

# The Milan Chamber of Arbitration Adopts New Measures In The Wake Of COVID-19 Pandemic

July 30, 2020

On July 1, 2020, the Milan Chamber of Arbitration (*Camera Arbitrale di Milano* or “CAM”), Italy’s main arbitral institution, adopted a number of measures to help enterprises navigating the Covid-19 pandemic. These measures include: (1) new arbitration rules establishing a simplified arbitration procedure (the “Simplified Rules”); (2) new model clauses for contractual determination procedures (*arbitraggio*); and (3) economic incentives for commencing mediation procedures administered by CAM.

## 1. The Simplified Rules

While presented among the measures adopted to foster the use of ADR mechanisms to solve Covid-19 related disputes,<sup>1</sup> the Simplified Rules are designed to enduringly flank ordinary arbitrations under the CAM rules of arbitration (the “Rules”) and become a permanent part of CAM’s offer to arbitration users. The Simplified Rules do in fact fit into a global trend whereby virtually all major arbitral institutions have in the past few years adopted provisions for conducting small to medium arbitrations in an expedited and less expensive fashion (*see, e.g.*: (i) the Expedited Procedure Provisions of the International Chamber of Commerce and the Rules of Expedited Arbitration of the Stockholm Chamber of Commerce, both released in 2017; (ii) the Expedited Procedure set forth in the 2010 arbitration rules of the Singapore International Arbitration Center, as amended; and (iii) the Expedited Procedure set forth in the 2008 arbitration rules of the Hong Kong International Arbitration Centre, as amended).

The Simplified Rules, which are available in English even though their official language remains Italian, are set out in a new Appendix D to the Rules (“Appendix D”) and include the following key provisions.

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<sup>1</sup> See CAM communication dated July 1, 2020, at <https://www.camera-arbitrale.it/it/news/arbitrato-semplificato-arbitraggio-mediazione.php?id=950>.



### 1.1. Scope of application

Pursuant to Article 1 of Appendix D, the Simplified Rules govern: (i) all post-July 1, 2020 arbitrations with a claim value that “does not exceed Eur. 250,000,” unless one of the parties objects to such application in the Request for Arbitration or the Reply (opt-out mechanism); and (ii) any other arbitrations, *irrespective of the claim value*, if the parties reference the relevant procedure in their arbitration agreement or agree to the application of Appendix D before the first round of written submissions is complete (opt-in mechanism). The aspects of the CAM-administered simplified arbitration that are not dealt with in Appendix D remain regulated by the Rules.

If the dispute is particularly complex, the CAM Arbitral Council, on its own motion or upon request of the arbitral tribunal before its constitution, remains at liberty to determine that the Simplified Rules do not apply. Even though the Simplified Rules do not provide so, it is reasonable to expect that the Council will hear the parties before making its determination.

### 1.2. The Arbitral Tribunal

Pursuant to Article 3, paragraph 1, of Appendix D, the arbitral tribunal in a CAM-administered simplified arbitration is always constituted by a sole arbitrator (appointed by the Arbitral Council), even if the parties agreed in their arbitration agreement to a three-member arbitral tribunal.

Article 3 may be said to be at odds with the principle that the parties’ agreement must always be complied with. The issue was recently addressed by the Singapore High Court, which, with respect to a similar provision set forth in the 2010 rules of the Singapore International Arbitration Center, held that the institutional rules chosen by the parties can override the arbitration agreement because such rules are “incorporated into the Parties’ contract and therefore [...] must be interpreted purposively.”<sup>2</sup> It remains to be seen, however, whether Italian courts

will adopt a different approach, including in light of Article 832, paragraph 2, of the Italian Code of Civil Procedure, pursuant to which, “if there is a contrast between the arbitration agreement and the institutional rules chosen by the parties, the former shall prevail.”

### 1.3. The Duration And Conduct Of The Simplified Arbitration

The Simplified Rules are designed to provide a time efficient method for resolving small scale disputes.

This is apparent from the following provisions of Appendix D, cutting by a half the time limits applicable to ordinary arbitrations under the Rules:

- Article 3, paragraph 3, which provides that the parties may file “comments or a reasoned challenge against the arbitrator within 5 days from receiving his/her statement of independence,” instead of the 10 days envisaged for challenges to arbitrators under Article 21 of the Rules.
- Article 4, paragraph 2, requiring that the arbitrator sign the document formalizing the constitution of the arbitral tribunal “within 15 days from the receipt of the parties’ submissions,” instead of the 30 days envisaged for the constitution of the arbitral tribunal under Article 24 of the Rules.
- Article 6, paragraph 1, pursuant to which the Final Award must be issued within “three” (instead of “six”) “months from the constitution of the Arbitral Tribunal.”

Other provisions aimed at minimizing the duration of the simplified arbitration include:

- Article 2, paragraphs 1 and 2, providing for a front-loaded procedure and setting forth a duty, “under penalty of rejection,” for each party to set out in their introductory briefs “the circumstances intended to be proved by each means of evidence.”
- Article 5, paragraphs 2 through 6, pursuant to which:

<sup>2</sup> See *AQZ v ARA* (2015) SGHC 49, at [http://www.uncitral.org/docs/clout/SGP/SGP\\_130215\\_FT.pdf](http://www.uncitral.org/docs/clout/SGP/SGP_130215_FT.pdf).

- (i) The arbitrator may establish limits to the number of brief pages, documents and witnesses that each party is allowed to present.
- (ii) Unless the arbitrator determines otherwise, the parties may file only “one supplementary brief in addition to the request for arbitration and the reply.”
- (iii) Unless the arbitrator determines otherwise in a reasoned decision, the parties cannot introduce new claims after the constitution of the arbitral tribunal.
- (iv) All the time limits set by the arbitrator “entail a lapse of a party’s right,” *i.e.*, must be treated as forfeiture deadlines (*compare* this provision *with* Article 7 of the Rules, pursuant to which “[t]he expiration of a time-limit set by [...] the Arbitral Tribunal shall *not* entail a lapse of a party’s right;” emphasis added).
- (v) Upon request of one of the parties or *sua sponte*, the arbitrator “may schedule a single hearing for the taking of evidence and a final discussion,” which may be “held by videoconference, telephone or similar means of communication.” This provision, which is in line with the CAM’s request that, in the wake of the Covid-19 pandemic, arbitral tribunals make “all possible efforts” to hold virtual hearings,<sup>3</sup> is likely to reduce the possibility for an unsatisfied party to challenge the enforceability and/or validity of the award on the basis that it has not consented to virtual hearings and, therefore, “the arbitral procedure was not in accordance with the

agreement of the parties” (*see* Article V.1.d of the New York Convention).<sup>4</sup>

#### 1.4. The Costs Of The Simplified Arbitration

As illustrated in the following two tables, the fees of both the CAM and the arbitral tribunal in a CAM-administered simplified arbitration are approximately 30% lower than the fees of ordinary CAM arbitrations.

##### a) CAM Fees

Claim value (€)	CAM fees in ordinary arbitrations (€)	CAM fees in simplified arbitrations (€)
Up to 50,000	1,000	500
From 50,001 to 100,000	1,700	1,200
From 100,001 to 250,000	3,500	2,500
From 250,001 to 500,000	7,000	5,500
From 500,001 to 1,000,000	12,000	9,000
From 1,000,001 to 2,500,000	18,000	13,000
From 2,500,001 to 5,000,000	24,000	18,000
From 5,000,001 to 10,000,000	30,000	22,000
From 10,000,001 to 25,000,000	40,000	30,000
From 25,000,001 to 50,000,000	55,000	40,000
From 50,000,001 to 100,000,000	70,000	50,000
In excess of 100,000,000	70,000 + 0.1% of the excess. Total amount not to exceed 140,000.	50,000 + 0.05% of the excess. Total amount not to exceed 80,000

<sup>3</sup> See CAM communication dated April 14, 2020, at <https://www.camera-arbitrale.it/it/news/arbitratos-sospensioni-dei-termini.php?id=930>.

<sup>4</sup> See Cleary Gottlieb’s alert memo dated May 5, 2020, at <https://client.clearygottlieb.com/72/1663/uploads/2020-05-05-the-italian-parliament-extends-emergency-measures-to-arbitration.pdf>.

b) Arbitral Tribunal Fees

Claim value (€)	Sole arbitrator's fees in ordinary arbitrations (€)	Sole arbitrator's fees in simplified arbitrations (€)
Up to 50,000	1,500-2,500	1,000-2,000
From 50,001 to 100,000	2,500-4,500	2,000-3,500
From 100,001 to 250,000	4,500-10,000	3,500-7,000
From 250,001 to 500,000	10,000-18,000	7,000-12,000
From 500,001 to 1,000,000	18,000-25,000	12,000-18,000
From 1,000,001 to 2,500,000	25,000-40,000	18,000-28,000
From 2,500,001 to 5,000,000	40,000-70,000	28,000-44,000
From 5,000,001 to 10,000,000	70,000-90,000	44,000-58,000
From 10,000,001 to 25,000,000	90,000-120,000	58,000-75,000
From 25,000,001 to 50,000,000	120,000-150,000	75,000-100,000
From 50,000,001 to 100,000,000	150,000-180,000	100,000-140,000
In excess of 100,000,000	180,000 + 0.05% of the excess. Total amount not to exceed 240,000	140,000 + 0.05% of the excess. Total amount not to exceed 180,000

## 2. The New Model Clauses For Contractual Determination Procedures

With a view to facilitating the likely renegotiation of many contracts in the wake of the Covid-19 pandemic, the CAM also adopted two new model clauses that parties can use to defer the determination of one of the elements of their contract to an umpire (*arbitratore*), as envisaged

by Article 1349 of the Italian Civil Code (*arbitraggio*).

With the first model clause, the parties agree that the CAM will act as appointing authority and nominate the umpire. The costs of this service are the same as the CAM charges when acting as appointing authority in arbitrations that it does not administer: *i.e.*, Euro 1,000 (if the dispute has a value up to Euro 2.5 million) and Euro 4,000 (if the value of the dispute exceeds Euro 2.5 million).<sup>5</sup>

With the second model clause, the parties agree to have their contractual determination procedure administered by the CAM and, therefore, regulated by the Rules (to the extent that they are applicable). The costs of the CAM-administered contractual determination procedures are calculated on the basis of the tariffs appended to the Rules, which provide different ranges depending on the amount at stake. In setting the umpire fees, the CAM will take into account the parameters that it uses to determine the fees of tribunal appointed experts, pursuant to Article 40, paragraph 7, of the Rules (*i.e.*, “the schedule of professional fees of the expert, national court schedules of fees and any other circumstance”).

## 3. The Economic Incentives For Commencing The CAM Mediation Procedures

Provided that the parties submit a declaration that their dispute is connected to the Covid-19 pandemic, from July 1 to September 30, 2020, the CAM will also:

- (i) Wave the fees associated with the filing of the first 100 requests for civil or commercial mediation submitted pursuant to Legislative Decree No. 28 dated March 4, 2010 (“Decree 28/2010”). Parties resort to this type of mediation if: (i) the underlying contract sets out a mediation clause or the parties so agree when the dispute arises; (ii) the dispute concerns one of the matters for which Article 5 of

<sup>5</sup> See <https://www.camera-arbitrale.it/it/cam-on-demand/nomina-arbitri.php?id=677>.

Decree 28/2010 establishes mediation as a compulsory step before the institution of civil proceedings; or (iii) the Court before which the civil proceedings are pending orders the parties to attempt to resolve their dispute through mediation. Pursuant to Article 4, paragraph 1, of Decree 28/2010, requests for mediation must be filed with an institution located within the district of the Court that is competent to adjudicate on the dispute. The CAM is located within the district of the Milan, Monza and Lodi Courts.

- (ii) Apply the lowest filing fee set out in the CAM rules for the online resolution of disputes, *i.e.*, Euro 30, to the first 100 requests for online mediation with a claim value lower than Euro 10,000.
- (iii) Apply discounted fees to the first 100 requests for mediation submitted pursuant to the CAM Fast Track Mediation Rules, provided that the dispute has a claim value lower than Euro 100,000.

The parties' declaration that the dispute is connected to the Covid-19 pandemic is subject to the CAM Secretariat's review.

#### 4. Conclusion

The Simplified Rules aim to improve the time and cost efficiency of small scale arbitrations and have the potential to also reduce the cost and duration of medium to large arbitrations. They are therefore likely to be welcomed by many arbitration users.

The success of the Simplified Rules will however depend on the posture that arbitrators will adopt while conducting CAM-administered simplified arbitrations. In particular, whether simplified arbitrations will in fact be more efficient than ordinary CAM arbitrations will largely depend on whether arbitrators will make use of the broad powers that the Simplified Rules confer on them, including the power to impose limits on the length of submissions and number of documents as well as to enforce the newly introduced forfeiture deadlines.

The possibility to have the CAM administering contractual determination procedures through the adoption of the new model clauses is also likely to be perceived as a useful tool. Especially now that, in the wake of the Covid-19 pandemic, there will likely be an increase in the number of contracts being renegotiated.

Likewise, the economic incentives for the use of mediation in Covid-19 related disputes are to be welcomed. Although very limited in time and amount, these incentives may help CAM users to become familiar with mediation procedures, which, except for the instances in which they are compulsory under Decree 28/2010, still go mostly unnoticed in a significant number of disputes.

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