Revista de Mediação e Arbitragem* 7 (2005): 260. '*Ementa: ... O fato de não ter havido arbitragem em conflito anterior entre as partes não caracteriza a dispensabilidade deste compromisso*'. In relation to the understanding that the frequent waive to disputes composing the main object of the arbitration triggers the waiver to the arbitration agreement itself and not only a reduction in its object, see: 4ª Vara Empresarial da Comarca do Rio de Janeiro. Proc. 2006.001.014953-3. *Latcem S.A. v. Companhia Nacional de Cimento Portland CNCP.* Rel. Márcia de Andrade Pumar, j. 29 December 2006.

22 Pedro A. Batista Martins, 'Da Ausência de Poderes Coercitivos e Cautelares do Árbitro', in Pedro A. Batista Martins, Carlos Alberto Carmona and Selma Lemes, *Aspectos Fundamentais da Lei de Arbitragem* (São Paulo: Forense, 1999), p. 362. In this sense, Art. 22, par. 4, Brazilian Arbitration Act orders the state judge to share *imperium merum*: '*havendo necessidade de medidas coercitivas ou cautelares, os árbitros poderão solicitá-las ao órgão do Poder Judiciário que seria, originariamente, competente para julgar a causa*', inclusive in regard to *ad futurum* installments and, especially in regard to the compulsory conduction of recalcitrant witnesses. See also op. cit. 4.

However, the arbitrator has the authority to determine measures of indirect enforcement, such as daily fines (*astreintes*) since they are based on the *imperium mixtum*. On the other hand, the arbitrator is prevented from ordering injunctions.

Article 8.3 of the new CAM/CCBC Arbitration Rules prescribes that the arbitrator has the authority to revoke a judicial interim or provisional measure. Of course this provision can be valid only to the extent that the court's national legal system accepts it.

In the Brazilian legal system, this permission comes first from the lack of exhaustive production of evidence when analyzing any decision by which an interim or provisional measure is granted; this prevents the decision from becoming *res judicata*. Thus, it can be revoked.

Second, as the arbitrator is the only jurisdictional authority competent to hear the merits of the case, s/he may, at any time, set aside the court's ruling, either by issuing an award or by means of an interlocutory order grounded upon the arbitrator's own evaluation of the requirements of the measure.[23] In this sense, the Court of Appeals for the State of Minas Gerais had the opportunity to rule on the court's obligation to send the interim measure files to the arbitrator in order to allow him/her to rule on whether to maintain the precautionary order. This opinion was recently confirmed by the STJ, in the *Itarumã v. PCBIOS*, when Justice Nancy Andrighi stressed the precarious nature of the judiciary's jurisdiction on urgent matters.[24]

When the motion for an interim measure is filed prior to the appointment of the arbitrators, the court must rule on the claim. The court must transfer the case records to the arbitrators immediately after the commencement of the arbitration proceedings. Thereafter, the arbitrators must decide whether to uphold the order for interim relief granted by the court or to modify or revoke it. Transmission of the file to the arbitrators must occur on an *ex officio* basis.[25]

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23 In this sense: C.A.S. Lobo and R.M. Rangel, 'Revogação de Medida Liminar Judicial pelo Juízo Arbitral', in R.R. de Almeida (coord.), *Arbitragem Interna e Internacional: Questões Práticas*. (São Paulo: Renovar, 2003), p. 253; C.A. Carmona, 'Medidas Cautelares em Processo Arbitral: a Solução da Lei Brasileira e as Experiências Estrangeiras', in *1° Seminário Internacional Sobre Direito Arbitral* (Belo Horizonte: Câmara de Arbitragem de Minas Gerais, 2003), p. 111; C. Alberto Carmona, 'Arbitragem e Processo: um comentário à Lei n° 9.307/96'; J.A. Almeida, *Processo Arbitral* (Belo Horizonte: Del Rey, 2002), p. 118. In the contrary sense: for those who the arbitrator cannot revoke the effects of the interim measure, see: A. Wald, 'A Recente Evolução da Arbitragem no Direito Brasileiro (1996-2001)', in *Reflexões sobre Arbitragem: in memoriam do Desembargador Cláudio Vianna de Lima* (São Paulo: LTr, 2002), p. 158. J.D. Figueira Júnior, *Arbitragem, Jurisdição e Execução*, 2ª ed. (São Paulo: RT, 1999), p. 224. The former author considers that the sovereignty of the state courts would be harmed by the revocatory arbitral act.

24 Op cit. 11.

25 Brasil. Tribunal de Justiça de Minas Gerais. 12ª C. Civ. Agr. Inst. 1.0480.06.083392-2/001. *Viação Pássaro Branco Ltda. v. Espólio de Antônio José Duarte Monteiro*. Rel. Domingos Coelho j. 14 February 2007, *Diário Oficial do Estado de Minas Gerais*, 03 March 2007. BRASIL. Tribunal de Justiça de Minas Gerais. 4ª C. Civ. Agr. Inst. 2.0000.00.410533-5/000(1). *Inepar Equipamentos e Montagens S.A. v. SMS Demag Ltda.* Rel. Avilmar de Ávila, j. 27 August 2003: '*Não obstante a eleição da arbitragem como meio de solução de conflitos, a ação cautelar de sustação de protesto, se ainda não instaurado o juízo arbitral, poderá ser ajuizada perante*

Although the order containing a provisional measure may be revoked at any time, it is also true that its effects may become irreversible in certain circumstances. In cases where the court compels a party to pay in advance monies and the party thereafter becomes insolvent or removes funds without leaving enough assets to ensure enforcement of the arbitration award, the provisional measure will likely have practical effects equivalent to an award.

Thus, in such cases, the court will effectively divest the arbitrator of jurisdiction and deprive the arbitration agreement of its substance.

In order to protect the jurisdiction of the arbitrator from provisional orders granted by judicial courts that are, practically speaking, irreversible, such court orders must be strengthened by companion orders compelling the moving party to provide guarantees necessary to ensure the return of the matter to a pre-order status.

This approach has been taken by several courts in Europe as a consequence of adherence to the Brussels Convention of 1958 (currently replaced by European Union Regulation No. 44/2001), as decided by the Court of Justice of the European Union in the famous Van Unden case.[26] In that case, the Court of Justice decided that a provisional payment ordered pursuant to Dutch law (*kort geding*) was a means of anticipating payments, thus infringing upon the arbitrator's jurisdiction over the merits, especially if the court order becomes irreversible in a practical sense.

In order to maintain the provisional nature of the payment, the Court stressed the need for the presentation of guarantees sufficient to permit the affected party to be reimbursed for the anticipated amounts.[27]

There are no legal obstacles to the adoption of this solution by operators under Brazilian law, courts or arbitrators.

The Brazilian Arbitration Law has recently been amended, as a result of a project developed by a commission of scholars.

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o juiz estatal, que, comunicado da instauração do juízo arbitral, providenciará a remessa dos autos para a devida apreciação da manutenção ou não da tutela concedida', *Diário Oficial do Estado de Minas Gerais*, 13 September 2003; Brasil. Tribunal de Justiça de Minas Gerais. 5ª C. Civ. Ap. Civ. 2.0000.00.393297-8/000(1). *GKW - Fredenhagen S.A. Equipamentos Industriais v. Daimler Chrysler do Brasil LTDA*. Rel. Eduardo Mariné da Cunha, j. 15 May 2003: '*Como a renúncia, com força definitiva, à via judicial é excepcionada em relação às demandas cautelares, o acesso à jurisdição, em tais casos, é permitido, sendo a hipótese de se acolher os pedidos de sustação de protesto e imposição de obrigação de não encaminhar duplicatas para protesto, ao passo que a controvérsia acerca da exigibilidade ou inexigibilidade das mesmas deve ser objeto de processo de arbitragem*', *RBA* 7 (2005): 134. <www.tjmg.gov.br>. 18 August 2007.

26 CJCE. C-391/95. *Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-line*. J. 17 November 1998, *Rev. arb.* (Paris: Litec, 1999), 152, commented by H. Gaudemet-Tallon; *Rev. crit.* (1999): 340, commented by J. Normand.

27 In the same sense, see: CJCE. C-99/96. *Internship Yachting Sneek BV v. Hans-Hermann Mietz*. J. 27 April 1999. Regarding the subject: Marmise & Wilderspin, 'Le Régime Jurisprudentiel des Mesures Provisoires à la Lumière des Arrêts Van Uden et Mietz', *Rev. crit.* (1999): 669.

The reformed Chapter IV is dedicated to interim and urgent measures, bringing to code what was already applied in practice or by the case law. Its Article 22-A allows a party to seek the courts to require interim or urgent measures, burdening the said party with the obligation to file the request for arbitration within thirty days from the effectiveness of the decision.

An important innovation brought by Chapter IV – in a matter that was previously dealt with by the *Itarumã* case[28] – is the one contained in Article 22-B by which as of the empowerment of the arbitrations only the arbitral tribunal has powers to uphold, modify or revoke the interim or urgent measure granted by a court; also, any new requirement for interim or urgent measures should be made directly to the arbitrators.

The introduction of this article is a sign of appreciation and reinforcement of the *kompetenz-kompetenz* principle, by granting to the arbitrator the power of decision.

28 Op. cit. 11.

Article 12 – Arbitration Expenses

Luciano Benetti Timm

1 Introduction

The purpose of this article is to draw some considerations regarding Article 12 of Chapter III in the Rules of CAM-CCBC, concerning costs and expenses of arbitration.

To make these comments, we have divided this article into two parts.

In the first part, we make specific observations with regard to each of the items that are a part of Article 12. Thus, our proposal is to analyze the three arbitration cost categories, namely, the Administration Fee, the Expense Fund, and the Arbitrators' Fees. Furthermore, we will address the consequences of incompliance with the payment of such costs, such as the possibility of one of the parties paying the costs in place of the defaulting party, in order to continue the arbitration, or the extinction of the procedure, owing to recurrent lack of payment.

In the second part, we propose the use of some concepts of Economic Analysis of Law in order to answer a potential doubt that may arise after the observations made in the first part: is arbitration really more 'expensive' than lawsuits? This is due to the fact that, as we have already presented in previous articles, the transaction costs involved in a lawsuit, especially due to the slowness of the Brazilian judiciary, may make arbitration more efficient to the parties when compared with public justice.

We consider such analysis to be essential when faced with corporate disputes, in which executives, profit maximizers, seek the reduction of losses and costs, which, as a general rule, will be provisioned and incorporated in the product's end-price passed to consumers.

2 Costs and Expenses of Arbitration: Article 12 of the Rules of CAM-CCBC

The Arbitration and Mediation Center of the Brazil-Canada Chamber of Commerce (CAM-CCBC), as a private entity, which is aimed at administering arbitrations, charges the dispute parties for the administration of such arbitrations.

The costs we refer to can be divided into three groups: (i) the administration of the arbitration, which is composed of two fees, the Registration Fee and the Administration Fees; (ii) the Expense Fund; and (iii) the Arbitrators' Fees. The classification proposed

follow the destination of the fees, being in the first case (A) the Center itself, in the second case (B) several service suppliers and the third (C) the Arbitrators.

Therefore, fees charged by CAM-CCBC are either for the entity itself or for third parties.

In addition, it will be addressed in the following subchapters (D, E, F) some consequences of non compliance of such set of rules.

A *Arbitration Center Fees*

Firstly, in Article 12.1 of the Rules, it is provided that the cost of such expenses is established through a Table of Expenses, available at the Chamber's own Web site.[1]

The first group of costs due to the arbitration center comprises the administration of the arbitration, provided in Article 12.2 of the Rules, which can be divided into two costs.

The first is the Registration Fee, which is the first cost to be borne by the Claimant when filing the request for arbitration before the Chamber. The Claimant shall present the payment receipt of the Registration Fee, which cannot be reimbursed or compensated, accompanied by the request for arbitration, pursuant to the provisions in Article 12.5 of the Rules. That payment is the price (compensation) for the service rendered by the Center while processing the case.[2]

The Registration Fee is always fixed, and does not relate to the value of the dispute attributed by the Claimant. The Registration Fee is updated from time to time by the Chamber, being attached to the CAM-CCBC Table of Expenses, provided that the current cost, which has been made effective as of 1 January 2015, is worth R$ 4,000.00 The amount is not significant because the significant part of the work is not yet rendered by the Center.

The second is the Administration Fees, which, in turn, are calculated according to the value of the dispute estimated by the parties (under the scrutiny and review of the arbitration tribunal). Claimant and Respondent must each perform full payment of the Administration Fees calculated according to the amount in dispute. The cost of the Administration Fees is also included in CAM-CCBC's Table of Expenses, reproduced bellow:

Amount in Dispute (RS)			**RS + % of the difference**	
up to RS 4 million	50,000			
from 4 million to 19 million	50,000	+	0.10%	of the amount exceeding 4 millions
from 10 million to 18 million	56,000	+	0.05%	of the amount exceeding 10 millions
from 18 million to 50 million	60,000	+	0.09%	of the amount exceeding 18 millions

1 Available at: <http://ccbc.org.br/Materia/1068/tabela-de-despeasas-e-calculadora>.

2 12.5. At the time of presentation of the notice for commencement of arbitration, the Claimant must pay to the CAM-CCBC the Registration Fee, in the amount stated in the Table of Expenses, which cannot be set off or reimbursed.

Amount in Dispute (R$)	RS + % of the difference			
from 50 million to 100 million	88,000	+	0.06%	of the amount exceeding 50 millions
from 100 million to 150 million	118,000	+	0.04%	of the amount exceeding 100 millions
from 150 million to 300 million	138,000	+	0.004%	of the amount exceeding 150 millions
from 300 million to 500 million	144,000	+	0.001%	of the amount exceeding 300 millions
from 500 million to 1 billion	146,000	+	0.002%	of the amount exceeding 500 millions
above 1 billion	156,000	+	0.005%	of the amount exceeding 1 billion

It is relevant to point out that, differently from what occurs with the dispute adjudicated by the judiciary, in which, as a general rule, the party who files the lawsuit shall bear the court costs, in arbitrations administered by CAM-CCBC, both parties shall collect the Administration Fee (Art. 12.3 of the Rules).[3]

Let's examine the following example, in order to illustrate this subject. Suppose in an arbitration, the Claimant "X" attributes the value of R$ 1 million to the dispute. The Respondent "Y", when presenting its response to the notice of commencement of arbitration, files a counterclaim worth R$ 2 million.

With regard to the Registration Fee, when presenting the request for arbitration, the Claimant shall present the fee's payment receipt, currently fixed at R$ 4,000.00. On the other hand, the Administration Fees are variable with respect to the cost of the dispute attributed by the parties. In our example, the cost given to the dispute is R$ 3 million (corresponding the sum of the values attributed by the parties). According to the Table of Expenses, each party shall collect, the Administration Fees in the total amount of R$ 50,000.00.[4]

B The Expense Fund

The Expense Fund, the second group of costs regarding the arbitration, is provided in Article 12.8 of the Rules.[5]

3 12.3. In an arbitration in which there are multiple parties, as Claimants or as Respondents, each of them, separately, must pay in full the Administration Fee owed as a result of the services performed by the CAM-CCBC.

4 Pursuant to the current Table of Expenses, in the disputes that involve a cost up to R$ 4 million, each party shall pay a total Administration Fee worth R$ 50,000.00.

5 12.8. After the Terms of Reference are signed, the Secretariat of the CAM-CCBC will be able to request that the parties make advance payment of the estimated expenses for the proceedings to establish an expense fund, with the amount paid by the Claimant being set off under Art. 12.6.1 of these Rules.

The Expense Fund is a kind of accrual to which the parties contribute in order to pay the expenses that are necessary during the course of the arbitration. It is a function of the Chamber, for example, to send to the parties the documents, petitions, notices from the Chamber itself and from the other party, to hire professionals to record the discovery hearings and to perform transcriptions, to make copies and print documents, etc.

With regard to the Expense Fund, the Chamber may request the Claimant to advance payment of the expenses it considers are necessary until the execution of the Terms of Reference, pursuant to Article 12.6.1 of the Rules.

Following the execution of the Terms of Reference, CAM-CCBC's Secretariat may require the parties to prepay expenses estimated to occur with the proceeding, to constitute an Expense Fund, while offsetting the amounts paid by Claimant.

Finally, pursuant to Article 12.9 of the Rules[6], all expenses that arise out of the arbitration will be paid in advance by the party that has required the measure, or by the parties, equally, if the measure is required by the Arbitral Tribunal.

Expense Fund is not thus a payment (remuneration) of services rendered by CAM-CCBC, but reimbursement of costs incurred to hire and pay third party service (and products) suppliers.

C *Arbitrators' Fees*

As a third group of costs of arbitrations, we have the Arbitrators' Fees, regarded in Article 12.7 of the Rules.[7] Arbitrators' Fees is the remuneration due to the Arbitrators.

The Arbitrators' Fees, as well as the Administration Fee, vary in accordance with the value assigned by the parties to the arbitration. Yet again, the cost of the fees is presented in CCBC/CAM's Table of Expenses:

Amount in Dispute (RS)	**RS + % of the difference**			
up to 2 million	75,000			
from 2 million to 4 million	75,000	+	1.25%	of the amount exceeding 2 millions
from 4 million to 10 million	100,000	+	0.90%	of the amount exceeding 4 millions
from 10 million to 18 million	154,000	+	0.10%	of the amount exceeding 10 millions
from 18 million to 50 million	162,000	+	0.10%	of the amount exceeding 18 millions

6 12.9. All the expenses that are incidental to, or incurred during, the arbitration will be paid in advance by the party who requested the act, or by the parties, equally, if resulting from acts requested by the Arbitral Tribunal.

7 12.7. Each party will deposit with the CAM-CCBC its portion of the amount of the Arbitrators' fees, corresponding to a minimum number of hours established in the Table of Expenses or a percentage of the amount in dispute. This deposit must be made by the time established in the Table of Expenses.

Amount in Dispute (RS)	RS + % of the difference			
from 50 million to 100 million	194,000	+	0.10%	of the amount exceeding 50 millions
from 100 million to 150 million	244,000	+	0.06%	of the amount exceeding 100 millions
from 150 million to 300 million	274,000	+	0.03%	of the amount exceeding 150 millions
from 300 million to 500 million	319,000	+	0.03%	of the amount exceeding 300 millions
from 500 million to 1 billion	379,000	+	0.025%	of the amount exceeding 500 millions
above 1 billion	504,000	+	0.020%	of the amount exceeding 1 billion

However, unlike the Administration Fee, the Arbitrators' Fees are divided between the parties. In our previous example, with a dispute value of R$ 3 million, each Arbitrator will be entitled to receive R$ 87,500.00. This cost shall be divided equally between Claimant and Respondent.

Claimant and Respondent must each pay CAM-CCBC 50% of the Arbitrators' Fees, and the payment of Arbitrators' Fees must occur within thirty days following the submittal of the request for arbitration by Claimant, or within forty-five days following the Notification concerning the Notice of Commencement by Respondent.

D Consequences of Lack of Costs' Payment

Once the arbitration has been initiated, pursuant to the clauses of Article 12 indicated above, the parties shall collect the Administration Fee, the Arbitrators' Fees, and the contribution to the Expense Fund.

However, there are cases in which one of the parties refuses to pay for the continuity of the arbitration.

To prevent the interruption or even the extinction of the arbitration, CAM-CCBC enables the parties to make the payment of such fees in place of the defaulting party, in order to continue the procedure (Art. 12.10 of the Rules).[8]

However, if none of the parties makes the payment in place of the defaulting party, the arbitration is suspended (Art. 12.10.2 of the Rules).

Finally, as a consequence of non compliance by the parties regarding to collecting the total of the arbitration expenses for more than thirty days of suspension, the arbitration

8 12.10. In the event that the Administration Fees, Arbitrators' fees and experts' fees or any arbitration expenses are not paid, one of the parties will have the option of making the payment for the other's account, by a time to be established by the Secretariat of the CAM-CCBC.

may be extinguished, in accordance with Article 12.11 of the Rules.[9] In addition, it is important to point out that the parties can present a new request for the commencement of a new arbitration aiming at solving the dispute, once the pending amounts are collected.

Article 12.12 of the Rules asserts that CAM-CCBC may demand the payment of Administration Fees, Arbitrators' Fees or Expenses by judicial or extrajudicial means, and such amounts will be deemed net and certain, they may be charged through execution procedure as well, plus interest and monetary update, pursuant to the provisions of the expense sheet.

It is worth mentioning that, recently, the CAM-CCBC Table of Expenses have been changed in order to deal with the questions arising from counterclaims.

In our previous example, Claimant started an arbitration and attributed the value of R$ 1,000,000 to the dispute. Respondent, considering the formulation of counterclaims, requested worth R$ 2,000,000.

However, sometimes, one party could assign a high value to its claims, to force to opposing party's fault in paying the costs involved in the proceeding. Trying to offer an option in these cases, CAM/CCBC created the rule of *segregation*.[10] By this rule, in cases of counterclaims, any of the parties may request the separate specification of the amount (segregation) for the purpose of payment of the Administration Fees and Arbitrators' Fees.

In such cases, Claimant and Respondent will be liable for the payment of amounts related to the respective claims. If payment is not effected, the notices thereto will be ignored by the Arbitral Tribunal, regardless of whether they will be submitted to another arbitration proceeding.

Another matter that is constantly faced by the parties during the arbitration is the production of expert evidence. Usually, when one or more parties request the production of expert evidence through the traditional Brazilian model, the Arbitrators will seek reliable experts to perform this technical evidence work.

The procedure that is normally adopted is the communication to the parties through a Procedural Order regarding the experts' quotes, and determining that, in case of acceptance by the parties, they shall deposit the experts' fees before the initiation of the expert analysis, pursuant to Article 12.12.1 of the Rules, as well as to Article 12.9.

Moreover, Article 12.13 regards the costs of the Special Committee, provided in Article 5.4 of the Rules, which regards the entity formed by three Arbitrators for judgment of potential appeals to the election of Arbitrators, due to independence and impartiality.

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9 12.11. Once the proceedings have been stayed for thirty days for lack of payment, without either of the parties effectuating the provision of funds, the proceedings can be terminated, without prejudice to the right of the parties to present a request for the commencement of new arbitration proceedings seeking resolution of the dispute, so long as the amounts in arrears are paid.

10 Available at: <http://ccbc.org.br/Materia/1068/tabela-de-despeasas-e-calculadora>.

E Consequences of Defeat

The party who is defeated in arbitration proceedings, unless otherwise agreed, may, in proportion of its lost, be ordered by the Arbitral Tribunal to make the early repayment of costs, expenses, Arbitrators' fees, as well as attorney fees. The Terms of Reference shall regulate attorney fees. In absence of that, the default rule of CAM-CCBC gives a discretionary power to the Arbitrators to fix the attorney fees. Brazilian Code of Procedure is not applicable in that matter, so that parties shall not have the expectation of winning a percentage of the amount in dispute as it happens before a court case if they do not regulate that on the Terms of Reference.

F Lack of Funds

Other situations that may cause difficulties are those in which a party has no fund to pay the costs related to the arbitration – whether the Claimant's claims to start the proceeding, whether the Respondent's counterclaim – due to a cause external to is will (financial difficulty, economic crisis, etc). That is problem that could arise in arbitration but not in court litigation since Federal Law gives free access to the civil justice system to the parties who lack financial conditions ("assistência judiciária gratuita"). Naturally, that Federal Law is not applicable to private arbitration institutions.

These discussions fostered the study of so-called third party funding.[11] Nevertheless, in many cases, given the high costs involved in the arbitration proceeding, the aggrieved party in the transaction relationship is being prevented from starting or continuing an arbitration for lack of funds to do so.

The issue concerning the right of access to justice, in cases where the parties do not have the financial resources to bear the costs of arbitration, is not treated unanimously within the judicial courts. Should the right of access to justice triumph over party autonomy to submit their disputes to arbitration governed by a procedure agreed by the parties and thus arbitration clause could be disregarded by a court of justice?

First, we will analyze two conflicting decisions on this issue.

11 About third party funding, see, for example, the Association of Litigation Funders ("ALF") from United Kingdom. The Association of Litigation Funders is an independent body that has been charged by the Ministry of Justice, through the Civil Justice Council, with delivering self-regulation of litigation funding in England and Wales. The ALF has its own Code of Conduct. The Code sets out the standards by which all full funder members of the ALF must abide, and meets each of the key concerns set out by Lord Justice Jackson in his Civil Litigation Costs Review. The Code of Conduct for Litigation Funders was published by the Civil Justice Council – an agency of the UK's Ministry of Justice – in November 2011. Available at: <http://associationoflitigationfunders.com>.

In the first case (*Pirelli v. Licensing Projects*),[12] the Paris *Cour de Cassation* annulled an ICC award because the Arbitral Tribunal refused to consider the counterclaims submitted by Respondent, on the grounds that due process had been violated and that the recognition or enforcement of the award would be contrary to international public policy.

On that case, in November 2007 Pirelli initiated arbitration proceedings before the ICC, requesting the arbitral tribunal to: (i) acknowledge the termination of the agreement; and (ii) hold *Licensing Projects* liable to pay the outstanding royalties, as well as damages resulting from alleged breaches of the agreement. Respondent introduced several counterclaims before the arbitral tribunal, with the aim of that Arbitral Tribunal declare that Pirelli had unlawfully terminated the agreement and requested damages for the resulting loss of profits.

Once *Licensing Projects* could not pay the advance on costs, the ICC court decided that the counterclaims were deemed to have been withdrawn pursuant to Article 30.4 of the 1998 ICC Rules (Art. 36.6 of the 2012 ICC Rules[13]). In the final award rendered in Paris in October 2009, the Arbitral Tribunal admitted all of *Pirelli's* claims and did not consider *Licensing Projects'* counterclaims.

Licensing Projects initiated the proceedings to set aside the award. It argued that the arbitral proceeding, in which the Arbitral Tribunal did not hear its counterclaim because of its failure to pay the advance of costs, even if *Licensing Projects* was materially unable to make such a payment, violated its right of access to justice. The *Cour de Cassation* understood that this fact would be offensive to the principle of access to justice and equality.

In Brazil the matter is new and the recent economic crisis of the country might bring the issue at stake to the courts. However, the lack of funds to pay the arbitration should be treated under the general rule of the theory of impossibility under the Civil Code. Personal (private) circumstances of any of the parties shall not be considered as basis for breaching contractual duties of the parties. Unless it is a general impossibility of all people under the same objective situation, agreements shall be enforced and respected. Therefore, courts should enforce arbitration clause even if the party lacks funds. Otherwise, our legal system will lack certainty for economic agents.

12 Cour de Cassation de Paris. Cass. Civ. 1er, 28 March 2013, n. 392 (11-27.770). Available at: <www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000027251564&fastReqId=1330870219&fastPos=1>.

13 Similar to the CAM-CCBC rule of *segregation*. As explained, by this rule, in cases of counterclaims, any of the parties may request the separate specification of the amount (segregation) for the purpose of payment of the Administration Fees and Arbitrators' Fees. In such cases, Claimant and Respondent will be liable for the payment of amounts related to the respective claims.

3 ECONOMIC ANALYSIS OF COSTS OF ARBITRATION: IS ARBITRATION MORE 'EXPENSIVE' THAN A LAWSUIT?

Legal science, also called legal doctrine, does not offer analytical tools to properly size the issue of costs and more broadly the price of the options that parties have to resolve their disputes. Accordingly, without the lens of economics, starting from the superficial assumption that cost is synonymous with financial payment, one would believe that arbitration is expensive when compared to the state method of dispute settlement.

However, by applying some concepts of economics, we arrive at the opposite conclusion. This is because the legal process, which may even have less costly Administration Fees,[14] includes many "hidden" costs that are present in the solution of disputes by the judiciary, namely transaction costs and opportunity cost.

The opportunity cost of a claim, in the words of Robert Cooter and Thomas Ullen, designates the economic cost of an alternative that has been overlooked.[15] In other words, in economic terms, it is the cost of alternative allocative use of financial resources, which is stopped during a dispute, because the creditors are not receiving the money corresponding to their right.

We understand that the arbitration procedure can reduce opportunity cost. Thus, starting from the content of recent research showing that a court decision takes around seven years, and that arbitration does not take more than two years, the opportunity cost due to the unavailability of funds and assets *sub judice* for a very long period, makes arbitration cheaper compared judicial proceedings.

Transaction costs, introduced in economics by Ronald Coase,[16] can be defined as all the costs involved in an exchange or trade. In summary, transaction costs cover the three steps of a commercial transaction: (i) search costs for conducting business; (ii) cost of trading; (iii) costs of complying with what was negotiated.

What is of interest to us, specifically, are the costs related to compliance of the business, since a typical example of transaction costs are the costs of resolving disputes that may arise from a contract.

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14 The Judicial fee has a ceiling that varies from state to state in the Federation, but that is usually not higher than R$ 60,000.00, in case, for example, of the Court of Justice of Sao Paulo. Available at: <http://www.tjsp.jus.br/Egov/IndicesTaxasJudiciarias/DespesasProcessuais/TaxaJudiciaria.aspx?f=2>.

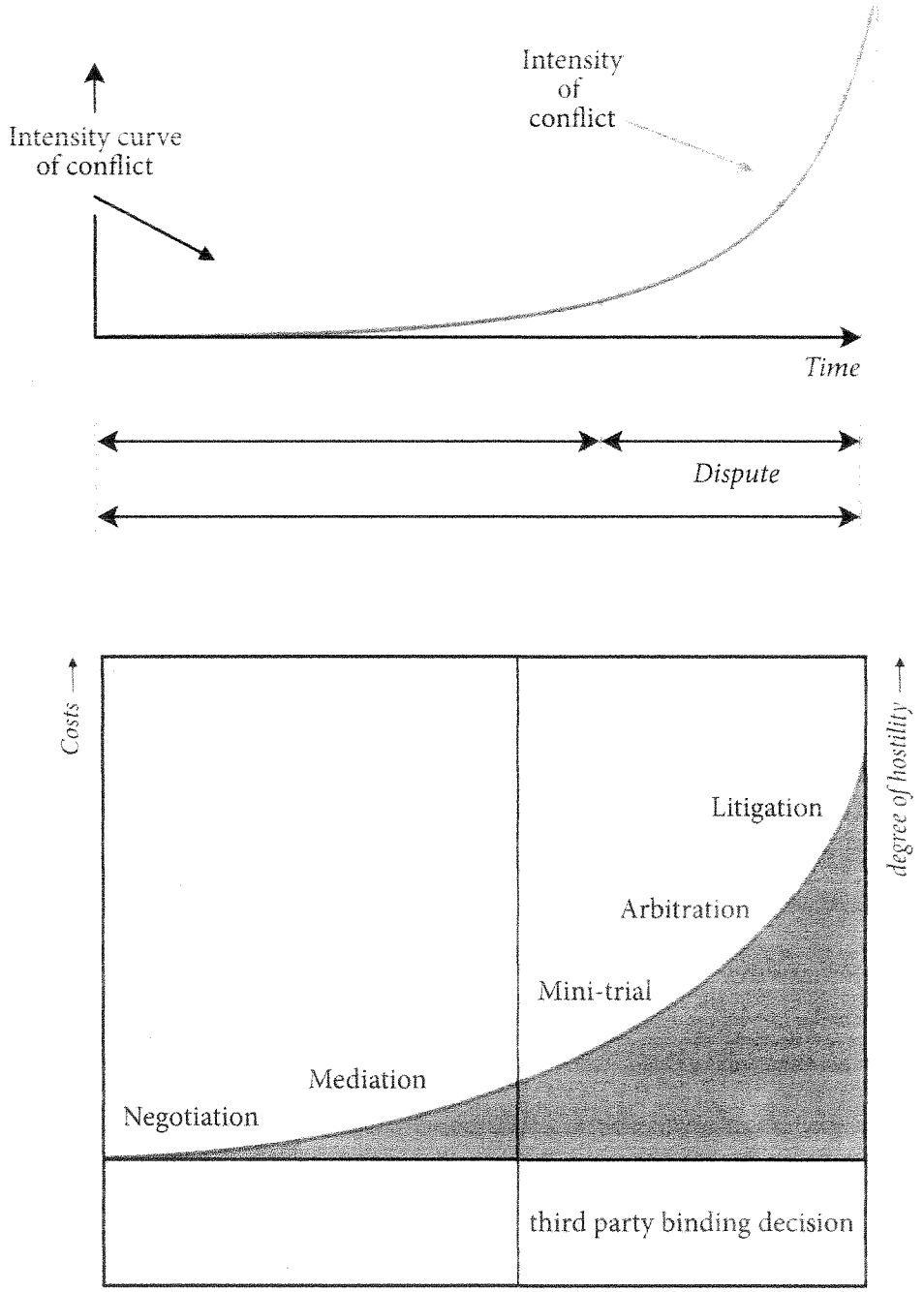
15 These authors demonstrate the opportunity cost with the following example: "When you decided to attend university, a post-graduate course or law school, you gave up other valuable alternatives, for example, getting a job, or training for the Olympics." (COOTER; ULLEN, 2010, p. 53)
Bringing the example to the scope of the law, the unavailability of economic assets for a long period of time during a lawsuit, increases the cost of a waiver of these assets, as well as decreasing the benefits that could be obtained from these foregone assets.

16 Through his two main articles: The nature of the firm (1937) and The problem of social costs (1960).

Accordingly, again we conclude that the arbitration procedure reduces the transaction costs involved in a dispute resolution. First, the agility of the procedure is the quality that attracts new players to arbitration. The extension in time of court proceedings itself can be extremely damaging to business activity.

Thereunto, we propose the analysis of two graphs:

Graph 3



Through the analysis of the graphics, we can reach the following conclusions:

i.) As a contention lasts in time, the intensity of conflict tends to increase exponentially; (graphic 01)

ii.) The cost of resolving a dispute is variable according to the degree of hostility of the dispute (intensity of the conflict), i. e., the higher the degree of litigiousness of the dispute, the higher the cost. Given that the judicial dispute is the one that lasts longer, it is the means for resolution of disputes that shows more hostility (see lower graph on page 200);

iii.) Therefore, what is observed is that litigation is more expensive than arbitration, which reduces the transaction costs involved, making it a more efficient means than the judiciary.

We can list other characteristics of arbitration proceedings, other than agility, which, in our view, also reduce the transaction costs of dispute resolution.

It should be emphasized that in arbitration are the parties who choose the Arbitrators. Therefore, there is a range of alternatives for them to choose experts in the subject matter of the dispute.

The specialization of the Arbitrator enables a considerable decrease in the risk of errors in decisions. The parties are free to choose Arbitrators who are experts in the subject matter of the dispute, being able to choose Arbitrators that have experience in civil works to interpret contracts of this kind and who have a more accurate knowledge of this matter, for example.

The Arbitrators are usually better prepared for the task of judging claims involving complex contracts, by virtue of their refined knowledge and expertise in the area in question.

Furthermore, we can assert that the expectation generated by the parties because of the great level of independence and impartiality of the Arbitrators is crucial to reduce the transaction costs. Partiality is clearly bad, intentionally and decidedly distorting a sense of justice.

Likewise, we can cite confidentiality. The arbitration proceedings are confidential, a desirable quality within the corporate scope. This is because, in many situations, corporate internal and confidential information are discussed, information which, if released, could get in the way of its good functioning. Confidentiality reduces the risk of the leakage of privileged information regarding product development, research performed, potential markets, and other information that could possibly be used by competitors if the procedure becomes public, as in the case of a lawsuit.

Finally, it is relevant to point out the importance of the impossibility to appeal on an arbitration award. Arbitration is free of the countless possibilities of appeal to which a lawsuit is subject. This feature generates more legal certainty for the parties, who are not subject to the different positions of the Courts of the judicial procedure.

4 Conclusion

Due to all we have presented, we conclude that arbitration is a highly efficient method of dispute resolution. The economic pendulum seems to favor arbitration as opposed to judiciary in Brazil when we use tools of law and economics, in situations in which all costs and risks are calculated. However, there is always a trade off when choosing the adequate method to solve disputes between parties. Parties shall be aware of the implications of the applicable rules with respect to bearing the costs. Differently from litigating in Brazilian courts, in which there is a high level of public subsidization, in arbitration they might borne significant costs in exchange of time saving, and by implication, avoiding transaction and opportunity costs.