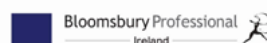


# Report on Arbitration Ireland's Dublin International Arbitration Day on 16 November 2018

Dublin International Arbitration Centre  
Distillery Building  
145-151 Church Street  
Dublin 7

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On Friday 16 November 2018, Arbitration Ireland held its sixth annual Dublin International Arbitration Day Conference. Over 100 delegates made up of leading practitioners in the international arbitration community gathered at the Dublin International Arbitration Centre. This year's conference boasted a record number of attendees, and welcomed leading arbitration lawyers to discuss a variety of topical issues in the field of international arbitration.

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## Opening Address

Gavin Woods (*President of Arbitration Ireland and Arthur Cox – Dublin*) opened the event, noting that the number of delegates present at the Conference (and the previous night's Young Practitioners' Seminar) combined with the judicial support at the event was a testament to the genuine interest in Ireland in the practice of arbitration.

Stephen Jagusch QC (*Quinn Emanuel - London*) delivered the keynote address, framing his remarks around where arbitration is today, with a focus on the need for arbitrators and counsel to be more rigorous in their approach to their work. He raised concern at the potential for arbitration to be viewed as a soft alternative to litigation due to the laziness of arbitrators and counsel. He advised practitioners to have confidence in their decision making processes, given that arbitration is receiving growing support from national courts, and suggested the need for more advocates, trained in their national jurisdictions, to practice in international arbitration.



## Session 1

### Session 1 – The Psychology of Persuasion within Arbitration

Ruth Byrne (*King and Spalding - London*) chaired the first session, noting that this topic was one of particular human interest, and invited the delegates to engage.

Duncan Matthews QC (*20 Essex Street - London*) focused his remarks on the importance of persuading a client to support, trust and have confidence in the strategy adopted by counsel. He noted that persuasion of the client is particularly important in international arbitration as clients will have many different expectations as to what the process will involve.

Michael Collins SC (*Bar of Ireland - Dublin*) discussed the importance of understanding and analyzing a decision-making panel's process. This will inform how counsel conducts her/his advocacy and the manner in which it is shaped to any particular tribunal. He suggested developing an awareness of a panel through observation in preliminary and procedural hearings.

Professor Janet Walker (*Arbitration Place and Outer Temple – London/Toronto*) addressed the importance of





effective communication and advocacy with an arbitral tribunal, suggesting that advocacy is just as important when sitting as an arbitrator. She advised arbitrators, after setting aside the necessary time, occasion and formats, to listen, discuss and reflect.

Tony Cole (*University of Leicester*) then gave a presentation on the impact of cognitive bias on decision-making, discussing that cognitive bias is about the manner in which a person's reasoning works, and is not a flaw: the existence of cognitive biases is simply a part of the reality of the way human minds work. He addressed the various psychological studies conducted in the area, including of anchoring and priming, and reflected on the impact those concepts have on decision-making in the judicial process.

## Session 2: Conduct within the arbitration process, including the conduct of arbitrators, counsel and witnesses

The second session, chaired by the Hon. Mr. Justice David Barniville (*Designated Arbitration Judge of the High Court of Ireland*), addressed issues relating to conduct of arbitrators, counsel and witnesses within the arbitration process.

Colleen Hanley (*20 Essex Street - Dublin*) discussed the various issues that arise regarding challenges due to bias in arbitration, and raised concern that these challenges are increasingly being used as a guerrilla tactic. In the context of a barrister set of chambers, she expressed concern that the perception continues that if an arbitrator from the chambers is appointed, then counsel from the same set cannot be. She noted that this gives rise to obvious difficulties, particularly in specialist areas. The perception that there will be bias is unfounded as practitioners from the same set of chambers appear against each other all the time.

In the context of preparation of witnesses for a hearing, Ms. Hanley noted that under the English and Irish Codes

of Conduct, counsel may familiarize a witness, but cannot conduct a rehearsal of a cross-examination, whereas in the United States you are considered in derogation of your duties if you do not conduct such a rehearsal. This discrepancy, she opined, inevitably leads to issues such as a failure to meet the expectations of clients, or an imbalance in the level playing field.

Paula Hodges QC (*Herbert Smith Freehills - London*) discussed issues that arise in arbitration as a result of its multinational and multicultural characteristics. She discussed that from an institutional perspective much time is taken attempting to ensure an experienced, impartial and effective tribunal is selected. From a counsel perspective, she noted it is rather different: while considering the factors such as experience and impartiality, counsel also requires at the very least that their client has a fair hearing. What is ultimately sought is an experienced, impartial, independent panel that will appreciate the case put forward. She went on to recommend, in the context of early stage issues, that the arbitrator ensures he or she is conflict-free, impartial and available. Ms. Hodges also discussed guerilla tactics, noting examples such as threatening of witnesses and counsel alike.

Philip Clifford QC (*Latham and Watkins - London*) discussed the changing disclosure rules as a result of the IBA guidelines. He opined that, from the outset, arbitrators must identify all the factors before them and determine what it is the parties are expecting, what their perceptions of the process are and what is to be done going forward. At a point where a consensus has recently been reached regarding the use of IBA rules, Mr. Clifford expressed concern about the Prague Rules, which now provide a completely different approach and may give rise to tensions that have yet to be explored.

Ronnie Barnes (*Cornerstone Research - London*) addressed the issues that are faced by expert witnesses when giving evidence, opining that experts desire to be prepared by counsel, but not coached.



John Gaffney (*Al Tamimi & Co. - UAE*) and Colm McInerney (*Skadden – New York*) gave interesting perspectives from practice in the Middle East and the United States respectively.

### ICCA 2020 Address

Andrew MacKenzie (*Scottish Arbitration centre*) gave a presentation on ICCA 2020, which is to be held in Edinburgh, Scotland.

Andrew noted that the Congress in Edinburgh is expected to be the largest ever international arbitration event in the world, and invited sponsorship and submission of papers to the Programme Committee. The theme of the Congress is Arbitration's Age of Enlightenment. Noting Scotland's significant role in the Enlightenment, Andrew quoted Voltaire's sensible approach: *"We look to Scotland for all our ideas of civilization."*

The Edinburgh Congress will focus on new ideas that can help the process progress even further, including those that come from new voices, in-house counsel, new centres of arbitration activity and beyond the field of arbitration.

## Session 3: Choice of Law in Commercial Contracts: the Perspective of Corporate Counsel

A thought-provoking session, chaired by Patrick Leonard SC (*Bar of Ireland - Dublin*), on Choice of Law in Commercial Contracts followed, at which panelists offered their opinions on the topic.

Anne-Marie Bohan (*Matheson - Dublin*) discussed technology related contracts, and in particular why such contracts have a tendency to lean toward litigation rather than arbitration for dispute resolution. She noted that arbitration is called on for very specific disputes within a contract, where the contract overall might still be litigated.

Siobhán Moriarty (*Diageo – Dublin and London*) then discussed the company's tendency to opt for contracts governed by English Law, as civil law contracts tend to be more vague and attract some uncertainty both in interpretation, the courts systems and the ability to enforce successful rulings. Ms. Moriarty also noted the popularity of the choice of Irish law in the context of the extent to which Brexit has had an impact, particularly in online services, describing a desire to keep online contracts within the European Union framework. She noted that this was perhaps driven by GDPR and the inevitable fact that the United Kingdom will become a third country for data exports.

Judith Lawless (*McCann Fitzgerald - Dublin*) discussed this topic from the Financial Services industry perspective. She explained that the International Swaps and Derivatives Association (ISDA) has a long history of creating solutions for the derivatives market participants in order to facilitate the more efficient elimination and reduction of risk in their business. One of the tools that they have produced to enable parties to reduce those risks is standard industry documentation, the primary document being a Master Agreement, which parties can use as a basis for negotiating their bilateral contracts. She noted that the terms can be modified, but for the most part are left alone, as parties rely on the fact that ISDA obtains legal opinions from law firms in a significant number of jurisdictions, which provides legal certainty to the users of its documentation.

ISDA has delivered a vote of confidence in Irish law and the Irish legal system, by introducing an Irish law version of its Master Agreement. The Irish law option would be particularly attractive post-Brexit given the similarities between Irish and English contract law and between the two legal systems. This would provide reassurance that the parties expectations as to how the Master Agreement would work would be respected.





## Session 4: Arbitral Awards: the good, the bad and the ugly

In a later session, chaired by Louis Flannery QC (*Stephenson Harwood - London*), panelists had an interactive discussion, drawing from personal experience, as to what makes and defines a good, bad or ugly arbitral award.

In particular, Paul Gardiner SC (*Bar of Ireland - Dublin*) explained *Fayleigh Ltd. v Plazaway Ltd.* as an Irish example of an ugly award. He noted that the content of the decision may not be the only factor in defining an award as 'ugly': speed is an important principle of arbitration, and this particular award took years to be given, and it was then overturned some seven years after the commencement of the process.

Matthew H. Adler (*Pepper Hamilton - Philadelphia*) was of the view that an award must be reasonable and reasoned if confidence in the system is to continue.

Anne-Karin Grill (*Vavrovsky Heine Marth - Vienna*) suggested that a good award is one that is fair to the losing party, where the thought process is visible and it is clear that the tribunal considered all of the arguments put to it. She was also of the view that a balanced costs decision is an important aspect of a good award.

In the context of a tribunal making an award on the basis of its own proposition that the obligation to act in good faith overrode the law of the contract as chosen by the parties, Dionysios Pantazis (*General Counsel - Huawei - Greece & Cyprus*) gave his perspective as to enforceability, noting that ultimately whether or not an award is good, bad or ugly is in the eye of the beholder. In the context of a set aside basis, he opined that it comes down to identifying, by reference to the law of the court that has jurisdiction to rule, whether or not a flaw in the award would be a ground to set aside that award. That is why, in his view, in response to whether an award is good, bad or ugly, there are as many answers as jurisdictions.



## Session 5: Rules-based Decision Makers: What Sport Can Teach Us

A lively session followed, chaired by Susan Ahern BL (*Bar of Ireland - Dublin*), on what is to be learned from sport in the context of decision-making. Donal Courtney (Former International Rugby Referee) discussed the role of a referee in successfully facilitating a rugby game. He identified communication, knowledge of the law, or law book, and physical fitness as the essential attributes of a good referee. He went on to note the importance of self-assessment and identifying personal mistakes through post-match analysis.

Ray O'Connor (*Former International Hockey Umpire*) discussed the role of a referee in successfully facilitating a hockey match, noting the importance of fairness, trust and safety. He noted the differences in the rules of hockey and rugby, explaining that referees in his sport almost arbitrate on every decision as there is no rule laid down to say a whistle must be blown. The secret, he said, is to let the game flow, keep it as safe as possible and deliver the best result possible.

Finally, Emily Beatty (*World Cup Hockey Finalist 2018*) discussed her experience from a player's perspective, and identified consistency and communication as key attributes in any good umpire.

Over the course of the day, the delegates and speakers had the opportunity of getting to know one another and exchanging views on current topics. The Conference was a great success and Arbitration Ireland looks forward to seeing the delegates and speakers at its future events. ■



## The speakers at the conference are listed below:

### Opening of conference and welcome address

Gavin Woods (President of Arbitration Ireland, Partner Arthur Cox- Dublin)

**Keynote Address:** Stephen Jagusch QC, Quinn Emanuel

### Session 1 - The psychology of persuasion within arbitration

Ruth Byrne, King & Spalding  
 Duncan Matthews QC, 20 Essex Street  
 Michael Collins SC, Bar of Ireland  
 Professor Janet Walker, Arbitration Place & Outer Temple  
 Tony Cole, University of Leicester

### Session 2 - Conduct within the arbitration process, including the conduct of arbitrators, counsel and witnesses

Mr. Justice David Barniville, High Court of Ireland  
 Paula Hodges QC, Herbert Smith Freehills  
 Colleen Hanley, 20 Essex Street  
 Philip Clifford QC, Latham and Watkins  
 Ronnie Barnes, Cornerstone Research  
 John Gaffney, Al Tamimi & Co  
 Colm McInerney, Skadden

ICCA 2020 – Address by Andrew MacKenzie (Scottish Arbitration centre)

### Session 3 - Choice of law in commercial contracts: the perspective of corporate counsel

Judith Lawless, McCann Fitzgerald  
 Siobhán Moriarty, General Counsel & Company Secretary, Diageo  
 Anne-Marie Bohan, Matheson  
 Patrick Leonard SC, Bar of Ireland

### Session 4 - Arbitral Awards: The good, the bad and the ugly

Louis Flannery QC, Stephenson Harwood  
 Paul Gardiner SC, Bar of Ireland  
 Matthew H. Adler, Pepper Hamilton  
 Dionysios Pantazis, General Counsel, Huawei – Greece & Cyprus  
 Anne-Karin Grill, Vavrovsky Heine Marth

### Session 5 - Rules based decision makers - what sport can teach us?

Emily Beatty, World Cup Hockey Finalist 2018  
 Donal Courtney, Former International Rugby Referee  
 Ray O'Connor, Former International Hockey Umpire  
 Susan Ahern BL, Bar of Ireland

### Closing Remarks

Gavin Woods (President of Arbitration Ireland, Partner, Arthur Cox- Dublin)



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