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THE NEW ARBITRATION RULES OF THE CHAMBER OF ARBITRATION OF MILAN¹

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INTRODUCTION

The Chamber of Arbitration of Milan³ (hereinafter “the Chamber” or “CAM”) has adopted a new set of arbitration Rules, which entered into force on 1 January 2010 (hereinafter “the Rules”).

The Chamber of Arbitration of Milan is an agency of the local Chamber of Commerce and has been managing arbitration cases since 1986. The Chamber performs its tasks through the Arbitral Council and the Secretariat. The Arbitral Council is the technical body in charge of a general competence over all matters relating to the administration of arbitral proceedings (*i.e.* appointment and challenge of the arbitrators, determination of the costs of the proceedings etc.). The Secretariat provides assistance to the Arbitral Council, the arbitrators and the parties in the course of the proceedings.

The initiative for the reform was taken by the Secretariat in 2007. A working group was established within the Secretariat, whose proposals were discussed and revised by the Arbitral Council. The final text of the new Rules was endorsed by the Arbitral Council on 16 September 2009 and approved by the Board of Directors of the CAM on 23 October 2009.

The 2010 Rules do not alter the essence of the CAM’s system of administration, while they improve its main features and fill certain gaps. The previous revision of the Rules dated back to 2004. Since then a legislative reform on

¹ The new Rules are available in Italian, English and Portuguese, as well as in other languages, at the Chamber’s web site: www.camera-arbitrale.com

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³ On the CAM see, *inter alia*: Azzali, Stefano *Arbitrato amministrato*, in *Codice degli arbitrato, delle conciliazioni e di altre ADR*, edited by Angelo Buonfrate and Chiara Giovannucci Orlandi, Turin, 2006, p. 49; Sali, Rinaldo *Arbitrato amministrato della Camera Arbitrale di Milano*, in *Codice degli arbitrato, delle conciliazioni e di altre ADR*, edited by Angelo Buonfrate and Chiara Giovannucci Orlandi, Turin, 2006, p. 133; Sali, Rinaldo *The new arbitration Rules of the Arbitration Chamber of Milan*, in *Yearbook Commercial Arbitration*, edited by Albert Jan van den Berg, 2004, p. 349.

arbitration took place in Italy⁴, while the caseload of the CAM has constantly increased, and the complexity of the contractual relationships and the arbitration proceedings have grown: the total number of cases was 105 in 2004, then 153 in 2009⁵. Also, the international cases administered by the Chamber were 11 in 2004 and grew up to 35 in 2009, involving parties coming from all over the world. Hence, the revision took into consideration the practice developed by the CAM and the new Italian arbitration law.

The main objective of the new Rules is to improve the efficiency of administered arbitration. To reach this goal, the revision amended the internal function of the CAM's bodies and roles (a) in order to grant an expedite, transparent and effective administration of the arbitral proceedings; confirmed the Institution's control on the independence of the arbitrators, the duration and the costs of the proceedings (b); enlarged the powers of the arbitrators (c); and cut off any redundant provision in order to make the final text short, flexible and simple (d). These four points will be described here. The analysis of each point will mainly follow the order in which the provisions are displayed in the Rules.

As a preliminary issue, the CAM now offers a new model of arbitration clause for the parties to consider when drafting their contracts. The new Rules provide for one model clause, while further examples are available on the CAM's web site. The language of this standard clause is broader than the previous types: in particular, the present clause refers any dispute "*arising out of*" or "*in connection with*" the contract containing the clause to arbitration (on the other hand, in the 2004 Rules reference was made to the disputes "*arising out of*" the contract only). The new wording is consistent with the current international practice⁶, as well as the 2006 Italian arbitration law⁷.

The 2010 revision makes clear that the Italian version is the official text, whilst the Rules can be translated and published in a number of languages. Also, it is explained that, whatever the language of the arbitration is, the Secretariat

⁴ Italian legislative decree No. 40 of 2006, which entered into force on 3 March 2006. See, *inter alia*: Bernardini, Piero *Ancora una riforma dell'arbitrato in Italia*, in *Diritto del commercio internazionale*, 2006, p. 227; Carpi, Federico (editor) *Arbitrato*, Bologna, 2006; Giovannucci Orlandi, Chiara *La nouvelle réglementation italienne de l'arbitrage après la loi du 2 février 2006*, in *Revue de l'arbitrage*, 2008, p. 19; Ricci, Edoardo F. *La delega sull'arbitrato*, in *Rivista di diritto processuale*, 2005, p. 1197.

⁵ A detailed report on these statistics is available at the CAM's website, see note No. 1.

⁶ Similar models can be found in the 1998 ICC Rules, the 2010 SCC Rules and the 1998 LCIA Rules.

⁷ The new Article 808-quater of the Italian Code of civil procedure on the interpretation of the arbitration agreement provides that "*In case of doubt, the arbitration agreement shall be in the sense that the arbitral jurisdiction extends to all disputes arising from the contract or from the relationship to which the agreement refers.*"

performs its communications in Italian, English or French. Therefore, the parties shall communicate in one of these language with the CAM for all the aspects of the arbitration affected by the administration of the case.

(A) STRUCTURES AND ROLES OF THE CHAMBER

The 2010 revision aims to provide the parties with an expedite, transparent and effective administration of the proceedings. As far as the duration of the arbitration is concerned, one of the reasons for which the parties traditionally chose arbitration is to obtain a fast solution to their disputes. Nevertheless, arbitration has been more and more criticized for turning into a “slow track” dispute resolution method⁸. Much debate has been growing on this matter, and the ICC issued a set of “*Techniques for controlling time and costs in arbitration*”⁹ addressed to parties, lawyers and arbitrators in order to foster a quick conduct of the arbitral proceedings. The CAM’s statistics show that arbitration can still be regarded as a time-effect solution: the final award was rendered in 13,1 months in 2009 and in 2008, and 13,4 months in 2007¹⁰. Still, the growing number of new cases filed in 2009 has not had any direct impact of these data, since most of the requests that were filed are still pending. Also, the complexity of the cases has been growing since 2004, and the Institution is facing new situations where time is of the essence, and problems must be prevented. Hence, when revising its Rules, the CAM’s goal was to avoid any lack of efficiency in the administration and to grant an expedite performance of the Institution’s functions along the proceedings.

The 2010 Rules offer a new structure for the Arbitral Council¹¹, which is the technical body in charge of a general competence over the administration of arbitral cases. This body is composed of a minimum of seven up to a maximum of eleven members, one being the President and one the deputy, appointed for three years by the Board of the Chamber of Arbitration. The Board of the Chamber of Arbitration may appoint both Italian and foreign experts to the Arbitral Council. This scenario has been improved in respect of the 2004 edition: the number of members has grown from nine to eleven, and no limit as for two foreign experts was

⁸ On this issue, see, *inter alia*: Davis, Benjamin *Fast-Track Arbitration and Fast-Tracking Your Arbitration*, in *Journal of International Arbitration*, 1992, p. 43; Müller, Eva *Fast-Track Arbitration: Meeting the Demands of the Next Millennium*, in *Journal of International Arbitration*, 1998, p. 5.

⁹ The 2007 Report of the ICC Commission on Arbitration available at www.iccwbo.org/court/arbitration

¹⁰ Statistics available on the CAM’s website.

¹¹ Preamble of the Rules, from 1 Para. to 9.

maintained. Thus, the CAM introduces the possibility to enrich the competence and the experience of its Council on both domestic and international sides.

The new Rules take a move from the previous requirement than half plus one of the member shall be present for the Arbitral Council to take its decision validly. The revision provides for three members to be the *quorum* for validity. Under the 2004 Rules, the Council used to meet every 40 days, and urgent issues were handled by the President alone. This amendment, together with the fact that the Council's members can use any means of communication to attend the meetings, will grant a prompt intervention of the Council on the administration of the case, as it will allow to schedule the Council's agenda frequently. The President is still provided with the power to make any decision in case of urgency. The Rules go further and, if prevented, such a power moves to the deputy or the oldest member¹². At the same time, the three members *quorum* will grant the opportunity of a collective discussion. Also, the three members could join the discussion in light of their own specific expertise, *i.e.* the foreign members could meet to appoint Arbitral Tribunals in international cases.

The new Rules affect the Secretariat's competence on the language of the arbitration. According to Article 5 of the Rules, the parties agree on the language of the arbitration, while failing any agreement, the Arbitral Tribunal decides. The new Rules deprive the Secretariat of the power to provisionally determine the language pending the Tribunal's decision. Under the previous set of Rules, the Secretariat's determination on the language was deemed to save the proceedings from uncertainty since its very beginning. Indeed, from a practical point of view, when the arbitration agreement does not provide for a chosen language, what happens is that Claimant files its request in a given language and Respondent can either reply in the same language or in a different one. In the latter case, under the 2004 Rules the Secretariat set the language before the final decision was taken by the Tribunal¹³. Nevertheless, such a determination was connected to the Tribunal's decision. Considering the provisional nature of the Secretariat's direction, then none of the parties had to translate its brief in the language ordered by the Secretariat. Finally, only Claimant's reply to Respondent's counterclaim was filed in the language

¹² Any decision issued in case of emergency by the President, the deputy or the oldest member shall be referred to the Arbitral Council at its next meeting.

¹³ Article 5, Para. 2, of the 2004 Rules stated: "*In the absence of an agreement by the parties, the Arbitral Tribunal shall determine the language of the arbitration. The Secretariat shall indicate the language of acts precedent to that determination.*"

fixed by the Secretariat, but the provision related to this brief is no longer contained in the CAM Rules¹⁴. Also, problems might rise when the Secretariat's provisional determination was inconsistent with the Tribunal's decision. In this case, although exceptional, time and costs for translation had to be considered. Finally, the CAM reasoned that the determination of the language remains in the hands of the parties and – failing any agreement - of the arbitrators only. So, it decided to leave any Institutional intervention out of the new Rules in order to smooth the proceedings.

The 2010 reform amended the incompatibility rule previously set by Article 16¹⁵. The new Rules confirm that the CAM cannot appoint a member of its Board, or of the Arbitral Council, or its auditors and employees as arbitrator. The 2004 edition barred professional partners, employees and all who had an ongoing cooperative professional relationship with those persons from any appointment. Such a limit mainly concerned the professionals working in the same law firm of a member of the Arbitral Council, who were prevented to act as arbitrators. The CAM considers transparency as a key value of its system, and the new Article 16 still hinder the members of the Arbitral Council from appointing professionals working in their law firms. The Institution's perception is that, without such a rule, there might be a suspicion that few divas always appear on the stage of the CAM arbitration, while it is not¹⁶. Nevertheless, such a low ceiling could frustrate the parties' freedom to select the best professional for their case¹⁷. Finally, the CAM adopted a new attitude and now provides for the parties with the possibility to derogate the incompatibility rule. In this way, efficiency is preserved: the parties remain free to jointly adopt the best criteria for the selection of their arbitrators, while the CAM goes on defending the appearance of its plain attitude.

As far as transparency is concerned, two other provisions of the Rules have been revised in 2010. The first concerns the Arbitral Council: according to Para. 9 of the Preamble, when a member of the Arbitral Council abstains, he/she shall leave the meeting whilst the discussion of the matter on which he/she is

¹⁴ Reference is made to Article 12 of the 2004 Rules, as discussed in § (d).

¹⁵ Article 16 of the 2004 Rules stated: "*The following persons cannot be appointed as arbitrators: a. members of the Board, members of the Arbitral Council and the auditors of the Chamber of Arbitration; b. employees of the Chamber of Arbitration; c. professional partners, employees and all who have an ongoing cooperative professional relationship with the persons indicated at Article 16.a, unless the parties agree otherwise.*"

¹⁶ On the CAM's practice in regards of the appointment of the arbitrator: Sali, Rinaldo "*How to chose the ideal arbitrator: the institutional point of view*" <http://www.european-arbitrators.org/>

¹⁷ While no excessive restriction was perceived by the parties, this situation sometimes occurred in regards of the President appointed by the co-arbitrators jointly.

abstaining continues and any measures are agreed. This point clarifies that the abstention will not affect the *quorum* necessary for the validity of the meeting. This provision mirrors the internal way of conduct of the Council and clearly describes what happens in the eye of the parties¹⁸.

Also, transparency comes into consideration when turning to the new edition of Article 8 on confidentiality. Here, the CAM shows a new attitude towards this critical issue which entails a constructive approach. The provision is composed of two paragraphs. The first one is devoted to confidentiality itself, while the second concern transparency. The new Rules consider confidentiality as one of the main features of international arbitration: one of the advantages of arbitration is for the parties to handle their dispute in private. The CAM acknowledges a lack of international consensus in this regard¹⁹, and the related necessity for the parties to rely on an expressly agreed provision. Consequently, the Chamber spells the duty of confidentiality out in its Rules. Today, Article 8, Para. 1²⁰, extends the duty to confidentiality to the parties, the CAM itself, the Arbitral Tribunal and the expert witness, if any. Hence, when the parties agree on the CAM Rules, they also agree to keep the proceedings - a broad expression covering any kind of material, brief, hearings, etc. - and the award confidential. When revising Article 8, the CAM discussed whether or not a list of exceptions to the duty of confidentiality shall be included. Finally, it was recognized that no effort could lead to a comprehensive list, as so many differences may rise from national legislations and case law applying to each case. Hence, the Rules now make clear that the confidentiality duty set in Para. 1 does not apply in the case that the information has to be “*used to protect one’s rights*”. This is an open way which covers, *i.e.*, the right to enforce or challenge the

¹⁸ For example, following the new Article 16 on the incompatibility, if the parties agreed on a professional of the law firm of member of the Council to act as arbitrator, then that member will not join the discussion and deliberation of the Council when administering that very case.

¹⁹ On transparency and confidentiality in international arbitration see, *inter alia*: Aboul-Enein, Mohamed I.M. *The need for Establishing a Perfect Balance between Confidentiality and Transparency in Commercial Arbitration*, in *Stockholm International Arbitration Review*, 2007, 2; Collins, Michael *Privacy and Confidentiality in arbitration proceedings*, in *Arbitration International*, 1995, p. 321; Coppo, Benedetta *Riservatezza vs. trasparenza nell’arbitrato internazionale e nei lavori di revisione del Regolamento UNCITRAL. La posizione del Club of Arbitrators di Milano*, in *Arbitraje. Revista de Arbitraje Comercial y de Inversiones*, 2008, p. 605; Dimolitsa, Antonias *Institutional Rules and National Regimes Relating to the Obligation of Confidentiality on Parties in Arbitration*, in ICC Special Supplement, 2009, p. 5; Fortier, Yves *The Occasionally Unwarranted Assumption of Confidentiality*, in *Arbitration International*, 1999, p. 131; Lazareff, Serge *Confidentiality and Arbitration: Theoretical and Philosophical Reflections*, in ICC Special Supplement, 2009, p. 81; Müller, Christoph *La confidentialité en arbitrage commercial International: un trompe-l’œil?*, in *ASA Bulletin*, 2005, 2; Paulsson, Jan – Rawding, Nigel *The Trouble with Confidentiality*, in *ICC Bulletin*, 1994, p. 48.

²⁰ Whenrafting this provision, the CAM took into consideration Article 30 of the 1998 LCIA Rules.

award. On the other hand, it goes without saying that a breach of the confidentiality duty may take place if a party has a legal duty to do so: this would prevail on the parties' agreed Rules in any case, whether or not the Rules so provide.

Under the cover of "confidentiality" of Article 8, the following paragraph (Para. 2) deals with "transparency". It is the author's opinion that the two topics are distinctive, and two different articles would have helped to make it clearer, as well as to prevent any apparent inconsistency. However, here the Rules provide that, for purposes of research, the CAM may publish the arbitral award in anonymous format, unless, during the proceedings, any of the parties objects to publication. The 2004 attitude towards the publication of sanitized awards (which was an "opt-in" solution: the award might be published only with the prior written consent of the parties) is completely reverted in 2010: here, an "opt-out" solution prevails, so that the CAM may render the award in an anonymous form and publish it, unless any of the parties objects. In the CAM's policy, the future development of arbitration is vitally linked to transparency, and institutional arbitration shall play its part to pierce the veil of inaccessibility of the arbitration practice. On the other hand, the CAM is aware of the critical issues which may lay beneath an award rendered in anonymous form: leaving the company's name out is not enough most of times, while few details would let other companies of the same field understand the frame of the situation entirely. In order to grant strict standards, the CAM is leading a research group at the LIUC University "Carlo Cattaneo", Castellanza, Italy, whose results are expected in the course of 2010 and will support the serious approach of the Institution.

(B) THE INSTITUTION'S CONTROL ON THE INDEPENDENCE OF THE ARBITRATORS, THE DURATION AND THE COSTS OF THE PROCEEDINGS.

The new Rules endorse the CAM's position in regards the typical features of its administration: verifying the arbitrators' independence, controlling the duration of the proceedings, and granting the predictability of its costs.

The independence of the arbitrators is a key-element for an arbitration to be effective and for any final award to be enforceable, as for the strict connection between the arbitrator's behavior and the respect of the due process principle. Consequently, the CAM pays the greatest attention to this aspect, and its Rules have always been structured in order to prevent any misleading attitude of the

arbitrators potentially affecting the efficiency of the arbitration. The CAM provides for a duty of the arbitrators to be independent and impartial²¹, and to remain so throughout the proceedings²². Arbitrators are requested to sign a statement of independence²³ and are subject to a challenge procedure²⁴. Also, the Rules provide for the Institution to confirm the arbitrators²⁵, and the CAM has a Code of Ethics attached to the Rules for the arbitrators to respect, which remained unchanged in the 2010 revision. According to the CAM system²⁶, the arbitrator undersigns a statement of independence where he/she discloses any circumstances from which any doubt in regards of his/her independence is likely to arise²⁷. The Institution transmits this statement to the parties, and the Rules²⁸ underline the content of this statement, so that the arbitrator shall disclose any relationship with the parties or their counsel, any interest in the outcome of the dispute, any bias as to the subject matter, as well as time and duration of the above. Here, the 2010 revision modified the wording of Article 18, which is now as broad as possible in order to cover any aspect that is likely to affect the appearance of independence of the arbitrator. As said above, the CAM Rules set that all the arbitrators are to be confirmed by the Institution, granting the parties an opportunity to fill comments or observations, if any, on the arbitrator's statement²⁹. The Secretariat³⁰ confirms the arbitrator when both two circumstances occur: (a) he/she filed a statement of independence without disclosing any situation, and (b) none of the parties submitted any comment within ten days from receiving it. In any other case, the Council decides on the confirmation. At four conferences held between 2008 and 2009³¹, the Chamber acknowledged that, in its decisions on the arbitrators' independence, the Council takes into consideration the "*IBA Guidelines*

²¹ CAM Code of Ethics Articles 5 and 6.

²² Article 18, Para. 5; furthermore, Article 6 of the Code of Ethics rules that the arbitrator's duty of independence is still pending "[...]after the award is filed, during the period in which annulment of the award can be sought."

²³ Article 18.

²⁴ Article 19.

²⁵ Article 18, Para. 4

²⁶ Article 18, Para. 1; Article 7 of the Code of Ethics.

²⁷ When signing his/her statement of independence, the arbitrator checks if any conflict exists between him/her-self and the situation which he/she is going to undertake as a decision maker. What is the meaning of this statement? This is the moment when the arbitrator thinks about his/her position, and then either does not accept (*i.e.* the circumstances being serious or delicate) or accepts and - at the same time - discloses any circumstance that in his/her opinion does not affect his/her independence but that, for sake of the appearance of his/her integrity, he/she submits to the parties.

²⁸ Article 18, Para. 2.

²⁹ Within ten days from receiving the statement, according to the Article 18, Para. 3.

³⁰ Article 18, Para. 4.

³¹ The conferences were co-organized by the CAM with the SCC, the DIS and the VIAC, they were held on 11 April 2008 at the CAM, on 25 June 2008 at the SCC, on 20 November 2008 at the DIS, and on 2 July 2009 at the VIAC.

*on conflict of interests in international arbitration*³², though not strictly applying them. Also, the challenge procedure remains unchanged by the 2010 reform³³.

When drafting their dispute resolution clauses, parties often select arbitration because it is perceived as an efficient alternative to avoid time-consuming proceedings before State courts. In this regards, the CAM provides for the arbitrators to render the final award within a pre-established time limit. According to Article 32 of the Rules, the arbitrators shall file the final award within six months, unless otherwise agreed by the parties. This time limit runs from the arbitrators' formal constitution³⁴. The Chamber is fully aware that any complicate case requires more than six months. Yet, on the one hand, this provision sends a clear message to the arbitrators to grant a time-efficient conduct of the case when accepting to act under its Rules³⁵. The other side of the coin is that the CAM maintains the control on any extension of the said time limit, thus providing for the predictability of the duration of the case. The Secretariat formally extends this time limit when the parties so agree, while the Council decides in any other case³⁶. Here the Rules offer to the parties the opportunity to address their comments on the extension to the Institution, instead of the Tribunal that will judge on them. At the same time, the arbitrators can rely of the CAM's prompt cooperation, since now the Council can intervene even *ex officio*.

The 2010 Rules succeed in improving the efficacy of the correction of the award. The new Article 34 identifies the steps of the correction, providing for certain duration of the whole procedure. The request for correction shall be filed within 30 days from receiving the award, and the Tribunal shall decide within 60 days from receiving the request, after having granted the parties the possibility to comment thereto in respect of the due process principle. Also, the Rules now make plain that the correction decision of the arbitrators is part of the award. Finally, no added costs are requested for the correction, unless otherwise decided by the Chamber. This last

³² www.ibanet.org. In 2004 the International Bar Association approved these Guidelines whose aim was to reflect the best current practice in the international community by providing general standards and lists of cases for arbitrators, institutions and State courts to consider when dealing with independence and impartiality issues.

³³ Article 19 rules that any party can file a grounded challenge against an arbitrator when circumstances exist giving rise to justifiable doubts as to the arbitrator's independence or impartiality. Challenge must be filed within 10 days from receiving the statement of independence or becoming aware of the ground for challenge. The other parties and the arbitrators are invited to submit any comments, and the Arbitral Council decides on the challenge.

³⁴ Article 21.

³⁵ This provision goes along with Article 4 of the Code of Ethics which requires that "*When accepting his mandate, the arbitrator shall, to the best of his knowledge, be able to devote the necessary time and attention to the arbitration to perform and complete his task as expeditiously as possible.*"

³⁶ Article 32, Para. 2.

provision aims to limit the costs for the parties, *i.e.* where a clerical mistake occurred, while the CAM maintains the possibility to ask for money in exceptional cases, *i.e.* when the request was patently fruitless or obstructive.

Article 34 represents a bridge between time and costs. When turning to the latter, predictability of costs is a great advantage of institutional arbitration. The Rules provide for fixed criteria drawing a connection between the amount in dispute and the fees for the arbitrators' and the institution: costs are fixed in accordance with a schedule of fees relying on the amount of the parties' claims. According to the Article 36, Para. 4 and 5, the costs of the arbitration cover the arbitrators' fees, the CAM's fee, the Tribunal's expert's fee, and both the arbitrators' and the expert's expenses. As for the CAM's fee, Annex "B" of the Rules lists included and excluded activities. No registration fee is requested when filing the request for arbitration, and in 2010 the schedule of fees remains unchanged. Here, a brief description of the CAM's system on costs will follow.

As said above, costs rely on the amount in dispute and they are fixed in accordance with a schedule of fees. That amount is referred to one of the baskets of the schedule to which arbitrators' and administrative fees correspond, and is calculated on the basis of all the parties claims³⁷. When deciding on the costs, the Arbitral Council takes into consideration the activities performed by the Tribunal, the complexity of the case, the length of the proceedings and any other circumstance³⁸. The Council may determine different fees for each member of the Arbitral Tribunal, and in exceptional cases it may deviate from the amount set in the schedule of fees, going either below or above it (*i.e.* where the parties withdrawn the case before the final award is rendered)³⁹. As for the arbitrators' fees, there is a schedule of fees for the sole arbitrator, then another one in case of a panel. For each basket of the amount in dispute there is a minimum and a maximum⁴⁰. The Council determines the exact amount on a case-by-case basis. While for the CAM's fee, a fixed amount corresponds to each basket⁴¹.

³⁷ Taking into account Claimant's request for arbitration, Respondent's statement of defence, any other briefs submitted by the parties and any observations coming from the arbitrators, Article 35, Para. 1 and 2.

³⁸ Article 36, Para. 6.

³⁹ Article 36, Para. 6.

⁴⁰ When the amount in dispute goes over € 100 000 000, a fixed percentage applies.

⁴¹ The CAM's fee are established along the schedule from a minimum of € 400 up to a maximum of € 120 000.

As for when the payment is made, the Secretariat fixes the advance on payment⁴², while the Council makes the final determination⁴³. Parties are requested to pay advance on costs after Respondent's statement of defence to the request for arbitration is submitted⁴⁴. Along the proceedings, the Secretariat may requests for additional advances considering the activities performed by the arbitrators or any change in the amount in dispute⁴⁵. The parties are jointly and severally liable for the costs of the arbitration, so that each party pays in equal shares⁴⁶. Nevertheless, the Secretariat may determine separate costs when the parties submit different claims⁴⁷, and in this case each party pays in respect of its own claims. The 2010 Rules explain (Article 35, Para. 4) that in this case both the Institution and the Tribunal's fees could not exceed the maximum set for where the division did not occurred.

According to Article 21, the advance on payment is to be paid in order for the Secretariat to forward the request for arbitration and the statement of defence to the Arbitral Tribunal. As for Article 38, if a party fails to pay, then the other party is given the opportunity to make a substitute payment, unless the amounts in dispute are separated. If the requested amount remains unpaid, then the Secretariat may suspend the proceedings in regard of the claims whose costs are unpaid. The suspension lasts one month, and then, in lack of any payment, the Secretariat may dismiss the claim⁴⁸. This is one of the main modification on costs, as the previous suspension lasted two months. In the CAM's practice, this period of time showed to be too long: the Secretariat constantly reminds the parties of the economical situation of the case, and no suspension occurs automatically, so that when the suspension intervenes there is no need to linger any longer. Finally, Article 37, Para. 6, now sets that the Secretariat may accept that part of the costs is provided by bank guarantee, or by another form of security, determining terms and conditions of it.

(C) THE POWERS OF THE ARBITRATORS

The new Rules have extended the power of the arbitrators in regards of several aspects. These amendments foster the international praxis, while leaving

⁴² Article 37, Para. 1.

⁴³ Article 36, Para. 1.

⁴⁴ Article 37, Para. 1.

⁴⁵ Article 37, Para. 2.

⁴⁶ Article 37, Para. 4.

⁴⁷ Article 35, Para. 3.

⁴⁸ Article 38, Para. 3.

room for the arbitrators to tailor their solutions in light of the peculiarities of the case at hand. When the previous edition of the Rules was enacted in 2004, the Chamber was facing quite a different arbitral environment: it administered some 80 cases per year (some 45% less than in 2009), which were mainly domestic, and the national legislation on arbitration dated back to 1994⁴⁹. In such a frame, when dealing with the arbitrators, the 2004 Rules provided a clear step-by-step system, describing powers and duties in order to lead their path through the proceedings. The picture has changed since 2004 thanks to a growing number of cases, an increasing percentage of foreign parties, a raising complexity of the cases, and an expanding number of experienced arbitrators. Today, the new Rules can leave to the arbitrators the opportunity to lead each case in accordance with its peculiarities, and to find the right solution thereto by enlarging their powers. At the same time, the 2010 Rules remove many provisions that had a purely descriptive nature, and whose content can be referred to the arbitrators' general powers and duties.

In this regard, Para. 3 of Article 3⁵⁰ on the rules applicable to the merits of the dispute was revised. As for today, when the parties fail to agree on the rules of law for the arbitrators to apply, then the Tribunal shall apply the rules that it deems appropriate, taking into account the nature of the contractual relationship, the quality of the parties and any other relevant circumstance of the case at hand. Hence, the new Rules depart from the narrower approach of the previous edition where the arbitrators were to apply the rules with which the subject matter of the dispute had its closest connection: the arbitrators are now entrusted with the power to identify the rules of law that they find appropriate to the case. Such an attitude of the new Rules is in line with the international practice⁵¹. At the same time, the predictability of the Tribunal's decision remains crucial for the parties, and the new Rules make clear for the arbitrators to anchor their choice to some objective criteria, consequently they are requested to take into consideration the contractual aspects of the case, as well as position of the parties.

⁴⁹ Law No. 25, dated 5 January 1994.

⁵⁰ Article 3, Para. 1, remained unchanged and provides for the arbitrators to render their decision according to the rules of law, unless the parties expressly agreed on an *ex aequo et bono* decision. Furthermore, Article 3, Para. 2, provides for the parties to agree on the rules that the arbitrators shall apply to the merits without any cutoff date (while the previous set of Rules clearly limited the parties' common will to the arbitration agreement or, in any case, until the Tribunal was constituted). This new provision is in line with Article 822 of the Italian Code of civil procedure. In any case, Para. 4 still provides for the Tribunal to take into account trade usages.

⁵¹ This amendment is in line with Art. 17 of the 1998 ICC Rules.

The new Rules widen the waiver presumption failing any prompt objection raised by the party to the existence, validity or effectiveness of the arbitration agreement or lack of jurisdiction of the Arbitral Tribunal⁵². This new provision corresponds to new Article 817 of the Italian Code of civil procedure, and re-organize this issue by supporting the arbitration proceedings and expanding the Tribunal's competence.

A number of modifications in regards of the power of the arbitrators occurred along Chapter IV "The proceedings" of the Rules. Here, Article 21 clarifies how the arbitrators formally constitute the Tribunal by way of an act in writing, undersigned by the arbitrators, providing for the further steps of the proceedings. The CAM widely discussed whether to introduce the terms of reference (hereinafter "TOR") in the new Rules for the parties and arbitrators to sign. Even if no express provision was contained in the CAM Rules, international cases have constantly shown that the TOR were signed where parties and arbitrators so agreed. Finally, a decision was made not to bound the proceedings to the TOR practice necessarily, so as to avoid any undue burden or delay for many a case (*i.e.* small disputes or purely domestic cases). It is for the Tribunal and the parties to agree on signing the TOR where they deems it appropriate (and when they are familiar with this practice). When they do not, the arbitrators will constitute the Tribunal by way of an at contained in an order, or by scheduling a hearing and taking the minutes, where they draft a calendar and set the procedural steps of the case (*i.e.* granting the parties an opportunity to file briefs and documents)⁵³.

The 2010 Rules⁵⁴ expand the possibility for the Tribunal to attempt a settlement of the case between the parties by expressly stating that the arbitrators may delegate such an attempt to the Mediation Service⁵⁵ of the CAM. The CAM Mediation Service has been developing along the last decade and now offers an international set of Rules, a panel of qualified international mediators, and a constantly improving experience. Making reference to a mediation attempt conducted by professional mediators – instead of arbitrators themselves – is a possibility that

⁵² Reference is made to new Article 12, while Article 22 of the previous edition was limited to objections in regards of the lack of jurisdiction of the Arbitral Tribunal.

⁵³ From the constitution of the Tribunal runs the six month time limit set for the arbitrators to render the final award, according to Article 32.

⁵⁴ Article 22, Para. 1.

⁵⁵ www.milanmediation.com

the new Rules officially introduce, also with the purpose of preserve the Tribunal's independence and impartiality while attempting an amicable solution of the case.

Para. 2 of Article 22 confirms the power of the Arbitral Tribunal to issue all urgent and interim measures of protection, also of an anticipatory nature, that are not barred by any mandatory provisions applicable to the case.⁵⁶

When revising the Rules, the Arbitral Council and the Secretariat deeply discussed the following themes: consolidation and third party's intervention⁵⁷. First, the CAM wondered whether or not to issue any direction in the Rules in this regards. Many aspects were considered, mainly the fact that the complexity of cases has been increasing, as well as the number of multiparty cases, and the fact that both the 2006 Italian Code of civil procedure⁵⁸ and the 2003 Italian corporate law Act⁵⁹ ruled on some of these issues. The CAM decided to introduce some new rules on these matters in order to harmonize its current practice. Secondly, the CAM wondered what the role of the Arbitral Council should be in these regards, if any, and whether the Secretariat should intervene at a certain stage. In the new Rules, the Chamber makes clear that consolidation and third party's intervention are fundamental issues only for the arbitrators to decide upon. In the revision process it was analyzed that any decision issued by the Institution would have only a provisional nature, pending the arbitrators' final statement. Also, the arbitrators' freedom to approach these critical aspects of the proceedings shall be preserved, in order to smooth the conduct of the case. Consequently, Article 22, Para. 3, provides the Tribunal with the power to consolidate multiple proceedings pending before it, when it deems them to be connected: according to the 2010 Rules the Tribunal's decision must no longer rely on an objective connection, as required by the previous set of Rules, while it is left to the Tribunal's discretion to consider the peculiarities of the cases it is handling to issue an order for consolidation. Para. 4 still clarifies the

⁵⁶ The Rules are consistent with most applicable national law providing the arbitrators with the power to issue interim measures of protection. At the same time, the Rules acknowledge the limits of the Italian national law, if applicable, where the arbitrators are prevented to issue any interim measures (Article 818 of the Code of civil procedure) as well as the openings in corporate law filed (Article 35, Para. 5, of legislative decree No. 5, 17 January 2003)

⁵⁷ See, *inter alia*: Hanotiau, Bernard *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions*, Kluwer, 2006; Salvaneschi, Laura *L'arbitrato con pluralità di parti*, Padova, 1999.

⁵⁸ Art. 816-*quinquies* reads as follows: "*The voluntary intervention or the joining of a third party in the arbitration is admissible only with the agreement of the third party and the parties and with the arbitrators' consent. The intervention foreseen by Article 105, paragraph 2, and the intervention of the party whose joinder is necessary by law ('litisconsorte necessario') are always admissible. Article 111 shall be applicable.*"

⁵⁹ Legislative decree No. 5, 17 January 2003, article 35, Para. 2.

power for the arbitrators to separate the same proceedings concerning several disputes. Finally, Para. 5 considers the case when a third party files a request to join the case, or it is requested to join the case by any of the parties: in these situations, any decision is left to the Tribunal taking into account the parties' positions and all the other relevant circumstances of the case (*i.e.* the applicable law).

The new wording of Article 25 in regards of the evidence taking phase gives the arbitrators the power to conduct it as they deem appropriate. This rule departs from any given national legislation and acknowledges the flexibility of arbitration to be shaped by the Tribunal in accordance with the peculiarities of each single case.

The arbitrators' power come into question also in regards of new claims. Article 27 now refers any decision on the admissibility of new claims to the Tribunal. The arbitrators shall decide taking into account the parties' points of view and any other circumstance, including the phase of the proceedings. The new Rules omit any definition of when a claim shall be considered to be new⁶⁰, leaving any determination to the arbitrators only. Also, the Rules now skip any redundant reminder for the Tribunal of its duty to preserve the due process principle on any new claim⁶¹.

Finally, the power of the arbitrators have been expanded in the closing phase of the proceedings. According to Article 28, Para. 1, when the Tribunal is ready to issue its award, the only mandatory requirement for the arbitrators is to close the taking of evidence phase and invite the parties to file their conclusions. The conclusions of the parties ("*precisazione delle conclusioni*") are their final prayers for relief, whether contained in their closing briefs or in separate lists. The opportunity to set any subsequent time limit for filing final statements or rebuttal briefs, or scheduling a final hearing is left to the Tribunal only, while according to the previous set of Rules the Tribunal had to grant the time limit to file the final statements if requested by any of the parties. The parties' conclusions identify the value of the dispute in the eye of the Arbitral Council for its final determination on the costs of the arbitration. The parties' conclusions are extremely valuable to detect any *infra* or *ultra*

⁶⁰ In the 2004 edition, Article 30 stated that "*The Arbitral Tribunal shall decide on the merits of new claims filed by the parties in the course of the proceedings where one of the following conditions is met: a. the party against which the claim is filed declares that it accepts adversarial proceedings on that claim or does not object thereto before raising any defense on the merits; b. the new claim is objectively connected with one of the claims in the proceedings.*"

⁶¹ Para. 2 of Article 30 of the 2004 edition set that "*The Arbitral Tribunal shall always allow for a written reply to new claims.*" This provision is now referred to Article 2, Para. 3 of the 2010 version.

petita case. Also, from then on the parties are barred from filing any new claim, presenting new facts, or submitting new documents or proposing new evidence, unless the Arbitral Tribunal so decides⁶². Therefore, it is up to the arbitrators to reopen the case where necessary.

(D) FORMAL AMENDMENTS

In order to make the final Rules short, flexible and simple, the revision cut off any redundant provision⁶³.

This was the case with previous Article 9 applying to cases governed by Italian law, which was cancelled. Generally speaking, by omitting Article 9 any national reference was prevented, and the international spirit of the Rules preserved.

Article 9, Para. 1, ruled that the arbitration shall be “*rituale*” unless the parties determined it to be “*irrituale*” in their arbitration agreement⁶⁴. The 2004 Rules stated that, in case of doubt, arbitration was “*rituale*”, thus overcoming any problems in this regard both for parties and arbitrators when dealing with the interpretation of the parties’ will. This provision became redundant after the 2006 Italian legislative reform ruled that the parties may establish in writing that their arbitration is “*irrituale*”, otherwise a “*rituale*” presumption shall apply⁶⁵. Consequently, the revision of the Rules took advantage of the new national regulation and omitted any echo.

Article 9, Para. 2, devoted to Italian corporate law disputes, was also deleted. The 2003 Italian reform on corporate law provides for arbitrators to be appointed by an authority other than the parties in dispute, otherwise the arbitration clause is null⁶⁶. The 2004 CAM Rules offered a way for the arbitration agreement to be in line with the 2003 corporate Act by stating in Article 9, Para. 2, that: “*Where the arbitration is based on an arbitral clause in the act of incorporation or founding or in the by-laws of a company and, in derogation of any provision in that clause, the Arbitral Council shall appoint all the members of the Arbitral Tribunal*”. Nevertheless,

⁶² Article 28, Para. 3.

⁶³ Formally, the total number of provisions of the Rules is now reduced to 39 (from 43 of the 2004 edition).

⁶⁴ On the difference between “*rituale*” and “*irrituale*” arbitration, see, *inter alia*: Biavati, Paolo *Arbitrato irrituale*, in *Arbitrato*, edited by Federico Carpi, Bologna, 2008, p. 160; Marinelli, Marino *La natura dell’arbitrato irrituale. Profili comparatistici e processuali*, Turin, 2002.

⁶⁵ Article 808-ter, Para. 1, of the Italian Code of civil procedure provides: “*The parties may establish in writing that the dispute be settled by the arbitrators through a contractual determination as an exception to the provision of Article 824-bis. Failing this, the provisions of this Title shall apply*”

⁶⁶ Italian legislative decree No. 5, 17 January 2003, Article 34, Para. 2: “*La clausola deve prevedere il numero e le modalità di nomina degli arbitri, conferendo in ogni caso, a pena di nullità, il potere di nomina di tutti gli arbitri a soggetto estraneo alla società.*”

Italian scholars and case law have long debated on the efficacy of the arbitration agreement facing the 2003 Act⁶⁷, and the CAM decided to cut off Article 9, Para. 2, as the arbitration Rules are no place to settle such a controversial issue: that provision could not prevail on the application of the law given by arbitrators and national courts, hence the matter was to be determined on a case by case analysis.

The 2010 revision deleted Para. 2 and 3 of the previous Article 12. While Para. 1 provided that Respondent might file a counterclaim with its statement of defense (such a provision is now contained in Article 10, Para. 1), then the rest of Article 12 set that in this case Claimant might file a reply within thirty days (Para. 2)⁶⁸, and that Claimant's reply was forwarded to Respondent by the Secretariat within five working days (Para. 3). In the 2004 text this step-by-step description aimed to make the path clear for the parties, as well as to provide a detailed analysis of Claimant's and Respondent's arguments before the arbitrators' constitution, in order to save time in full respect of the due process principle. Nevertheless, experience showed that, in most of cases, where a counterclaim was filed, then one of the following situations occurred:

- Claimant filed its reply according to Article 12, Para. 2, then the Tribunal was constituted, and before the arbitrators both parties requested time-limits to file their respective briefs, where most of times Claimant tended to reproduce the content of its reply; or
- Claimant filed a very brief reply according to Article 12, Para. 2, then the Tribunal was constituted, and before the arbitrators Claimant requested a time-limit to file a full reply to the counterclaim; or
- Claimant did not file any reply according to Article 12, Para. 2, then the Tribunal was constituted, and before the arbitrators Claimant requested a time-limit to file its reply to the counterclaim.

Consequently, when revising its Rules, the CAM decided to unburden the text of the reply to counterclaim, leaving any decision to the arbitrators, as no actual advantage to the proceedings could arise from it. Furthermore, by deleting

⁶⁷ On this issue, see, *inter alia*: Auletta, Ferruccio *La nullità della clausola compromissoria a norma dell'art. 34 d.lgs. 17.1.2003, n. 5: a proposito di recenti (dis-)orientamenti del notariato*, in *Rivista dell'arbitrato*, 2004, p. 361; Salvaneschi, Laura *Clausole compromissorie statutarie di diritto comune: una specie che stenta a raggiungere la dovuta estinzione*, in *Rivista di diritto processuale*, 2008, p. 548; Zucconi Galli Fonseca, Elena *La convenzione arbitrale nelle società dopo la riforma*, in *Rivista trimestrale di diritto e procedura civile*, 2003, p. 929.

⁶⁸ This provision clarified that the Secretariat might extend this time-limit.

such a provision, no 30 days time-limit to reply to the counterclaim is now pending, and the case proceeds directly before the Tribunal.

Some general and common remarks can be drawn from § (c) on the powers of the arbitrators. In this regards, the new Rules do not present Article 23 of the previous edition. This Article provided for the Arbitral Tribunal to issue an order of resignation of all its member in case that they deemed to have been appointed in violation of a mandatory provision applicable to the arbitration. To put it in a nutshell, the 2004 Rules aimed to prevent time and costs of an award declining jurisdiction. Yet, Article 23 was hardly ever applied. In the CAM's practice the arbitrators use to render an award when declining jurisdiction. Therefore, the new Rules omitted this provision.

Also, articles 23 and 24 of the new set of Rules have been revised in order to re-organize the provisions on the procedural orders of the Tribunal and the conduct of the hearings. In particular, Article 23 now omits any reference to the fact that the order issued by the arbitrators may be revoked⁶⁹, since this remark is self-contained in any order. As for Article 24, the present edition refers the scheduling of any hearing to the arbitrators only⁷⁰, and leaves out any description of the Tribunal's duties in case a party does not appear at the hearing⁷¹.

A number of formal amendments then concern previous provision whose content is conformed in the new Rules, while the wording is re-organized or clarified. Here, the Rules confirmed the way of appointment of the arbitrators in case of multiparty. The CAM Rules have been in line with the international practice since 1996⁷². The new Rules divide in two paragraph the text, so that it become clearer for

⁶⁹ As previously stated by Article 26, Para. 4, of the 2004 Rules, expressly.

⁷⁰ Article 27 of the 2004 Rules was misleading in this regard, as it stated that the date of the hearings was determined by the Arbitral Tribunal together with the Secretariat: in the CAM's praxis the arbitrators have always fixed the hearing by themselves, and the new Rules make clear that they consult the Secretariat, without any co-decision with the CAM. The reason for the Tribunal to consult the Secretariat before scheduling a hearing is that the CAM host the hearing at its premises at no additional costs, but to grant this opportunity the Tribunal and the Secretariat must cooperate before any order is issued.

⁷¹ Previous Article 27, Para. 3, is now excluded. This rules provided that "*If a party does not appear at the hearing without justified reason, the Arbitral Tribunal shall ascertain whether the party was duly summoned and may then proceed with the hearing. If it ascertains that the party was not duly summoned, the Arbitral Tribunal shall summon the party again.*" The CAM consider this provision to be implied in the Tribunal's powers and duties. Nevertheless, if a party remains absent, then the Secretariat will constantly invite the Tribunal to preserve the due process principle by referring to the 2004 Rules.

⁷² The well-known practice arising out of the *Dutco* case (*Cour d'Appel de Paris*, 5 May 1989, in *Revue de l'arbitrage*, 1989, p. 723; *French Cour de Cassation*, 7 January 1992, in *Revue de l'arbitrage*, 1992, p. 470) was already contained in Article 5, Para. 4, of the 1996 CAM Rules, and Article 16 of the 2004 CAM Rules.

the reader to follow the way of appointment of the arbitrators. The new provision set that (Article 15, Para 1⁷³) in case of multiple parties (Claimants and/or Respondents) acting as two sides only and appointing an arbitrator for each side, then the Tribunal will be appointed in accordance with the parties' will. On the other hand, (Article 15, Para 2⁷⁴) if such a scheme does not occur, the Arbitral Council of the CAM shall appoints all the members of the Tribunal. The new Rules indicate that the CAM's appointment is made regardless of any appointment conducted by the parties, and such an explicit remark follows the current revision of the UNCITRAL Arbitration Rules⁷⁵.

The new Rules have updated the provisions on the award to the 2006 Italian Reform⁷⁶. In 2004 the Rules set two different provisions for the deliberation of the award⁷⁷ and its form and content⁷⁸. Today, the two rules have melt in Article 30, Para. 1, dealing with the deliberation of the award: it provides for the award to be issued by a majority decision, where it is made clear that all the members of the Tribunal joined the discussion, and the award shall state the reasons for an arbitrator who could not or did not want to sign it. The 2010 Rules skip over the way for the arbitrators to deliberate⁷⁹. Article 33 of the previous edition of the Rules provided for the arbitrators to deliberate by meeting in person only if the rules applicable to the proceedings so require. This provision was in line with the Italian legislation in force before the 2006 Italian Reform⁸⁰, according to which the arbitrators had to meet in person to issue a domestic award, while this could happen by way of videoconference in case of international arbitration. The 2006 amended such a system, and today no personal meeting is required unless any arbitrator so requests, as per Article 823, Para. 2, of the Code of civil procedure. Consequently,

⁷³ Article 15, Para 1, provides: "*Where the request for arbitration is filed by or against several parties, if the parties form two sides when filing the request for arbitration and the statement of defence and the arbitration agreement provides for a panel of arbitrators, each side shall appoint an arbitrator and the Arbitral Council shall appoint the president, unless the arbitration agreement delegates the appointment of the entire panel or of the president to another authority.*"

⁷⁴ Article 15, Para 2, provides: "*Regardless of the arbitration agreement, if the parties do not form two sides when filing the request for arbitration and the statement of defence, the Arbitral Council, without considering any appointment made by any of the parties, shall appoint the Arbitral Tribunal, or a sole arbitrator if deemed appropriate.*"

⁷⁵ Reference is made to the current rafting of Article 10 of the Revision of the UNCITRAL Rules, as for the 51th session of the Working Group II, held in Vienna on 14-18 September 2009, available at www.uncitral.org

⁷⁶ Reference is to Article 823 of the Code of civil procedure.

⁷⁷ Article 33.

⁷⁸ Article 34.

⁷⁹ The new Rules excludes any reference to a conference in person ("*conferenza personale*").

⁸⁰ Reference is made to Article 823, Para. 1, for domestic arbitration, and to Article 837 for International arbitration, before the 2006 Reform entered into force.

the 2010 Rules do not cover this issue any longer, and the arbitrators will refer to the applicable rules of law, if any, in this regard.

CONCLUSIONS

The development of the CAM's system of administration called for this 2010 revision. While the fundamental structure of the Rules is not modified, the new set offers a chance to accelerate the procedure and to suit it the case at hand, in line with the international practice. Several articles have been rewritten or clarified, while their meanings remained unchanged. Intended amendments and completely new articles will grant the parties, the arbitrators and the Institution with the opportunity to conduct the arbitration efficiently.

Potentially, the new Rules are a valid instrument for parties and arbitrators to shape: they are innovative and up-to-date, but not any original or unfamiliar to use. At the very end, the rules of any institution are but a constant frame, whilst it is for parties and arbitrators to draw the picture. It will be up to them to take their chance.