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Highlights from the 2019 Rules of the Milan Chamber of Arbitration

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On 1 March 2019 the Milan Chamber of Arbitration issued its amended Arbitration Rules (the "2019 Rules'") with the aim of improving "the efficiency and the rapidity of arbitral proceedings [while] ensuring the necessary guarantees." This objective follows the current international trend. Indeed, in the last decade, several arbitral institutions have revised their rules in order to guarantee that arbitrations are conducted in an expeditious and cost-effective manner, without sacrificing fairness and reliability. Pursuant to Article 45 of the 2019 Rules, these apply to arbitration proceedings instituted after 1 March 2019 unless otherwise agreed by the parties in accordance with Article 832 of the Italian Code of Civil Procedure ("ICCP"), or in specific instances as set forth by the 2019 Rules themselves. Although the revisions introduced several changes to the CAM Arbitration Rules, only the most significant ones are analysed below.

Third Party Funding ("TPF")

TPF is a method of financing an arbitration where all or some of the funds required to cover the expenses of the proceedings are provided by an entity that is not a party to the dispute (the funder), to one or more of the arbitration parties (the funded). A very important issue related to TPF concerns the disclosure of a TPF agreement to verify the arbitrators' impartiality and independence, which could be compromised by a conflict of interest between one of the arbitrators and the third-party funder. On this issue, the international legal framework is diversified. While some arbitral institutions require the parties to mandatorily disclose the existence of a TPF agreement and the identity of the funder (*e.g.*, 2018 HKIAC Administered Arbitration Rules and 2017 CIETAC International Investment Arbitration Rules), most of them only recommend that the parties disclose this information (*e.g.*, 2016 CAM-CCBC Arbitration Rules), or recognize that arbitral tribunals have discretion to order such disclosures (*e.g.*, 2017 SIAC Investment Rules). Overall, it can be argued that there is an international trend towards greater disclosure of TPF agreements. The 2019 Rules join such a trend by requiring in Article 43(1) that a party "funded by a third party in relation to the proceedings and its outcome **shall** disclose the existence of the funding and the identity of the funder." (Emphasis added.) This development is more than welcome. Indeed, the disclosure of a TPF agreement is a fundamental step in verifying the arbitrators' impartiality and independence, which are deemed to guarantee the fairness and integrity of the arbitral procedure. Such disclosure must also be considered from the perspective of transparency. Indeed, as highlighted by the 'ICCA-Queen Mary Task Force on Third-Party

Funding in International Arbitration' in its 2018 Report, the disclosure of TPF agreements allows all parties to an arbitration to precisely identify all the players and interests involved in the proceedings.

Interim or Provisional Measures

A second important development of the 2019 Rules relates to the power of arbitral tribunals to order interim or provisional measures. Article 26 of the 2019 Rules reads as follows:

> 1. (…) the Arbitral Tribunal may issue all urgent and provisional measures (…) that are not barred by mandatory provisions applicable to the proceedings. 2. In any case, unless otherwise agreed by the parties, the Arbitral Tribunal (…) has the power to adopt any determination of provisional nature with binding contractual effect upon the parties.

While Article 26(1) was already included in the 2010 Rules (Article 22), Article 26(2) represents a significant innovation. In order to understand such amendment, it is fundamental to examine Article 818 of the ICCP, which provides that "arbitrators are not entitled to grant attachments, or any other form of interim relief, unless the law provides otherwise." According to most authors and case law, this provision is a mandatory rule of the Italian *lex arbitri* whose *ratio legis* is found in the private nature of arbitration, and in the lack of coercive powers of arbitrators. Due to this outdated and criticisable provision, arbitrators are not allowed to order any provisional relief unless strictly provided by law. The only statutory exception to Article 818 is Article 35(5) of the Legislative Decree 5/2003 on Corporate Arbitration, which "empowers arbitral tribunals to suspend the effects of shareholders' meeting resolutions when their validity is challenged in arbitration." (L. Radicati di Brozolo and M. Sabatini, Arbitration Guide on Italy, available here). Therefore, under Italian *lex arbitri*, the parties seeking interim relief must necessarily involve national courts, which have the exclusive power to grant it, even after the constitution of the arbitral tribunal.

In light of the foregoing, Article 26(2) could play an important role in arbitral proceedings seated in Italy. According to this provision, arbitral tribunals could order provisional determinations binding the parties as if these were contractual obligations. Therefore, if one of the parties fails to comply with the ordered measures, the other party – although it cannot seek enforcement before national courts – could eventually seek damages for breach of contract. From this perspective, the ability of the 2019 Rules to improve the efficiency and expeditiousness of proceedings administered by the CAM will likely be tested soon.

Emergency Arbitrators ("EA")

Following the practice of several arbitral institutions such as the ICC and LCIA, Article 44 of the 2019 Rules introduced the figure of EA – namely, an arbitrator appointed by the arbitral institution to issue interim measures which cannot await the constitution of the arbitral tribunal. The 2019 Rules empower parties to an arbitration proceeding where a tribunal is not yet in place, to request

the CAM to appoint an arbitrator empowered to adopt measures as provided by Article 26. Specifically, in conjunction with Article 26, Article 44 allows the EA to adopt, even *inaudita altera parte* (*i.e.*, without the other party involved), binding interim or provisional measures. However, the EA provision under Article 44, by derogation from Article 45, only applies to proceedings where the arbitration agreement was concluded after the entry into force of the 2019 Rules, *i.e.*, after 1 March 2019. This derogation is more than justified given the innovative nature of Article 44.

The CAM's determination to establish an efficient and expeditious procedure is apparent from Articles 44(2)-(4), which dictate that EA decisions should be issued within 20 days from the date of application. Furthermore, under Article 44(4), the EA can order measures *inaudita altera parte* if there are "prior disclosure risks causing serious harm to the applying part." However, in this case, the EA has to schedule a hearing within 10 days of ordering the interim relief in order to grant due process rights to the parties. During this hearing, the EA will confirm, amend or revoke the measures previously granted.

In this regard, the CAM followed the international trend towards empowering EAs to take all necessary measures to ensure that delays in the constitution of the arbitral tribunal does not seriously affect the parties' positions.

However, not all that glitters is gold! There are at least two problematic questions concerning EAs that deserve more attention:

1. First, it is not clear whether the EA is vested with the power to issue provisional determinations that have binding contractual effects between the parties. One could maintain that the lack of any specific provision to this effect precludes such a power. However, it is argued that, by way of reference to the 'measures *and determinations* provided by Article 26', Article 44 authorizes the EA to issue such interim relief. Moreover, it would not make much sense to introduce the figure of EA without vesting him with the power to issue interim any interim or provisional relief under the Italian *lex arbitri*.
2. Second, Article 44(8) provides that an EA's order can be "challenged, amended or revoked before the Arbitral Tribunal once constituted." There are several possible interpretations of the difference between a challenge and a revocation, but the 2019 Rules provide no clue. In this sense, it is not clear which kind of instruments/procedures are available to the party contesting an EA's order once the Arbitral Tribunals has been constituted.

Greater clarity in the 2019 Rules would have resolved both of these important questions.

Final Remarks

In conclusion, the amendments to the CAM Rules deserve to be endorsed. Indeed, it seems clear that the revisions have taken into account some of the most relevant developments and latest trends in international arbitration with the aim of enhancing their legitimacy and promoting Italy as a venue for international arbitration. The three innovations examined above should all contribute to further the integrity and transparency of CAM proceedings, as well as their efficiency and expeditiousness. This process could arguably increase awareness of the CAM as a suitable and efficient option to settle international disputes. However, an important controversial issue concerning interim and provisional measures must be pointed out. Under the 2019 Rules, it is

unclear if the possibility to seek damages for breach of contract under Article 26(2) will increase the spontaneous compliance by the parties with the ordered measures. If this is not the case, then the arguable need to involve an Italian court to obtain the damages arising from such breach of contract could defeat the purpose of Article 26(2), since it would be more convenient for the parties to seek interim relief directly from Italian courts.

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