

International Arbitration Focus Team

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The revised Milan Chamber of Arbitration Rules: Leading the way in arbitral procedure

On 1 March 2019, the Milan Chamber of Arbitration (“**CAM**”) issued its revised Rules on Arbitration (“**CAM Rules**”), which apply to all proceedings commenced after that date.

The CAM Rules seek to incorporate the innovations that have emerged in the last decade, raising the CAM’s profile in the competitive arbitration market.

We discuss below the most significant amendments and include a comparison with the rules of other leading arbitral institutions.

1. Duty of fair conduct

Article 9 of the CAM Rules imposes upon arbitrators, experts, parties, and counsel an **obligation to act in good faith** during all phases of the proceedings. While this principle echoes provisions established in other institutional rules (see, e.g., Article 13(5) of the 2018 HKIAC Rules, whereby “*the parties shall do everything necessary to ensure the fair and efficient conduct of the arbitration*”; Article 14(5) of the 2014 LCIA Rules and Article 2(1) of the 2017 SCC Rules are similar), those provisions are largely toothless, failing to indicate the consequences of a breach, leaving it to the arbitral tribunal’s discretion. Arbitrators often overlook parties’ and counsel’s poor behaviour in order to avoid the risk of their award being challenged on breach of due process grounds.

Instead, Article 9 provides that the arbitral tribunal “*may sanction any breach of its decisions and any unlawful conduct that is contrary to good faith*”. Therefore, **under the CAM Rules the parties accept that any unfair conduct on their part (“guerrilla tactics” included) will be appropriately sanctioned.** This is a bold and welcome amendment that separates the CAM Rules from many of the most commonly used arbitration rules worldwide.

Whether this clause can effectively operate as a deterrent will hinge on the arbitrators’ willingness to use the sanctioning power they are vested with.

2. Emergency Arbitrator

Under Articles 26 and 44 CAM Rules, prior to the confirmation of the arbitrators, a party may file an application for an emergency arbitrator. The Chamber of Arbitration then appoints an emergency arbitrator, who, providing the application is manifestly grounded, must issue an order **within 15 days** from receiving the files. If prior disclosure risks causing serious harm to the applying party and the latter so requests, the arbitrator, **within 5 days** from receiving the files, may even issue the order without notice to the other party.

The order can be challenged, amended, and revoked by the arbitral tribunal upon its constitution. Until then, the emergency arbitrator retains competence over any challenge.

The previous lack of an emergency arbitrator procedure was an important omission in the CAM Rules, one that is now filled by taking the example offered by other arbitral institutions (Article 29 ICC Rules, Article 9B LCIA Rules, Appendix III of the SCC Rules, Schedule 4 of the SIAC Rules and Schedule 4 of the HKIAC Rules).

However, where the *lex arbitri* is **the Italian law**, the effectiveness of resorting to an emergency arbitrator for urgent relief remains questionable, considering that **the intervention of a domestic court would probably prove necessary in any case**.

3. Interim Measures

Pursuant to Article 26 CAM Rules, upon a request from a party, the arbitral tribunal may issue all urgent and provisional measures of protection, “*that are not barred by mandatory provisions applicable to the proceedings*”. The mandatory reservation was necessary since Article 818 of the Italian Code of Civil Procedure imposes an unqualified ban, stating that “*arbitrators may not grant attachments or other interim measures*”.

The peculiarity of Article 26 is that it empowers the arbitral tribunal to adopt “*any determination of provisional nature with binding contractual effect upon the parties*”. Since such a measure would have a contractual effect, in case of a party’s non-compliance the issue could be resolved by bringing a court action for breach of contract. This provision is a **unique feature** of the CAM Rules, necessitated by the limitation imposed by Italian legislation.

4. Third Party Funding

The new CAM Rules have introduced a provision on third-party funding. Article 43 provides that **the funded party shall disclose the existence of a third-party agreement and the identity of the funder**. The CAM Rules do not specify to whom the disclosure needs to be made, whether solely to the arbitral tribunal or also to the non-funded party, though it is apparent that disclosure needs to be made to the tribunal, the CAM Secretariat and the unfunded party. Moreover, it is unstated if the presence of a third-party funding arrangement has any impact on the allocation of costs or on a security for costs application.

Some arbitral institutions have merely referred to third-party funding, without, however, implementing provisions in their rules (see, ICC's Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration). A couple of others have recently introduced specific third-party funding provisions. The HKIAC November 2018 rules provide that the funding agreement and the identity of the funder need to be disclosed to the parties, the arbitral tribunal, any emergency arbitrator, and the HKIAC. A slightly different approach was adopted in the 2017 SIAC Investment Arbitration Rules, which expressly invested the tribunal with the power to order disclosure of the funding arrangement, and/or the identity of the third-party funder and, where appropriate, details of the third-party funder's interest in the outcome of the proceedings, and potential funder's liability on adverse costs.

Against this background, the CAM Rules, alone with the HKIAC Rules, appear to be in a **leading position** when it comes to disclosure of third-party funding.

5. Company Law Arbitration

The newly introduced Article 17 CAM Rules, which finds no equal in other mainstream arbitration rules, provides that, if an arbitration agreement is contained in the **bylaws of a company subject to Italian law**, and the bylaws fail to designate which authority (other than the company itself) is competent to appoint the tribunal, the CAM Arbitral Council will serve as the appointing authority.

Behind this choice is the awareness of the risk that, in the context of a multi-party arbitration, any reference to the company would favour a specific group of stakeholders and thereby impair the independence and impartiality of the arbitral tribunal.

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The **CAM** is expected to enhance its international appeal and hold on to its position as the leading arbitral institution in Italy, as the 2019 **CAM Rules largely succeed in catching up** with the latest developments in international arbitration practice and even attempt to set some new standards (e.g., by empowering arbitrators to sanction unfair conduct in the proceedings).