



THE 12TH DUBLIN INTERNATIONAL ARBITRATION DAY CONFERENCE

REPORT ON ARBITRATION IRELAND'S DUBLIN
INTERNATIONAL ARBITRATION DAY 2024



On Friday November 22, 2024, Arbitration Ireland held its 12th annual Dublin International Arbitration Day conference. Over 100 delegates, including leading practitioners in the international arbitration community, attended the conference this year.

The conference was held in the Distillery Building in Dublin. This year's conference welcomed leaders in international arbitration to discuss a number of topical issues including privilege, the Energy Charter Treaty, and criminal law and human rights in international arbitration.

OPENING ADDRESS

Paul McGarry SC (*The Bar of Ireland – President of Arbitration Ireland*) opened the event and provided a warm welcome to the conference delegates. He thanked the sponsors of the event and noted that it was great to see some

familiar faces as well as plenty of new attendees to the conference. He informed the conference delegates that they were in for a treat with a varied and thought-provoking schedule ahead. Finally, he invited Seán Guerin SC, Chair, Council of The Bar of Ireland, to say a few words.

Seán Guerin SC (*Chair, Council of The Bar of Ireland*) stated that it was a great pleasure and an honour to welcome the conference delegates. In particular, he thanked those who had travelled from abroad to attend. He noted that the Distillery Building is home to the Dublin Dispute Resolution Centre. Ireland's premier venue for arbitration being located within The Bar of Ireland's building was an illustration of the commitment of the Irish Bar to arbitration. This commitment was also reflected in the Distillery Building being the venue for the conference. Finally, Sean congratulated the organisers of the conference on assembling a spectacular series of talks and a wonderful line-up of speakers.



From left: Emmanuel Foy (Derains & Gharavi – Paris); Charlie Caher (Wilmerhale – London); Stephanie Collins (Gibson Dunn LLP – London); David Herlihy SC (A&O Shearman – Dublin); and, Campbell Jackson (EY – London).



Alan de Rochefort-Reynolds (Norton Rose Fulbright), and Annmarie Keane (CSSO).

PANEL 1 – 1994-2024: THE DEMISE OF THE ENERGY CHARTER TREATY?

David Herlihy SC (A&O Shearman – Dublin) chaired the first session of the conference and a discussion on the introduction of the Energy Charter Treaty, its themes, its current status, and whether it has achieved its goals 30 years on.

Stephanie Collins (Gibson Dunn LLP – London) took stock of the Energy Charter Treaty 30 years on from its introduction. She noted that the Treaty initially protected western investment of companies entering Eastern European countries. However, this all changed around 2010 when we started to see cases being brought against western European States – mostly in relation to renewable energy subsidies. Following this, Stephanie touched upon three themes relating to the future of the Treaty: (i) the Energy Charter Treaty as a catalyst for driving and developing new law, and for grappling with novel legal issues; (ii) whether the Energy Charter Treaty could be considered a champion of the fossil fuel industry; and finally, (iii) whether the Energy Charter Treaty can be considered a means of safeguarding the green transition.

Campbell Jackson (EY – London) provided an insightful analysis of the cases brought by claimants relating to the Energy Charter Treaty. He referred to the report of the Energy Charter Secretariat dated December 1, 2023, which identified a total of 162 cases relevant to the Treaty. Aside from a ‘spike’ in cases between 2013 and 2016 (70 in total), this averaged out to a low volume of four cases per year. The top State respondents were Spain with 51 cases, followed by Italy with 14 cases and Romania with eight cases. A majority (55%) of claimants were small and medium enterprises (SMEs) and a majority (58%) of claims related to renewable energy. Until 2009, the average claim amounted to \$100 million. Since 2010, the average claim has amounted to over \$300 million. Finally, Campbell referred to two decisions (*Khan Resources v Mongolia* and *Mohammad Ammar v Tajikistan*), which highlighted the difficulties faced by claimants in the calculation of damages.

Emmanuel Foy (Derains & Gharavi – Paris) spoke on the intra-EU objection under the Energy Charter Treaty. He noted that this issue was particularly relevant for Ireland as the very idea of the Treaty was born in Dublin at the European Council meeting of June 1990. In addition to this, Ireland has a high level of natural resources such as gas and wind power. Recently, Ireland held its first ever offshore wind auction under a new offshore renewable energy electricity support scheme. The question then arises: if Ireland was to change its regulations or the conditions applicable to these contracts, would it be exposed to liability under the Treaty? Or could it rely on the intra-EU objection?

He then outlined a number of tribunal decisions that demonstrate the resounding rejection of the intra-EU objection. Finally, he referred to a new declaration from June 2024 under which all EU member states confirmed that the offer to arbitrate in the Treaty was never meant to be binding.

Charlie Caher (Wilmerhale – London) highlighted the last two years and the withdrawal of the EU member states from the Treaty, followed by the EU’s announcement of its withdrawal earlier this year. He then raised the question as to why we are seeing the withdrawals from the Treaty in the last two years. Firstly, the intra-EU objection has played a significant role in some member states deciding to ‘pull the plug’. Secondly, there is a political argument that the Treaty is creating a chilling effect on the ability of member states to transition from fossil fuels to renewable energy. And finally, there is a hostility towards investor-state dispute settlement in multilateral treaties. However, he also argued that the demise of the Treaty has been exaggerated for two reasons. Firstly, while some EU member states have withdrawn, it is not clear if the rest will follow suit. Secondly, the sunset clause under the Treaty means that member states are still bound by its obligations for 20 years after withdrawal.



Rossa Fanning SC (Attorney General of Ireland).



From left: Dr Patricia Nacimiento (Herbert Smith Freehills – Frankfurt); Ahmed Abdel Hakam (Volterra Fietta – London); Utku Cosar (Arbitration Chambers – Istanbul and New York); and, Dr Yagmur Hortoglu Grant (School of Law & Criminology – Maynooth University).

ADDRESS FROM THE ATTORNEY GENERAL

Rossa Fanning SC (Attorney General of Ireland) spoke on the longstanding practice of arbitration, despite the view that it is a relatively novel method of dispute resolution when compared with ‘conventional’ litigation. He went on to note that this conference, in particular, underscores the importance of arbitration to the modern Irish economy. The Attorney General also highlighted a key advantage of the arbitration process – the ability to choose the identity of the arbitrator and the influence the parties to a dispute can have on their selection. He outlined three reasons why this is beneficial for both practitioners and their clients. Firstly, the parties have a greater degree of control over how the arbitration will be conducted. Secondly, the specific experience and expertise available from a chosen arbitrator is not always available from a judge assigned to a hearing in conventional litigation. Finally, with both parties having input to the selection of an arbitrator, there is more balance and fairness.

In concluding, the Attorney General welcomed all of the visitors who have travelled to Dublin for the conference and commended the organisers for putting together a first-rate event.

PANEL 2 – THE INTERSECTION BETWEEN ARBITRATION AND CRIMINAL LAW

Dr Yğmur Hortoğlu Grant (School of Law & Criminology – Maynooth University) chaired the second session of the conference and a discussion on the intersection between criminal law and arbitration.

Utku Coşar (Arbitration Chambers – Istanbul and New York) spoke on the topic of fraudulent evidence in arbitration. In particular, she covered the types of fraudulent evidence, evidentiary issues and legal consequences. She defined fraudulent evidence as any false or deceptive information with the intent to prove or disprove alleged facts. The classic example of this is documentary evidence that is forged, fabricated and/or inauthentic. She referred to cases in which mining licenses, nationality

documents and expense reports were forged, fabricated and fraudulent. She also referenced the decision in *P&ID v Nigeria* in which an award was annulled on the basis of a fraudulent witness statement submitted by the claimant. When it comes to the consequence of false evidence, tribunals have wide discretion to disregard evidence, strike it from the record or make a decision on fraud. In her experience, the most likely outcome is for a tribunal to simply give no weight to such evidence.

Ahmed Abdel Hakam (Volterra Fietta – London) spoke on fraudulent or ‘sham’ arbitrations. He provided a singular, take-home message for all in attendance: every time you represent a party that has to defend a fraudulent arbitration, it is usually very expensive, lengthy and fact sensitive. He also noted that the legal elements to fraud are stable and parties do not disagree on them. Rather it is the factual elements on which parties disagree. He gave three common examples of these elements. Firstly, in a typical sham arbitration you have a real client with a fake claim, a fake arbitral tribunal and a real respondent. Secondly, where there are two parties conspiring to cover up a wider fraud to mislead the arbitral tribunal. And finally, a scenario that is less common, when you have an arbitrator defrauding the parties.

Dr Patricia Nacimiento (Herbert Smith Freehills – Frankfurt) provided an overview of the issue of money laundering in arbitration. She highlighted the dangers of this particular issue for legal representatives. It is very easy to become part of it without knowing, and this then entails personal responsibility, not only for a law firm but for individual lawyers. She then look at what money laundering is in the context of arbitration. Money laundering means that you conceal the origins of illegally obtained funds and then make them appear as legitimate again. There are typically three phases to this. The first is the place – where illicit funds are introduced into a financial system. The second is layering, where funds are covered with certain layers so that it becomes unclear where they came from. The last is where the funds are reintroduced so that they appear legitimate.



From left: Gordon Nardell KC (Twenty Essex – London); Suzanne Spears (Paxus LLP – London); Janet Whitaker (Clifford Chance – Washington DC); and, James Castello (Arbitration Chambers – New York).



Philippa Charles (Twenty Essex).

PANEL 3 – THE INTERACTION BETWEEN HUMAN RIGHTS AND INTERNATIONAL ARBITRATION

James Castello (Arbitration Chambers – New York) welcomed the delegates back from the lunch and chaired the third session of the conference, a thought-provoking discussion on the interaction between human rights and international arbitration.

Janet Whitaker (Clifford Chance – Washington DC) provided an overview of the different cases and scenarios in which human rights issues have arisen to date in both investment and commercial arbitration. Human rights have long formed part of the investment arbitration landscape and have been raised by both States and investors in offensive and defensive ways. Historically, human rights issues have featured less in commercial arbitration, developments such as the UNGP, the purpose-built Hague Rules of Business and Human Rights Arbitration, and new regulations requiring businesses to respect human rights and remedy adverse human rights impacts, such as the EU Corporate Sustainability Due Diligence Directive ("CSDDD"), may lead to more commercial disputes involving human rights concerns. Janet also highlighted obstacles to human rights claims and the risks of fragmentation that exist, not only due to different approaches to arbitrability, but also because of different regulatory trends around human rights, potentially creating tensions between jurisdictions.

Suzanne Spears (Paxus LLP – London) first discussed difficult and unfamiliar points of law that counsel and arbitrators will need to grapple with in business-to-business (B2B) and victim-to-business (V2B) human rights disputes. She focused on the questions of interpretation, applicable law, causation and remedies that will arise when contractual provisions require parties to undertake human rights due diligence. She noted that B2B disputes will also raise questions about shared responsibility for human rights impacts and remedies, and procedural challenges under multi-tier dispute resolution clauses, while V2B disputes will raise questions about arbitrability and procedural fairness. Suzanne then discussed the often-fraught relationship between investment and human

rights law, pointing out that arbitrators have tools at their disposal to help reconcile these two areas of international law.

Gordon Nardell KC (Twenty Essex – London) spoke on recent jurisprudence from the European Court of Human Rights on the adequacy of arbitral procedure and the structure of arbitration.

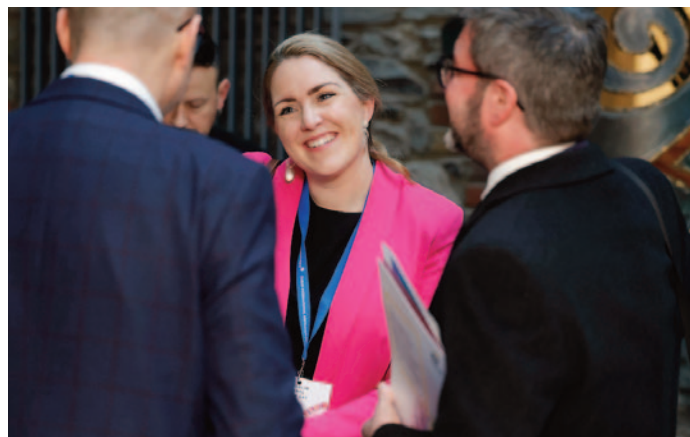
He also outlined the difficulties that can arise in commercial disputes where human rights are in play. He referred to recent decisions from the European Court of Human Rights regarding arbitration. He outlined three strands to these decisions. The first relates to procedure. When dealing with issues such as impartiality and especially waiver of objections, it's important to give proper weight to Article 6 rights. The second strand is that when substantive human rights issues arise in arbitration, national court review must be adequate. The final strand refers to enforcement of arbitral awards. His key take away is that where procedural or substantive human rights questions arise, tribunals and national courts need to address them by asking the right questions.



John J. Buckley (Williams & Connolly LLP – New York and Washington DC) and James Castello (Arbitration Chambers – New York).



From left: David Kavanagh KC (Independent Arbitrator – London); Colleen Hanley (Twenty Essex – London); John J. Buckley (Williams & Connolly LLP – New York and Washington DC); Canelle Goldstein (Addleshaw Goddard – Paris); and, Stephen Dowling SC (Bar of Ireland – Dublin).



Niamh Leinwather (Secretary General, Vienna International Arbitral Centre).

PANEL 4 – PRIVILEGE IN INTERNATIONAL ARBITRATION

Colleen Hanley (Twenty Essex – London) chaired the fourth session of the conference and an informative discussion on the question of privilege in international arbitration.

Stephen Dowling SC (The Bar of Ireland – Dublin) gave an overview of different types of privilege that practitioners will face. He referred to the three classic forms of privilege that exist in Ireland, among other jurisdictions: legal advice privilege; legal litigation privilege; and, without prejudice privilege. He also offered an insight into other types of privilege, including common interest privilege, public interest privilege, and the privilege against self-incrimination.

John J Buckley (Williams & Connolly LLP – New York and Washington DC) outlined the different forms of privilege in the US and the terms used in that jurisdiction. He noted that while there are similarities between Ireland and the UK, there are a number of differences with privilege law



James Coleman (Goldman Ismail).

in the US. The first difference he highlighted is attorney-client privilege extending to any employees who are providing information to in-house counsel so that they may advise the company. The next difference is the “work product doctrine”, which operates to protect what a party does in anticipation of litigation and this applies to both lawyers and clients. Finally, he referred to settlement privilege, which is a rule of evidence in the US and this extends to anyone who makes an offer of compromise on behalf of a company, and not only to lawyers.

Canelle Goldstein (Addleshaw Goddard – Paris) spoke on the position of privilege in civil law systems. Specifically, she outlined the doctrine of privilege as it applies in France. She noted that it does not exist as a substantive right. Rather, it is a professional obligation relating to certain lawyers. If breached, it can lead to criminal proceedings. As such, this professional obligation is strictly adhered to and there is no waiver possible. Interestingly in France, professional confidentiality also operates so that communications between two opposing lawyers cannot be shown to their clients. This creates difficulties in international disputes involving French and non-French lawyers, as it is difficult to reconcile the common law and civil law positions.

David Kavanagh KC (Independent Arbitrator – London) spoke on common interest privilege and how it applies in an arbitration. He noted that the US approach is to document the common interest position where one of two situations arise: (i) where you wish to share materials with co-defendants; or, (ii) where you wish to share legal advice with insurers, shareholders or funders. He contrasted this with the UK, where common interest privilege is only vaguely defined by the courts. He also touched upon public interest privilege, which often arises where there is a public element, even in private arbitrations. He noted that privilege is frequently lost in private arbitrations where a public relations firm has advised one or more of the parties. This dispenses with confidentiality, which, in turn, results in a party losing privilege.



From left: Andy Moody (Baker & McKenzie LLP – London); Dr Sonja Heppner (Norton Rose Fulbright – Australia); Natascha Tunkel (KNOETZEL – Austria); John McElroy (Fieldfisher – London); Mr Justice David Barniville (President of the Irish High Court); Matthew York (JAMS – New York); Ronnie Barnes (Cornerstone Research – London); Richard Alam (Macfarlanes LLP – London); and, Conna Weiner (JAMS – Boston).



Ronnie Barnes (Cornerstone Research).

PANEL 5 – QUICK FIRE ROUND

Mr Justice David Barniville (President of the Irish High Court) chaired an engaging fifth and final session featuring eight speakers, each discussing a distinct topic relevant to current issues affecting international arbitration.

John McElroy (Fieldfisher – London) spoke on the recent UK Supreme Court case of *UniCredit v RusChemAlliance*. In this case, the Court granted final anti-suit injunctive relief to restrain proceedings commenced in Russia. The contract in issue was governed by English law and contained an arbitration clause for an ICC arbitration seated in Paris. The central issue before the Supreme Court was whether the Court of Appeal was correct to decide that the arbitration agreements were governed by English law and therefore England was the proper place in which to bring the claim for anti-suit relief. This judgment demonstrates the pro-arbitration approach of the UK courts and also provides clarity that the parties may be able to obtain anti-suit relief from the English courts for foreign-seated arbitrations.

Dr Sonja Heppner (Norton Rose Fulbright – Australia) spoke on arbitral precedence in sports arbitration and investor-state arbitration. She noted that in a system of precedent, it is the judges who make law by specifying norms over time and it is undisputed that, in arbitration before the Court of Arbitration for Sport, such a system of precedent exists and that arbitrators do specify norms over time. She highlighted an issue that arises with the Court Arbitration for Sport where there is not equal access to precedent due to a backlog in publishing decisions on its website.

This problem does not exist for investor-state arbitrations. However, the issue for investor-state arbitrations is that the arbitrators tend to deny they are making “law”. Instead, they speak of an emerging consensus or of an emerging standard, as opposed to openly embracing their role as lawmakers.

Ronnie Barnes (Cornerstone Research – London) spoke about how to get the most from a damages expert. He noted that damages experts are typically engaged later in a case cycle and the junior members of a counsel team are typically given the task of working with the damages expert. In his experience, engaging a damages expert later in the case cycle is problematic. However, the counsel working with the damages expert having seniority is not important. It is more important for whoever is working with the damages expert to be genuinely engaged.

Matthew York (JAMS – New York) spoke on the use of technology and AI tools as an arbitrator. He began by proposing to the conference that despite the fears of many, the use of AI is okay. He then put forward that it is specifically okay for arbitrators to use AI. It is part of an arbitrator’s responsibility to think about the uses of AI in their practice, including its pros and cons. There are potential dangers – such as bias and AI “hallucinations”. There is also the risk of breaches of privacy and confidentiality, and the misuse of data.



Cathy Smith SC (The Bar of Ireland).

However, he also noted some positives such as preventing disputes through contract management, mapping potential risks and flagging breaches of contract. It can also assist the operation of arbitration through arbitrator selection, managing arbitral proceedings, and enhancing procedural efficiencies and the drafting of arbitral awards.

Conna Weiner (JAMS – Boston) provided some practical lessons for those working in life sciences and technology arbitrations. She spoke about difficulties that can arise where a breach of a collaboration agreement may be proven, but the issue of damages is outstanding. For arbitrators it can be frustrating to see someone establish liability only to fall at the final hurdle. She offered some observations on this issue and noted that lawyers appear to put off the topic of damages until later in the dispute process. There should be a focus on this issue earlier in the process. It is also important to have a factual foundation for the statements your expert will make. Finally, she noted that there should also be a focus on comparables, especially in risky life science areas.

Andy Moody (Baker & McKenzie LLP – London) outlined two recent Court of Appeal decisions on state immunity and the enforcement of International Centre for Settlement of Investment Disputes (ICSID) awards. He referred to the case of *Infrastructure Services v Spain*, which arose from an award of \$101 million arising from changes to Spain's renewable energy incentive regime. He also referred to *Border Timbers v Zimbabwe*, in which an award was granted against Zimbabwe requiring them to reinstate properties to the claimant and pay \$29 million, or alternatively to pay \$123 million. He noted two issues of interest that were dealt with by the Court of Appeal: whether state immunity is engaged with the process for service of an

ICSID award; and, whether article 54 of the ICSID Convention constituted a "prior written agreement" for a waiver of immunity.

Richard Alam (Macfarlanes LLP – London) spoke on the interaction between adjudication and arbitration. He outlined the temporary nature of adjudication outcomes as arbitration will still be open to either party to re-argue the substantial issues.

He referenced UK High Court jurisprudence, which has addressed what happens when parties agree to arbitration as the final tier of dispute resolution, but a losing party in an adjudication seeks to challenge a decision in the courts. He stressed that the key takeaways are that parties seeking to challenge an adjudication decision via arbitration should carefully consider the exact wording of the dispute resolution clause.

Natascha Tunkel (KNOETZEL – Austria) spoke on the topic of whether arbitration is ready for environmental, social and governance (ESG) issues. She first noted that this topic should be of particular interest to arbitration practitioners due to its recency and the significance it will have. She referred back to some of the themes touched upon during the conference, such as human rights and environmental issues, and noted that ESG will tie in with these.

She also referred to the Corporate Sustainability Due Diligence Directive, which will be implemented in 2029. According to its terms, companies will be obliged to include ESG clauses in contracts. Member states will be required to create legislation that terminates non-compliant contracts. As such, she posited that arbitrators will need to be wary of ESG issues, as the Directive will cause these issues to lead to arbitrations.

CLOSE OF CONFERENCE

Paul McGarry SC (The Bar of Ireland – Dublin) closed the conference by thanking all of the panellists for their valued contributions and the delegates for their attendance and participation in what was a captivating and informative event. A special thanks was extended to the conference sponsors, without whom this event would not be possible, and to Rose Fisher, the Executive Director of Arbitration Ireland, for her hard work and professionalism, which has been critical for the continued success of DIAD.



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