arbitrationireland

9TH DUBLIN INTERNATIONAL ARBITRATION DAY CONFERENCE

ARBITRATION DAY

REPORT ON ARBITRATION IRELAND'S DUBLIN INTERNATIONAL ARBITRATION DAY HELD ON 19 NOVEMBER 2021

Clockwise from top right: Nicola Dunleavy, President, Opening address; Eva Kalnina, Arbitration Chambers; Mr Justice David Barniville, Court of Appeal; Audley Sheppard, Clifford Chance and John Fellas, Fellas Arbitration.

On Friday 19 November 2021, Arbitration Ireland held its ninth annual Dublin International Arbitration Day Conference. The delegates made up of leading practitioners in the international arbitration community physically attended the conference held at the Distillery Building in Dublin. This year's conference welcomed leading arbitration lawyers to discuss a variety of topical issues in the field of international arbitration.

Opening Address

Nicola Dunleavy *(Matheson, Dublin – President of Arbitration Ireland)* opened the event and welcomed the delegates to the conference. She spoke about the current trends in the arbitration sphere in Dublin, including the growth in mergers and acquisitions disputes, insurance disputes and regulatory action. She also introduced some of the themes for the conference, including diversity, professional ethics, shared values and common denominators.

Several engaging and informative panel discussions followed.

Dr Patricia Shaughnessy, Stockholm University; Edward K. Lenci, Hinshaw & Culbertson LLP; Maureen Ryan, General Counsel Atlas Renewable Energy.

Heiko Heppner, Dentons; Paul McGarry SC, The Bar of Ireland; Carine Dupeyron, Darrois Villey Maillot Brochier, and Eva Kalnina, Arbitration Chambers.

SESSION 1 – ACHIEVING DIVERSITY IN INTERNATIONAL ARBITRATION: A LOT DONE – A LOT TO DO?

Ed Lenci *(Hinshaw & Culbertson LLP – New York)* chaired the first session's discussion on achieving diversity in the international arbitration arena.

Jackie van Haersolte-van Hof *(LCIA – London)* spoke about the implementation at the LCIA of a pledge of equal representation in arbitration, noting that by focusing on gender, the LCIA had seen an increase of female arbitrators from almost 16% in 2015 to 33% in 2020. She noted the steps the LCIA had taken as an institution in this regard, such as publishing statistics, gender parity in arbitrator lists and inclusivity at events. She also spoke about the difficulties faced in implementing diversity, including avoiding repeat female appointments.

Dana MacGrath *(President of Arbitral Women and Independent Arbitrator – New York)* then discussed what organisations, such as Arbitral Women, do to achieve progress and visibility for diverse members of the arbitral community, such as the use of media outlets, hosting events that showcase women with talent in areas of international arbitration, promoting diversity initiatives and events in the international arbitration sphere, running apprenticeship, training and mentorship programmes and running networking sessions. She opined that working collectively to promote diversity of all kinds is the best way to achieve further diversity.

Patricia Shaughnessy *(Stockholm University – Sweden)* then spoke about the formation of the International Court of Commercial Arbitrations Cross Institutional Diversity Task Force, its objectives and the steps it has taken. She noted the Task Force consists of just under 30 women and described the various sections of its annual report, including why gender diversity matters, the trends, statistics and the data analysis and a discussion on the causes of the lack of diversity and the pipeline issues regarding same. The report, she noted, ends with a helpful section on what lawyers, law firms, companies and conference organisers can do to and what strategies they can utilise to guide them going forward in this area.

Maureen Ryan *(General Counsel Atlas Renewable Energy – Miami, Florida)* then gave an in-house perspective in this context, describing her view of the role of the client in furthering diversity and noting that it is incumbent on companies and the client to do what they can to require their legal counsel to implement diversity initiatives. She noted that a lot of work had been done in this context and gave examples of various companies and their respective initiatives. She also mentioned the work that there still is to do and expressed hope that the role of the client will be helpful in achieving same. In the questions and answers section of the session, the panel also discussed the work to be done going forward, in particular in other forms of diversity outside of gender.

SESSION 2 – EUROPE: WHAT'S IN STORE FOR INTERNATIONAL COMMERCIAL ARBITRATION?

The Honourable **Mr Justice David Barniville** *(Court of Appeal of Ireland)* chaired the second session's discussion on what is to be expected for International Commercial Arbitration in Europe going forward.

Heiko Heppner (Dentons – Germany) spoke about what is in store for commercial arbitration in Europe and some recent developments and issues that have arisen. He opined that there is a worrying trend of states and international organisations, at least indirectly, calling arbitration as a method of upholding the rule of law into question. In that context, he also noted the potential possibility of difficulties in enforcing awards if individual states begin to question the rule of law.

Paul McGarry SC *(The Bar of Ireland – Dublin)* then spoke about the continuing fallout from Case C 284/16 *Slowakische Republik v Achmea BV* in 2018, general issues that arise as a result of arbitrating EU law issues and the difficulties that arbitrators face in being unable to make a reference to the European Court of Justice of the European Union. Noting that when the judgment in *Achmea* was delivered it was thought to be limited only to arbitration conducted under a bilateral investment treaty, as that was no longer the case, he questioned how long it would

Ank Santens, White & Case; Marieke van Hooijdonk, Allen & Overy; Peggy O'Rourke SC, The Bar of Ireland; James P. Duffy IV, Reed Smith LLP, and Shane Daly, Bredin Prat.

Matt Fritzsche, EY Sponsor.

be before the judgment in *Achmea* would apply to disputes that do not involve state parties at all but simply ones where there are issues of European law involved.

Eva Kalnina *(Arbitration Chambers – Hong Kong, London, New York)* then discussed environmental issues as they arise in arbitration and noted that the challenges regarding climate change are not only scientific, political and economic, but are also legal. Her view was that the EU has a key role to play in fighting climate change and noted in that context that one of the EU's goals is to reduce average EU carbon emissions by 55% by 2030. She outlined that the EU has therefore introduced a number of measures, including a carbon tax. She discussed the introduction of the EU Carbon Border Tax, which, she outlined, will put a carbon price on imports produced by companies with a large carbon footprint to ensure that the European emission reductions contribute to a global emissions decline instead of simply pushing carbon intensive production outside of Europe. She noted potential disputes that could arise in this context, including tax disputes between affected companies and EU authorities, WTO disputes between the EU and affected states and commercial disputes. She also highlighted the contractual disputes arising out of the use of highly inflammable clean hydrogen as an alternative energy source. Eva suggested practitioners consider the small choices they can make to save the environment.

Finally, **Carine Dupeyron** *(Darrois Villey Maillot Brochier – Paris)* discussed the recent judgment of the European Court of Human Rights in *BEG S.P.A. v Italy* in May of 2021. She gave a concise summary of the facts in the case and discussed the questions and lessons arising out of the case. In particular, she noted the lesson of jurisdiction, namely that the decision confirmed that commercial arbitration is independent from State courts and State powers of other judiciary, but that the reasoning is that since resources are presented before domestic courts, then Italy becomes again responsible for what was being decided by its Courts, and there the Court decides that it has jurisdiction *ratione personae* over the case.

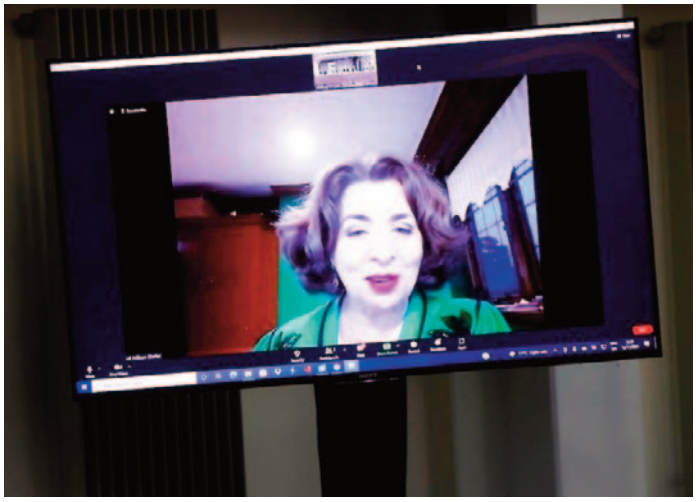
PRESENTATION – IRELAND FOR LAW

Patrick Leonard SC *(The Bar of Ireland – Dublin)* then gave a short presentation on Ireland for Law, a government initiative established to promote Ireland and Irish law, recognising that, following Brexit, Ireland remains the only common law jurisdiction in the European Union. Patrick discussed the ambition of the organisation to develop Dublin and Ireland as an important regional legal services hub in Europe and the many changes there have been in the Irish legal services sector in the last 20 years reflecting the internationalisation of the Irish economy. Patrick invited attendees to the organisation's Dublin International Disputes Week in June 2022.

SESSION 3 – IS A COMMON CODE OF CONDUCT FOR ARBITRATORS NECESSARY?

Peggy O'Rourke SC *(The Bar of Ireland – Dublin)* chaired the third session's lively discussion on whether a common code of conduct for arbitrators was necessary. Peggy asked the attendees at the outset to indicate by show of hands whether there is a need for mandatory code of conduct for arbitrators. She also asked whether "double-hatting" should be prohibited, which revealed that most of the audience were of the view that it should not be prohibited.

Marieke van Hooijdonk *(Allen & Overy – Netherlands)* spoke first, discussing the many codes of conduct for international commercial arbitrations developed by bar associations, arbitral institutions, professional societies and legal societies, which have proliferated and evolved over time. She noted some of the broader consistent principles throughout those codes, including the requirement for arbitrators to be independent and impartial. She discussed that the world of commercial arbitration is far from having a common code for arbitrators, but instead currently has a patchwork of different codes, practices and ethics across various institutions and bodies. She mentioned that while the new ICCA Guidelines on Standards of Practice in International Arbitration have been seen as an attempt to introduce a common code, they are not mandatory.



Philippa Charles, Stewarts, participating virtually.

David Roney, Sidley Austin, and Klaus Reichert SC, Brick Court Chambers.

Ank Santens *(White & Case – New York)* then spoke about mandatory codes of conduct in the context of investment arbitrations. She noted one of the central criticisms against investment arbitration has been the sense of outsiders not involved in the system itself, namely that there is an unregulated class of decision makers that are appointed pursuant to unclear procedures and that undermine domestic public policy or engage in self-dealing. She discussed what that has caused in the field of investment arbitration with respect to ethical conduct.

Shane Daly *(Bredin Prat – Paris)* then spoke about the area of interstate trade framework in the context of developing codes of conduct. He also discussed the question before the panel noting that while a common code of conduct would increase confidence, transparency and accountability, there are others who would consider that ethical standards have already been well established, that the tenets of arbitrators' ethical duties are clear and that overregulation of ethics can lead to confusion.

James P. Duffy IV *(Reed Smith LLP – New York)* then discussed the question of whether an arbitrator's cultural background impacts on the interpretation of a code of conduct. He opined that the codes have to be applied and, when does so, the person applying them, their views and their background must be considered.

The panel then took part in a lively discussion on the topic of double-hatting and to what extent it should or should not be prohibited, with the panel for the most part concluding that it had become an issue, particularly in the area of investment arbitration.

SESSION 4 – ARE WITNESS STATEMENTS IN INTERNATIONAL ARBITRATION WORTH THE PAPER THEY ARE WRITTEN ON?

Audley Sheppard QC *(Clifford Chance – London)* chaired the fourth session's discussion on whether witness statements have a place in international arbitration.

David Roney *(Sidley Austin – Geneva)* spoke first, addressing how witness evidence is addressed in Swiss civil court proceedings. In that context, he noted the important distinction between individuals who are appearing to give evidence as to what are called party representatives or those giving evidence as witnesses, and he noted that Swiss civil court proceedings include a judge-led inquisitorial approach. This approach, he outlined, means that the witness statements are rarely used in Swiss civil court proceedings swiss lawyers are prohibited from discussing the evidence of witnesses with the witnesses in advance off the testimony. He then considered how that influences the way in which Swiss arbitration practitioners view witness evidence in the context of international arbitration. He noted that Swiss lawyers could be divided first into those who appear only sometimes appear in international arbitration and are quite sceptical about the value of witness evidence, and second into those who are international arbitration specialists and see the value and limitations of witness evidence.

John Fellas *(Fellas Arbitration – New York)* the discussed witness evidence in US proceedings. He noted the constitutional right to have a civil case decided by a jury, which means that, for the most part, evidence is presented orally. In that context, he discussed the benefits of a deposition, including that the parties are aware of the other's side position in advance of trial. He then discussed international arbitrations in the US. In particular, he outlined that how they proceed depends, somewhat, on the lawyers involved, but that they almost always include witness statements.

Philippa Charles *(Stewarts – London)* then spoke about the work of the ICC Commission on Arbitration and ADR in relation to witness evidence. She outlined that the Commission set about trying to work out from a scientific standpoint what the questions are in relation to the reliability, veracity and probative value of witness evidence. She

Kieran John McCarthy, Clifford Chance.

Kevin O'Gorman, Norton Rose Fulbright, and Louis Flannery QC, Mishcon de Reya.

noted they concluded that actual witness memory is just as fragile and frail in a commercial dispute situation over a long period of time as it is in relation to flash bulb moments. The Task Force then considered who the key actors are in the preparation of witness evidence other than the witnesses themselves and provided guidance in their report on what steps they could take to ameliorate the effects of the process of taking witness evidence on the reliability and accuracy of memory.

Matt Fritzsche *(EY Claims and Disputes – London)* then gave a practical perspective as a damages expert on how he interacts with factual witnesses and the reliance he places on them, explaining that his hope was that any changes to the role or scope of a factual witness in arbitration does not go too far. He noted that one of the areas of debate seemed to be around the extent to which, in addition to dealing with disputed facts and technical explanations, a factual witness should also be used to add colour or context and opined that all of those purposes for factual witness evidence are really important.

Klaus Reichert SC *(Brick Court Chambers – London)* then spoke on this topic considering where witness statements fit into the investor state field approach. He commented that good approach when preparing a witness statement is to keep focus on what its evidential function is and what does it seek to prove. He opined that witness statements are essential, but that they are only worth the paper they are written on if the counsel presenting the memorial thoroughly understands the evidential function of every single word and phrase in the statement.

SESSION 5 – QUICK FIRE TOPICS

A thought-provoking session, chaired by the Hon. Mr Justice Mark Sanfey (Judge of the High Court of Ireland) followed, including seven speakers addressing some of the most significant issues affecting arbitration and international arbitration.

Judith Levine *(Levine Arbitration – Sydney)* spoke first about the ethical dimensions of arbitrator resignations. She noted that while there is no universal code of ethics, arbitrators are understood to have an implied duty to perform the function for which they are appointed, and not resign during the course of the arbitration without good cause. She outlined that even with the most thorough efforts at the outset of a case, situations can arise during the course of proceedings that may justify resignation and gave some example scenarios.

Susan Ahern BL *(The Bar of Ireland – Dublin)* then spoke about the ad hoc division of the Court of Arbitration for Sport (CAS), noting that it was created against the imperative for expedition in a sporting context. She noted the jurisdiction encapsulates any dispute that falls within a period of ten days before the Olympic Games and throughout the Games. The ad hoc division deals with qualification, selection matters and doping appeals. She also noted that while field of play matters are frequently referenced to the ad hoc division, there is a reluctance on the part of the division to interfere in such matters due to the recognition of the technical officials who have the expertise to make those determinations. She also mentioned the anti-doping division of CAS and its procedures.

Louis Flannery QC *(Mishcon de Reya – London)* then discussed the judgment of the UK Supreme Court in *Kabab-Ji Sal (Lebanon) v Kout Food Group (Kuwait) [2021]* UKSC 48, which concerned the applicable governing law of arbitration agreements and enforcement, noting he was of the view that the decision was incorrect as the decision to apply English law rather than the agreed French law by applying the principles in *Enka v Chubb* [2020] UKSC 38 was a step too far.

Kevin O'Gorman *(Norton Rose Fulbright – Houston)* then spoke about expedited commercial arbitration and gave his views on how best to proceed in disputes that are both expedited and complex, including

Moderator: The Hon. Mr Justice Mark Sanfey, High Court, Ireland.

Susan Ahern BL, The Bar of Ireland.

considering whether expedited treatment is truly appropriate for the dispute, being prepared to sacrifice social life, appointing a capable and experienced tribunal, issuing a case management conference in airtight procedural order, requiring the parties to issue full statements of their positions, claims and defences early in the timeframe, imposing significant limits on disclosure of documents, setting a hearing date early, informing the witnesses and presenting the case succinctly.

Clíona Kimber SC *(The Bar of Ireland – Dublin)* then spoke about the question of environmental dispute resolution and the extent to which arbitration has a role to play in that regard. She noted that while environmental disputes are increasing and will increase, traditional methods of litigation are finding it difficult to accommodate them. She noted the model environmental law drafted by the Climate Bar Association in Ireland, which is to be presented for comment and discussion in order to move the debate forward and consider the solutions in this context. Her view was that environmental dispute resolution is going to require more arbitration in future.

Kieran John McCarthy *(Clifford Chance – London)* then reviewed the role of arbitration in the aftermath of COP26 in enforcing environmental commitments and standards. He noted that, following COP26, there was finally some discipline through the so-called Paris rule book, but that there remains no hard enforcement mechanism in the UN framework and certainly no means of arbitrating state/state emissions disputes. He also mentioned that while Article 14 of the UN FCCC intended that parties could arbitrate non-compliance in accordance with the procedures to be adopted by the COP as soon as practicable in an annex on arbitration, such an annex have not been agreed. He also outlined that COP26 was as much about private sector ambition as about government commitments, so where arbitration is likely to make the biggest difference is as a compliance tool in commercial agreements.

Raëd Fathallah *(Bredin Prat – Paris)* then spoke about the issue of counsel conduct in international arbitration proceedings. He noted the issue of having multiple counsel, admitted in multiple jurisdictions, often practising in law firms that are not of their own jurisdiction and appearing before panels in seats outside their jurisdiction, which patchwork of potentially conflicting ethical rules often leads to difficulties in determining which rules to apply and how to sanction conduct. This, he noted, could be aggravated by the fact that there is an absence of a supranational or an identified body that could regulate or enforce these rules. He then discussed the attempts to regulate counsel conduct, including the IBA Guidelines on Party Representation in International Arbitration, the LCIA Rules and the ICC Practice Note. He concluded that arbitrators should take a more proactive and courageous role in sanctioning the types of misconduct he discussed, such as a reference in the award or an adverse costs order.

Nicola Dunleavy *(Matheson, Dublin – President of Arbitration Ireland)* then closed the conference, recapitulating on the themes of commonality and difference during the conference. She thanked the speakers and congratulated TrialView, the conference and court view system seamlessly used for the conference for the day. The conference was a great success and Arbitration Ireland looks forward to seeing the delegates and speakers at its future events.