ArbitrationIreland
The Irish Arbitration Association

Dublin International Arbitration Day 2016

Friday 18th November 2016

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Dublin International Arbitration Day took place on Friday, 18 November 2016, at the Dublin Dispute Resolution Centre

The Vice-President of Arbitration Ireland, Gavin Woods (since appointed President), opened the conference by welcoming over 100 delegates to Dublin and to the DDRC and by introducing Mr. Justice Brian McGovern, designated arbitration judge of the High Court, and Paul McGarry SC, Chairman of the Bar Council, who made brief remarks.

Keynote Address:

The main proceedings opened with a keynote address from James Castello, partner in King & Spalding's Paris office. Mr. Castello framed his remarks around lessons to be learned from the 2016 U.S. presidential election by those involved in the area of investor-state dispute resolution. First, Mr. Castello noted the "looming death" of the Transatlantic Trade and Investment Partnership (TTIP) treaty in light of Donald Trump's election victory and suggested that now was an opportune moment to examine more deliberatively investor-state dispute resolution models—a topic that caused much controversy in the debate over TTIP.

Second, Mr. Castello noted that as with media coverage of the U.S. election, which he felt was sometimes seriously deficient, media coverage of the controversy over investment arbitration resulted in a very poorly informed public debate on the issue. He called on investors to play a more active role in the debate over investor-state dispute resolution, and urged arbitration practitioners to contribute also.

Finally, Mr. Castello referenced the cynicism that had set in among many observers of the U.S. election process.

He observed that one might take a similarly cynical view of the EU's promotion of its proposed investment court as a means of protecting the public from allegedly self-interested "corporate lawyers" who arbitrate investment disputes.

Mr. Castello then took on three issues of particular importance that he said have been distorted in the public debate around investor-state dispute resolution. As to the first, namely the criticism that investment arbitration is lacking in transparency, Mr. Castello pointed out that solutions to the transparency problem in investor-state arbitration have already been developed, but have not yet been widely deployed. These are the 2013 UNCITRAL Rules on Transparency on Treaty-based Investor-State Arbitrations and the 2014 Mauritius Convention on Transparency.

The second issue that Mr. Castello viewed as having been distorted in public debate is the so-called "regulatory chill"—that is, the fear that investor-state arbitrations impact states' ability to regulate health, safety, and the environment. Mr. Castello noted that the premise of the "regulatory chill" objection is both unexamined and largely erroneous, and he questioned how an alternative model for resolving these disputes would be markedly different. He also pointed out that despite widespread publicity around certain high-profile cases, the actual number of investor-state cases implicating health and safety regulations is quite small.

The third issue tackled by Mr. Castello concerned proposed moves away from the principle inherent in investor-state arbitrations that parties appoint the tribunal. Mr. Castello drew on academic papers and empirical studies to argue that state-appointment of judges to an investment court risks leading to national bias in decision-making, the possibility that judges will be influenced by prospects of re-appointment to the court, and a loss of credibility and confidence among investors in the process because of their exclusion from the selection of adjudicators.

Session 1. Choice of law – are there limits?

The first session was chaired by Mr. Justice Donal O'Donnell, Judge of the Supreme Court of Ireland.

John V.H. Pierce, partner in WilmerHale's New York office, provided an overview of the issues surrounding the choice of law in international arbitrations. In particular, he addressed the significance of the interplay between the choice of law that applies to the parties' underlying contract, the arbitration agreement, the arbitral proceedings, and conflict of law rules. Mr. Pierce then discussed the U.S. approach to choice of law, highlighting the somewhat complex scheme of federal law and state law, and the general principles upholding party autonomy in this area.

Louis Flannery, partner in Stephenson Harwood's London office, focused his presentation on questions concerning the law applicable to the arbitration agreement (as distinct from the underlying contract), specifically as addressed in certain andmark decisions by the English courts. Mr. Flannery drew attention to a split in the authorities in England and Wales concerning the applicable law in this regard.

Duncan Matthews QC, barrister at 20 Essex Street Chambers in London, explored the extent to which parties are at liberty to choose the law applicable to the merits of their dispute and how things can go wrong when they do. He noted the general rule that parties have freedom of choice as to the applicable law, but highlighted the specific limitations and restrictions on that freedom stemming, for the most part, from public policy considerations. Mr. Matthews also observed an increasing tendency of EU law to limit the power of parties to choose the applicable system of law for their dispute. Finally, he drew on arbitrations he was involved in to show how even when parties are careful in their choice of law, complications can arise that result in the application of a particular system of law contrary to the parties' expectations.

Peter Cullen, partner in Stikeman Elliot's Montreal office, described the choice of law regime in Canada. He gave an overview of the development of the legal system in Quebec, in particular the dual civil law and common law system, and explained how that fits into the federal structure of the Canadian system, specifically the sources of law governing parties' choice of law. Mr. Cullen then described the leading Canadian Supreme Court case on choice of law in arbitrations under the Quebec civil code, noting that the Court found there to be unrestricted choice of law. He remarked that he saw no reason why Canadian provinces with common law systems would not also take that approach.

Session 2. Third party funding: the challenges for tribunals: does it change the game?

The second session was chaired by Colm Ó hOisín SC, then President of Arbitration Ireland.

Ania Farren, partner in Berwin Leighton Paisner's London office, is a member of the ICCA-Queen Mary task force on third party funding in international arbitration. She framed the discussion by giving an account of the main issues being examined by the task force, including the definition of third party funding, conflicts arising from third party funding and the question of whether funding should be disclosed, the question of how third party funding should impact the recovery of costs, the manner in which third party funders should be regulated, and the significance of the involvement of third party funders for the doctrine of privilege.

Steven Friel, from Woodsford Litigation Funding in London, brought the perspective of a third party funder to the discussion. He offered five practical reasons in favour of a permissive approach to third party funding that abandons the principles of champerty and maintenance: first, his business model only works if he invests in good cases; he will go out of business if he invests in spurious claims. Second, he works with good lawyers who protect the judicial system and protect the clients they advise; third, defendants' lawyers are a safeguard: if they can pick holes in what the claimant and its funders are doing, they will do exactly that. Fourth, he only invests in claims going before reputable tribunals that will not allow judicial process to be disrupted. Finally, if he interferes with the claimant's process of seeking relief, he can be sure that the

claimant will plead that interference as a reason not to pay him.

Joseph Matthews, partner in Colson Hicks Eidson's Miami office, offered the view from the United States. Being a plaintiff's attorney whose economic model depends on contingency fees, Mr. Matthews described himself as being in the litigation funding business for almost 40 years. He told how his firm, and others like it, have millions of dollars invested at any one time in cases against large corporations. In general, Mr. Matthews remarked that he viewed third party funding as striking a balance between the desirability of having an independent legal profession and avoiding limitations on access to justice.

Following the Session 2 speakers' opening remarks, Mr. Ó hOisín led a more in-depth discussion about the issues raised. He and the speakers had an exchange about the considerations that apply to third party funding of arbitrations as distinct from litigation before courts. Mr. Friel noted in this regard that international arbitration is a more hospitable environment for funders and that the objection to third party funding stemming from the risk of interference with the administration of justice has no application in the area. Mr. Ó hOisín also elicited the views of the speakers concerning the disclosure of third party funding to adversaries; in this regard Ms. Farren noted that there is a broad general approach that tribunals will ask a party whether they are being funded and the identity of the funder, but will not order the disclosure of the funding agreement. Mr Matthews highlighted the desirability of disclosure of the existence of funding arrangements so that potential conflicts of interest on the part of the arbitrator can be avoided. The discussion then turned to the effect of third party funding on the dynamics of arbitration and the issues of security for costs and the recovery of costs.

Session 3. Arbitration in banking, financial services and reinsurance: current practice and future potential.

The third session was chaired by Ian Talbot, Chief Executive of Chambers Ireland.

Gerard Meijer, partner in NautaDutilh's Amsterdam office, set the scene for Session 3 by noting how financial institutions were in the past reluctant to embrace arbitration.This, he said, was due to several factors, including institutions' fear that arbitrators would split the baby, a feeling that appellate mechanisms were needed for the disputes institutions were involved in, and the unarbitrability of several types of disputes commonly arising for institutions—e.g., insolvency and regulatory matters.

Mr. Meijer went on to describe how the situation has changed and identified some of the reasons for that change, including: the financial crisis saw a wave of claims against and between financial institutions, creating a need for new dispute resolution initiatives; institutions became interested in having disputes resolved by arbitrators expert in complicated financial issues rather than by judges who do have that technical expertise;and a greater understanding among institutions of the global regime of recognition and enforcement of arbitration awards.

Noah J. Hanft, President and CEO of the International Institute for Conflict Prevention and Resolution (CPR) in New York, described his background as General Counsel at MasterCard and the work of his current organisation. Mr. Hanft spoke about how the CPR developed from a think tank and membership organisation into an ADR service provider, and has developed a set of administrative arbitration rules that introduced innovations in various aspects of the arbitral process, including setting limits on the timeline of an arbitration and screening from an arbitrator the identity of the party that nominated him or her. Mr. Hanft also remarked that the CPR is unique insofar as it is focused on dispute prevention.

Edward K. Lenci, partner in Hinshaw & Culbertson's New York office, began his presentation by observing that insurers and reinsurers have traditionally sought to resolve their disputes through arbitration. Mr. Lenci attributed this mainly to these parties' desire to have adjudicators with in-depth knowledge of the business. This was especially important in the reinsurance field, he said, since reinsurance contracts often contain ill-defined language and a legalistic interpretation risks missing the spirit of the enterprise of reinsurance. There were other reasons for insurers' and reinsurers' traditional preference for arbitration, Mr. Lenci explained, including finality, flexibility, the ease of enforcement, and the cost. Mr. Lenci noted, however, that it is increasingly common for insurers and reinsurers to opt for litigation instead of arbitration. He put this down to the likelihood that judges will better control proceedings, will limit discovery, and will be amenable to granting summary judgment. He also cited the very high cost of arbitrators as a factor weighing in favour of litigation.

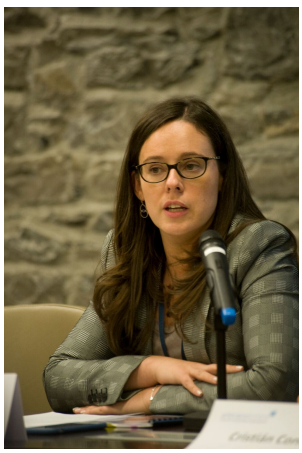
Mr. Lenci also discussed the work of the ARIAS US Dispute Resolution Process, an organisation working to improve the insurance and reinsurance arbitration process, and noted that arbitrations in these areas have traditionally been ad hoc, not involving organisations such as AAA and JAMS.

Session 4. Diversity in international arbitration: what can be done to expand the pool of arbitrators?

The fourth session was chaired by Nicola Dunleavy, partner in Matheson's Dublin office.

Annet Van Hooft, partner in Bird and Bird's Paris office, began by addressing the question of why we should be thinking about diversity in the area of international arbitration. She offered several reasons, including the importance that each party perceives themselves to be represented on the arbitration panel, an element that in her view goes to the question of the legitimacy of the tribunal. Ms. Van Hooft also observed that diversity leads to better decision-making—specifically, having people from different backgrounds leads to the consideration of a wider array of issues and more nuanced views.

Ms. Van Hooft went on to highlight the roles of the different participants in the arbitral process in promoting diversity. She noted, for instance, that the publication of data on the profiles of arbitrators by institutions is likely to contribute to diversity, that counsel ought to propose a more diverse range of arbitrators to their clients, and that arbitrators themselves can be more thoughtful about promoting diversity among fellow arbitrators and administrative secretaries.



Ruth Byrne, partner in King & Spalding's London office, began by discussing the question of whether gender quotas would be an appropriate and desirable means of improving gender diversity in international arbitration. Ms. Byrne proceeded to offer several proposals for improving gender diversity in international arbitration, including the enhancement of flexibility in work practices at law firms, increasing the visibility of female arbitrators, including by consciously promoting colleagues, and improving engagement at all levels.

Cristian Conejero, partner in PPU's Santiago office, began by noting the persistent dominance of North American and Western European arbitrators and observing that the arbitral process,including choice of arbitrators, is guided by conservatism. He observed, however, that arbitrations are more commonly being seated in Asia, Latin America, and elsewhere, and that diversity of nationality among arbitrators has improved as a consequence. Some changes, he said, have been dramatic, such as the high prevalence of cases in Latin America involving contracts governed Latin American countries' laws—this has led parties to seek the appointment of arbitrators from the region who can master the governing law. Finally, Mr. Conejero remarked that nationality of counsel and the changing legal market play a part in diversity of nationality among arbitrators, as does the growth of regional arbitral institutions.

Ms. Dunleavy ended the discussion by pointing out two milestones for gender diversity recently achieved in Ireland: the fact that all of the top legal positions in Ireland are held by women and, for the first time in western Europe, the sitting of an all-female Supreme Court.

Debate: Ireland v. New Zealand

The conference ended with a high-spirited and good-natured debate on the following motion: "That Auckland is a better arbitration seat than Dublin."

The debate was chaired by Audley Sheppard QC, partner in Clifford Chance's London office. Wendy Miles QC, partner in Boies Schiller & Flexner's London office, and James Hosking, partner in Chaffetz Lindsey's New York office, argued for the motion. Michael Collins SC, from the Bar of Ireland, and Maureen Ryan, General Counsel of AEI Services LLC in Houston, argued against it.

Representatives of each jurisdiction argued passionately for their side, citing, among other important factors, the ubiquity of Michelin-starred restaurants in Dublin, the quality of pinot noir in Auckland, the proximity of New Zealand to Antarctica, and the geographic centrality of Dublin among global commercial centres.

Some discussion also took place concerning the world dominance of the All Blacks in rugby and the Irish emigrant, Dave Gallagher, who was instrumental in establishing that dominance as captain of the original All Blacks in the early years of the twentieth century. In the end, Mr. Sheppard presaged the outcome of this year's rugby series between Ireland and New Zealand and called the debate a draw.

Young Practitioners Event

This year's event was preceded by a Young Practitioners Event chaired by Joseph Matthews. The panels discussed the following topics:

- Guerrilla tactics in international arbitration
- Evidential issues in international arbitration

The speakers included:

- Colm McInerney (Skadden – New York)
- Diana Bowman (White & Case – Paris)
- Barry Mansfield (Bar of Ireland)
- Niamh Leinwather (Freshfields – Vienna)
- Michael Howe (WilmerHale – London)
- Maria Kennedy (Matheson)
- Patrick Mair (Bar of Ireland)
- Risteard de Paor (White & Case – Paris)
- Robert Rooney (A&L Goodbody – Dublin)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