ArbitrationIreland
The Irish Arbitration Association

Dublin International Arbitration Day 2017 Report

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On Friday 10 November 2017, Arbitration Ireland held its fifth 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 delegates, and welcomed a number of leading arbitration lawyers to discuss a variety of topical issues in the field of international arbitration.

Opening Address

Gavin Woods *(President of Arbitration Ireland and Arthur Cox – Dublin)* and Seamus Woulfe SC *(Attorney General of Ireland)* 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 reflection of the genuine interest in Ireland in the practice of arbitration. Indeed, Seamus Woulfe acknowledged the recent explosive growth of alternative dispute resolution in Ireland and observed that the Conference attendance was proof of the many developments in the area.

Several engaging and informative panel discussions followed the opening remarks.

Session 1

Arbitration – Judicial Experience from Ireland and South Africa

The opening session concerned the judicial experience in Ireland and South Africa, and involved a comparative discussion between the Hon. Mr. Justice Frank Clarke, Chief Justice of Ireland, and the Hon. Malcolm Wallis, Judge of the Supreme Court of Appeal of South Africa. They insightfully shared their perspectives on the interaction between the judicial experience and arbitration.

Michael Collins SC, panel chair, enquired as to what extent arbitration has taken most of the "big cases" away from the courts, to which Judge Wallis responded that virtually every major commercial contract now has

a clause providing for arbitration. He remarked that the bigger commercial cases are increasingly being decided behind closed doors, with no facility for the publication of arbitration awards, which he warned might have a definitive impact on the development of the law.

Mr. Justice Clarke echoed Judge Wallis's concerns, noting that a development of the case law is required in order to allow the law to be modernized in the absence of legislative change. He remarked that if a stage was reached where there was virtually no case law allowing for the development of the common law, there could be a serious issue. Michael Collins SC raised the question of whether there are lessons that litigators can learn from the arbitral process, and the judicial perspective from the panel in that respect was that, while it may depend on the arbitrator in any given case, one particular aspect of the arbitral process that litigators could benefit from

observing is a more detailed statement of the case at the outset, which Mr. Justice Clarke called *"a significant front-loading of the detail of the case that has to be put forward."* They warned of the *"protective medicine"* practice that has developed in litigation, whereby the pleading process has become uncontrollably wide.

Finally, Michael Collins SC enquired as to what role the courts could play in supporting the arbitral process in maintaining ethical standards and disciplining the conduct of parties to arbitration. Mr. Justice Clarke suggested that this may be the most important remaining job of the courts in respect of arbitration: to oversee the process is properly conducted, especially given that the capacity of the Courts to interfere with the merits of the arbitral decision has been almost completely removed.

Session 2:

Brexit – Is Ireland more attractive as a choice of seat in the wake of Brexit?

The second session addressed issues relating to Brexit and whether Ireland has become more attractive as a choice of seat in its wake. The panel, chaired by Paul McGarry SC (*Chairman of the Council of the Bar of Ireland*) framed their remarks around the relative merits of 'Dublin versus London' and the potential for future logistical difficulties associated with Brexit.

Colleen Hanley BL (*20 Essex Street - London)* observed that the legal uncertainty associated with the draft EU Withdrawal Bill could provide an advantage for Dublin, as the supremacy of EU law will remain in place in Ireland. In the context of whether arbitration presents a feasible solution to some of the legal issues created by Brexit, Maurice Kenton *(Clyde & Co. - London)* noted that enforcement of arbitral awards does not depend on EU Membership.

The panel debated on whether free movement rights will be affected and whether can we expect movement of practitioners and specialists. Gillian Cahill BL noted the need for reciprocity in this regard, and Colleen Hanley opined that the Lawyers' Services Directive must be retained for the mutual recognition of lawyers to travel between Member States and appear before Tribunals.

The panel spoke about third party funding of litigation and how that impacts on arbitration. Nicholas Peacock *(Herbert Smith Freehills - London)* was of the view that third party funding has not of itself been a huge driver of growth in arbitration, and observed that it is one part of the overall development rather than a game changer in itself.

On the question of whether the UK's exit from the European Union could trigger viable investment arbitration claims against the UK, Janet Whittaker *(Clifford Chance - Washington DC)* noted that while there may be claims made, how successful they will be is a different question. While commenting that investors will claim that their reasons for investment included access to the European Market, she remarked that it may be difficult for them to demonstrate actionable harm and a failure of long-term notice.

Session 3:

Damages claims in International Arbitration

A thought-provoking session, chaired by The Hon. Mr. Justice Brian McGovern, on Damages Claims in International Arbitration followed, at which panelists offered their opinions on the topic. Charlie Caher *(Wilmer Hale - London)* opined that the mutual incomprehension between lawyers and quantum experts in this regard does clients a great disservice. He noted that the basis

for any damages analysis should be an assessment of the legal basis for the claim, understanding the applicable legal and policy standards, making strategic procedural decisions and choosing quantum experts. He also referred to the importance of keeping sight of the broader considerations of other potential categories of compensatory and non-compensatory damages. Adrian Cole *(King & Spalding - Abu Dhabi)* continued in this line of discussion, noting that a clear understanding of the recoverability of damages in any particular jurisdiction is also critical. He mentioned the importance of perspective and the genuine consideration required in relation to what costs can be recovered i.e. are they actual losses and how are they proved?

Patrick Taylor *(Debevoise & Plimpton – London)* then discussed the procedural questions involved in damages, and referred to some potentially more radical suggestions such as reverse-bifurcation. Erin McHugh *(NERA - London)* gave the expert's opinion in this regard, discussing how to make effective use of a damages expert in international arbitration and the role of the expert at each stage of the process. In particular, she advised engaging with an expert from the early stages of the proceedings, as their assistance in framing the case and assessing its strengths and weaknesses is invaluable.

Session 4:
Interim measures: Emergency Arbitrators versus the Courts

In a later session, chaired by Susan Ahern BL, panelists addressed issues relating to interim measures in the context of 'Emergency Arbitrators versus the Courts'.

Klaus Peter Berger *(DIS - Cologne)* spoke about the beginnings of the concept of emergency arbitration, while Sophie Lamb *(Latham & Watkins - London)* noted that a party should consider a number of factors in deciding on the route of emergency arbitration, including confidence in the case and the potential outcomes. Her perspective was that the most experienced and successful arbitrators in the world routinely make themselves available for emergency appointments and are incredibly efficient, despite what might be the broader perception as to the opposite. The panel shared their own experiences in emergency arbitration settings and discussed several important aspects within this area, including the most frequent interim measures sought, ex-parte applications in emergency arbitrations and the enforceability of emergency decisions.

Session 5:
Conflicts of interest, disclosures and challenges

A lively session on the issues and challenges associated with Conflicts of Interest and Disclosures followed. Chaired by Rory Kirrane *(Mason Hayes & Curran – Dublin)*, the panel began by sharing their perspectives on the International Bar Association (IBA) "Guidelines On Conflicts Of Interest in International Arbitration", addressing questions as to whether they are necessary, whether they are comprehensive and how they sit with local law in various jurisdictions. Pierre Yves Tschanz *(Tavernier Tschanz - Geneva)* suggested that these guidelines seemed to have become part of a trend towards '*soft regulation*' of International Arbitration. He noted that if the Guidelines did in fact purport to change or tweak the test for independence under the applicable Arbitration Law, they could create more legal uncertainty by conflating the issues of independence, waiver and disclosure.

Tomasz Wardyński *(Wardyński and Partners - Warsaw)* did not agree with the description of soft law and suggested that such an approach provided convenience to practitioners. Dan Terkildsen *(Danders & More - Copenhagen)* also disagreed, indicating that the guidelines were guidelines, and nothing more.

Peter Rogan *(Ince & Co – London)* addressed the test for apparent bias in the context of the English courts' interpretation of the guidelines. He submitted that they are perhaps too specific, and that the detail required for disclosures creates a platform for challenges. He noted the recent English case of *W v M*, where it was held that on a case specific basis, notwithstanding the conflict came within the definition of the red non-waiverable list, it was

clearly not a case where the Arbitrator should be recused.

The question as to whether there are consequences to Arbitrators also acting as counsel arose, which Dan Terkildsen noted as being an inevitable issue in most jurisdictions, particularly in Treaty Arbitrations, as such decisions are published and it is thus clear what views individuals take on certain issues.

Session 6:
Recent developments in International Arbitration

The final panel rounded out the day with an overview of recent developments in the area of International Arbitration. David Barniville SC acknowledged the support and respect the Irish Courts offer to the arbitral process. He outlined the importance of the consistent jurisprudence that has developed in the area regarding stay applications and set aside applications, and remarked on the importance of the decision in *Sterimed Technologies International v. Schivo Precision Ltd.* [2017] IEHC 35 from this year, where McGovern J. decided that in determining the existence of a valid arbitration agreement, the appropriate approach to be taken was a full judicial consideration. The recent decision in *Persona Digital Telephony Ltd. v. Minister for Public Enterprise* [2016] IEHC 187, was discussed, where the Supreme Court held that while third party funding in litigation fell foul of the rules of champerty in this jurisdiction, the Court was keen to stress that changing the law in this regard was not a matter for the Court, but for the legislature. David Barniville noted that there were signs of potential legislation in the area, which would abolish maintenance and champerty, but he was slow to suggest that this would have any real effect on arbitration. Julianne Hughes Jennett *(Hogan Lovells - London)* then focused largely on the topic of human rights in the context of arbitration, in particular questions around the possibility of arbitration for victims of human rights infringements and whether such a route is appropriate.

Ed Lenci (*Hinshaw & Culbertson - New York)* spoke on the topic of the use of class action waivers in arbitration agreements in the United States, and Jim Bridgeman SC (*incoming President of the Chartered Institute of Arbitrators*) discussed the growth and extent of the Institute around the globe, and the potential for development into the future.

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 remarks and welcome address

Gavin Woods *(President of Arbitration Ireland and Arthur Cox – Dublin)*

Seamus Woulfe SC *(Attorney General of Ireland).*

Session 1
Arbitration – Judicial Experience from Ireland and South Africa

Michael Collins SC (*Bar of Ireland*) (chair)

The Hon. Mr. Justice Frank Clarke, Chief Justice of Ireland

The Hon. Malcolm Wallis, Judge of the Supreme Court of Appeal of South Africa

Session 2
Brexit – Is Ireland more attractive as a choice of seat in the wake of Brexit?

Paul McGarry SC (*Chairman of the Council of the Bar of Ireland*) (chair)

Gillian Cahill BL *(Bar of Ireland)*

Janet Whittaker *(Clifford Chance - Washington DC)*

Maurice Kenton *(Clyde & Co. - London)*

Nicholas Peacock *(Herbert Smith Freehills - London)*

Colleen Hanley *(20 Essex Street – London)*

Session 3
Damages claims in International Arbitration

The Hon. Mr. Justice Brian McGovern *(Designated Arbitration Judge of the High Court of Ireland*) (chair)

Adrian Cole *(King & Spalding - Abu Dhabi)*

Erin McHugh *(NERA - London)*

Charlie Caher *(Wilmer Hale - London)*

Patrick Taylor *(Debevoise & Plimpton – London)*

Session 4
Interim measures: Emergency Arbitrators versus the Courts

Susan Ahern BL (*Bar of Ireland*) (chair)

Sophie Lamb *(Latham & Watkins - London)*

James Hargrove *(Eversheds Sutherland - Geneva)*

Klaus Peter Berger *(DIS - Cologne)*

Philippe Cavalieros *(Simmons & Simmons – Paris)*

Session 5
Conflicts of interest, disclosures and challenges

Rory Kirrane *(Mason Hayes & Curran – Dublin)* (chair)

Pierre Yves Tschanz *(Tavernier Tschanz - Geneva)*

Tomasz Wardyński *(Wardyński and Partners - Warsaw)*

Dan Terkildsen *(Danders & More - Copenhagen)*

Peter Rogan *(Ince & Co – London)*

Session 6
Recent developments in International Arbitration

David Barniville SC *(Bar of Ireland, 20 Essex Street)* (chair)

Ed Lenci (*Hinshaw & Culbertson - New York)*

James Bridgeman SC *(Incoming President of CIArb for 2018)*

Julianne Hughes-Jennett *(Hogan Lovells - London)*

Closing Remarks

Gavin Woods *(President of Arbitration Ireland and Arthur Cox – Dublin)*

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