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Milan event looks at criminal law-IA interplay

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This year's Milan Chamber of Arbitration conference looked at the interplay of criminal law and international arbitration, including discussion of the *Lagergren* case, which a speaker said marked the start of the transition from an "eyes shut" to a "zero-tolerance" approach to corruption 60 years ago, and of the more recent *Enrica Lexie* inter-state case between India and Italy.

The 15th annual conference in Milan on 29 November was chaired by **Stefano Azzali**, general director of the Milan Chamber of Arbitration and moderated by **Paolo Marzolini**, founding partner of Patocchi & Marzolini, and brought together 140 professionals from 13 countries. High-profile speakers addressed the critical issues arising from criminal conduct in arbitration proceedings.

In his opening speech, Marzolini spoke about the oft-cited award rendered by Swedish arbitrator and judge **Gunnar Lagergren** in 1963 in ICC case number 1110, in which he said allegations of corruption were first addressed in arbitration and the current approach started to develop. While it would be bold to say that a "zero tolerance" approach was taken in this case, Marzolini said it marked an "indisputable" change and paved the way for tribunals to be more proactive when dealing with claims of illegality.

The first panel looked at when criminal conduct might be relevant in international arbitration and the role of arbitrators when such conduct occurs.

According to **Mark Pieth**, former professor of criminal law at the University of Basel, illegality can take a variety of forms in international arbitration, including corruption, fraud, money laundering and bid-rigging. Allegations or evidence of these can emerge in both commercial and investment arbitration and it is crucial to know the duties and powers of arbitrators in such a situation.

While in many cases arbitrators have decided not to engage with the allegations or evidence of criminality, Pieth argued that they have a duty to investigate upon request by counsel or *sua sponte*.

Going into more depth on the duties and powers of arbitrators, **Michele Potestà**, partner at Lévy Kaufmann-Kohler in Geneva, suggested that allowing them to address criminal conduct *ex officio* is the right approach in light of their duty to render enforceable awards, which, unlike in the past, are infrequently challenged and annulled by national courts.

Arbitrators' power to investigate *ex officio* seems to be recognised by many arbitration laws, making it uncontroversial amongst professionals, he said.

In the second panel, **Mohamed Shelbaya**, partner at Gaillard Banifatemi Shelbaya Disputes in Paris, and **Loukas Mistelis**, partner at Clyde & Co in London and professor of transnational law and arbitration at Queen Mary University of London, focused on corruption, which they saw as a particularly live issue in investment arbitration.

According to Shelbaya, recent bilateral investment treaties are increasingly addressing the potential for corruption, sometimes through a more specific definition of "investment" that excludes transactions made through corruption or bribery.

Shelbaya also considered the burden and standard of proof for establishing corruption, noting that while the first is generally not controversial, tribunals take a varied approach to the second. Requirements can range from parties having to prove corruption on the balance of probabilities to having to offer clear and convincing evidence, or even certainty, of the corrupt conduct.

Shelbaya stressed that, ultimately, the approach taken will be down to the tribunal's viewpoint and willingness to investigate the alleged corruption.

The discussion shifted to the question of whether illegality can be arbitrated. Unlike in the past, Mistelis argued it is nowadays clear that arbitral tribunals can deal with the issue of corruption where it features in parties' arguments or appears on the face of the evidence to have taken place.

If the issue is not deliberately raised by a party but appears to arise, the tribunal has the duty to address it in the award, Mistelis said. They are equipped with limited, yet adequate, investigative powers, including the ability to request documents and witnesses, as well as to draw adverse inferences from parties' refusal or failure to comply with the request.

A section of the conference was dedicated to the *Enrica Lexie* case, a sensitive inter-state arbitration between Italy and India brought at the Permanent Court of Arbitration in The Hague under the UN Convention on the Law of the Sea, which addressed matters of criminal law and international security.

The case concerned the shooting of two Indian fishermen by Italian naval officers guarding the *Enrica Lexie* oil tanker off the coast of Kerala, in southern India, in 2012, after they claimed to have mistaken them for pirates. The naval officers were arrested by the Indian police, raising issues over whether they were subject to Indian criminal jurisdiction or benefitted from state immunity.

The Indian prosecution of the marines was eventually quashed by the Indian Supreme Court in 2021, after Italy paid compensation for loss of life, damage to the Indian fishing vessel and moral harm suffered by its crew in line with the award of the arbitral tribunal and undertook to bring its own criminal proceedings against the marines.

Attila Tanzi, professor of international law at the University of Bologna and associate member of 3 Verulam Buildings in London, provided a comprehensive analysis of the issues in the case, which he said was a great example of the integration between adjudicative and diplomatic means of dispute resolution.

Tanzi emphasised that while claims and counterclaims relating to criminal conduct are admissible in international commercial and investor-state arbitration, it may not always be advisable to bring them or easy to resolve them on the merits. He said competition inevitably arises between arbitral tribunals and domestic criminal courts and it is crucial to consider whether the exercise of quasi-criminal jurisdiction distorts the original rationale of arbitration.

The day continued with an in-depth analysis of illegally obtained evidence in arbitration presented by **Kathrin Betz**, lawyer at Betz Law in Basel, and **Kamalia Mehtiyeva**, a professor at Paris-East Créteil University.

Betz discussed the admissibility phase of arbitrations, outlining the factors that tribunals generally consider when determining whether illegally obtained evidence can be admitted. These include the level of illegal measures taken to obtain it, its relevance and materiality and the general accessibility of the evidence. They also consider whether the party submitting the evidence was implicated in the illegality and whether the evidence is subject to legal privileges.

Once the evidence has met the admissibility threshold, there are several further factors that can diminish its persuasive effect or legal value, Mehtiyeva asserted. The probative value of the evidence can be challenged on grounds of authenticity, accuracy, integrity and reliability.

When determining the admissibility, relevance and weight of any evidence, tribunals have a discretionary power to decide the standard of proof and whether to apply conflict of law provisions or take into consideration relevant national laws.

The event concluded with an engaging Q&A session, which saw strong participation from the audience. The next annual event will be on 27 November 2025.