YOUNG PRACTITIONERS SEMINAR 2019

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On Thursday, 14th November 2019, the Young Practitioners Committee of Arbitration Ireland held its annual Young Practitioners' Seminar 2019 in the Dublin International Arbitration Centre, Distillery Building, Church Street, Dublin. The free seminar was open to all practitioners and those with an interest in arbitration, not just attendees of the Dublin International Arbitration Day, and provided for an engaging, entertaining and educational discussion on some of the current issues in international arbitration. After some opening remarks by Paul Gardiner SC, President of Arbitration Ireland, Sinead Drinan BL, Chair of the Young Practitioners Committee, welcomed the attendees.

Chaired by Patrick Leonard SC (*Bar of Ireland*), the panellists were Nadia Smahi (*Bär & Karrer - Geneva*), Jerry Healy (*Willkie Farr & Gallagher - London*), Daragh Brehony (*Pérez-Llorca - Madrid*), Gerard James (*William Fry - Dublin*), Cameron Forsaith (*Eversheds Sutherland – London*), Anne Collins (*Clifford Chance - London*), Rahul Donde (*Lévy Kaufmann-Kohler - Geneva*) and Niamh Leinwather (*Freshfields Bruckhaus Deringer- Vienna*).

PANEL 1: Regional "Hot Topics" in International Arbitration

The opening session was themed "hot topics" in international arbitration and the panellists' varied regional perspectives made for a very interesting discussion. It centered around the scope of challenges to arbitral awards on public policy grounds and recent revisions and proposals for revisions to various national arbitration laws.

Daragh Brehony (*Pérez-Llorca*) informed attendees that the "hot topic" in Spain is public policy as a ground for annulment of an arbitral award. He referred to a case concerning the prominent Larios family which has been accepted to the Constitutional Court of Spain following the annulment of an award on public policy grounds by the Superior Court of Justice of Madrid. He suggested that this was an outlier case, contrasting with the established jurisprudence of Spain and indicated that the case will be followed with great interest.

Nadia Smahi (*Bär & Karrer*) accepted that given Switzerland is a well established and stable environment for arbitration, it was in fact not straightforward to find a hot topic to discuss! However, some proposals to revise parts of the Federal Law to codify some of the recently refined principles of case law, as well as to bring the law up to date with modern technology, continue to be discussed by the arbitration community. She noted that Switzerland is widely considered a "safe seat", where courts are reluctant to interfere in the arbitral process, and challenges to arbitral awards will only succeed in the most exceptional of cases.

Jerry Healy (*Willkie Farr & Gallagher*) shared interesting perspectives from the UK - also described as being a "pro-arbitration" jurisdiction. He spoke specifically about challenges under section 68 of the English Arbitration Act 1996, and that out of 112 applications based on an alleged "serious irregularity" in the arbitral process, just three were successful.

Gerard James (*William Fry*) outlined the Irish position and drew attention to the recent case of *Ryan v O'Leary* [2018] IEHC 660. This case arose, like many good stories do, out of a broken down second-hand Opel car. The Applicant car owners sought to have the arbitral award set aside pursuant to Articles 34(2)(a)(ii) and (iii) and 34(2)(b) of the UNCITRAL Model Law. In finding against the Applicants, Barniville J., the High Court's designated arbitration judge, traced the policy of the jurisdiction to set aside arbitral awards and reiterated the "*desirability of making an arbitration award final in every sense of the term*" (§32).

Louis Flannery QC in interview with Louise Reilly BL

Next up came a very lively interview of Louis Flannery QC (*Stephenson Harwood*), with Louise Reilly BL (*Bar of Ireland*) including in her introductory remarks the fact that Louis has a cocktail named after him. When asked what makes a good arbitrator, Louis said that one should be gracious and kind to counsel - and to do the reading before the hearing. He said that it was a privileged position to be counsel or arbitrator, a point which would be picked up again in the final panel.

Considering the "Catch 22" of how to get appointed as an arbitrator with little or no experience, Louis advised aspiring young arbitrators to apply to become a member of the Chartered Institute of Arbitrators (CIArb), and to consider taking the CIArb fellowship exams in time.

One of the interesting stories Louis shared was of his best experience as counsel; a cross examination of a multi-billionaire that started with *"shall we play a game?"*. He noted that being tough with a witness can sometimes just be part of the job. On the subject of the integrity of the arbitral process, he discussed the different trends in investment treaty arbitrations and commercial arbitration and that there can be a perception that confidentiality of proceedings can offer a carapace for bad behaviour. Considering the offering of the independent Bar, Louis acknowledged the quality, talent and depth of expertise of the Bar but also the dedication a barrister can offer to a case. He agreed that solicitor advocates are increasingly carrying out the role of counsel, but that reforms to the strict separation of the professions go both ways. Echoing a point made throughout the evening, the advocacy skills of barristers was noted, along with the importance of realising that different cases and different tribunals require different approaches.

PANEL 2: Guerrilla tactics

Patrick Leonard SC picked up on Louis Flannery's point that it is a privilege and an honour to represent a client, and noted the Bar of Ireland's Code of Conduct which requires barristers to act without fear or favour, and asked how this duty could be best achieved in a world of guerrilla tactics.

Niamh Leinwather (*Freshfields Bruckhaus Deringer*) suggested that there is no clear definition of guerrilla tactics, and that it can be used to describe the extremes of witness intimidation, wiretapping and bribery to more subtle forms of procedural tactics. She stated that the most common forms of guerrilla tactics are excessive cross examination, an aggressive approach to document production requests, causing procedural delays and taking unjustified challenges.It can be difficult to distinguish between a guerrilla tactic and creative lawyering.

The importance of the case management conference to set out in writing a fair playing field at the outset was emphasised. It was noted that it is incumbent on the opposing counsel to be proactive and use the tools available within the rules to best protect their client's interests. This brought us to a comparison with commercial litigation and whether the courts are more willing than arbitral tribunals to step in to stop disruptive behaviour. "Due process paranoia" on the part of the arbitral tribunal was discussed, especially when it comes to applications for extensions of time - this being the idea that arbitrators are more likely to entertain frivolous requests to amend the procedural timetable due to concerns about potential challenges to any eventual award.

Patrick picked up on the concern an arbitrator has for his/her reputation if an award is challenged, and contrasted that with a judge. Anne Collins (*Clifford Chance*) referred to the statistics discussed in the previous panel regarding challenges to arbitral awards on procedural grounds, and noted that in the UK, courts are more likely to defer to the discretion of the arbitrator and consequently, arbitrators could afford to take a firmer hand in dealing with guerrilla tactics. The benefit of using a specific institution rather than an *ad hoc* arbitration was also discussed, as panellists agreed that in times of doubt, the rules of institutions such as the LCIA or ICC provide very clear guidance, as well as offering the support of the ICC Secretariat or LCIA Court, should further backup be required by a tribunal.

Cameron Forsaith (*Eversheds Sutherland*) discussed the pros and cons of tools such as interim costs orders against a party that has attempted to engage in an abuse of process, potentially by deploying a guerrilla tactic.

Rahul Donde (*Lévy Kaufmann-Kohler*) also suggested that arguments that are on their face bad should be called out as so, and that there is provision in some institutional rules for early dismissal of manifestly bad arguments. He said that one approach is to ask for specific inferences to be drawn from the guerrilla tactics, such as delay or refusal to provide documents, and for these to be set out in a table, making it very difficult for them not to be addressed by a tribunal.

Report by **Sara-Jane O'Brien BL**

Welcome from Paul Gardiner SC, President of Arbitration Ireland.

Sinéad Drinan BL, Chair of Young Practitioners Arbitration Ireland

Chair Patrick Leonard SC with speakers Nadia Smahi, Jerry Healy, Gerard H. James and Daragh Brehony.