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The Practice of the Chamber of Arbitration of Milan on Independence and Impartiality of Arbitrators

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Professional paper

Due to the harmonization with the Italian legislative reform on arbitration, the new Arbitration Rules of Chamber of Arbitration of Milan came into force in 2010. This paper gives a review on the standards of independence and impartiality of arbitrators.

The author explains the procedure of appointment of arbitrators, their obligation to make a written statement of independence, and the reasons of potential dependence and partiality which should be disclosed in the statement. Furthermore, a review is made on the requirements for the confirmation of arbitrators by the Chamber, with reference to the purpose of such provisions and the practice of the Chamber.

Key words: independence and impartiality of arbitrators, appointment of arbitrators, challenge of arbitrators, Italian legislative decree No. 40/2006, Arbitration Rules of the Chamber of Arbitration of Milan, IBA Guidelines on conflict of interest, Chamber of Arbitration of Milan

I. Introduction

The present article means to focus on the approach of the Chamber of Arbitration of Milan on one of the crucial aspects of arbitration: the independence and impartiality of arbitrators.

The Chamber of Arbitration of Milan ("CAM")¹ is a special agency of the local Chamber of Commerce, Industry, Handicraft and Agriculture, established in 1985. Besides taking into consideration the functions legislatively referred to the Italian Chambers of Commerce², the CAM offers an array of Alternative Dispute Resolution ("ADR") tools: arbitration, mediation, online mediation and domain

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¹ For an overview on the CAM see *inter alia* Azzali, S., "Arbitrato amministrato", in Buonfrate, A., and Giovannucci Orlandi, C. (eds.), *Codice degli arbitrato, delle conciliazioni e di altre ADR*, 2006, Turin, Utet, p. 49; Coppo, B., "Comparing Institutional Arbitration Rules: Differences and Similarities in a Developing International Practice", in *International Arbitration Law Review*, 2010, 3, p. 100; Sali, R. "Arbitrato amministrato della Camera Arbitrale di Milano", in Buonfrate, A. and Giovannucci Orlandi C. (eds.), *Codice degli arbitrato, delle conciliazioni e di altre ADR*, 2006, Turin, Utet, p. 133.

² Italian Law no. 580/1993 and legislative decree no. 23/2010.

names dispute reassignment. Furthermore, it provides materials and documentation by means of a library and a Research Centre for ADR, it carries out international projects, and is partner of the Italy-China Business Mediation Center ("ICBMC")³.

On 1 January 2010, a new set of Arbitration Rules ("the Rules")⁴ entered into force, applying to both domestic and international arbitration. The revision aimed to improve and confirm the main features of the CAM administration system, update it to the Italian 2006 legislative Reform on arbitration⁵, and fill in certain gaps. Also, the new Rules take into account the growing practice of the CAM, arising from a constantly increasing number of administered cases⁶.

The 2010 Rules now provides the parties with an expedite, transparent and effective administration of the proceedings. To reach this goal, the revision (a) amended the internal function of the CAM's bodies, that is to say the Arbitral Council⁷ and the Secretariat⁸, (b) confirmed the Institution's control on the independence of the arbitrators, the duration and the costs of the proceedings, (c) enlarged the powers

³ Further information are available on the CAM's website www.camera-arbitrale.com.

⁴ The Rules are available in English, Italian and other languages at the CAM's website. The revision was set in motion in 2007 by a working group 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 then approved by the Board of Directors of the CAM on 23 October 2009. The previous version of the Rules dated 2004. On the 2010 CAM Arbitration Rules see Coppo, B., "The 2010 Revision of the Arbitration Rules of the Chamber of Arbitration of Milan", in *The Vindobona Journal of International Commercial Law and Arbitration*, 2010, 14, p. 283.

⁵ Italian legislative decree no. 40/2006, which entered into force on 3 March 2006. On the 2006 Italian Reform on arbitration see, *inter alia*, Bernardini, P., "Ancora una riforma dell'arbitrato in Italia", in *Diritto del commercio internazionale*, 2006, p. 227; Carpi, F. (ed.), *Arbitrato*, Bologna, Zanichelli, 2006; Giovannucci Orlandi, C., "La nouvelle réglementation italienne de l'arbitrage après la loi du 2 février 2006", in *Revue de l'arbitrage*, 2008, 1, p. 19; Ricci, E. F., "La delega sull'arbitrato", in *Rivista di diritto processuale*, 2005, p. 1197.

⁶ The total number of cases administered by the CAM was 105 in 2004, and increased up to 153 in 2009. The international cases were 11 in 2004 and grew up to 35 in 2009, involving parties from all over the world. A detailed statistical report is available at the CAM's website, *supra* fn 4.

⁷ The Arbitral Council is the technical body in charge of a general competence over the administration of cases (i.e. appointment and challenge of the arbitrators, determination of the costs of the proceedings etc.). The Council 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 may appoint both Italian and foreign experts.

⁸ The Secretariat assists the Arbitral Council, the arbitrators and the parties in the course of each case, according to the Rules.

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of the arbitrators⁹, and (d) cut off any redundant or purely descriptive provisions to make the final text shorter¹⁰ and clearer by rewording some articles¹¹.

II. The independence of the arbitrators in the 2010 Arbitration Rules of the CAM

The independence of the arbitrators¹² is a key-element for arbitration to be effective, and for any final award to be enforceable, because of the strict connection between the arbitrator's conduct along the proceedings and the respect of the due process principle. The CAM¹³ has always paid the greatest attention to this aspect, and its Rules have been structured in order to prevent any misleading attitude of

⁹ Consider, for example, Article 3, Para. 3, on the determination of the rules applicable to the merits of the dispute.

¹⁰ Formally, the total number of provisions of the Rules has been reduced to 39 (from 43 of the 2004 edition).

¹¹ Consider, for example, Article 15 on multiparty arbitration, now composed by two paragraphs to make its ruling crystal clear.

¹² On this issue see, *inter alia*, Aboul-Enein, M.I.M., "Recent Trends Concerning Conflicts of Interest in International Commercial Arbitration", working paper delivered at the 8th Biennial IFCAI Conference, *Key Current Issues in International Arbitration*, Washington, 3 June 2005; Bernardini, P., "The Role of the International Arbitrator", in *Arbitration International*, 2004, 2, p. 113; Born, G. B., "Selection, Challenge and Replacement of Arbitrators in International Arbitration - Independence and Impartiality of Arbitrators", in *International Commercial Arbitration*, 2009, The Hague, Kluwer Law International, p. 1461; Cárdenas, E., - Rivkin, D. W., "A Growing Challenge for Ethics in International Arbitration", in *Global Reflections on International Law, Commerce and Dispute Resolution*, Aksen, G., - Böckstiegel, K., - Mustill, M. J., - Patocchi, P. M., - Whitesell, A. M., (editors), ICC Publishing, Paris, 2005, p. 191; Consolo, C., "La ricsuzione dell'arbitro", in *Rivista dell'arbitrato*, 1998, 1, p. 17; Gaillard, E., and Savage, J. (eds.), "Fouchard Gaillard Goldman on International Commercial Arbitration", 1999, The Hague, Kluwer Law International, p. 561; Giovannucci Orlandi, C., "Ethics for International Arbitrators", in *UMKC Law Review*, 1998, 67, p. 93; Henry, M., "Pluralité de désignation et devoir d'indépendance et d'impartialité de l'arbitre", in *Revue de l'arbitrage*, 2005, 3, p. 722; Luttrell, S., "Bias Challenges in International Commercial Arbitration", Wolters Kluwer, 2009; Paulsson, J., "Moral Hazard in International Dispute Resolution", Inaugural lecture as holder of the Michael R. Klein distinguished Scholar Chair, University of Miami School of Law, 29 April 2010; Rogers, C. A., "Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct", in *Stanford International Law Review*, 2005, 53; Spaccapelo, C., "L'imparzialità dell'arbitro", Giuffrè, Milan, 2009; Whitesell, A. M., "Independence in ICC Arbitration: ICC Court Practice Concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators", in *ICC Bulletin Special Supplement*, 2007, p. 7.

¹³ On the CAM's practice in this regards see Azzali, S., and Coppo, B., "Comment to a decision of England's Court of Appeal (Civil Division) rendered in 2000 in case [2000] EWCA Civ. 154, The "Saudi Cable" case", in *Stockholm Arbitration Report*, 2003, 2, p. 65.

the arbitrators, potentially (or apparently, to put it in an independence-related way) affecting the efficiency of the proceedings.

The arbitrator's duty to be independent is included in the Code of Ethics attached to the Rules. In regards to this Code, Article 1 states that any arbitrator accepting to act in a case administered by the Chamber of Milan shall do it accordingly to the CAM Rules and the Code of Ethics. Consequently, when the parties enter an arbitral agreement referring to the Chamber of Milan, they agree on the Code of Ethics too, as it is part of the Rules.

Hence, both the CAM Rules and the Code of Ethics set a duty for any arbitrator to be independent and impartial¹⁴ (Article 18, Para. 2, let. a., b and c, of the Rules, and Articles 5 and 6 of the Code of Ethics).

From a general point of view, the CAM Rules deal with the independence of the arbitrators in Articles 18 – 20, as well as in the Code of Ethics of arbitrators attached to the Rules, which remained unchanged in 2010. Besides, connected issues are covered by Articles 16 and 14, Para. 5, which are here represented at first.

As a preliminary issue, the Rules intend to provide the international cases with a neutral decision-maker. According to Article 14, Para. 5, when the Arbitral Council of the CAM shall appoint the sole arbitrator or the chairman of the Tribunal, and in case that the parties have different nationalities, or registered offices in different Countries, then the Council shall appoint a person of a nationality other than those of the parties (so called "third nationality rule"), unless otherwise agreed by the parties themselves.

Article 16 states that the CAM cannot appoint as arbitrator a member of its Board, or of the Arbitral Council, or its auditors and employees (so called "incompatibility rule"). The 2004 edition of the Rules barred professional partners, employees and all who had an ongoing cooperative professional relationship with those individuals. Such a limit mainly concerned professionals working in the same law firm of a member of the Arbitral Council. The CAM has considered transparency as a key value of its system, and today Article 16 still hinders the Arbitral Council from appointing professionals working in the same law firms of its members. The Institution's own perception is that, without such a rule, there might be a suspicion that few divas always play on the stage of the CAM arbitration, while it is not¹⁵. Nevertheless, such a low ceiling could frustrate the parties' freedom to select the

¹⁴ Scholars have long discussed independence and impartiality, analyzing differences, similarities and definitions, see, in particular, Giovannucci Orlandi, C., as quoted in footnote no. 13.

¹⁵ On the CAM's practice in regards of the appointment of the arbitrator see Sali, R., "How to choose the ideal arbitrator: the institutional point of view", available at <http://www.european-arbitrators.org> (last visited on 10 July 2010).

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best professional for the case at hand. Hence, the CAM 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, whilst the CAM is still limited by Article 16 to preserve the appearance of its plain conduct when appointing an arbitrator.

Turning to the independence of the arbitrators, the new Rules confirm the duty of the arbitrators to be independent and impartial (CAM Code of Ethics, Arts. 5 and 6), and to remain so throughout the proceedings, and after the award is filed, during the period in which an annulment can be sought¹⁶ (Article 18, Para. 5, of the Rules, and Article 6 of the Code of Ethics). As far as such a duty is concerned, no distinction can be found either in the Rules or in the Code of Ethics between the Sole Arbitrator / President of the Tribunal and the party-appointed arbitrators.

Arbitrators are requested to sign a statement of independence (Article 18, Para. 1 and 2), disclosing:

- a. any relationship with the parties or their counsel, or any other person (i.e. a co-arbitrator) or entity (i.e. the counsel's law firm) involved in the case,
- b. any interest in the outcome of the dispute, either personal or economical, direct or indirect,
- c. any bias or reservation as to the subject matter,

as well as time and duration of the above, and are subject to a challenge procedure (Article 19)¹⁷. While points a. and b. of Article 18 deal with independence (lack of any objective circumstances affecting the arbitrator's position), point c. is direct to impartiality (that is to say, an inner attitude of the arbitrator).

As far as the arbitrator's duty to disclose is concerned, the 2010 revision modified the wording of Article 18, which is now broader than in the 2004 version, in order to cover any aspect that is likely to affect the appearance of independence of the arbitrator.

When signing the statement of independence, the arbitrator examines his/her own position, and then either does not accept, or accepts and - at the same time - discloses any circumstance that in his/her opinion does not negatively influence his/her independence but that, for sake of the appearance of his/her integrity, he/she

¹⁶ Should the seat of the arbitration be in Italy, then Article 828 of the Italian Code of civil procedure would apply, providing that a challenge against the arbitral award can be filed within 90 days from the notification of the award before the competent Court of Appeal, and that no recourse may be filed after one year from the date of the last signature.

¹⁷ The challenge procedure remains unaffected by the 2010 reform.

submits to the parties and the Institution to which the parties referred the administration of their case.

The Code of Ethics clarifies that the arbitrator shall resolve any doubt in regards to the opportunity to disclose in favor of disclosure (Article 7, Para. 2). Also, it is stated that the CAM can draw a ground to replace, or not to confirm the arbitrator in other proceedings where facts, circumstances or relationships were discovered that should have been disclosed, but were not (Article 7, Para. 3 of the Code of Ethics).

The Rules grant the parties an opportunity to fill comments or observations, if any, on the arbitrator's statement within ten days from receiving the statement by the Secretariat (Article 18, Para. 3).

Then, the Rules provide for the Institution to confirm the arbitrators (Article 18, Para. 4). The Secretariat 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 10 days from receiving it.

In any other case, the Council decides on the confirmation.

The arbitrator is expected to submit a new statement of independence along the proceedings, in case of supervening circumstances or upon request of the Secretariat (Article 18, Para. 5).

Regardless of his/her appointing authority, each arbitrator accepting to act under the CAM Rules shall respect the Code of Ethics attached thereto (as said above, Article 1, Code of Ethics). Thus, the Code of Ethics clarify that no difference exists between a party-appointed arbitrator and the chairperson. Also, the Code sets a border for any communication between the arbitrator and his/her appointing party by stating that, in case the chairperson shall be appointed by the co-arbitrators, he/she may contact the party or its counsel, providing that he/she will not be bound by any indication (Article 2). Furthermore, the Code sets that the arbitrator shall refrain from unilateral contact along the proceedings with any of the parties or its counsel (Article 9), and that any violation of the Code of Ethics entails a ground for the CAM to replace the arbitrator or to refuse confirmation in another case (Article 13).

This last provision of the Code of Ethics, as described here above, is connected to Article 20, Para. 1, lett. g, of the Rules, which empowers the Arbitral Council to remove an arbitrator in case of violation of his/her duties under the Rules or for any serious ground. The wording of this rule refers to a power that the Council applies

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As far as the challenge of the arbitrator is concerned, according to Article 19, Para. 1, of the Rules, each party may file a reasoned challenge on any ground that casts a doubt on the arbitrator's independence or impartiality. It is up to the Arbitral Council to decide on the challenge (Article 19, Para. 4). The challenge must be filed within 10 days from receiving the statement of independence, or becoming aware of the ground for challenge (Article 19, Para. 2). The Secretariat transmits the challenge to the arbitrators and the other party/ies, and sets a time limit to submit comments, if any (Article 19, Para. 3). The party waves its right to make a challenge, if it fails to raise it in the first brief or hearing following the ground for objection (Article 12).

In regards of the substitution of the arbitrators (Article 20), the Milan Rules now add to the list of grounds for removal (among resignation, challenge etc.) the case where the arbitrator is removed by all parties.

The Rules clarify that, in case of replacement, the new arbitrator shall be appointed by the same authority that appointed the substituted one (Article 20, Para. 3). Nevertheless, in order to prevent any filibustering activity that might impact on the smooth conduct of the proceedings, such a rule is applied once only: in case the replacing arbitrator him/herself must be substituted, then the new arbitrator shall be appointed by the Arbitral Council.

When an arbitrator is replaced, the Arbitral Council shall determine his/her fee, if any (Article 20, Para. 4). The Council makes its determination taking into account the work done by the arbitrator, as well as the reason for the replacement.

Finally, in case of removal of an arbitrator, the Secretariat may suspend the proceedings (Article 20, Para. 5). In any case, when the suspension is lifted, the time limit left for the new Tribunal to file the award is extended to 90 days, if it is less than 90 days, in order to preserve the case from any practical problem.

III. The CAM's practice on the independence of the arbitrators

As seen in § II, the arbitrator's duties in regards of his/her independence are listed in Article 18 of the Rules and in the Code of Ethics. The Institution's control on the independence of the arbitrator is based on the Arbitral Council's decision on the confirmation and on the challenge of the arbitrator.

The Rules do not provide for the Council to render a reasoned decision, nor they prevent it to. Although the Council rarely reasons its decision, it makes its determination on a case by case analysis.

The Rules (Article 18) structure a path where the Secretariat confirms the arbitrators where no relevant issue arises (i.e., no circumstance whatsoever is disclosed, and none of the parties files any comment thereto within a pre-established time limit). By so providing, the Rules grant a time-efficient administration of the case. On the other hand, the Council, whose meetings take place once a month¹⁸, is in charge of the control on the arbitrator's independence for any case where any kind of relationship is disclosed, or any of the parties submits observation, or rises a challenge. Hence, the control of the arbitrator's independence relies on the Council's competence to ensure the greatest attention to this aspect, and save the effectiveness of the arbitral proceedings and the final award. When choosing an arbitration administered by the CAM, the parties commit the case to the respect of the content of both the Rules and the Code of Ethics, and they entrust the Institution to preserve the proceedings from any misleading attitude. Such a role played by the Institution can concretely limit the grounds for challenging the award, where based on grounds connected to the impartiality of the arbitrator. Consequently, in this regards the CAM administration can support the finality of the arbitral decision, and avoid any time and money wasting along the proceedings.

Where the appointment of the arbitrator is conducted by the CAM, the control on the independence is conducted at an early stage: the Institution contacts the prospective arbitrator before the appointment is official in front of the parties, and invites him/her to make a conflict check, under a strictly confidential restriction. In case where any circumstances arise from such a preliminary check, then the CAM moves on to another selected candidate, so to provide the parties with an impartial and independent arbitrator since the very beginning of the case.

When the Secretariat of the CAM receives the arbitrator's statement of independence, it consider whether it is complete, and it may requests for clarifications (Article 18, Para. 5). For example, if a relationship of any kind is disclosed, the Secretariat can request the arbitrator to clarify when it began/ended. The Secretariat acts in order to give both the parties and the Council a comprehensive description of the situation disclosed by the arbitrator (nature, duration etc.).

While a statement where any circumstance is disclosed does not lead automatically to a disqualification of the arbitrator, the Council may derive elements for its decision from a manifest lack of disclosure.

¹⁸ In case of urgency, the President of the Council, or, if prevented, the deputy, may take any decision on the administration of the case, and then inform the Arbitral Council at its following meeting (See the Preamble of the Rules, point 8).

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Though no fixed pattern is followed by the Council, its decisions aim to preserve the appearance of independence and impartiality of the arbitrator, which derives from the spirits of the Rules and the Code of Ethics.

Between 2004 and 2009, 1.317 arbitrators were appointed (either by the parties, the co-arbitrators, the Arbitral Council or a different authority). Along the same period of time, 1.082 (77%) arbitrators were confirmed, 244 (17%) statements of independence were not examined (i.e. because the case was withdrawn before the confirmation stage), while 83 arbitrators were not confirmed, or successfully challenged (6% of the total number of appointed arbitrators).

In the recent past, the Council drew a lack of impartiality from the fact that the arbitrator disclosed to be counsel for his/her appointing party before a State court proceedings, or before another arbitral tribunal.

In another case, the Arbitral Council admitted an arbitrator's challenge on the ground that his/her daughter was a practicing lawyer at the law firm of the counsel of his/her appointing party.

On the other hand, the Council did not consider as a disqualifying ground the fact that the arbitrator and the counsel of his/her appointing party were scholars at the same University.

An interesting case can be described in regards to the evolution under the Italian perspective on a specific situation disclosed by the arbitrator: the fact that the arbitrator is a lawyer sharing his/her office in the same premises of the counsel of his/her appointing party ("*condivisione di locali*"). Such a situation, where disclosed in a statement of independence rendered under the CAM Rules, has constantly led to a non-confirmation decision of the Council, or to a successful challenge of the arbitrator, since the very beginning of the CAM's activity. Yet, in 2004 the Italian Supreme Court¹⁹ ruled that the fact that the arbitrator was a lawyer sharing the premises of his office with the counsel for his appointing party did not entail *per se* a successful ground for challenge the arbitrator, unless it was proved that such a situation gave rise to a common professional activity, either from a technical or an economical point of view ("*[...] compenetrazione delle rispettive attività professionali dal punto di vista tecnico-organizzativo [...] ovvero [...] economico [...]*"). The Court explained that a suspicion of apparent partiality ("*sospetto di apparente parzialità*") was not enough to disqualify the arbitrator. Nevertheless, in 2006 the Code of Ethics of the Italian Bar Association was amended, and now (Article 55) it prevent a lawyer to accept to act as arbitrator where he/she is sharing the premises with the council of his/her appointing party. From the situation here described, we

¹⁹ Supreme Court decision no. 17192, dated 28 August 2004, available at <http://dejure.giuffre.it>

can see that the evolution of the Italian approach to such a delicate issue has developed towards the greater attention to the appearance of the independence of the arbitrator, and this is line with the constant position applied by the CAM Arbitral Council's decisions. Also, we can derive that the Council refers its decision to the appearance of independence of the arbitrator.

IV. The Milan approach toward the IBA Guidelines on conflicts of interest²⁰

In 2004 the International Bar Association approved the *Guidelines on conflicts of interest in International arbitration* ("the IBA 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.

At four conferences on the arbitrators' independence, held between 2008 and 2010, that the CAM co-organized with the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the German Institution of Arbitration (DIS) and the Vienna International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC)²¹, the Chamber of Milan acknowledged that, in its decisions, the Council takes into consideration the *IBA Guidelines on conflict of interests in international arbitration*²², though it does not apply them. The Chamber of Milan acknowledged

²⁰ The IBA Guidelines are available at www.ibanet.org (last visited on 20 September 2010). On the IBA Guidelines see, inter alia, Cabrol, E., Shore, L., "A Comment to the IBA Guidelines on Conflicts of Interest: The Fragile Balance Between Principles and Illustrations, and the Mystery of the 'Subjective Test'", in *The American Review of International Arbitration*, 2004, 3/4, p. 599; Clay, T., "Présentation des directives de l'International Bar Association sur les conflits d'intérêts dans l'arbitrage international", in *Revue de l'arbitrage*, 2004, 4, p. 991; Gill, J., "The IBA Conflicts Guidelines – Who's Using Them and How?", in *Dispute Resolution International*, 2007, 1, p. 58; Hoffman, A. K., "Duty of Disclosure and Challenge of Arbitrators: the Standard Applicable under the New IBA Guidelines on Conflicts of Interest and the German Approach", in *Arbitration International*, 2005, 3, p. 427; Lawson, D. A., "Impartiality and Independence of International Arbitrators. Commentary on the IBA Guidelines on Conflicts of Interest in International Arbitration", in *ASA Bulletin*, 2005, 1, p. 22.

²¹ When drafting the present article, seven seminars had been already co-hosted by these Institutions: on 11 April 2008 at the CAM, on 25 June 2008 at the SCC, on 25 November 2008 at the DIS, on 2 July 2009 at the VIAC, on 4 December 2009 at the CAM, on 16 April 2010 at the VIAC, and on 9 September 2010 at the SCC. Along these conferences, the four leading European institutions exchanged views on international administered arbitration as a result of an informal co-operation whose goals are to discuss best practices and to improve and promote their respective services

²² The CAM approach to the IBA Guidelines can be found in the draft report, dated 25 January 2010, edited by a Sub-committee of the IBA Arbitration Committee, monitoring the first five years of the IBA Guidelines, available at: http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx (last visited on 10 July 2010).

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that the IBA Guidelines could represent a useful tool to foster a developing practice on the independence of the arbitrator, and it cooperated with the IBA to translate them into Italian in order to get the national approach closer to international criteria and principles.

Today, the CAM makes the IBA Guidelines available on its website, both in English and Italian. Furthermore, the Secretariat regularly sends a copy of the IBA Guidelines to arbitrators appointed under the CAM Rules, either in English or Italian (depending on the language of the arbitration): by so doing, the CAM consider that the Guidelines might assist the prospective arbitrator when filling his/her statement of independence (i.e. considering what to disclose etc.), while clarifying that the Council shall not be bound to apply them in case it examines the arbitrator's statement for confirmation or challenge procedure.

When the Arbitral Council analyses the circumstances disclosed in any arbitrator's statement of independence, the members of the Council put forward different perspectives, and discuss also the principles announced in the IBA Guidelines and the cases described in the IBA Red, Orange and Green lists.

By so doing, in November 2004 the Council examined the position of an arbitrator disclosing that he and the counsel of his appointing party had been partners in the same law firm from February 2001 to April 2003, and their partnership formally ended in January 2004. The Arbitral Council denied confirmation in this case by a reasoned decision setting that the relationship disclosed was too recent (less than a year had elapsed since the end of it). Along their discussion, the members of the Council considered the three years period provided in the Orange List of the IBA Guidelines (item 3.3.3), although no expressed reference was included in the decision.

In another case, the arbitrator disclosed that he and his appointing party had been partners for some 15 years, and this partnership formally ended in 2002. The Arbitral Council examined the case in March 2005 and it confirmed the arbitrator. The Council gave no reason for its decision, but the so called "three years rule" of the IBA Guidelines supported its inner discussion (item 3.1.1).

In March 2007 the Arbitral Council confirmed an arbitrator who disclosed that - between 2000 and 2007 - he had received 4 appointments as arbitrator by the law firm of the counsel of his appointing party (none pending). The Council gave no reason of its confirmation decision, while it expressly referred that, when so deciding, the illustrative extent of the IBA Guidelines had been considered.

V. The Italian legislative perspective on the independence of the arbitrator

In order to provide the reader with a full picture of the CAM's action, a brief description of the Italian legislation on the independence of the arbitrators is here offered.

As said above, the national legislation on arbitration was revised in 2006, and it applied to Articles 806-832 of the Code of Civil Procedure ("CPP"). No provision in the CPP requires the arbitrator to render a statement of independence, nor a general duty for the arbitrator to be independent is stated, but it derives from the provision on the challenge of the arbitrator (Article 815)²³ and the provision on the annulment of the arbitral award in case of violation of the due process principle (Article 829, Para. 1, no. 9).

As for the grounds for challenging an arbitrator, the 2006 Reform listed them in Article 815: (1) the arbitrator does not have the qualifications agreed upon by the parties; (2) the arbitrator (or a company or entity that he/she directs) has an interest in the outcome of the dispute; (3) the arbitrator (or his/her spouse) is a relative or has a close relation with any of the parties, their representative of their counsel; (4) the arbitrator (or his/her spouse) has a pending suit against, or a serious enmity to, any of the parties, their representative of their counsel; (5) the arbitrator is an employee or a regular consultant/adviser of any of the parties; (6) the arbitrator has provided legal advice or assistance to any of the parties in a previous stage of the proceedings, or he/she was a witness in relation thereto.

Article 832, Para. 5, CCP makes clear that the parties can agree on implementing such a list of grounds for challenging the arbitrator by making reference to the rules of an arbitral institution.

It is interesting to notice that before the 2006 Reform, Article 815 provided for the arbitrators to be challenged on the same grounds as national judges by making reference to Article 51 CCP.

Article 51, Para. 1, lists a number of grounds on which a judge shall abstain from taking part in the proceedings, and which are the grounds on which the parties can disqualify an arbitrator (Article 52). Also, the previous version of Article 815 made reference to Article 51 as a whole, and this provision is comprised of two paragraphs: Article 51, Para. 2, provides that a judge shall abstain if it is strongly

²³ On the Italian legislation on the challenge of the arbitrator, see Consolo, C., *op. cit.*; Giovannucci Orlandi, C., "Art. 815. Ricusazione degli arbitri", in *Arbitrato: commentario al titolo VIII del libro IV del codice di procedura civile - artt. 806-840*, Carpi, F. (editor), Zanichelli, Bologna, 2008

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advisable ("*gravi ragioni di convenienza*"), hence it offers a broader scope than the list of Para. 1, and this could have suggested that arbitrators had to refrain from accepting an appointment where serious circumstances existed that might affect their independence. Nevertheless, the 2006 Reform cut any connection on independence between judges and arbitrators, by listing peremptory grounds for disqualification referred to arbitrators only, without providing for a general duty of independence, nor for broader reasons for abstention. However, arbitrators derive their decision-making role from the contractual will of the parties, and they dispense a private form of justice: in this regards, especially when dealing with complex international arbitration, a fixed list of grounds for challenge may not fit countless different situations.

Still, in Italy too, no one can be judge in his/her own cause, and under Italian law the parties could have the arbitrator's conduct reviewed by a later State court decision. Art. 829, Para.1, no. 9, provides the award can be challenged on the grounds of violation of the principle of due process.

VI. Conclusion

When considering the CAM's approach on the independence of the arbitrators one shall bear in mind in the domestic context in which the Institutional acts. From the Italian legislative description given above, though short, one may first conclude that the CAM's strict attitude in regards of the independence of the arbitrator is a concrete reaction to the local legislative lack of a duty to disclose. Such an attitude is agreed upon by the parties when selecting the CAM Rules (as seen above, this chance is expressly provided by Article 832 CCP).

Furthermore, one could argue that arbitration today is in lack of common international standards and criteria²⁴. Consequently, the same situation might lead to different conclusions, whether it is disclosed or not, depending on multiple factors: is the case *ad hoc* or administered?; in case it is an administered arbitration, how strict is the attitude of a given institution?; would a lack of independence of the arbitrator actual entail a ground to challenge the award before the competent State court of the seat of the arbitration?

Perhaps, no golden rule applies, and reality remains unpredictable for any guidelines or code of ethics, and that is made even more difficult by the multi-cultural,

²⁴ See Baum, A. H., "International Arbitration. The Path Toward Uniform Procedures", in *Global Reflections on International Law, Commerce and Dispute Resolution*, Aksen, G., - Böckstiegel, K., - Mustill, M. J., - Patocchi, P. M., - Whitesell, A. M., (editors), ICC Publishing, Paris, 2005, p. 51; Mourre, A., "Conflicts of Interest: Towards Greater Transparency and Uniform Standards of Disclosure?", in *Kluwer Arbitration Blog*, www.kluwerlaw.com, posted on 19 May 2009.

business-focused world arbitrators and institutions are working in, where different legal systems coexist. Still, in administered arbitration, parties may consider to prevent any undue wavering of their case (and of the time and money that they are devoting to it) by both appointing arbitrators that they are confident with, and - at the same time - by entrusting (and empowering) their selected institution to control their independence. In such a situation, as agreed by the parties, the role played by the Arbitral Council of the CAM on a case-by-case analysis, and the Code of Ethics for the arbitrators to respect, can help to make arbitration an efficient tool to settle dispute finally, by securing the parties' confidence in the arbitral tribunal's decision.

The paper provides a brief overview of the paper a brief overview of the Dutco-case, a brief overview of the second multiparty arbitration.

Key words: multiparty arbitration

Multiparty arbitration is on the side of the international commercial disputes. There is arbitration¹, and multiparty arbitration conditions had to be consolidated such a consolidated constitution of

In practice, parties are arbitrations in their were in practice Court of Arbitration

* Dr. Werner Me Chamber, Vienna

¹ As for instance publication 1991

² Philippe Foucha at seq.