

The Milan Chamber of Arbitration Adopts New Arbitration Rules

April 8, 2019

The Milan Chamber of Arbitration (*Camera Arbitrale di Milano* or “CAM”), Italy’s most important arbitral institution, adopted new arbitration rules which entered into force on March 1, 2019 (the “Rules”). The Rules, which are available in English even though their official language remains Italian, replace the earlier, 2010 version and codify prevailing best practices in international commercial arbitration. Pursuant to Article 45 of the Rules, unless otherwise set forth therein or agreed by the parties, the Rules apply to all arbitration proceedings instituted post-March 1, 2019, irrespective of the date of execution of the agreement to arbitrate.

1. New Provisions

There are seven key new provisions in the Rules:

1.1. Conservatory and interim measures

Pursuant to Article 26.1 of the Rules, a party may seek from the arbitral tribunal conservatory and other interim measures “that are not barred by mandatory provisions applicable to the arbitration proceeding.” Article 818 of the Italian Code of Civil Procedure (“CCP”), which is a mandatory rule of the Italian *lex arbitri*, prohibits arbitral “conservatory or other interim measures, unless the law provides otherwise.” Some scholars have construed this prohibition narrowly, maintaining that its scope of application be limited to measures the enforcement of which requires the taking of coercive action (e.g., through a bailiff or other court officer). It is against this background that Article 26.2 of the Rules now provides by default that “the Arbitral Tribunal, at request of a party, has the power to adopt any determination of provisional nature with *binding contractual effect* upon the party.” (emphasis added)

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In the event of noncompliance with any such determination, the party in whose favor it was granted would now arguably be entitled to sue the noncompliant party for breach of contract.

1.2. Emergency arbitrator

Article 26 of the Rules applies when the arbitral tribunal is constituted. Article 44 of the Rules now provides that, prior to the constitution of the arbitral tribunal, a party may seek urgent conservatory or interim measures from an emergency arbitrator appointed by the CAM. In contrast to the *ratione temporis* rule set forth in Article 45, Article 44 applies to proceedings commenced on the basis of an arbitration agreement executed post-March 1, 2019, unless otherwise agreed by the parties. Among other things, the emergency arbitrator rules set forth in Article 44 provide that: (i) any decision in respect of the application must be taken only after giving all parties an opportunity to be heard; (ii) however, pursuant to Article 44.4, the applicant may request that its application be decided *inaudita altera parte*, in which case the emergency arbitrator will direct both parties to appear before him or her within ten days from the date of the *inaudita altera parte* relief and will decide whether to confirm the relief within the subsequent five days; and (iii) the arbitration proceedings shall be instituted within 15 to 60 days from issuance of the measure, absent which the order becomes ineffective. Absent provisions allowing the emergency arbitrator to issue relief with binding contractual effects, in arbitration proceedings seated in Italy the party obtaining such relief may not be able to enforce it against the noncompliant party. The party in need of urgent measures prior to the constitution of the arbitral tribunal may therefore have to resort to a court of competent jurisdiction, including potentially the Italian courts pursuant to Article 669-*quinquies* of the CCP.

1.3. Third-party funding

Article 43 of the Rules now requires disclosure of any funding arrangement existing between one of the parties and a third-party funder. The disclosure relates to the existence of the funding arrangement and the identity of the funder, and is intended to deal with issues of conflict of interest of the

arbitrators. Unlike the arbitration rules enacted by other institutions, the Rules do not expressly allow the arbitral tribunal to take into account the existence of any third-party funding arrangements for the purposes of assessing and allocating the costs of the arbitration, including the costs of any such financing that the prevailing party may have incurred.

1.4. Consolidation of arbitrations

Article 12 of the Rules now empowers the Arbitral Council of the CAM to consolidate two or more arbitration proceedings, including proceedings instituted on the basis of separate arbitration agreements, provided that: (i) all parties agree to the consolidation; (ii) the arbitration agreements upon which each proceeding has been instituted are identical or compatible with respect to arbitral seat and procedure for the appointment of the tribunal; and (iii) no tribunal has been constituted in any proceedings. If consolidation is ordered, the separate proceedings will be consolidated into the arbitration that was instituted first.

1.5. Arbitrations on corporate law disputes

Article 17 of the Rules relates to corporate law arbitration (*arbitrato societario*), a dispute resolution mechanism applicable to, among the others, disputes between members of an Italian corporate entity (such as the share- or quota-holders of an S.p.A. or an S.r.l.) or relating to claims against the entity's corporate bodies (such as directors, auditors and liquidators). In light of the potentially multiparty nature of these disputes, under Italian law they must be adjudicated by a tribunal appointed by a third party. If the entity's founding instruments contemplate that such disputes be adjudicated by CAM-administered arbitration without identifying the external appointing authority, pursuant to Article 17 of the Rules "[t]he Arbitral Council shall appoint the Arbitral Tribunal."

1.6. Good faith-conduct

Article 9.1 of the Rules requires the parties and all other individuals involved in CAM-administered arbitrations to act in good faith throughout the

proceedings. Specifically, pursuant to Article 9.2 the parties are required, among other things, to give effect to the tribunal's awards, orders and decisions (including any determination of provisional nature pursuant to Article 26.2 and, arguably, an emergency arbitrator's decision pursuant to Article 44). Further, Article 9.3 and 9.4 of the Rules now empowers the arbitral tribunal to issue sanctions aimed at preserving or restoring the fairness and integrity of the proceedings. The tribunal may also take into account the parties' and their counsel's conduct when allocating arbitration costs at the end of the proceedings.

1.7. Irregular constitution of tribunal

Pursuant to Article 23 of the Rules, an arbitral tribunal may resign from its function if it finds that any of its members has been appointed in breach of a mandatory rule applicable to the proceedings. The resignation must be formalized in a reasoned order and involves the tribunal as a body, rather than one or more arbitrators individually. Upon formalization of the resignation a new tribunal must be constituted in accordance with the Rules. This provision seems aimed at pre-empting possible challenges to the award or denials of enforcement on the ground that the tribunal was not properly constituted.

2. **Amendments to Existing Provisions**

Additionally, several pre-existing provisions of the Rules have been amended, including:

2.1. Arbitrators' appointment

The default provision concerning arbitrators' appointment under Article 15 remains that the CAM Arbitral Council would appoint a sole arbitrator or a tribunal chair having a nationality other than the nationalities of the parties, where these are different. Article 15.5 of the Rules now allows the Arbitral Council "under particular circumstances" to appoint the sole arbitrator or the tribunal chair "sharing the nationality of one of the parties," provided however that none of the parties objects.

2.2. Time limits for the tribunal's constitution

Article 24.2 of the Rules now provides that the tribunal should constitute "as promptly as possible, also by taking into account the needs of the parties, and in any case within thirty days from receipt of the briefs and documents forwarded by the Secretariat."

2.3. Tribunal's constitution

Article 24.3 of the Rules abrogates the requirement in Article 21.3 of the earlier version of the Rules that the constitution of the tribunal be formalized in written minutes, which oftentimes resulted in a delay of the arbitral process. Article 24.3 now provides that the tribunal's constitution "shall take place by an act dated and signed by the arbitrators," without the need to formally convene a meeting.

2.4. Conduct of the proceedings

There has never been under the Rules a requirement for the tribunal to hold a case management conference ("CMC"), much less an in-person conference. Under the previous version of the Rules, most arbitrators would in practice hold a CMC at the same hearing at which the tribunal would formalize its constitution. Article 25.1 of the Rules now codifies such practice and requires the tribunal to define the procedural framework of the arbitration "when it constitutes."

2.5. Consolidation post-constitution

Pursuant to Article 25.4 of the Rules, the arbitral tribunal *must* consolidate two or more proceedings pending before it which relate to the *same* dispute. This provision aims at preventing conflicting awards on the *same* dispute (i.e., same parties, same causes of action, same relief sought). If the multiple proceedings are *related* (i.e., some aspects of the disputes are related), then pursuant to Article 25.5 the tribunal *may* consolidate them.

2.6. Award scrutiny

The scrutiny by the CAM of the arbitral award before issuance remains an option open to the tribunal (not the parties) in the Rules. Should the tribunal opt for this option, Article 34.2 of the Rules now provides that it will have to provide the draft

award to the CAM within the time limits set forth by it. As with other arbitration rules, the scrutiny by the CAM is limited to issues of form.

2.7. Confidentiality

Article 8 of the Rules extends the confidentiality obligations set forth therein to the parties' counsel. The CAM remains entitled to publish or consent to the publication of awards in anonymous format. However, any of the parties is now given a thirty day-time limit from the issuance of the award to object to such publication. Article 27.4 of the Rules also now expressly provides that hearings are held in private, unless otherwise agreed by the parties.

2.8. Model clause

The scope of the model clause has been widened to include references to (i) disputes of non-contractual nature and (ii) disputes "*connected*" to the contract.

3. **Conclusion**

Some of the amendments in the Rules are likely to be welcomed by arbitration users insofar as they reflect best practices in international arbitration, including with respect to speed, efficiency and costs. Others, however, are more controversial. The provisions allowing a tribunal to resign when it finds *sua sponte* that there had been an irregularity in its constitution is perhaps the most notable example of these provisions. Some arbitration users may also question why CAM did not take the opportunity in this most recent round of revisions to address other issues, including the possibility to summarily dismiss patently unmeritorious claims. Finally, the Rules preserve some of the peculiarities that are characteristic of the Italian *lex arbitri*, including for example with respect to corporate law arbitration and arbitral conservatory and interim measures.

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