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Freie Universität Berlin

Arbitrating in Italy and Germany

Christian Armbrüster / Rodolfo Dolce (Hgg.)

Schriften des Italienzentrums der Freien Universität Berlin
Band 9

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Zitationsangabe für diesen Band:

Armbrüster, Christian / Dolce, Rodolfo (Hgg.): *Arbitrating in Italy and Germany.* Freie Universität Berlin 2022.

DOI http://dx.doi.org/10.17169/refubium-36578
ISBN 978-3-96110-389-8

Herausgeber: Prof. Dr. Bernhard Huss
Editorische Betreuung: Sabine Greiner
Lektorat: Sabine Greiner
Wissenschaftliche Beratung: Dr. Selene Maria Vatteroni

Freie Universität Berlin
Italienzentrum
Geschäftsführung
Habelschwerdter Allee 45
D-14195 Berlin
Tel: +49-(0)30-838 50455
mail: sabine.greiner@fu-berlin.de

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Arbitrating in Italy and Germany

Opening remarks

The Italienzentrum (Center for Italian Studies), founded a quarter of a century ago at Freie Universität Berlin, has set itself the goal of establishing, continuing, and expanding academic cooperation between Italy and Germany. On the German side, this concerns in particular the Berlin and Potsdam areas, i.e., in addition to Freie Universität: Humboldt Universität, Technische Universität Berlin, and the University of Potsdam. The Center for Italian Studies, which in its founding phase initially focused on Italian literature and language, is now concerned with academic contacts and the organization of events in a wide variety of disciplines. The so-called complementary subjects of FU's BA program in Italian Studies (Italienstudien) are of particular importance in this regard. These are History, Art History and Theater Studies as well as Economics and Law. In all these fields, we always want to look beyond the confines of academia in the narrower sense and open ourselves up to an interested public. In order to achieve all these goals, the constant participation of the members of our Scientific Advisory Board is of very high importance. All the above-mentioned universities as well as the Italian Cultural Institute Berlin (Istituto Italiano di Cultura di Berlino) and the non-academic professional world are represented in this committee. We are very pleased that Prof. Dr. Christian Armbrüster and Dr. Rodolfo Dolce have been actively participating in the Advisory Board for many semesters now on behalf of FU's law faculty and the non-academic sphere. We would like to take this opportunity to thank both of them most sincerely.

The volume presented here on "Arbitrating in Italy and Germany" brings together reflections developed at a workshop held at the FU Berlin on November 16, 2021, organized by Prof. Armbrüster and Dr. Dolce and attended by Prof. Andrea Carlevaris (AIA, President), Dr. Cecilia Carrara (Legance Avvocati Associati), Prof. Maria Beatrice Deli (AIA, Executive Director), Dr. Francesca Mazza (DIS, Secretary General) and Rosanna Grosso (Siemens AG, Senior Legal Counsel). The very successful event was a prime example of the interdisciplinary, transnational work that is at the core of our Center's activities. We are extremely happy with this contribution of academic and non-academic legal scholarship and are particularly pleased to be able to present to the public, with this volume published in our open access series Schriften des Italienzentrums, an impressive testimony to our wide-ranging activities. Our heartfelt thanks go to the editors and authors of the volume.

Berlin, December 2022

Bernhard Huss

Introduction

Christian Armbrüster and Rodolfo Dolce

Germany and Italy have a long-standing tradition of exchanging ideas and views on legal issues. At the same time there are strong economic ties and a vivid commerce with goods and services between both countries. As commercial contracts nowadays frequently refer the parties to arbitration in case of a dispute, it seems appropriate to have a comparative look onto recent developments in the field of arbitration Italy and Germany. This is of particular interest at a time when the leading arbitral institutions in both countries, the *Deutsche Institution für Schiedsgerichtsbarkeit (DIS)* and the *Camera Arbitrale di Milano (CAM)* have recently issued revised versions of their rules of arbitration.

The present volume was inspired by a conference on "Arbitrating in Italy and Germany", which took place at Freie Universität Berlin on 16 November 2021 within the programme of the *Italienzentrum* and under the auspices of the *Associazione Italiana per l'Arbitrato (AIA)* and the *Deutsche Institution für Schiedsgerichtsbarkeit (DIS)*. The authors, being both members of the advisory board of the *Italienzentrum*, are grateful that the *Italienzentrum* has generously offered a forum for this exchange on issues of arbitration by organizing the conference as well as by including the present volume in its series of publications.

Christian Armbrüster *Rodolfo Dolce*

Recent Developments of Arbitrating in Germany

Christian Armbrüster (Berlin)

I. Introduction

This is a short overview of some recent developments with regard to arbitration in Germany. In the last few years there have been three major developments which seem worth to be mentioned and commented on. First of all, some practical experiences have been made with the revised DIS Arbitration Rules, which have been effective as of 1 March 2018. This was the first revision of the rules since 1998, and it was preceded by intensive debates. Secondly, some interesting decisions by public courts on the setting aside of arbitral awards are worth mentioning. Thirdly, a vivid academic debate on the admissibility of dissenting opinions in German arbitral proceedings has been going on.

The following contribution is aimed at offering some orientation on vital issues with regard to these three topics from the perspective of a German academic and former court of appeal judge who also has practical experience as an arbitrator.

II. First experiences with the revised DIS Arbitration Rules

1. Speeding up of arbitral proceedings

a) Overview

Among the many features of the revised 2018 DIS Arbitration Rules (hereinafter referred to as DIS rules) there are three topics which shall be mentioned and assessed here. The first of these topics concerns the goal of the revised DIS rules to additionally speed up the arbitral proceedings. In order to achieve this objective several 21 days periods as well as an entirely new instrument, the so-called Expedited Proceedings, have been introduced. The deadlines which are in force according to those various rules are not exclusion periods. Rather, if they are not met this shall be reported and explained to the DIS. Therefore, the approach is one of "comply or explain". However, the mere fact that such explanation is necessary once the deadline has passed will have a certain impact on those who are responsible for meeting the requirements, be it the parties and their representatives or the arbitrators.

b) Nomination of an arbitrator

The respondent has to nominate an arbitrator within 21 days after the date when the request for arbitration was transmitted (Art. 7.1 DIS Rules).

c) Case management conference

Once the arbitral tribunal is constituted it shall hold a case management conference as soon as possible, "in principle within 21 days" (Art. 27.2 DIS Rules). As first experience demonstrates, this can present quite a challenge for the arbitral tribunal, especially with regard to multi-party arbitration. However, even if there are just two parties involved it may be difficult to find a date which is suitable for all arbitrators and counsel (and in some cases for the parties as well). This is particularly true if the parties wish to hold the case management conference in presence and not just as a digital conference or video call. The case management conference shall include the production of a procedural timetable. This also helps to speed up proceedings as it is expected that all parties and arbitrators shall ensure their availability at the fixed dates unless there is a sound reason for a request to postpone a date.

d) Expedited Proceedings

Another interesting instrument which serves the goal to speed up proceedings is the newly introduced option for Expedited Proceedings, as laid down in Annex 4 of the DIS rules. Provided that all parties agree to this option, the arbitral award shall be rendered within six months after the case management conference has

taken place. In order to achieve this ambitious goal, the rules provide that there are only two written statements per party allowed (i.e. request for arbitration, answer plus one further written submission for each party), to which in case of a counterclaim one further reply may be added. There shall be just one oral hearing including the taking of evidence. Once again, the technique of "comply or explain" is applied, as Art. 5 of Annex 4 to the DIS rules expressly requires the arbitral tribunal to inform not only the parties but the DIS as well of the reasons for missing the time limit of six months.

First experiences with this new special procedure have shown that it can be really difficult to meet the time limit. For instance, in a medium-volume dispute which concerned a construction contract and where the request for arbitration was filed just after the revised rules had entered into force both parties agreed to Expedited Proceedings but once their submissions including requests for taking of evidence were made it soon became clear that the case was far too complex to be dealt with in such a short time. This "surprise effect" is presumably due to a lack of long-term experience of the parties. Usually all parties are interested in speedy proceedings; this is in particular true for claimants. Therefore, the parties might be tempted to agree to the new instrument even though it is not suitable for their case.

However, apart from the fact that the members of the arbitral tribunal and especially the chairperson find themselves in a situation of defence (or they might even feel a need to work less thoroughly and diligently than is appropriate for the respective case), no serious harm is done if the deadline is not met. In contrast, the awareness of the parties as well as the arbitral tribunal that from the outset an ambitious common goal was set regarding the timetable could encourage a settlement of the case. At least this is exactly what happened in the construction case mentioned above.

2. Involvement of the DIS Arbitration Council

a) Overview

The newly-installed DIS Arbitration Council is aimed at performing a number of functions which would otherwise be tasks of the arbitral tribunal. Amongst these, the decision on a challenge of an arbitrator or on the effect which a premature termination of the proceedings has for the remuneration of the arbitrators stand out. However, even the revised DIS rules have not led to the introduction of certain additional competences for the institution, such as the check of terms of reference submitted by the parties or a strict procedure of scrutinizing the arbitral award, which are e.g. provided in the ICC rules.

b) Challenge of an arbitrator

As mentioned above, one of the competences granted to the Arbitration Council concerns the situation when a party files a request for challenge of an arbitrator. In this case it is for the Arbitration Council to decide upon the challenge (Art. 15.4 DIS rules). The decision to confirm such a challenge is final and binding. This means that the Arbitral Council has significant authority with regard to a situation which is not at all uncommon in arbitral proceedings. In Germany, as in other countries, there is a lot of dispute and uncertainty with regard to the requirements for a successful challenge.[1] There is only a small number of publicly accessible decisions by state courts, where the matter may be raised in an attempt to set aside an arbitral award. Therefore, it would be desirable if DIS, at least after having gathered some experience with the challenges decided by the Arbitration Council, published some criteria. This could help both the parties and the arbitrators to assess whether a challenge would be well-founded. However, while such guidelines would offer some orientation it will always be necessary to decide on challenges on a case-by-case basis, taking into account all the circumstances.

c) Decision on arbitrators' fees in cases of early termination

In German arbitral proceedings it is not at all a rare phenomenon that in the end no arbitral award is produced. Rather, it happens quite frequently that there is a settlement which might lead to a termination

[1] See e.g. ARMBRÜSTER, Christian/WÄCHTER, Vincent: "Ablehnung von Schiedsrichtern wegen Befangenheit im Verfahren", in: *SchiedsVZ – Zeitschrift für Schiedsverfahren* 6 (2017) 213-223.

of the proceedings without any award being issued at all. One of the reasons for this is that amicable settlements shall be promoted by the arbitral tribunal (see below, sub 3). In all such situations where no regular award is produced the effect on the arbitrators' fees has to be determined. This is necessary as the DIS remuneration system is not based on hourly rates (as is, for instance, the case with the LCIA rules) but on the amount in dispute.

The assessment of the arbitrators' fees in such cases is not an easy task.[2] It is obvious that in cases of an early termination which has caused the arbitrators significantly less work than the production of an award this should be mirrored in a reduction of their remuneration. While under the old DIS rules, it was for the arbitral tribunal to decide on the issue of a reduction of the fees in such cases, this decision is now to be made by the Arbitration Council (Art. 34.4 DIS rules). The council shall consider the stage of the proceedings as well as the diligence and also the efficiency of the arbitrators (which, by the way, again illustrates the interest in speeding up the proceedings). In addition, the complexity and economic importance of the dispute shall be taken into account.

This shift of responsibility from the arbitral tribunal to the Arbitration Council relieves the arbitrators from the delicate task of having to decide on their own remuneration. Instead, the Arbitration Council will consult the parties as well as the arbitral tribunal before making a decision. There is a debate in German literature on the question which criteria should dominate the assessment. The criteria mentioned in Art. 34.4 leave considerable room for discretion.

For instance, if the request for arbitration is withdrawn shortly after the constitution of the arbitral tribunal usually no remuneration at all is due. This seems appropriate even in cases where the arbitrators have already spent a considerable amount of time and effort, in particular for identifying the chairperson or of conflict checks. As such work is not to be remunerated if afterwards the arbitral tribunal is not constituted there is no reason for a different decision after constitution.

However, there are cases where the arbitral tribunal has already done practically all its work and even the award has been produced but just not expedited yet at the time when the proceedings are terminated prematurely. There is no reason here to deny the arbitrators a full remuneration, provided that they have dealt diligently and efficiently with the case.

In yet another scenario, the arbitrators may have saved time-consuming actions such as taking oral evidence but have spent additional time on substantially assisting the parties in arriving at their settlement (be it outside the arbitral proceedings or in the form of an award by consent). Here the parties, with the assistance of the arbitral tribunal, have fully achieved their goal to solve the dispute. It therefore seems appropriate to apply only a minor deduction of e.g. 10% of the full remuneration.

3. Promotion of early settlements

A well-known cultural difference between arbitration in continental Europe and in the Anglo-American world concerns the role of the arbitral tribunal with regard to a settlement of the dispute between the parties. The traditional Anglo-American view is that the parties expect the arbitrators to produce a decision in the form of an enforceable award. In contrast, the continental European approach encourages settlements. This aim is expressly laid down in Art. 26 DIS rules, according to which the arbitral tribunal "shall, at any stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues". However, this shall not happen if any party objects.

In German arbitration practice it is usually perceived as a success if the parties, with the assistance of the arbitrators, arrive at a settlement. This outcome is considered to be a consistent continuation of the consent

[2] See ARMBRÜSTER, Christian: "La remunerazione degli arbitri in caso di interruzione anticipata del procedimento secondo l'ordinamento tedesco e nei regolamenti delle principali Camere Arbitrali", in: *Giurisprudenza Arbitrale* 2/2017 341-354. (pubblicato on line nel mese di Aprile 2018 presso la G. Giappichelli Editore, Torino: http://www.giurisprudenzarbitrale.it/interruzione-anticipata-procedimento-ordinamento-tedesco [last access 27.01.2022]).

which they had found in the phase before the dispute came up, namely in the arbitration clause or agreement. The arbitral tribunal's contribution to the settlement often consists of expressing their preliminary view of the factual and legal situation, which might be accompanied by an assessment of the parties' interest in future cooperation as well as in saving additional effort and cost, e.g. with regard to evidence-taking.

The cultural difference mentioned above presents a particular challenge for the arbitrators in ad-hoc arbitration where the parties are connected to different traditions. In such cases it is crucial for the arbitral tribunal to clarify beforehand whether all parties are happy with any encouragement regarding amicable settlements or not. However, if all parties have agreed to the DIS rules then Art. 26 applies so that such agreement is assumed unless any party protests.

In this context it appears worth mentioning another scenario, in which international parties might be surprised by a proposal by the arbitral tribunal. In German state court proceedings, it is quite common that during an oral hearing the judges enter into an exchange on the legal arguments (*Rechtsgespräch*) with the parties, which might take place without being recorded or laid down in a protocol. This habit, which is usually not (or at least not primarily) aimed at encouraging settlement but at enabling the arbitral tribunal to explore the legal situation more deeply before producing the award, is also occasionally taken up by German arbitral tribunals. However, in international arbitration this practice might very well be entirely foreign to some parties so that the arbitral tribunal should ask beforehand whether such an informal talk is consented or not.

III. Case Law

Recently a number of state court decisions have been published which concern the challenge of arbitral awards. In this context the Court of Appeal of Frankfurt/Main plays a particularly important role, as this is the seat of many German arbitral proceedings. As in other jurisdictions, according to German civil procedure law there are only very limited grounds for a successful challenge of an award. The most relevant of these grounds is the right to be heard, which is an important element of the rule of law. As the German Federal Court of Justice (*Bundesgerichtshof*) has decided this right requires the arbitral award to address all the core arguments brought forward by a party. This is often not an easy task for the arbitral tribunal, especially in cases where the submissions comprise several hundred pages (or more) plus extensive exhibits and comprehensive evidence-taking.

However, the German courts have applied a moderate line with regard to this challenge. There are only relatively few published cases in which a challenge based on an infringement of the right to be heard has been successful.[3] This restrictive position is appropriate as otherwise there would be a risk to endanger the basic principle that in arbitration there is no *révision au fond* (judicial control regarding the merits of the case) by state courts. This would lead to considerable legal uncertainty. In addition, an extensive practice of annulment of arbitral awards based on an infringement of the right to be heard might encourage parties to produce ever and ever more extensive submissions, hoping that the court might identify a relevant passage which was not addressed in the award. However, it is essential for the trust of parties in arbitration as an appropriate instrument for dispute resolution that their core arguments are addressed in the award, in particular when the award is not entirely in their favour.

In the context of a decision on a challenge the Court of Appeal of Frankfurt/Main has made a short parenthetical remark which was not relevant for the outcome but has raised a lot of attention nevertheless. This remark regards the issue whether under German law the production of a dissenting opinion by an arbitrator is admissible or not. This issue will be dealt with below.

[3] See e.g. Federal Court of Justice (*Bundesgerichtshof*) I ZB 1/16, SchiedsVZ 6 (2017) 317 paras 17 ff.; I ZB 11/20, BeckRS 2020, 39395 paras 20 ff.

IV. Admissibility of dissenting opinions

In German statutory law, as is the case in Italy, there is no express rule concerning the admissibility of dissenting opinions in arbitration. In the aforementioned decision the Court of Appeal of Frankfurt/Main expressed doubts whether the publication of a dissenting opinion by an arbitrator is in line with the duty of confidentiality, as an aspect of the procedural public order (*ordre public*).[4] This remark has caught much attention as in German literature the predominant view has been that there is no conflict with confidentiality.[5] This liberal attitude seems to be the majority view in other countries as well.

However, the Court of Appeal's doubts deserve a closer reflection.[6] This is because it is anything but clear that an arbitrator may claim a legitimate interest to produce a dissenting opinion and make it public internally, i.e. for the parties and arbitrators. If state courts admit dissenting opinions, as is the case in Germany for the Federal Constitutional Court (*Bundesverfassungsgericht*), this is usually in order to promote the legal debate on controversial issues. In contrast, this cannot be a relevant reason in arbitration where even the arbitral awards are usually not published. In this situation a possible motive might be simply that the respective arbitrator feels a need to demonstrate to the party who originally nominated him (or her) that even though in the end the majority decided differently he had fought for their position. It is obvious that such a desire, which may be understandable, cannot amount to a legitimate reason for producing a dissenting opinion. Once the arbitrator is appointed, he is entirely detached from the interests of the party that nominated him, and has to respect the duty of impartiality. In addition, the fact that the award was not the result of a unanimous decision is an information that falls under the scope of the confidentiality duties.

In any case as long as the Federal Court of Justice (*Bundesgerichtshof*) has not decided on the question arbitral tribunals run a considerable risk if they admit the production of a dissenting opinion, as at least according to the Court of Appeal of Frankfurt/Main this might lead to an annulment of the award due to an infringement of the requirement of confidentiality.

V. Conclusion

This short overview on recent developments in German arbitration has shown that there are multiple topics which are of general interest for both Italy and Germany. This is particularly true with regard to the revised arbitration rules which have been introduced by both AIA and DIS, where first experiences have already been gathered. A continuing dialogue between practitioners and academics from both countries should therefore be very rewarding.

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[4] Frankfurt Court of Appeal 26 Sch 14/18, BeckRS (2020) 4606 para 226.

[5] See e.g. ELSING, Siegfried H.: "On the admissibility of dissenting opinions in domestic arbitral proceedings in Germany", in: Daniel GREINEDER/Karl PÖRNBACHER/Stefan VOGENAUER (eds.): *Schiedsgerichtsbarkeit und Rechtssprache. Festschrift für Volker Triebel zum 80. Geburtstag*, München 2021, 23 ff.

[6] ARMBRÜSTER, Christian: "Der parteibenannte Schiedsrichter zwischen Unparteilichkeitsgebot und Parteierwartungen", in: Oliver FEHRENBACHER/Boris PAAL/Dörte POELZIG (eds.): *Deutsches, Europäisches und Vergleichendes Wirtschaftsrecht: Festschrift für Werner F. Ebke zum 70. Geburtstag*, München 2021, 43-52.

Recent Developments of Arbitrating in Italy

Rodolfo Dolce (Frankfurt a.M.)

There is also news to report from Italy on arbitration: On the amendments to the Rules of the Essential Italian Arbitral Tribunal (I), on amendments to the relevant provisions of the Italian Code of Civil Procedure (II) and on new trends in Italian Jurisprudence (III).

I. "Regolamento Arbitrale" of the Milan Arbitration Chamber

The main Italian arbitration regulation, comparable in its practical national relevance to the DIS Arbitration Rules, is the "Regolamento Arbitrale" of the *Camera Arbitrale di Milano* (CAM), i.e. the Milan Chamber of Arbitration, which is a 100% subsidiary of the Milan Chamber of Commerce. The most important institution of Italian arbitration besides the CAM, the *Associazione Italiana per l'Arbitrato* (AIA) today still essentially aims at the promotion and diffusion of national and international arbitration on a scientific and cultural level and, since the end of 2020, does not conduct arbitration proceedings itself. To this end, the AIA has concluded a convention with CAM, confirming CAM's leading position in Italian arbitration.

For its part, CAM has concluded agreements with 16 other Italian chambers of commerce that allow the company to initiate arbitration proceedings before its own chamber of commerce, which is then administered locally by CAM (see https://www.camera-arbitrale.it/it/arbitrato/network-camere-convenzionate.php?id=335).

1. Simplified procedure

On 1.7.2020, the CAM introduced a simplified procedure ("Arbitrato semplificato") to be applied in principle to all disputes with an amount in dispute not exceeding a value of 250.000 €, as well as to all other disputes in which the simplified procedure has been expressly agreed between the parties.

It should be noted that due to the particularly slow ordinary justice system in Italy, compared to the rest of Europe (see EU Justice Barometer, https://ec.europa.eu/commission/presscorner/detail/de/IP_22_3146), Italian companies tend to resort to arbitration even for smaller amounts in dispute. A legal court proceeding in Italy, especially at regional courts in the southern regions, can take more than four years at first instance (see https://osservatoriocpi.unicatt.it/ocpi-pubblicazioni-i-tempi-della-giustizia-civile-in-italia-gli-anni-della-pandemia-e-il-pnrr).

In the simplified procedure, the sole arbitrator is the rule; the time limits are halved compared to the ordinary procedure (three months instead of six months for the publication of the arbitral award); the number of pleadings is reduced to the essentials and the proceedings are to be concentrated in a single oral hearing. An average duration of six months and a cost saving of approximately 30% are thus achieved.

The defendant has the right to object to the application of the simplified procedure in its initial response. In this case, the proceedings will be continued according to the rules of the ordinary procedure of the CAM, which is briefly presented in the next section in comparison with the DIS Arbitration Rules.

2. Comparison DIS-CAM Rules

The two sets of rules in their respective latest versions (DIS as of 1.3.2018 and CAM as of 1.7.2020) are basically comparable and contain rules that differ only in detail. However, they are worth looking at because they are also indicators of the different legal traditions of the two countries.

a) Initiation of the arbitral proceedings

In both rules, the arbitral proceedings begin with the service of the arbitral claim on the office of the arbitral tribunal (Art. 5.1 DIS Rules, Art. 10 CAM Rules), whereby the Italian rules emphasise the arbitral tribunal's

duty to promote the proceedings by imposing a time limit of five days on the office to serve the claim on the defendant (Art. 10.3 CAM Rules). In Germany, it is apparently assumed anyway that the arbitral tribunal will deal with the matter expeditiously and refrains from setting its own deadline.

b) Transmission of Documents

Pursuant to Art. 4.1 DIS-Rules, all documents of the parties and the arbitral tribunal shall be transmitted electronically, with the exception of the statement of claim, which shall also be submitted in paper form.

The CAM Rules leave the decision on the means of transmission to be chosen to the administrative office, although digitalisation in legal and business transactions is much more advanced in Italy than in Germany. Every company in Italy must have a secure electronic address (PEC); communication with the judicial structures has been successfully converted exclusively to electronic communication much earlier than in Germany.

c) Deadlines

Art 7 CAM Rules expressly states that time limits set by the arbitral tribunal or the office are not to be understood as preclusive time limits unless they are expressly designated as such. Such a - procedural - provision is missing in the DIS-Rules; Art 4.8 DIS-Rules only specifies that the office may extend deadlines at its discretion - and only its own deadlines, not those of the arbitral tribunal.

d) Appointment of Arbitrators, Composition of the Arbitral Tribunal

The substantive rules of Art. 13 et seq. CAM Rules essentially correspond to the rules of Art. 9 et seq. DIS Rules. While the DIS Rules do not express any preferences for a certain number of arbitral tribunal members and Art. 10.1 provides that the parties may also appoint any unpair number of arbitrators, Art. 13.2 CAM Rules basically assume the principle of a monocratic arbitral tribunal, unless the parties have previously agreed otherwise, or the administration office considers a number of three arbitrators appropriate in view of the complexity or the amount in Dispute of the case.

Furthermore, in German proceedings, the administration office reserves the right to formally appoint the arbitrator pursuant to Art. 13.1 DIS Rules, even if the arbitrator has already been nominated by the party. A corresponding express provision can only be found in the Italian Rules when appointing the chairperson in a multi-party arbitration (Art. 15.2 CAM Rules). The administration office may then even deviate from the agreement of the parties, which is unlikely to happen in practice.

e) General Procedure, Seat, Default

Both arbitration rules give the parties wide latitude in the choice of substantive law, rules of procedure and language of the proceedings. According to Art. 22 DIS Rules, the arbitral tribunal shall determine the place of arbitration, unless the parties have agreed on such place. In contrast, Art.4.2 CAM Rules sets Milan as the place of arbitration in the absence of an agreement between the parties.

With regard to the oral hearing, the DIS Rules mention in Art. 29.2 the verbatim record as a suitable means to reflect the course of the oral hearing. The mention also points to a significant competitive advantage of the German arbitral proceedings compared to oral hearings in proceedings under the German Code of Civil Procedure, in which the court, among other things, summarises witness statements not in the original text but in its own words, which surprises international parties, especially from Anglo-American countries. The comparison with the ordinary judiciary is not more favourable in this respect in Italy either, Art. 27.3 nevertheless only succinctly states that minutes of the oral proceedings are to be taken.

According to Art. 30 of the DIS Rules, the claimant's factual submissions shall not be deemed admitted in the event of default by the respondent. A corresponding provision is missing in the CAM Rules and is owed to the German legal tradition in procedural law. In contrast to Italian state procedural law, according to the German Code of Civil Procedure (section 331 (1), first sentence), in the event of default by the respondent, the claimant's submission is deemed to have been admitted by the respondent. The German drafter of the rule may have wanted to adapt to international – at least European – customs here, but he may also have wanted to make it easier for the contracting parties who want to avoid an expensive arbitration court to conclude an arbitration clause. The defendant who does not enter into an arbitration clause does not have to fear that everything will be believed by the plaintiff.

f) Promoting consensual dispute resolution

Art. 26 DIS Rules directs the arbitral tribunal to promote consensual resolution of the dispute or individual issues at every stage of the proceedings, to the extent that the party lines do not conflict. This also corresponds to the requirement of the state code of civil procedure (section 278 (1) ZPO).

Art. 25.3 CAM Rules contains the additional indication that the parties may also engage in the mediation procedure, which is also conducted at CAM. An arbitrator influenced by the German legal culture will generally also find it easier to work towards a settlement in the context of the arbitral tribunal, as he does not have to keep his provisional legal opinion behind him – in line with a German state judge, who already gives a prognosis on the course of the legal dispute at the first oral hearing and bases his settlement proposal on it. The Italian judge, in contrast, will not go too far out on a limb because otherwise he runs the risk of being considered biased. In this respect, the agreement will have a better chance of success in the mediation procedure,

g) Interim relief

According to Art 25 DIS Rules, unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, order an interim or protective measure and may modify, suspend or revoke the order of such measure. In practice, if there is a particular urgency, the arbitration claimant will opt for ordinary jurisdiction, which is compatible with the arbitral tribunal's jurisdiction over the main proceedings under section 1033 of the German Code of Civil Procedure.

A corresponding provision is found in Art. 26.1 CAM Rules, whereby Art.26.4 also clarifies here that recourse to ordinary jurisdiction in urgent matters does not constitute a derogation of the arbitral proceedings.

An interesting provision that entered into force with the amendments to the Rules on 01.03.2020 is the introduction of an "urgent arbitrator" ("Arbitro d'Urgenza") under Art. 44 CAM Rules, who can be appointed by the administrative office even without hearing the arbitral defendant, when it comes to ordering interim relief measures under Art. 26 CAM Rules (see also on this below under 2. on the reform of the Italian Code of Procedure and the strengthening of the arbitrator's position as a judge in urgent proceedings). The CAM also follows the example of the "Emergency Arbitrator" according to Art. 29 ICC Rules, which was already introduced in 2012.

h) Litigation funding

The fact that the CAM Rules are younger than the DIS Rules can also be seen in the introduction of a third-party funding rule, which is – still – missing in the DIS Rules. Considering the development of practice in recent years, in which litigation funding has also become increasingly important in Europe, Art. 43 introduces a duty of Disclosure for the party receiving litigation funding from a third party about the very fact of litigation funding, which continues until the conclusion of the arbitral procedure.

Under the DIS Rules, such a conflict of interest, for instance with an arbitrator associated with a litigation funder, would have to be disclosed under the general impartiality and independence declaration in terms of Art. 9.4 DIS Rules. Also, in this respect, the ICC Rules are more up-to-date than the DIS Rules and explicitly mention the conflict of interest by litigation funders in their Article 11.7.

II. New legal provisions on arbitration

The Italian legislature, by itself of 26 November 2021 (No. 206/21), which entered into force 30.06.2022, authorised the government to amend parts of the Code of Civil Procedure regulating arbitration. These are the main tasks that the government must implement:

a) On the independence of arbitrators

The new law aims to strengthen the guarantees of impartiality and independence of the arbitrator by reintroducing the right of challenge on serious grounds of expediency and by providing for the obligation to make a declaration containing all factual circumstances relevant to his or her impartiality when accepting the appointment. Provision is made for the invalidity of the acceptance in the event that the statement is not

made, as well as, in particular, for disqualification in the event that the arbitrator has failed to state the relevant circumstances when accepting the appointment.

b) On the enforcement of the foreign arbitral award

The new rules should explicitly provide for the enforceability of the decree by which the president of the court of appeal declares the foreign award effective

c) On urgent legal protection

Provision is made for the arbitrators to have the power to issue precautionary measures if the parties expressly so request, as expressed in the arbitration agreement or in a subsequent written instrument; the ordinary judge will now only have the power to issue precautionary measures in such cases if a request is made prior to acceptance by the arbitrators; recourse to the ordinary judge will only be provided for in cases where the reasoned objection of lack of jurisdiction of the arbitral tribunal has not been raised in the first pleading or the objection of publicity;

d) Other

The new rules have to

- specify the power of the parties to the applicable law is expressly provided for;
- bring the time limits for challenging arbitral awards into line with the time limits for judgments in ordinary courts;
- provide that the appointment of arbitrators by the judicial authority shall in all cases be based on criteria ensuring transparency, rotation and efficiency.

III. New case law on arbitration

Recent decisions of the Italian supreme courts on arbitration are presented here.

a) Transfer of the dispute from the arbitral tribunal to the ordinary court

The Court of Cassation, in its judgment of 5 October 2021, n. 2649, on a ritual arbitration award, ruled that if the arbitrators decided on a matter that was not arbitrable, there was a case of competence and not jurisdiction. It follows that, in application of Article 819-ter (2) of the Code of Civil Procedure, as supplemented by the 2013 Supplementary Judgment No. 223 of the Constitutional Court, the proceedings before the competent judge may be continued by means of the *translatio iudicii* referred to in Article 50 of the Code of Civil Procedure, i.e. without the need to start the proceedings all over again.

b) Consequences of default in international arbitration

On the other hand, a decision by an ordinary court in the event of default by one of the defendant parties is not possible if the parties had previously entered into an arbitration agreement and one of the parties involved – in the case of several defendants, one of them – objects to this. In this regard, the United Senates of the Court of Cassation on 08.03.2022 (no. 17244/2022) overturned a contrary decision of the Bologna Court of Appeal and clearly gave precedence to Art. II, para. 3 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, which clearly prevails over national legislation. According to this provision, the court of a Contracting State which is called upon for a matter in dispute in respect of which the parties have entered into an arbitration agreement must, upon request, refer them to arbitration. The Contracting States involved in the case were Algeria and Italy.

c) Free choice of procedural rules in compliance with the right to be heard

The Court of Cassation confirms the arbitral tribunal's choice to apply procedural rules that do not comply with the Italian Code of Civil Procedure, even if the facts of the case are purely Italian and the parties are Italian, provided that the parties have not expressly committed themselves to a particular procedural rule in their arbitration clause. The only limit to this freedom of choice would be the violation of the right to be heard and the principle of adversarial procedure according to Art. 101 Italian Code of Civil Procedure ("principio del contraddittorio"). This also included being able to submit pleadings and comments on the outcome of the taking of evidence until the end of the oral hearings (Court of Cassation of 21.02.2019n (no. 5243)).

As a result, the two legal cultures are converging, be it in the area of the leading arbitration rules, be it in legislation or in case law. The national view is still required due to Art 1 (2) (d) of Regulation 1215/12012, but there is still a long way to go before a European Code of Civil Procedure with corresponding European rules for arbitration proceedings is established!

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Freie Universität Berlin

Schriften des Italienzentrums der Freien Universität Berlin
Herausgeber: Prof. Dr. Bernhard Huss
Editorische Betreuung: Sabine Greiner

Freie Universität Berlin
Italienzentrum
Geschäftsführung
Habelschwerdter Allee 45
D-14195 Berlin