

# How the 2019 Arbitration Rules of the Milan Chamber of Commerce May Impact Italian M&A Disputes

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The Italian M&A market experienced positive growth in both domestic and cross-border transactions over recent years, with the number and value of deals steadily increasing, especially since 2017. While neither sellers nor buyers intend for M&A deals to end in dispute, the reality is transactions offer many reasons for conflicts: shareholders disagree on investments or divestments, the price needs adjustments or reps and warranties turn out to be inaccurate – just to name a few.

On 1 March 2019, the Milan Chamber of Arbitration (CAM) released its new Commercial Arbitration Rules (New CAM Rules). While CAM itself is still on tour to present its new Rules across Italy,<sup>1</sup> the New CAM Rules already show some distinct features that could benefit M&A disputes. Since increased M&A activity is likely to yield M&A disputes, the following gives an overview of the features of the New CAM Rules that can help mitigate the risk of lengthy and expensive disputes related to Italian M&A transactions.

## General benefits of Arbitration for M&A Disputes

Arbitration is generally very suitable to resolve M&A-related disputes both in a purely domestic and a cross-border context. Its key features are the confidentiality of the proceedings, the ability to obtain a relatively fast, final and binding decision, and the possibility to enforce the award almost worldwide. Moreover, the parties have the opportunity to appoint experienced arbitrators who understand the details, complexities and mechanics of M&A transactions, especially regarding technical aspects such as purchase price calculation or industry-specific warranties.

## The Application of the New CAM Rules

CAM decided in September 2017 to update its rules and align them with current international standards. While the Rules maintain their essential characteristics, they also introduce a number of features that could particularly benefit parties involved in M&A disputes. The New CAM Rules apply to all arbitrations

<sup>1</sup> <https://www.camera-arbitrale.it/it/news/non-solo-milano-il-regolamento-arbitrale-cam-e-in-tour.php?id=868> (last visited: 11 December 2019).

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administered by CAM from 1 March 2019 onwards. The New CAM Rules can apply to M&A transactions when the parties agree on them in a clause of the share purchase agreement (SPA) or in a separate (subsequent) agreement (Articles. 1 and 2 New CAM Rules).

## The Key New Provisions from an M&A Perspective

M&A transactions often involve more than two parties, they have complex cross-border structures, and are generally the result of lengthy negotiations and mutual concessions. At the same time, both corporate M&A players and private equity funds equally appreciate that time is money. Since M&A disputes can become a bad distraction to the newly acquired business, arbitration rules that have the ability to streamline the abovementioned issues into a time and cost efficient dispute resolution mechanism will be particularly appealing to the fast-paced world of M&A transactions. In addition, one of the key novelties of the New CAM Rules is the explicit permission to use third-party funders, which is still uncommon in the Italian disputes market. While third-party funding plays a greater role in other types of disputes, it might also positively impact M&A disputes.

The following provides an overview of the features of the New CAM Rules that may allow for streamlining M&A disputes.

### Multi-Party Arbitrations

CAM introduced a simplified procedure governing multi-party arbitrations in the New CAM Rules. The New Rules now state where an arbitration is filed by or against several parties and when those parties form two sides, arbitrators will be appointed in the usual manner with each side appointing a co-arbitrator and either the CAM Arbitral Council or the two co-arbitrators appointing the president of the arbitral tribunal (Article 16.1 New CAM Rules). Where the numerous parties do not form two sides, the CAM Arbitral Council, without considering any appointment made by any of the parties, shall appoint the arbitral tribunal (Article 16.2 New CAM Rules). Moreover, the CAM Rules provide under certain circumstances for the possibility to consolidate pending arbitration proceedings by the CAM Arbitral Council before the tribunal is constituted, even if they are not based on the same arbitration agreement, provided the arbitration agreements are compatible (Article 12.b New CAM Rules). In addition to that, the arbitral tribunal will be able to consolidate multiple proceedings related to the same dispute pending before it (Article 25.4 New CAM Rules).

This is advantageous to the resolution of M&A disputes, which often involve more than one party on at least one of the sides involved in the transaction (e.g. a holding and a selling/buying company). In addition, there are often multiple contracts between the parties related to an SPA and third parties, such as the former shareholders, which remain managing directors of the target, or escrow agents. Unless tactical reasons speak against consolidating disputes, the easier it is to combine all these parties and agreements into one arbitration, the faster and cheaper will be the dispute resolution.

### Corporate Disputes

An often underrated cause for dispute in an M&A context is the relationship between shareholders as to the decision to engage in a transaction. Especially in the Italian corporate market, where small businesses often grow to become worldwide silent champions but remain family-owned, shareholders might sometimes have diverging views on the future of their companies. Decisions to sell their own company or invest in other companies can thus become very difficult. But problems can also arise at a larger scale: for example, when parties in cross-border transactions decide to work together without completely merging or changing control, the shareholder agreements of the joint-venture company may themselves trigger disputes, e.g. when one party changes control – leaving the other party in a relationship with a partner that it did not expect, let alone agree to.

The New CAM Rules try to mitigate such risks, by stating that where the arbitration agreement contained in the statute or bylaw of a company subject to Italian law does not refer the power to appoint any arbitrators to an authority other than the company itself, the CAM Arbitral Council shall appoint the arbitral tribunal (Article 17 New CAM Rules).

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This fallback-solution allows to solve many M&A-related dispute scenarios, as the Italian Supreme Court confirmed the arbitrability of corporate disputes,<sup>2</sup> and held that disputes regarding the exclusion of shareholders from a company can be resolved through arbitration.<sup>3</sup> Another far-reaching consequence could derive from a recent decision of the Court of First Instance of Milan, which upheld the principle that the arbitration clause contained in the company's articles of association is also binding upon the withdrawing shareholder/partner.<sup>4</sup> Consequently, bypassing arbitration proceedings by exiting the company could no longer be an option.

In all these dispute scenarios, the New CAM Rules avoid time-consuming and expensive stalemate situations when determining who should appoint the arbitrators.

## Short Time Limits for Arbitration Milestones

Arbitration proceedings are characterized by several milestones: The request for arbitration, the constitution of the arbitral tribunal, the parties' submissions, the hearing and the final award. Much of arbitration's efficiency and benefits depend on the ability of the parties and the tribunal to navigate swiftly through those milestones. Accordingly, the New CAM Rules have introduced several features to expedite the arbitral proceedings.

As of 2018, CAM arbitrations already had an average dispute duration of 12 months<sup>5</sup> as compared to 2.7 years before Italian courts.<sup>6</sup> While it remains to be seen whether the New CAM Rules will lead to a further acceleration of the procedures, the features suggest further time-saving is possible:

First, within 10 days from the receipt of an arbitrator's statement of independence, each party may file written comments with the Secretariat or a reasoned challenge (Article 21.1 New CAM Rules). After this timeframe, the arbitrator will either be confirmed or the CAM Arbitral Council shall decide the outcome (Article 21.2 New CAM Rules).

Second, the arbitral tribunal will be constituted as promptly as possible, also by taking into account the needs of the parties, and in any case, within 30 days from receipt of the briefs and documents forwarded by the Secretariat (article 24.2 CAM Rules). The Secretariat may extend this time limit for justified reasons (article 24.2 CAM Rules).

Third, after its constitution, the arbitral tribunal takes full control of the proceedings. It can set conditions and time limits to conduct any further steps of the proceedings and in any case no later than the first hearing (article 25.1 New CAM Rules).

Finally, the New CAM Rules introduced the possibility for arbitrators to request a scrutiny of the form of a draft of the award before signing it (Article 34.1 New CAM Rules), as well as imposing a six month time limit for the final award to be rendered to the parties (Article 36.1 New CAM Rules), unless the Secretariat or the CAM Arbitral Council deems it appropriate to extend this period (Article 36.2 New CAM Rules), with only limited possibilities to suspend such time limit (Article 36.3 New CAM Rules).

## Avoiding Dilatory Tactics

Another time and cost-saving measure is to avoid the use of dilatory tactics by the parties that could slow down the procedure. The New CAM Rules introduce a provision stating that if a party objects to the application of the New CAM Rules before the arbitral tribunal's constitution, the CAM Arbitral Council shall decide the admissibility of the arbitration, but such decision shall not be binding on the arbitral tribunal (Article 1.4, 1.5 New CAM Rules). Thus, the arbitral tribunal remains in full control of the procedure once it is constituted. Moreover, the New CAM Rules also impose fairness on to the parties: To enforce such good faith

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<sup>2</sup> Italian Supreme Court, Decision 26300, 6 November 2017.

<sup>3</sup> Italian Supreme Court, Decision 10399, 30 April 2018.

<sup>4</sup> Court of First Instance of Milan, Decision 10728, 21 November 2019.

<sup>5</sup> CAM Arbitration Facts & Figures (2018), available at: <https://www.camera-arbitrale.it/upload/documenti/statistiche/arbitration-facts-figures-2018.pdf> (last visited: 11 December 2019).

<sup>6</sup> Statistics for 2016 available under: [https://www.giustizia.it/giustizia/it/mg\\_1\\_14\\_1.page?jsessionid=fSKpuJdf2r5po1b-0qaAkOi?facetNode\\_1=0\\_10&facetNode\\_2=1\\_5\\_33&facetNode\\_3=2\\_4&contentId=SST1263302&previousPage=mg\\_1\\_14](https://www.giustizia.it/giustizia/it/mg_1_14_1.page?jsessionid=fSKpuJdf2r5po1b-0qaAkOi?facetNode_1=0_10&facetNode_2=1_5_33&facetNode_3=2_4&contentId=SST1263302&previousPage=mg_1_14) (last visited: 11 December 2019).

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promise, the arbitral tribunal may sanction any breach of its decisions and any unlawful conduct of the parties and their counsel when deciding on the allocation of costs (Article 9.4 New CAM Rules).

As a practical example, M&A transactions involving escrow accounts are now better protected under the New CAM Rules as it will not be worthwhile for the withholding party to delay the release of escrow arrangements by deliberately stalling the arbitral proceedings.

### **Interim Relief and Emergency Arbitrator**

Provisions on interim relief (Article 26 New CAM Rules) and emergency arbitrator (Article 44 New CAM Rules) have been added to the New CAM Rules, contributing to achieving CAM's objective of swift and effective dispute resolution. Within 20 days from application, the emergency arbitrator can issue the urgent interim relief or a provisional measure (Article 44.2, 44.3 New CAM Rules). This may be useful in post-M&A arbitrations, for example, when account-freezing and urgent decision-making as regards the release of funds are needed to preserve the status quo of the parties. But also before the closing phase, when the consent of a reluctant shareholder is needed to complete the transaction, an emergency arbitrator can prevent the collapse of the entire deal.

## **Do the CAM Rules Suit Cross-Border M&A Disputes?**

While it is likely the abovementioned new features will primarily benefit the domestic Italian M&A market, they might also appeal to foreign corporate M&A players and private equity funds.

Although the majority of CAM's case load is primarily focused on Italy, this should not dissuade potential foreign users from considering the New CAM Rules as a real and viable option to resolve cross-border Italian M&A disputes. The more so, since private equity funds or multinational conglomerates often operate through their Italian subsidiary, which lessens the significance that ought to be attributed to this consideration.

In any event the latest CAM Arbitration statistics<sup>7</sup> reveal the CAM Rules have the scope and ability to handle cross-border M&A disputes. In 2018 alone, the total economic value of cases administrated under the CAM Rules was approximately EUR 890 million, with the average case value exceeding EUR 4.77 million.<sup>8</sup> Furthermore, according to its own statistics, disputes resolved under the CAM Rules involved potentially M&A-relevant matters in about 41.5% of all cases (27.7% were corporate matters; 6.9% rent, sale and concession of a business matter; and 6.9% sale and purchase agreements).<sup>9</sup> Both of these factors comfortably align with the characteristics usually apparent in M&A disputes, both domestic and international.

## **Conclusion**

The New CAM Rules offer a variety of elements which benefit both domestic and cross-border M&A Italian-related transactions. In addition to these specifically mentioned provisions, the New CAM Rules offer several benefits of pursuing arbitration over litigation to resolve M&A disputes. These benefits include features such as the selection of a neutral forum, the choice of experts and the average time needed to resolve disputes, making it a very sound option to use for Italian-related M&A disputes.

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<sup>7</sup> CAM Arbitration Facts & Figures (2018), available at: <https://www.camera-arbitrale.it/upload/documenti/statistiche/arbitration-facts-figures-2018.pdf> (last visited: 11 December 2019).

<sup>8</sup> CAM Arbitration Facts & Figures (2018), available at: <https://www.camera-arbitrale.it/upload/documenti/statistiche/arbitration-facts-figures-2018.pdf> (last visited: 11 December 2019).

<sup>9</sup> CAM Arbitration Facts & Figures (2018), available at: <https://www.camera-arbitrale.it/upload/dssdocumenti/statistiche/arbitration-facts-figures-2018.pdf> (last visited: 11 December 2019).

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