

**THE ITALIAN EXPERIENCE OF ARBITRATION AND THE
ARBITRATION RULES OF THE CHAMBER OF ARBITRATION OF
MILAN: A PARALLEL VIEW***

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**1 THE NEW ARBITRATION RULES OF THE CHAMBER OF
ARBITRATION OF MILAN**

On 1 January 2010 the amended Arbitration Rules of the Chamber of Arbitration of Milan (hereinafter ‘the Rules’) entered into force. The Rules provide for institutional arbitration under the auspices of the Chamber of Arbitration of Milan (hereinafter ‘the Milan Chamber’).

By choosing institutional arbitration - as opposed to *ad hoc* arbitration - litigating parties accept to be bound to the procedures and rules of an arbitral institution which supervises the proceedings and performs important tasks in the course of it,¹ including, in some instances, the formal scrutiny of the award.²

* This paper is dedicated to Giorgio Schiavoni, Vice President of the Milan Chamber of Arbitration for many years. Giorgio was internationally perceived as the ‘soul’ of the Chamber and is greatly responsible for the development of the Institution during those years. With Giorgio’s loss, all the international community lost a friend.

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¹ While this paper will not dwell on a description of the different tasks an arbitral institution usually carries out, readers should be aware that the main assignments concern a *prima facie* test of the

By way of background, the Milan Chamber is a special entity of the Chamber of Commerce of Milan, which has been active in the arbitration domain starting from mid-1980s. It is a generalist arbitral institution which manages arbitration proceedings concerning any kind of commercial disputes, both domestic and international.

The 2010 reform is the third enactment of the rules adopted by the Milan Chamber in the last two decades.³ These adjustments stem from the development and globalisation of international transactions and from the institution's strong commitment in the field of arbitration.

This paper addresses some peculiarities of the new set of rules within the framework of the new Italian arbitration law, effective from March 2006. While commenting some quantitative and qualitative facts on the current practice of arbitration in Italy we will discuss the Rules' main features.

2 *THE PRACTICE OF ARBITRATION IN ITALY: THE STATE OF THE ART*

Despite the fact that the concept of arbitration is firmly entrenched within the Italian legal system (being already regulated in the 1865 code of civil procedure), the actual practice of arbitration in Italy has been remarkably limited until the 1990s.⁴

This does not come as a surprise since the official and formal acknowledgement of a new institution in a legal system is indeed a necessary step but, it may not be enough to actually further the real appreciation of the same institution. The transition to the latter term is usually triggered by a crucial catalyst, which is culture and a new culture takes time and trust to develop and to be embedded in a system. For this reason, nowadays Italy does not stand in the forefront of international arbitration practice: arbitration has yet to truly the Italian business community as an ordinary means to settle disputes.

arbitration clause, the appointment of arbitrators, the control of their independence and impartiality, arbitration costs management and sometimes, the scrutiny of the award.

² See ICC Arbitration Rules, Art. 27; the Rules of the Milan Chamber – Art. 30.4 of the 2010 Rules - provide for a control of the draft award concerning formal requirements only, when the Secretariat is asked to do so by the arbitrators.

³ The first set of rules dates back to 1986, being subsequently amended in 1996 and 2004. The 2004 version of the Rules has witnessed the institution's development in the last six years, with almost 700 cases being administered by the Milan Chamber, so that important day-to-day practices could be used for the implementation of new rules.

⁴ It is difficult to give formal accounts, a sort of scientific evidence, regarding the evolution of the Italian arbitration practice, given that only in recent times has there been a renewed interest in arbitration and ADR (which developed into a greater availability of data). However, the time reference we have provided is to be regarded as reliable, as it draws on personal experience and on the real activity and caseload of well-established Italian institutions dealing with arbitration, which started being active in the last decade of the 20th century, as consistently reported by Recchia, G., "L'arbitrato istituzionalizzato nell'esperienza italiana" (1992) *Rivista dell'arbitrato* 1, at p. 171 and Appendix I, who referred to a very few arbitration cases managed in the 1990s by Italian institutions.

This scenario has been outlined by a recently released report⁵ (hereinafter ‘the survey’), whose aim was to describe the state of the art of alternative justice in Italy according to some qualitative and quantitative parameters.⁶ The survey illustrates that alternative resolution techniques continue to play a minimal role (as a whole) in the resolution of civil claims in Italy.⁷ In spite of that, a focus on arbitration data helps us to describe a slightly different setting.

It has to be emphasised that the data that the survey collects refers only to institutional arbitration, i.e. cases conducted either by Italian public centres – such as the Chambers of Arbitration set up by the Chambers of Commerce;⁸ or by Italian private institutions, each of them providing a case management service, according to a given set of rules and tariffs. What is omitted is the somehow obscure phenomenon of *ad hoc* arbitration, which cannot be easily detected.⁹

⁵ “Terzo rapporto annuale sulla diffusione della giustizia alternativa in Italia”, available at: <http://www.camera-arbitrale.it/consulta.php?sez_id=26&lng_id=7>, last visited June 30, 2010; and also available at <<http://blogconciliazione.com/wp-content/uploads/2010/02/Ebook-Terzo-Rapporto.pdf>>. The goal of such a research is admittedly to monitor the actual use of alternative dispute resolution methods in Italy: in so doing the survey sketches the current trends as well as the activity of Italian institutions which deal with the resolution of commercial disputes.

⁶ There are other international empirical surveys which have been conducted in the last few years to explore worldwide attitudes towards arbitration, a sort of trend which would prove the quest for a stronger empirical dimension of international arbitration, as highlighted by Christopher R. Drahozal in: Drahozal, C. R., “Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration” (2006) 22 *Arb. Int'l* 291, at p. 305.

⁷ The survey reports some interesting data: in 2008 there were 100.000 alternative justice proceedings out of 5.000.000 civil trials, see *supra* fn 5, at p. 16.

⁸ In Italy the role of Chambers of commerce as providers of ADR services has been enhanced by the law no. 580 of 1993, with the intent of creating an alternative system of dispute resolution (dedicated, more suitable and effective) with respect to state court justice, in between entrepreneurs’ support and consumers’ safeguard. The provision of such services is part and parcel of the regulatory market mission assigned to Chambers of commerce. See in this respect Caponi, R., “L’arbitrato amministrato delle Camere di commercio in Italia” (2000) *Rivista dell’arbitrato* 4, at pp. 665 et seq.

⁹ According to Richard Naimark: “These ad hoc cases are much harder to track. I have been doing an informal word-of-mouth survey of lawyers who specialize in international commercial arbitration. The question I ask them is very simple, ‘compared to the institutionally conducted arbitrations, how many ad hoc cases are taking place every year?’ A number of attorneys have said that there were just a few of these cases, with most of the cases going through institutions; others have said that there were a significant number of ad hoc cases and estimated that the number might approximate the number of institutional cases; and two attorneys told me that they thought there were far more ad hoc cases taking place around the world each year than all the arbitral institutions put together. So what is the correct answer?” Naimark, R. W., “Building a fact-based global database: the countdown” (2003) 20 *J. of Int'l Arb.* 105, at p. 106.

This being said, the survey highlights that although not acknowledged as an ordinary means of disputes settlement, arbitration is more and more used as an alternative method. Such a development is in line with the international trend.¹⁰

Hence, both the total number of arbitration cases and the value of the disputes settled through arbitration have generally increased in Italy.¹¹ Moreover, the great majority of the arbitration cases are managed by Chambers of Arbitration set up by Chambers of Commerce; finally and most importantly, the same Italian public centres seem to handle almost all international institutional arbitration proceedings in Italy.¹²

Therefore, institutional arbitration in Italy is mostly managed by public centres within the Chambers of Commerce network, which are steadily increasing their caseload and activity; and play a dominant role in the Italian international scene. In other words, when it comes to international arbitration in Italy we must look at the experience of institutional arbitration as managed by the most active public institutions, such as the Milan Chamber.

3 A BRIEF OVERVIEW ON THE LAST ITALIAN REFORM OF THE ARBITRATION STATUTE: ARE WE THERE YET?

The scenario outlined above must be interpreted in conjunction with the last reform of the Italian arbitration law, which entered into force on March 2, 2006.¹³

¹⁰ A worldwide overview of international arbitration cases managed in 2009 by different institutions is available at: http://www.siac.org.sg/cms/index.php?option=com_content&view=article&id=204&Itemid=73#international_cases, last visited July 9, 2010.

¹¹ See *Ibid.*; and *supra* fn 5, at pp. 114 – 122; whereby the Italian survey compares 2008 and 2007 data: it shows that the number of cases has increased by 22%, whereas the value of the dispute increased by 48%. However, the survey also points out a drawback of the expansion of the Italian arbitration “market”, i.e. the fact that arbitration institutions are mushrooming (around 90 centres...) - although most of them cannot boast a significant caseload (see pp. 20 et seq.) - thus providing a quite fragmentary supply of arbitration services vis-à-vis a still limited demand.

¹² See *supra* fn 5, at p. 121 of the survey. Further on, we will compare and contrast these data with those concerning the Milan Chamber.

¹³ The reform was enacted by legislative decree no. 40 of February 2, 2006 *Modifiche al codice di procedura civile in materia di processo di cassazione in funzione nomofilattica e di arbitrato, a norma dell'articolo 1, comma 2, della legge 14 maggio 2005, at n. 80*. The full text of the reform is available in English in “International Handbook on Commercial Arbitration”, in Paulsson, J. (ed.), *Code of Civil Procedure, Book Four, Title VIII, Arbitration, Amended by Legislative Decree of 2 February 2006*, 2006, Italy, at No. 40, together with a commentary of the new law and a recognition of Italian arbitration practice by Bernardini, P., Supplement No. 49, at pp. 1 – 58. For a short commentary about the amendments see “Recent Developments In Arbitration Law and Practice: Italy” in van den Berg, A. J. (ed), *YCA* Vol. XXXI, 2006, at pp. 502, 503. The 2006 reform is the third enactment made by the Italian legislator to improve the arbitration’s regulation in less than thirty years: other important reforms were implemented in 1983 and in 1994. This has raised some critical remarks on the somehow excessive attention paid by the Italian legislator to arbitration: its multiple and recurring interventions would apparently lead to more ties in the regulation and less freedom for the parties. This would run contrary to the plea for a greater freedom and flexibility in arbitration, which has been eminently made in the international arena,

This was part of major legislative changes concerning different sections of the Italian code of civil procedure (hereinafter ‘CCP’) which generally aimed at improving the competitiveness, on the international level, of the economic and administrative Italian system. It is indeed common knowledge that the duration of Italian civil proceedings is excessive and the same holds true for the (overwhelming) caseload of Italian state courts: these factors heavily affect national economy and business relationships.¹⁴

In the view of the Italian legislator, such a problem could be at least partially solved by amending the existing arbitration’s regulation, therefore offering to businesses and users a real alternative to state courts for the settlement of domestic and international disputes, in order to grant streamlined proceedings without disregarding important procedural guarantees.

With this in mind, the 2006 arbitration reform introduced some interesting innovations and laid down the following basic principles capable of:

- adjusting the Italian arbitration statute to the international experience and to the most modern arbitration laws, so that arbitration as an institution, as well as its practice, could be fostered in Italy;
- increasing the popularity of the country as a more attractive and reliable venue for international arbitration.

The scholarly and practitioners’ opinions on the recently revised statute are on the whole positive.¹⁵ They regard the reform in a favourable light, as an improvement to

against any form of over-regulation and excessive detail in the rules; see, for instance, Carpi, F., *Libertà e vincoli nella recente evoluzione dell’arbitrato*, 9 marzo 2006, available at: <http://www.judicium.it/old_site/ricerca/contatti_glo.htm>, last visited July 8, 2010, who blames the legalistic approach as well as “*l’ansia di regolamentazione*”; Lalive, P., “De la fureur réglementaire” (1994) *ASA Bulletin*, at p. 213.

¹⁴ As has been widely remarked, see for instance Tampieri, T., “La nouvelle loi italienne de réforme de l’arbitrage” (2006) *Gazette du Palais* 112, at p. 20-24; Carrara, C., “Remedies against awards in international arbitration - setting aside of awards under Italian law” (2007) 10(1) *Int. A.L.R.* 7, at p. 7, where the author acknowledges: “The growing crisis of the Italian civil court proceedings, hopelessly slow and inefficient, recently led the Italian legislator to promote the use of arbitration and ADR”. *Ibid.* However, we will further see some drawbacks related to the interplay between arbitration’s success and the ineffective operation of state court justice.

¹⁵ Essential bibliography on the Italian arbitration reform should count, at least, the following articles: Bernardini, P., “Ancora una riforma dell’arbitrato in Italia” (2006) *Diritto del commercio internazionale* 2, at p. 227-254; Carpi, *supra* fn 12; Cutolo, D. and Esposito, A., “The reform of the Italian arbitration law, the challenging of arbitrators and the setting of time limits” (2007) 1 *J. of Int’l Arb.*, 49, at pp. 49-62; Di Pietro, D., “Arbitration in Italy” in Eksi, N., Martinez-Fraga, P., and Sheehy, W. K. (eds.), *International Commercial Arbitration: A Comparative Survey*, 2007, Istanbul Chamber of Commerce; Di Pietro, D., “The influence of the new Law on Arbitration Agreements and arbitrato irrituale” (2007) 10(1) *Int. A.L.R.* 18; Giovannucci-Orlandi, C., “La nouvelle réglementation italienne de l’arbitrage après la loi du 2 février 2006” (2008) 1 *Revue de l’Arbitrage* 19, at pp. 19-31; Punzi, C., “Luci ed ombre nella riforma dell’arbitrato” (2007) 2 *Rivista trimestrale di diritto e procedura civile* 395, at pp. 395-438; Sasson, M., “The Recent ‘Reform’ of the Italian Civil Procedure Chapter on Arbitration” (2007) 1 *Int’l Arb. Law Review* 1, at pp. 1-6; Tampieri, *supra* fn 14.

the previous regulation, thanks to a more liberal and arbitration friendly approach. In this respect we may name just a few newly established principles, which are worthy of note: the freedom of the parties to arbitrate non-contractual disputes (Art. 808 bis CCP), the principle of a broad interpretation of the scope of the arbitration agreement (Art. 808 quarter CCP), judicial assistance for the examination of witnesses (Art. 816 ter CCP), the clear statement of the *kompetenz-kompetenz* principle (Art. 817 CCP), the power of the arbitrators to decide *incidenter tantum* non arbitrable matters (Art. 819 CCP), and the unequivocal statement that the award has the same effects as a court judgment (Art. 824 bis CCP).¹⁶

Conversely, one has to mention the regrettable solution adopted with regard to the arbitrators' powers to grant provisional measures inasmuch as – contrary to almost all modern legal systems - the Italian legislator declined to grant any interim relief power to arbitrators (as per Art. 818 CCP).¹⁷ Almost at the end of the first lustre, the Italian legislative scenario can be tested to see whether the goal of an arbitration-friendly institutional environment has been reached; as shall be illustrated in this article by matching the Italian practice with the experience of the Milan Chamber.

4 INSTITUTIONAL ARBITRATION IN THE NEW ITALIAN REGULATION

One of the most interesting issues, among the directives given by the delegating authority to reform the Italian arbitration law, was the clear assignment to lay down a new regulation concerning institutional arbitration. Following the examples of other European legislations,¹⁸ the Italian lawmaker officially acknowledged a phenomenon

¹⁶ To claim such a principle may be a bit astonishing, especially for those practitioners working in countries where arbitration is keenly supported. On the contrary, in Italy there was an urgent need of establishing this principle, due to a strong position taken by the Italian Supreme Court which - arguing from the 'private nature' of arbitration – had concluded that an arbitral award had a contractual nature ('*natura negoziale*'). This statement brought about a long and intense academic debate on the nature and effects of arbitral awards, which should be by now definitely settled.

¹⁷ While commenting on the 2004 revision of the Milan Arbitration Rules - with regard to the pioneer provision allowing the arbitrators to issue provisional measures not barred by mandatory provisions applicable to the proceedings (under former Art. 25.2 Rules, now Art. 22.2 of the 2010 Rules) – it was hoped for the Rules' innovation to pave the way for consistent amendments of the Italian arbitration statute, see Giovannini, T. and Sali, R., "Le nouveau Règlement d'arbitrage de la Chambre Arbitrale Nationale et Internationale de Milan" (2004) 22 *ASA Bulletin* 2, at p. 284. Unfortunately this hope has been frustrated. It is not clear whether such prohibition would be overcome, thanks to the ratification by Italy of the European Convention on International Commercial Arbitration of 1961, which acknowledges institutional arbitration by stating at Article IV: "1. The parties to an arbitration agreement shall be free to submit their disputes: (a) to a permanent arbitral institution; in this case, the arbitration proceedings shall be held in conformity with the rules of the said institution [...]". As suggested by some scholars, if the parties want to grant interim relief powers to arbitrators, they could do so by referring to a set of arbitration rules which acknowledges such a power, as argued by Ricci, E. F., "La longue marche vers l' "internationalisation" du droit italien de l'arbitrage" (2006) 290 *Gazette du Palais* at p. 16.

¹⁸ By way of comparison, we should not overlook other reforms of European arbitration laws where institutional arbitration has been regulated, such as Spain or Austria.

which was already known to Italian practitioners, judges and scholars.¹⁹ A new provision, Art. 832 CCP, indeed states in this regard:

1. *The arbitration agreement may refer to pre-established arbitration rules.*
2. *In case of conflict between the provisions of the arbitration agreement and the arbitration rules, the arbitration agreement shall prevail.*
3. *Unless the parties have agreed otherwise, the rules in force on the date on which the arbitral proceedings begins shall apply.*
4. *Institutions in the nature of associations and those set up for the representation of the interests of professional categories may not appoint arbitrators in disputes where their own associates or members of the professional category are opposed to third parties.*
5. *The rules may provide for further cases of replacement or challenge of the arbitrators in addition to those provided by the law.*
6. *Should the arbitral institution decline to administer the arbitration, the arbitration agreement shall remain effective and the preceding Chapters of this Title shall be applicable.*

Given the focus of this article, emphasis will be placed on the interplay which Art. 832 CCP (at paras. 2 and 6) establishes between the parties' autonomy and the arbitral institution's interest to the integrity of its rules.

In order to understand such dynamics we should first define the nature of the relationship existing between the parties and the arbitral institution which administers the proceedings; that is:

[b]y drafting and publishing its arbitration rules, the arbitral institution effectively puts out a permanent offer to contract, aimed at an indeterminate group of persons (those potential litigants operating in the field or fields covered by the institution), but made under fixed conditions. By concluding their arbitration\ agreement, the parties accept that offer and agree to empower their chosen institution to organize and oversee the arbitration in the event that a dispute arises between them.[...]When the request for arbitration is submitted to the institution and it begins to organize the proceedings, the

¹⁹ As remarked by Azzali, S., "Arbitrato amministrato" in Buonfrate, A. and Chiara Giovannucci Orlandi, C. (eds.), *Codice degli arbitrati, delle conciliazioni e di altre ADR*, 2006, Torino, UTET, at p. 49. As a matter of fact the power of the parties to refer to institutional arbitration was undisputed, thanks to the language of Art. 816 CCP, prior to the reform, according to which the parties were free to choose the rules that the arbitrators had to apply in the proceedings (now Art. 816 bis CCP).

*contract is perfected. Generally it will not be perfected before that point, because the institution will not know whether its offer has been accepted.*²⁰

The question then is whether, and if so to what extent, this contractual relationship constrains the parties' autonomy, which is a fundamental premise of arbitration. Art. 832 CCP, para. 2, stipulates that even when referring to the arbitration rules of an institution, the parties are not deprived of the freedom to shape the proceedings to suit their needs.²¹

Arbitration rules may be derogated²² as they are to be intended as a sort of ready-to-use model offered to the parties, which are free to fully adhere to it or to make some changes. In the latter case, when the parties express their preferences, such changes are legitimate and prevail over the rules.²³ However, in this context, consideration must be given to the institution's response to the parties' preferences. Each set of arbitration rules, usually contains some mandatory provisions concerning fundamental features of the rules from which the parties cannot depart. Whenever the parties do not conform to such fundamental features²⁴ the arbitral institution may not be willing to administer the arbitration, i.e. to conclude the contract at the conditions set by the parties. In accordance with such a *tenet*, Art. 832 CCP para. 6, provides that in case of refusal by the arbitral institution, the arbitration agreement is not null and void but the dispute is submitted to *ad hoc* arbitration,²⁵ being governed by the other arbitration provisions of the CCP.

²⁰ Gaillard, E. and Savage, F., *Fouchard Gaillard Goldman on International Commercial Arbitration*, 1999, at p. 602; on the contract between the institution and the parties see Jarrosson, C., « Le rôle respectif de l'institution, de l'arbitre et des parties dans l'instance arbitrale » (1990) *Revue de l'arbitrage*, atp. 381; for Italian references on the topic, see Caponi, *supra* fn 8, and Mirabelli, G., *Contratti nell'arbitrato: con l'arbitro, con l'istituzione arbitrale* (1990) 1 *Rassegna dell'arbitrato* 3, at pp. 3-31.

²¹ Needless to say, the parties' freedom is always subject to procedural public policy principles and mandatory rules.

²² See Azzali, *supra* fn 19, at p. 51.

²³ On the contrary, when the parties choose a minimal approach in the arbitration clause and are silent on important aspects of the proceedings, arbitration rules have a gap-filling function and may supplement the will of the parties with respect to several important features of the arbitral proceedings which the parties have not explicitly governed, such as the seat, the number and the appointment of arbitrators, etc..

²⁴ These features may concern the principle of due process, the control on the independence and impartiality of the arbitrators, or the costs management function. By laying down such principle, the Italian lawmaker has acknowledged a well-established international practice: arbitral institutions usually enjoy the discretion to determine their policy in respect of changes of the rules propounded by the parties, as pointed out by Yves Derains and Eric A. Schwartz in Derains, Y. And Schwartz, E.A., *A Guide to the ICC Rules of Arbitration*, 2005, at pp. 7-8; this holds true also for the Swiss Chambers of Commerce rules, as explained in Züberbühler, T., Müller, K., Habegger, P. (eds.), *Swiss Rules of International Arbitration Commentary*, 2005, at pp. 9-10.

²⁵ The solution has been criticised by some scholars who object that in such a case the parties would be forced to arbitrate even when they agreed on arbitration on the only condition that it had to be institutional arbitration, see in this respect Carratta, A., *Le recenti riforme del processo civile. Commentario*, 2007, Bologna, at p. 1898; however, now that the principle is clearly established by

Therefore, Art. 832 CCP, safeguards the choice for arbitration made by the parties and strikes the balance between two different needs: it emphasises the parties' autonomy without forcing the arbitral institution to administer a proceeding which may distort its fundamental principles, due to one-sided alterations of the rules.

5 THE MILAN CHAMBER EXPERIENCE: A REGIONAL CENTRE WITH AN INTERNATIONAL VOCATION

Spurred by the growth of international trade and recently boosted by the economic turmoil arbitration has also increased in Italy. The Milan Chamber's activity has mirrored this increase. The institution is widely known in Italy and, given the substantial caseload that it handles every year (30 percent increase in 2009),²⁶ has gained its reputation as the leading arbitral institution of the country.

Such a favourable regard is likely to soon transcend national boundaries. As a matter of fact, the proceedings which the Milan Chamber handles are not limited to 'Italian' arbitrations. As far as the Rules of the Milan Chamber are concerned there is no stumbling block to the complete delocalisation of the arbitration proceedings: the seat of the arbitration can be freely established by the parties, also abroad;²⁷ the language of the arbitration may be whatever language the parties or the arbitrators determine; the parties are at liberty to choose whatever state law or a-national rules of law they deem suitable; and finally, the arbitrators are mostly nominated by the parties and come from different countries when an international dispute is at stake.²⁸

Art. 832 CCP, the parties may plainly stress their choice for institutional arbitration by providing that the arbitration clause is to be considered void in case the identified arbitral institution declines to administer the proceedings.

²⁶ Just to get a sense of the mentioned increase, some figures at a glance: 676 cases managed in the last six years, with a peak in 2009, when 153 cases have been filed with the institution. Facts and figures of the Milan Chamber of arbitration are published and available at: <http://www.camera-arbitrale.it/Documenti/arbitration_stat_2009-it.pdf>, last visited July 21, 2010. For a general description of the institution's activity see: Cicogna's, Michelangelo, "Milan Chamber of Arbitration", in Gola, Götz, Staehelin, and Graf eds., *Institutional Arbitration*, 2009, Sellier, Zurich at p. 169.

²⁷ Although already a vested right, this possibility has been expressly established by the 2010 version of the Rules, at Art. 4, para. 1: "*The parties shall fix the seat of the arbitration, in Italy or abroad, in their arbitration agreement*" (emphasis added).

²⁸ Moreover, an additional international element occurs when the parties come from different countries: in such a case the Chamber of Arbitration, when appointing the chairman or the sole arbitrator, shall apply the "third nationality rule" and choose a person of a nationality other than those of the parties, unless the parties provide otherwise (Art. 14, para. 5, of the Rules). Also, the Arbitral Council of the institution – with general competence over all matters relating to the administration of arbitral proceedings (e.g. appointment of arbitrators, control on their independence and impartiality, determination of arbitration costs) - comprises arbitration expert foreign members (pursuant to the new provision in the Preamble, concerning the Arbitral Council, and contrary to what was provided for in the 2004 Rules, there is no limit to the number of foreign experts appointed in the Council).

Thanks to such flexibility, the number of international cases over the last six years has more than tripled.²⁹ Such a trend will probably continue, given the engagement the institution has undertaken in the Mediterranean area.³⁰ The Milan Chamber has indeed set up a partnership with other arbitration centres in the Mediterranean area which would serve the purpose of promoting arbitration culture and practice in the free trade area of the Mediterranean basin established by the so-called Barcelona process.³¹

This is a far-sighted policy, as it makes available a well-functioning system of alternative dispute resolution (enjoying a common background of shared principles and procedural standards)³² in a market offering attractive investments opportunities and multiplying business transactions. Being one of the most important institutions in the area, it is not difficult to guess that the Milan Chamber will increase its international exposure, attracting more foreign users. However, it is clear that arbitration development in Italy cannot make its way only through the activity of the Milan Chamber. In order for international arbitration to grow in a given country at least two conditions must be met:

First, arbitration culture must be promoted in the country: nationals have to be familiar with arbitration, to trust and use it. Taking into account some interesting data coming from abroad about Italian arbitration users,³³ we can assume that such requirement is increasingly satisfied.

²⁹ From 11 to 35 cases in 2009, see the institution's statistics, *supra* fn 25.

³⁰ The institution has devoted special attention to the Mediterranean Region, as part of a more general strategy set by the Chamber of Commerce of Milan aiming at strengthening economic relations between Milan, Italy and Mediterranean Countries "That is the reason why in 2005 was launched the Mediterranean Project, which is based on the consideration that international disputes are often difficult to manage, especially for SMEs [...] That prompted the Chamber of Arbitration of Milan to think of a set of ADR services tailored on the needs of SMEs and to develop a series of activities in this Region for the creation of a shared system of commercial justice which protects entrepreneurs and investors while ensuring their efforts in the Area." Available at: <http://www.camera-arbitrale.it/consulta.php?sez_id=19&lng_id=14>, last visited July 22, 2010.

³¹ The Barcelona Process, now Euro-Mediterranean Partnership, was launched in 1995 by then 15 EU members and 14 Mediterranean partners; one broad working area is economic and financial partnership, including the gradual establishment of a free-trade area (by 2010) aimed at promoting shared economic opportunities through sustainable development, available at: <http://www.eeas.europa.eu/euromed/index_en.htm>, last visited July 22, 2010.

³² The so-called best practices. Likewise the Milan Chamber of Commerce, together with other partners, has established at the end of 2009 ISPRAMED (Institute for the Promotion of Arbitration and Mediation in the Mediterranean Area), a network between arbitral institutions of the Mediterranean area (Egypt, Algeria, Tunisia, Morocco, Turkey) which set a shared space of private justice. This Institute was also led by the late Giorgio Schiavoni. For a description of the ongoing projects in the Mediterranean area led by the joint efforts of different arbitration centres, with a brief comparison of their arbitration rules, see Vogl, V. T. and Krozingen, B., "Schiedsgerichtsbarkeit im Mittelmeer-raum" (January/February 2010) 1*SchiedsVZ*.

³³ Italian users do know and use arbitration, indeed. Such inference is drawn from 2009 ICC statistical report (to be published in (2010) 21 *ICC International Court of Arbitration Bulletin* 1), where Italian parties rank third in the list of European nationalities and sixth in the list of the most frequent nationalities in ICC arbitrations, after big countries like USA and Brazil or arbitration friendly countries as France.

Second, the attractiveness of the country as seat of arbitration must grow: foreign and Italian arbitration users involved in international trade should feel confident about reverting to Italy as an arbitration forum. This condition requires a coordinated effort made at different professional and institutional levels to improve the Italian attractiveness and to let Italy occupy an elevated rank in international arbitration. By way of example, state courts' inefficiency may be a hurdle. In order for arbitration to work and be used in a given country civil justice must work too, be it only for the necessary assistance provided by the latter to the arbitration process. Italian state courts overload and lengthy proceedings may indeed trigger arbitration users wanting to stay away from the country in order not to run into ancillary proceedings before Italian judges,³⁴ which would indefinitely slow down arbitration. Therefore, the Milan Chamber commitment must be supported by a wider movement, a stronger national policy towards arbitration friendliness and support.

6 A GLIMPSE OF THE JANUARY 2010 ARBITRATION RULES

The new version of the Rules aims at ensuring a greater degree of flexibility and efficiency of the proceedings: this means streamlined and transparent proceedings, a more effective control on arbitrators' independence and impartiality, and stronger powers on the arbitrators' side. The Milan Chamber of Arbitration is thus committed to guarantee a leaner administration of the arbitral process without foregoing quality control and institutional involvement in the monitoring of the different stages of the proceedings. Some examples of this commitment are illustrated below.

6.1 APPLICATION OF THE RULES - PUBLIC POLICY ISSUES

Pursuant to their revised version (applicable to arbitral proceedings commenced after 1 January 2010³⁵), the scope of application of the Rules (Art. 1) became wider.

The Rules apply – now as before - when the parties make reference to the Milan Chamber of Arbitration or the Milan Chamber of Commerce, but in addition - and this is new - also when there is a language in the agreement which somehow refers to arbitration as handled by the Milan Chamber.³⁶ This new provision focuses on the real

³⁴ Ancillary proceedings are not a remote possibility in arbitration, indeed: they may occur whenever judicial assistance for the taking of evidence is required (see the new provision in Art. 816 ter CCP) or in case an interim relief is requested by a party in an arbitration taking place in Italy (in such a case the party should apply to state court, as arbitrators in Italy do not enjoy the power to grant such measures, as we said; the only exception established by the legislation concerns arbitration in corporate matters, where the arbitrators may order the suspension of the effects of the challenged shareholders' resolution).

³⁵ As per Art. 39 Rules, which, in any event, reserves the right of the parties to agree otherwise. Such a provision echoes the new language of Art. 832 CCP, para. 3, which states: "Unless the parties have agreed otherwise, the rules in force on the date on which the arbitral proceedings begins shall apply".

³⁶ Art. 1.1 Rules: "The rules shall apply where so provided by the arbitral clause or other agreement between the parties, 'however expressed'. A reference in the agreement to the Chamber of Arbitration of Milan or to the Chamber of Commerce of Milan shall be deemed to provide for the application of the Rules", (emphasis added). By way of example, given Art. 1 new wording, we

intention of the parties to have recourse to the Rules, regardless of the precise wording adopted by them. It is also susceptible to help the institution in the delicate function of the *prima facie* test of the arbitration clause, by narrowing down the uncertainty as to the willingness of the parties to submit the dispute to the Milan Rules.³⁷ As per Art. 2 of the Rules, the arbitral process is governed by the Rules as well as by other rules agreed upon by the parties or, in default, by the rules which the arbitrators might set.

As far as the procedural rules chosen by the parties are concerned, the institution has now clearly stated that they apply only if consistent with the Rules.³⁸ Under former Art. 2, it was granted greater respect, *vis-à-vis* the will of the parties,³⁹ the latter standing in a subordinate position. Now the rules and the parties' agreed upon rules stand on an equal footing (provided that the consistency requirement is met).

The consistency requirement is to be interpreted in the sense that the interest of the institution to the integrity of the Rules is not absolute, as the Milan Chamber may accept to manage cases where the parties have agreed (and proposed to the institution) alterations of the rules, provided that those alterations do not affect the core principles of the institution. For the Milanese institution such core principles may be identified with the control on the arbitrators' independence and impartiality, the respect of due process and with costs management as defined by the Rules.⁴⁰

6.2 THE ARBITRAL TRIBUNAL

The amendments concerning the position of arbitrators are also of particular interest. Art. 13 of the Rules has a new para. which deals with those arbitration clauses providing for an even number of arbitrators: in such a case it is for the Arbitral Council to appoint an additional arbitrator, unless the parties have agreed otherwise.⁴¹ The institution has therefore formally endorsed a stricter solution, consistent with the practice developed by other international institutions, of an uneven number of

assume that it may be interpreted as providing for the application of the Rules a reference in the arbitration clause to the "Milan Arbitration Rules" or to "arbitration in Milan, court/chamber of arbitration". Needless to say, parties are always invited to use the model clauses provided by the institution, this would avoid the dozens of cases of inaccurate reference to institutional arbitration in everyday practice.

³⁷ Nonetheless the Rules do not neglect to preserve the procedural right of a party objecting to the application of the Rules, as per Art. 11 (admissibility of the arbitral proceedings).

³⁸ Art. 2.1 Rules: "The arbitral proceedings shall be governed by the Rules, by the rules agreed upon by the parties up to the constitution of the Arbitral Tribunal if consistent with the Rules, or, in default, by the rules set by the Arbitral Tribunal", (emphasis added).

³⁹ Art. 2, para. 1 – 2004 Rules version – stated: "The arbitral proceedings shall be governed by these rules, subordinately by the rules agreed upon by the parties, further subordinately by the rules set by the Arbitral Tribunal".

⁴⁰ See in this respect the position expressed by Sali R., "Arbitrato amministrato" in *Digesto delle discipline privatistiche, sezione civile, aggiornamento*, 2007, Tomo I, UTET, Torino, at p.77.

⁴¹ Art. 13.3 Rules: "If the agreement to arbitrate provides for an even number of arbitrators, the Arbitral Council shall appoint an additional arbitrator, unless otherwise agreed by the parties".

arbitrators.⁴² Moreover such a solution is in line with the Italian arbitration law, which, contrary to other countries' jurisdiction - such as the 'umpire system' provided for in the English Arbitration Act⁴³ - precludes the constitution of an even-numbered Arbitral Tribunal (see Art. 809 CCP.⁴⁴) Italian jurisprudence has also echoed the provision,⁴⁵ albeit with some isolated solutions concerning the enforcement of foreign awards rendered by an even-numbered Arbitral Tribunal.⁴⁶

The arbitrators' independence and impartiality has been dealt with greater concern and attention. In Art. 18 of the Rules, prospective arbitrators are invited to disclose in the statement of independence any relationship, not only with the parties and their counsel (as was previously provided) but now also with any other person or entity involved in the arbitration (e.g. another arbitrator on the panel, if already appointed).⁴⁷

⁴² See, for instance, ICC position as regards this issue. Notwithstanding the fact that such a principle has not been specified in the Rules, "The Court repeatedly took the position that the parties could not agree to the appointment of two arbitrators and an "umpire" as this would be inconsistent not only with the provisions concerning the constitution of the Arbitral Tribunal but the scheme of the Rules in general". see Derains and Schwartz, *supra* fn 24, at p. 142.

⁴³ 1996 Arbitration Act, Section 15: "(1) The parties are free to agree on the number of arbitrators to form the tribunal and whether there is to be a chairman or umpire. (2) Unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal [...]", together with Section 21: "(1) Where the parties have agreed that there is to be an umpire, they are free to agree what the functions of the umpire are to be [...] (2) If or to the extent that there is no such agreement, the following provisions apply. [...] (4) Decisions, orders and awards shall be made by the other arbitrators unless and until they cannot agree on a matter relating to the arbitration. In that event they shall forthwith give notice in writing to the parties and the umpire, whereupon the umpire shall replace them as the tribunal with power to make decisions, orders and awards as if he were sole arbitrator. [...]"

⁴⁴ Article 809 CCP: "1. There may be one or more arbitrators, provided their number is uneven. [...] 3. Where an even number of arbitrators is indicated, an additional arbitrator shall be appointed by the president of the tribunal in the manner specified by Article 810, unless the parties have agreed otherwise [...]"

⁴⁵ See the Supreme Court (Corte di Cassazione) decision no. 5599, 26 October 1981: "È nulla, ai sensi dell'art. 809 c.p.c., e, come tale, inidonea a sottrarre la controversia al giudice, la clausola compromissoria che affidi la soluzione di possibili controversie a due arbitri e preveda la nomina di un terzo arbitro, da parte degli arbitri già nominati, unicamente in via del tutto eventuale e subordinata, per il caso di discordanza di questi ultimi nel giudizio da emettere".

⁴⁶ See the Supreme Court decision no. 6915, dated 15 December 1982: "Può essere dichiarato esecutivo in Italia, in base alla convenzione di New York del 10 giugno 1958, il lodo arbitrale, pronunciato sulla base della clausola compromissoria inserita nel contratto sottoscritto da brokers in Canada, su autorizzazione telefonica delle parti, e reso da due arbitri secondo la legge arbitrale inglese, ancorché non sottoposto alla procedura per 'enforcement' nello Stato della pronuncia." The decision is mentioned by Giorgio De Nova in De Nova, G., "Disciplina legale dell'arbitrato e autonomia privata" (2006) *Rivista dell'arbitrato* 3, at p. 427, where the author discusses the mandatory character of Art. 809 CCP, and apparently acknowledges the validity of an arbitration clause with an even number of arbitrators.

⁴⁷ Art. 18.2 Rules: "In the statement of independence the arbitrator shall disclose, specifying the time and the duration: a) any relationship with the parties, their counsel or any other person or entity involved in the arbitration which may affect his/her impartiality or independence; b) any personal or economic interest either direct or indirect, in the subject matter of the dispute; c) any bias or

As far as arbitrators' powers are concerned, Art. 3 of the Rules has significantly stressed the discretion arbitrators enjoy in determining the rules applicable to the merits of the dispute, failing a choice by the parties. Under the former version of the provision, the only admitted criterion of choice was the closest connection (so that arbitrators had to choose the rules with which the subject matter of the dispute was most closely connected): in the revised provision the arbitrators may make the choice taking into account several parameters.⁴⁸

Moreover, Art. 22 of the Rules, last para. has introduced a welcome change with regard to parties' joinder or third parties' intervention. Although such possibility was not prevented by the old rules, it is now clearly stated that the Arbitral Tribunal is in charge of the process and decides about the joinder/intervention, after consulting the parties, taking into account all the circumstances of the case (e.g. whether the new parties are signatories to the arbitration clause, objections raised by one of the party to the arbitration, the real interest the party to arbitration has to seek a third party intervention, etc.).⁴⁹ The implied consequence is that, when intervening, the third party has no other alternative but to accept the Arbitral Tribunal already constituted.

Finally, a more proactive role on arbitrators' side is also acknowledged by Art. 25 of the Rules, with particular regard to the evidence-taking process. In the previous version of the Rules (Art. 28) arbitrators' *ex officio* powers in the process were limited to the provision that the Arbitral Tribunal could hear the parties and gather evidence not excluded by mandatory provisions applicable to the proceedings or to the merits of the dispute, both on its own initiative and at a party's request.

In the 2010 version, the Rules boost such powers and most importantly, they point out arbitrators' independent case-management, especially when it comes to the ways evidence can be taken. The new Art. 25 advocates for a more proactive role for the arbitrators with particular regard to the evidence-taking process as they can now autonomously direct the process: their consideration about relevance and admissibility of evidence is crucial, as well as the assessment they make on the different ways through which means of evidence can gain access into the proceedings.⁵⁰

reservation as to the subject matter of the dispute. [...]”, (emphasis added). The disclosure duty has to be construed in a broad sense, pursuant to Art. 7, para. 2, of the Code of Ethics annexed to the Rules, providing that “All doubts as to the opportunity to disclose a fact, circumstance or relationship shall be resolved in favour of disclosure”.

⁴⁸ Art. 3.3 Rules: “In the absence of any agreement pursuant to paragraph [sic] 2 [by the parties] the Arbitral Tribunal shall apply the rules it determines to be appropriate, taking into account the nature of the relationship, the qualities of the parties and any other relevant circumstance”, (emphasis added).

⁴⁹ Art. 22.5 Rules: “If a third party requests to join a pending arbitration or if one of the parties to the arbitration seeks a third party's intervention, the Arbitral Tribunal shall decide the application after consulting the parties, taking into consideration all the relevant circumstances of the case”.

⁵⁰ Art. 25.1 Rules: “The Arbitral Tribunal leads the case by taking all the relevant and admissible evidence adduced in the manner it deems appropriate”.

Likewise arbitrators' powers are also stressed in Art. 27 of the Rules: here the formerly abundant language of the article has been reduced to a short one-para. which underlines the arbitrators' absolute discretion to decide on the admissibility of new claims.⁵¹

6.3 CURRENT CONCERNS: ARBITRATION TIME AND COSTS

Also, some important measures have been taken in order to speed up processes and with regard to arbitration costs' control.⁵²

Thus, the pre-arbitral phase, from the filing of the request for arbitration up to the constitution of the Arbitral Tribunal, has been simplified, as we understand the abrogation of former Art. 12. Under former Art. 12, indeed, a default time-limit was granted to the claimant to file a reply in case of respondent's counterclaim.⁵³ In the new version of the rules the pre-arbitral phase is concentrated in only one exchange of briefs between the parties (request for arbitration and statement of defence). After such an exchange no other pre-established (and possibly time-consuming) steps are provided for by the rules, up until the Arbitral Tribunal is officially in charge of the case.

Likewise, particularly telling is the fact that no change has been made with regard to the time-limit set to render the award, which is still six month from the constitution of the arbitral tribunal (as per Art. 32 Rules), despite the change in the Italian arbitration law (Art. 820 CCP, para. 2, which provides:

Unless a time limit has been established for the rendering of the award, the arbitrators must render the award within two hundred and forty days from the acceptance of the appointment.

This proves the Milan institution's interest to improve arbitration's efficiency and expedite the proceedings.⁵⁴ As for costs, three changes enhance the parties' involvement in the management function, therefore granting more transparency and protecting their interests.

By way of short background, in arbitrations handled by the Milan Chamber the parties have to pay advances, as fixed by the Secretariat, in order to finance the proceedings up to its end. Advances (and final deposits) are determined pursuant to a published fee

⁵¹ Art. 27 Rules: "The Arbitral Tribunal, after consulting the parties, shall decide on the admissibility of new claims, taking into account all circumstances, including the stage of the proceedings".

⁵² In such a way the Milan Chamber tries to meet the quest for transparency, efficiency and predictability as a way to implement the arbitral institution's legitimacy, as pointed out by Ziadé, N. G., "Reflections on the role of institutional arbitration between present and the future" (2009) *Arb. Int'l* 3, at pp. 427- 430.

⁵³ Art. 12.2 – 2004 Rules version – stated: "In case of counterclaim by defendant, claimant may file a reply with the Secretariat within thirty days of receiving the statement of defence [...]".

⁵⁴ This commitment is actually reflected by the average duration of proceedings managed by the Milan Chamber: around 13 months. See statistics, *supra* fn 26.

scale - a system which grants predictability - encompassing both arbitrators' and institution's fees.⁵⁵ This fee schedule is based on the "sum in dispute" criterion (pursuant to Art. 35, para. 1, of the Rules).⁵⁶

Final determination of arbitration costs are made by the Arbitral Council.⁵⁷ First, Art. 35, para. 3,⁵⁸ makes reference to the possibility the Chamber has to decide for separate advances on costs to be asked to the parties in relation to each party's claim (which is the case when counterclaims are submitted in addition to the principal claims). This possibility was already regulated in the 2004 version of the Rules.

Usually parties are jointly and severally liable when it comes to arbitration costs, and they are directed to pay an equal advance determined on the cumulated dispute value. Contrariwise, when a separate advance is asked, each party is directed to pay a share which is proportionate to the claim it has submitted and it is solely responsible for that.

Art. 35 Rules clearly states that the parties are not to suffer for the decision to separate advances: the newly introduced para. 4 of the article provides that the Chamber's fees and the Arbitral Tribunal's fees may not exceed the maximum of the fees which would be determined in case of a cumulated dispute value.⁵⁹ By the same token, the new rules provide that in exceptional cases, not only higher fees, but also lower arbitrators' fees can be fixed by the Arbitral Council.⁶⁰

Second, Art. 36, para. 2⁶¹ provides now that also the parties, not only arbitrators, are informed about the costs' final determination fixed by the Arbitral Council: by virtue of this new provision, more transparency is granted, as the parties know beforehand the amount of costs which will be eventually referred to in the award.

⁵⁵ Pursuant to Art. 36.4 Rules, the costs of the arbitration include the fees of the Chamber, the Arbitral Tribunal, and the expert witnesses, as well as reimbursement of expenses of the Chamber of Arbitration, of the arbitrators and of the expert witnesses.

⁵⁶ Art. 35.1 Rules: "The costs of the arbitration depend upon the value of the dispute, which is the sum of the claims filed by all parties".

⁵⁷ Unless the arbitration ends before the constitution of the Arbitral Tribunal: in such a case the Secretariat shall determine the costs, i.e. the Chamber's fees (as per Art. 36.3 Rules).

⁵⁸ Art. 35.3 Rules: "At any stage of the proceedings the Secretariat, where it deems it appropriate, may divide the value of the dispute in relation to the claims of each party and may direct each party to pay the costs related to its claims".

⁵⁹ Art. 35.4 Rules: "In case of division of the value of the dispute the fees of the Chamber of Arbitration and of the Arbitral Tribunal may not exceed the maximum of the fees determined on the basis of the cumulated value of the dispute, as in paragraph [sic] 1".

⁶⁰ Art. 36.6 Rules: "[...] *Lower* or higher fees may be determined in exceptional cases", (emphasis added).

⁶¹ Art. 36.2 Rules: "The Arbitral Council shall inform the Arbitral Tribunal and *the parties* of its determination of the costs which the Arbitral Tribunal shall indicate in the award", (emphasis added).

Finally, for the first time the Rules deals with the possibility for arbitration costs to be paid by way of a bank or insurance guarantee, as proposed by a party in order to cover advance and final costs (under justifiable reasons), as set in Art. 37, para. 6.⁶²

7 CONCLUSION

The Italian arbitration ‘market’ is growing but it has yet to be developed. In this context the role of an arbitral institution is crucial, as it may enhance the culture of arbitration.

The quality service provided by the Milan Chamber of Arbitration - and its active presence in the territory - may have beneficial effects on the promotion of the overall national culture of arbitration and trigger some important changes in the business, institutional and professional community’s attitude towards arbitration.

What Italian entrepreneurs and professionals need is to be familiar with arbitration and consequently to enjoy trust in it. What international arbitration users need is to be confident about choosing Italy as arbitration forum.

The valuable experience of the Milan Chamber may certainly serve those purposes.

⁶² Art. 37.6 Rules: “If a party so requests, and gives reasons for this request, the Secretariat may accept a bank or insurance guarantee for the amount set at paragraphs [sic] 1, 2 and 3, setting terms and conditions”.