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The Milan Chamber of Arbitration Introduces New Rules: Pioneering Or Codifying?

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Italy's leading arbitral institution, the Milan Chamber of Arbitration ("**CAM**"), issued its new rules ("**CAM Rules**") on 1 March 2019.

The new rules, superseding the previous CAM Rules of 2010 ("**2010 CAM Rules**"), apply to arbitration proceedings commenced after 1 March 2019, unless the parties have agreed otherwise under Article 45(2) of the CAM Rules and Article 832(3) of the Italian Civil Procedure Code.[1)]

This post analyses whether CAM pioneered innovative development in formulating arbitral rules or it has simply codified developments and best practices within the international arbitration community and other leading arbitral institutions around the world. A summary of some of the most significant amendments, together with comparisons with the rules of other leading arbitral institutions, is provided below.[2)]

Duty of fair conduct (Article 9)

The new Article 9 of the CAM Rules imposes on all individuals involved in arbitration proceedings (*e.g.* parties, arbitrators, experts and counsel) an obligation to act in good faith throughout the proceedings. This duty was not in the 2010 CAM Rules, which stated only that the principles of the right to be heard and equal treatment of the parties applied (Article 2 of the 2010 CAM Rules).

More importantly, it now states that an arbitral tribunal "*may sanction any breach of its decisions and any unlawful conduct that is contrary to good faith*".

By empowering arbitral tribunals to sanction unfair conduct, Article 9 not only brings the CAM in line with worldwide arbitration rules, it goes even further. Article 13(5) of the 2018 HKIAC Rules and Article 14(5) of the 2014 LCIA Rules merely set out the principle of fair conduct; yet fail to indicate any consequences of breach.

Although it could be argued that arbitral tribunals were already vested with sanctioning powers, the specific mandate under Article 9 of the CAM Rules may encourage the application of sanctions in such instances.

Interim measures (Article 26)

Upon request, the arbitral tribunal may issue all urgent and provisional measures of protection "*that are not barred by mandatory provisions applicable to the proceedings*". This reservation was necessitated by Article 818 of the Italian Civil Procedure Code, which denies arbitrators the power to order interim and provisional measures.

The peculiarity of Article 26 is that it empowers arbitral tribunals, unless otherwise agreed, to adopt "*any determination of provisional nature with binding contractual effect upon the parties*". As these measures have a contractual effect, non-compliance entitles the other party to bring a court action for breach of contract. This is unique to the CAM Rules and was necessitated by the limitation imposed by Italian legislation.

Moreover, Article 26(3) authorises arbitral tribunals to "*order the party requesting an interim measure to provide appropriate security for costs as a condition to issue the measure*". Similar provisions can be found in Article 28(1) of the ICC Rules, Article 23(6) of the HKIAC Rules, Article 25(1) of the LCIA Rules, Article 37(2) of the SCC Rules, Article 30(1) of the SIAC Rules and Rule 37(b) of the AAA Rules.

Emergency Arbitrator (Articles 26 and 44)

Under the 2010 CAM Rules, a party seeking an urgent measure had to approach a national court. Now, a party may file an application with the CAM for the appointment of an emergency arbitrator to issue urgent, interim and provisional measures prior to the constitution of an arbitral tribunal.

The CAM appoints the emergency arbitrator, who issues an order on the provisional measure within 15 days from application if it is "*manifestly grounded*", which means that the requirements of *fumus boni iuris* ("prima-facie case") and *periculum in mora* ("danger of delay in the proceedings") lie with the applicant.

Truly innovative is that, if so requested, the arbitrator may also issue such an order within 5 days "*without notice to the other party*" if prior disclosure would put the applicant at risk of serious harm. This provision is unmatched in other leading institutional arbitration rules and allows the parties to obtain an *inaudita altera parte* order without involving national courts. If issued, the emergency arbitrator will schedule a hearing within 10 days where each party is given a reasonable opportunity to be heard.

Until the arbitral tribunal's constitution, the emergency arbitrator has the authority to challenge, amend or revoke an order.

These new provisions fill the gap and follow the path of other arbitral institutions, which already included a mechanism to seek urgent relief before the constitution of an arbitral tribunal (*e.g.*, Article 29 and Appendix V of the ICC Rules, Article 9B of the LCIA Rules, Appendix II of the SCC Rules, Schedule 1 of the SIAC Rules, and Schedule 4 of the HKIAC Rules). Over the last decade the emergency arbitrator seems to have been increasingly used under the institutional rules of other arbitral institutions; however, issues remain on recognition and enforceability before

national courts of orders issued by same.[3)]

In this regard, when the *lex arbitri* is Italian law, the effectiveness of resorting to an emergency arbitrator for urgent measures remains questionable, given that intervention by a domestic court will likely prove necessary. In fact, under Italian law, arbitrators are not vested with the power to order interim or provisional measures, yet the CAM Rules include no provisions allowing an emergency arbitrator to issue such orders with binding contractual effects on the parties. In other words, if arbitration proceedings are seated in Italy, a party can obtain urgent relief from an arbitrator before the arbitral tribunal is constituted but may be unable to enforce the same against the noncompliant party.

Third-party funding (Article 43)

Many unanswered questions arise when discussing third-party funding: should the existence of a funding agreement or identity of the funder be disclosed? Must the terms of such funding be disclosed?

Sensitive issues arise when dealing with the disclosure of the funder's identity. The presence of an outside influence, which affects the arbitration process, could lead an arbitrator to be in conflict of interest, harming the impartiality of the proceedings themselves. Conversely, due to confidentiality rules, the appropriate scope of disclosure must be set.

However, although third-party funding is becoming more common, the vast majority of arbitral institutions fail to reflect its importance in their rules, other than the HKIAC, a pioneer in including regulatory provisions regarding disclosure of third-party funding, and, now, the CAM is following suit.

The CAM Rules provide that the funded party "*shall*" disclose both a third-party agreement and the funder's identity.

In comparison with the HKIAC Rules, which under Article 44 require that the existence of any funding agreement and the funder's identity be disclosed to the parties, the arbitral tribunal and the HKIAC (click here or here for more on the Rules in Hong Kong), the CAM Rules do not specify to whom the disclosure must be made. That said, it seems reasonable to assume that disclosure be made to the arbitral tribunal, the CAM Secretariat and the counterparty.

Regarding costs, Article 34(4) of the HKIAC Rules stipulates that the arbitral tribunal may consider any third-party funding arrangement in "*determining all or part of the costs*". Under CAM Rules however, there is no provision preventing the tribunal from considering third-party funding when allocating the costs.

Although the CAM Rules do not regulate all aspects of third-party funding, they do make a significant addition to the international arbitration backdrop. Indeed, even though third-party funding is still subject to debate, things now appear to be moving towards increased disclosure, at least with regards to the funding agreement and funder's identity.

Corporate law arbitration (Article 17)

Article 17 of the CAM Rules applies to disputes arising between companies, groups of companies, shareholders or stakeholders of an Italian company as well as to claims brought against a company's bodies (*i.e.*, boards of directors or statutory auditors).

Article 17 provides that the CAM Arbitral Council is in charge of appointing the arbitral tribunal or the sole arbitrator whenever the arbitration clause, contained in statute or by-law of a company subject to Italian law, fails to designate the appointing authority, which cannot be the company itself.

This provision complies with Article 34(2) of Italian Legislative Decree No. 5/2003, under which a corporate arbitration clause is void if it fails to stipulate that the appointing authority must be a third party (other than the company).

This clause finds no equal in other major arbitration rules and evidently responds to the fact that such corporate disputes arise between members of the same company or relate to claims against the company's corporate bodies. Any involvement of the company in such a decision might favour a specific group of stakeholders, thus impairing the arbitral tribunal's impartiality.

Conclusion

The comprehensive amendments to the CAM Rules not only consider specifics of the Italian legal framework, but also the latest developments and best practices of the international arbitration community. As highlighted above, they also pave the way for new standards, as yet unexplored by other arbitral institution, thus increasing Italy's reputation as an "arbitration friendly" venue.

References

?1 Article 832(3) of the Italian Civil Procedure Code provides that: “Unless otherwise agreed by the Parties, the Rules in force at the time of the start of arbitral proceedings shall apply”.

?2 The drafting history and the CAM awards are not publicly available.

?3 See the recent ICC Report on Emergency Arbitrator Proceedings published in April 2019, according to which “[*a*]*s EA proceedings have become more prevalent, concerns about the enforceability of EA decisions have given rise to numerous debates. Enforceability concerns have principally arisen from the status of the EA, the interim nature of the EA decision and the specific form of the EA decision”*.

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