

GAR – Global Arbitration Review

Second Italian Arbitration Day
Planet of the arbitrators

18 luglio 2023

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After a successful “prima” in Rome last year, the second Italian Arbitration Day took place in Milan, focusing on fairness in international arbitration, and featuring a “Planet of the Apes”-inspired keynote speech by **Toby Landau KC**.

The event on 4 July was hosted by the Milan Chamber of Arbitration (CAM) and the Italian Arbitration Association (AIA), gathering more than 200 participants from 15 different countries, including experts, academics, in-house counsel and lawyers.

The day was opened by **Stefano Azzali**, general director of CAM, and **Maria Beatrice Deli**, a professor at the University of Molise in Campobasso, Italy, and general secretary of AIA,

Azzali reported on changes implemented in Italian law in the last year to make the country more attractive for international arbitration users and international investments. The new law finally recognises arbitrators’ power to grant interim measures.

A working group composed of representatives of the Court of Appeal of Milan, the Tribunal of Milan and CAM is cooperating with the judiciary to guarantee the proper application of the new law.

Azzali also reported an 8.4% increase in the number of CAM arbitration cases, and a stable number of mediation cases in the range of 1,000 new cases per year.

He also reported the great success of CAM’s expedited rules and its increased cooperation with major institutional organisations such as ICCA, IFCAL, UNCITRAL, UNIDROIT and the International Arbitration Commission (UIA), all of which are supporting institutions of the Italian Arbitration Day, together with the IBA Arbitration Committee.

Deli introduced the conference's subject, referring to fairness as a broad and universal principle of international arbitration that is part of all legal systems and a key requirement of the process irrespective of the type of arbitration or set of rules used.

Toby Landau KC of Duxton Hill Chambers in Singapore delivered the keynote speech, reflecting on procedural fairness with reference to the 1968 Hollywood science fiction movie “The Planet of the Apes”.

Recalling the plot of the movie, Landau compared what he described as the “due process paranoia” felt by many arbitrators with the worship for millennia of the “Divine Bomb” by a subspecies of mutant humans in the irradiated ruins of New York City.

Due process paranoia, and the fear of procedural unfairness, leads to arbitrators feeling a pervasive sense of threat and is a “Damocles’ Sword” that counsel hold over them, Landau said.

Landau described this fear as unjustified, based on belief rather than empirical experience, and argued that it is leading to a degradation of the arbitration system. A collective effort is required for it to be overcome, he said.

There are three main potential solutions to the problem, Landau argued. One would be the release of more information to dispel arbitrators' fear of breaching due process, especially information about the minimal impact such breaches have on the validity and enforceability of arbitral awards. Another would be for arbitrators to show more spine, using Procedural Order No.1 to set parties' expectations about the arbitral process. A third solution would be clear messages from lawmakers and national courts supporting the efforts of the international arbitration community to ensure procedural flexibility on the part of tribunals.

As an example of the third solution, Landau noted the 2020 decision of the Singapore Court of Appeal in the case *Jaguar Energy Guatemala LLC and AEI Guatemala Jaguar Ltd v China Machine New Energy Corporation*, in which it stated that breaches of due process require a very high threshold and should not be used by counsel as an empty threat.

The day continued with two panels, focusing on procedural fairness and substantive fairness respectively, each of which was followed by a "reverse debate".

The panel on procedural fairness was moderated by London-based independent arbitrator **Emilia Onyema** and featured managing counsel of the ICC International Court of Arbitration **Pedro Arcoverde**, founding partner of Gaillard Banifatemi Disputes **Yas Banifatemi**, and founding partner of Zulficar & Partners **Mohamed Abdel Wahab**. They looked at the concept from the perspective of counsel, arbitrators and arbitral institutions.

The discussion emphasised the global nature of the arbitration community and the need for all actors on the arbitration stage to fairly acknowledge and respect cultural differences. **Erica Stein**, co-chair of the IBA Arbitration Guidelines and Rules Subcommittee, intervened to give the IBA's definition of fairness, which is based on international principles reflected in soft law instruments.

Stein also reported on recent developments and future endeavours of the IBA Arbitration Committee, underlining the key role played by the IBA Guidelines as a benchmark for the international community.

The panel on substantive fairness was moderated by University of Oslo professor **Giuditta Cordero-Moss** and featured Heidelberg University professor **Herbert Kronke**, Spanish arbitrator **Juan Fernández-Armesto** and founding partner of Milan boutique Arblit **Luca Radicati di Brozolo**. They looked at arbitrators' decision-making, the assessment of damages, and fairness as a substantive standard in investment arbitration.

The speakers referred to substantive fairness as a relative and elusive concept, a product of social evolution which jurisdictions have interpreted over time from their own point of view.

The "reverse debates" that followed the panels were moderated by the chair of the ICC's Governing Body for Dispute Resolution Services **Michael McIlwrath** and head of White & Case's Paris arbitration group **Michael Polkinghorne** and involved asking the audience questions with the aim of establishing a shared concept of fairness by reference to its concrete applications in both common law and civil law jurisdictions.

Andrea Carlevaris, president of AIA, closed the event by recalling the need to overcome and dispel due process paranoia, which he described as a "poisonous fruit" of the finality of arbitral decisions. He argued, however, that a reasonable amount of concern for procedural fairness is not necessarily a bad thing. This is needed to build a dispute resolution system that respects not only fundamental rights but also the parties' concern that the process is fair.

Carlevaris also reflected on the different roles of fairness in international arbitration and court litigation, stressing that arbitration needs to constantly reconfirm its legitimacy.

While in court litigation, fairness is built into the process as circumscribed by the rules, in arbitration the scarcity of procedural rules requires arbitrators to establish their authority and legitimacy on every occasion, he said.

Confirming the growing interest of the international arbitration community in Italian arbitration law and practice, the event was held on the former trading floor of the Palazzo Mezzanotte, the headquarters of the Italian stock exchange – *Borsa Italiana* – since 1932. The third Italian Arbitration Day will take place on 13 June 2024, in Rome.