arbitrationireland

ARBITRATION DAY 2023 REPORT

On Friday November 17, 2023, Arbitration Ireland held its 11th annual Dublin International Arbitration Day Conference. Over 150 delegates, constituted from leading practitioners in the international arbitration community, attended the conference this year.

This year's conference was the largest to date, with leading practitioners discussing a number of topical issues in international arbitration, including intra-EU arbitral awards, bankruptcy, artificial intelligence and ESG issues in arbitration.

OPENING ADDRESS

Paul McGarry (*The Bar of Ireland – President of Arbitration Ireland*) opened the event and welcomed the delegates to the conference. He thanked the attendees, noting that this is the flagship event in the Arbitration Ireland calendar. The event represents a celebration of knowledge, expertise and collaboration.

On behalf of the executive committee, he extended the committee's gratitude to the esteemed sponsors who have made the event possible. Firstly, a heartfelt thank you was given to Cornerstone Research and EY as the event's premium sponsors. Further thanks were extended to the gold sponsor of the event – FTI consulting – for their continued support and contribution to the event's success. The committee's appreciation was also conveyed to TrialView and Gwen Malone for their valuable support, which always plays a significant role in the success of Dublin International Arbitration Day.

Finally, Paul McGarry thanked the members of the organising committee: Gerard James, Elaine White, Susan Ahern, David Herlihy, and Colm Ó hOisín. A special mention was reserved for the Executive Director of Arbitration Ireland, Rose Fisher, without whom the event could never take place.

Jeffrey Sullivan KC, Debevoise & Plimpton.

From left: Lucinda Low, Steptoe & Johnson LLP; Lena Sandberg, Gibson, Dunn & Crutcher; and, Dr Markus Perkams, Addleshaw Goddard.

SESSION 1 – THE ENFORCEMENT OF INTRA-EU ARBITRAL AWARDS: LATEST DEVELOPMENTS FROM THE UK, AUSTRALIA, THE US AND EU

David Herlihy (*Allen & Overy – Dublin*) chaired the first session's discussion on the enforcement of intra-EU arbitral awards.

Jeffrey Sullivan KC (*Debevoise & Plimpton – London*) spoke about the history of intra-EU investment treaty arbitration. He noted that between 2007 and 2018 there were 10 decisions from investment treaty tribunals dealing with the issue of intra-EU arbitration. All of these concluded that intra-EU arbitration is compatible with EU law. Since the Court of Justice of the European Union rendered its Achmea judgment in 2018, there have been a further 95 decisions on this point: 94 of which rejected the notion that EU law prohibits intra-EU arbitration. He then outlined tribunals' rationale for these decisions, including the interpretation of those treaties based on the Vienna Convention and tribunals' findings of EU law not being relevant to the question of jurisdiction. He also referred to the Green Power decision as the single investment treaty tribunal to find that EU law prohibits intra-EU arbitration and noted the specific circumstances of that case including the legal seat being within the EU.

Dr Markus Perkams (*Addleshaw Goddard – Frankfurt*) spoke on the enforceability of intra-EU arbitral awards. He began by outlining the approach of the German Supreme Court on this issue in cases such as *Achmea*. He referenced the decisions in *Mainstream Renewable Power* and *RWE* and posed the question: how does the approach of the German Supreme Court sit with proceedings under the International Centre for Settlement of Investment Disputes (ICSID) Convention? In doing so, he noted that the German Supreme Court has followed the CJEU and found that an ICSID arbitration agreement is not valid, as it is in conflict with EU law. He also outlined how other jurisdictions such as Sweden, France and Luxembourg have taken similar approaches. In conclusion, he identified four key points from this series of jurisprudence. Firstly, all ICSID awards rendered outside the scope of the Convention are no longer enforceable within EU law. Secondly, it is still not clear whether intra-EU arbitral awards rendered within the scope of the Convention are also not enforceable. Thirdly, there is a question as to the approach other jurisdictions will take now that the EU is thinking of the ICSID Convention as operating within the EU. Fourth and finally, it is important to note that this may all have further consequences in the future. For example, a recent judgment from the Hellenic Supreme Administrative Court applied the decision in *Achmea* to arbitration agreements outside the system of bilateral investment treaties.

Ruth Byrne KC (*King & Spalding – London*) spoke on the recent English Commercial Court decision in *Infrastructure Services v Kingdom of Spain*. She noted that this decision summarised the English law in this area. She outlined the case as involving an Energy Charter Treaty ICSID award against Spain relating to a renewables project that suffered from changes in the Spanish legislative regime. Spain challenged the jurisdiction of the English Commercial Court on a number of grounds, including the issues as raised in the *Achmea* case. In particular, it was argued that the investment treaty created an arbitral tribunal that is outside the CJEU's jurisdiction, which is applying or interpreting EU law but the conclusions of which will be unreviewable. The English Commercial Court found that it is central to international arbitration that the tribunal is outside the jurisdiction of a domestic court save for supervisory powers or enforcement. The Court further held that the UK has pre-existing Treaty obligations, which predate its accession to the European Community, and which include its obligations under the ICSID Convention. As such, the UK position is that ICSID awards are enforceable.

Lucinda Low (*Steptoe & Johnson LLP – Washington DC*) spoke about the enforceability of intra-EU arbitral awards in the United States. In respect of a number of requests to confirm awards heard by Federal District Court judges in the District of Columbia, the Courts have come to diametrically different conclusions. Some cases have been dismissed on jurisdictional grounds, others have been upheld. The decisions in the *NextEra* and *9REN* cases have dismissed jurisdictional objections. This is

From left: Jeffrey Sullivan KC, Debevoise & Plimpton; Ruth Byrne KC, King & Spalding; Lucinda Low, Steptoe & Johnson LLP; Lena Sandberg, Gibson, Dunn & Crutcher; Dr Markus Perkams, Addleshaw Goddard; Catherine Gilfedder, Dentons; and, David Herlihy, Allen & Overy.

Diora Ziyaeva, Dentons, New York.

in contrast to other decisions from the Federal District Court, which have upheld jurisdictional objections, such as the recent decision of Judge Leon in *LLC v Kingdom of Spain*. Finally, she noted that these decisions are under appeal to the Circuit Court of Appeal and are due to be heard next year, so we can expect clarification on this issue in the near future.

Catherine Gilfedder (*Dentons – London*) spoke on the enforcement of intra-EU arbitral awards in Australia. She noted that there had been a lot of activity in this space recently as a number of investors are seeking to enforce arbitral awards there. She stated that most of these cases involve enforcement against Spain. She also noted that the Australian courts have taken a very investor-friendly stance, similar to the courts in England and Wales. In particular, she outlined the decision of the Australian High Court in the Infrastructure Services case. The Court held here that the result of the ICSID Convention was that Spain had waived immunity to recognition and enforcement. As such, the Australian courts have and will likely continue to recognise intra-EU ICSID awards in the same way as any other investment treaty awards. Finally, she noted that the Federal Court in Australia has recently granted recognition in enforcement proceedings of an UNCITRAL arbitral award against India. As such, we can expect that UNCITRAL awards pursuant to intra-EU arbitrations will likely be enforced and recognised in Australia.

Lena Sandberg *(Gibson, Dunn & Crutcher – Brussels)* spoke on EU state aid law and its application to the issue of intra-EU arbitral awards. She referred to the decision of the CJEU in the Achmea case. That decision was clear in its finding that decisions by arbitration tribunals are not valid in the EU as their application of EU law is not subject to review by EU courts.

She noted that the Commission's problem is that it is difficult to enforce the judgment, since classic infringement procedures before the EU courts can take many years.

Therefore the Commission has used the state aid rules in order to claim that the awards constitute illegal state aid that cannot be granted. However, according to constant case law, compensation for damages does not constitute state aid unless the compensation compensates for non-notified or incompatible state aid. The Commission claimed that the awards compensate for the grant of non-notified aid (ie the RES support scheme). Indeed since Spain had not notified that scheme, the Commission claimed that the award is state aid. She pointed out that the Commission has not questioned why Spain did not notify the old Spanish support scheme for which the award compensates.

If Spain would do so the award would no longer constitute state aid. Furthermore, if the Commission really does consider the awards to constitute notifiable state aid, then, (due to the notification process) the awards are subject to the Commission's review and hence also the EU court's review. Thus the awards do therefore not contradict Achmea. It was finally noted that there has been no judgment finding that awards, under the Energy Charter Treaty or Bilateral Investment Treaties, constitute state aid.

SESSION 2 – ARBITRATION, BANKRUPTCY & SANCTIONS

Ronnie Barnes (*Cornerstone Research – London*) chaired the second panel of the conference on arbitration, bankruptcy and sanction, and introduced each of the panellists.

Shawn Conway (*Conway & Partners – Rotterdam*) spoke about the effect of a bankruptcy declaration on arbitration proceedings and focused on the issue from a Dutch perspective. He noted that Dutch law doesn't make any distinction between arbitrations and national courts. He went on to state that where there is a declaration of bankruptcy on behalf of a respondent entity, the claimant will be afforded the opportunity to apply and request that the respondent's trustee(s) agree fully with the arbitration. If the trustee(s) wants to represent the estate in the arbitration proceedings, then the award is binding and enforceable on the estate. If the trustee(s) does not wish to participate in the arbitration, then there will be two different lawyers for the respondent – one representing the trustee and another representing the bankrupt entity.

Stavros Pavlou, Patrikios Pavlou & Associates LLC.

Keynote speaker Rossa Fanning SC, Attorney General of Ireland.

Diora Ziyaeva (*Dentons – New York*) spoke about the effect of bankruptcy on arbitration from a US perspective. From the outset she noted that a declaration of bankruptcy would likely stall arbitration proceedings. In the US, the Bankruptcy Code places an automatic stay on legal proceedings when a party initiates the insolvency process. The Federal Courts have held that this applies to arbitration proceedings. However, this stay on proceedings is not permanent and a claimant can apply for the arbitration to proceed. In deciding to lift the stay, an application must be made to a bankruptcy court. She outlined the four-part test that is applied in deciding to lift the stay: do the parties agree to arbitrate; does the dispute fall within the arbitration clause; does the claim involve a core bankruptcy matter; and, should the court stay any non-arbitral claims pending the outcome of the arbitration.

Matthew H. Adler (*Troutman Pepper – Philadelphia*) also spoke about the issues caused by a declaration of bankruptcy in arbitration proceedings from the US perspective. He noted that in the US, judges have to reckon with the competing interests of the national law under the Arbitration Act and bankruptcy law. He reiterated the point that in the US, arbitration proceedings will apply the same stay under the bankruptcy code as applies in litigation – arbitration 'walks like a duck and quacks like a duck' enough for the stay to apply as it does in litigation. He then raised the question that arises once proceedings are stayed following a filing for bankruptcy: what can the representatives for the claimant and respondent do about it? Do you want the arbitration to even proceed? He referenced the decision of the US Court of Appeal in *Akan v Travellers*, in which the Court stated that where there is an automatic stay, you should not waste your time arbitrating. As such, where an arbitration award is granted after bankruptcy is declared, it is unlikely to be enforced by the US courts.

Stavros Pavlou (*Patrikios Pavlou & Associates LLC – Cyprus*) spoke about the effect of bankruptcy on the arbitration process from a Cypriot perspective. He noted that bankruptcy also causes an automatic stay on arbitration in Cypress. The bankruptcy also automatically terminates the services of a respondent's lawyer. The registrar of companies is then appointed as a trustee followed by other private trustees. He further noted that the Court that issued the bankruptcy order can permit the continuation of the arbitration in respect of a claim for damages. It is unlikely that the arbitration will continue in respect of monetary claims.

ADDRESS BY THE ATTORNEY GENERAL

Rossa Fanning SC (*Attorney General of Ireland*) spoke about the vital role that the Irish State has in creating the conditions under which international arbitrations can be carried out successfully. He reaffirmed the State's recognition of the importance of arbitration and the commitment to facilitating it. He then outlined the three ways in which this commitment manifests itself. Firstly, he referred to the legislative framework for arbitrations that is in place in this jurisdiction, namely, the Arbitration Act 2010, which gives the UNCITRAL Model Law the force of law in Ireland. This represents a decisive legislative endorsement of international best practice in this jurisdiction. Secondly, he noted that the attitude of the Irish judiciary has always been supportive of the arbitration process. He stated that historically, the Irish judiciary has been reluctant to entertain challenges to the substance of arbitral awards. This underscored a commitment to facilitating, rather than impeding, arbitration. Finally, he pointed to the infrastructure that is required for international commercial arbitration, which Ireland possesses. In particular, he outlined Ireland's geographical location, which remains a strong advantage. On the western edge of Europe, with links to both the United States and the EU, Ireland is easily accessible for parties on either side of the Atlantic. He also noted the first-class hearing facilities available, including the Dublin Dispute Resolution Centre. Further advantages of Ireland as a seat for arbitration were noted to include the common law system, which provides a familiar backdrop for lawyers from the US and the UK, and the wealth of practitioners in Ireland who possess valuable expertise and experience in conducting international commercial arbitration.

From left: Paula Gibbs, A&L Goodbody LLP; Dr Nils Rauer, Pinsent Masons; Tunde Oyewole, Orrick, Paris; Sanaa Babaa, EY, London; and, Stephen Dowling SC, The Bar of Ireland/TrialView.

Sanaa Babaa, Director, Forensic & Integrity Services, EY.

SESSION 3 – ARTIFICIAL INTELLIGENCE, CHATGPT & ARBITRATION

Paula Gibbs (*A&L Goodbody LLP – Dublin*) chaired the third panel of the conference on artificial intelligence, ChatGPT and arbitration, and introduced each of the speakers.

Dr Nils Rauer (*Pinsent Masons – Frankfurt*) provided an introduction to generative artificial intelligence (AI) such as ChatGPT. He defined AI as software that is capable of learning and executing what it has learned. He then outlined what constitutes generative AI – artificial intelligence that creates something. For example, it can create copyright-protectable works including code, text, images, etc. He also defined the term "large language models" as used by AI applications as thy learn from language, break it down, and then piece it back together. He referred to the three key stages of AI: the coding of algorithms; the training of the product; and, the operation of the AI product. He noted two ways in which generative AI is important for arbitrators. Firstly, it can act as a tool for easing up daily work. Secondly, new disputes have already arisen around chatbots that rely on AI. He also referred to the US Government order on the use of AI – noting that AI holds extraordinary potential for both promise and peril.

Tunde Oyewole *(Orrick – Paris)* spoke about the risks and dangers associated with the use of AI. He noted that the widespread use of AI is evident and inevitable. However, he also outlined the two types of risks posed by AI. Firstly, he referred to the technological drawbacks, which result in "hallucinations" – where machines confidently produce answers that are completely wrong. Secondly, he referred to the intellectual category of risks. This occurs when arguments are constructed on secondary sources provided by AI instead of engaging with the material and thinking intelligently about how to make the best argument. He also stated that the latest numbers show that by 2028 AI-driven machines will account for 20% of the global workforce and 40% of all economic activity. He also argued that a major drawback of AI is the reliance on predictability where no two cases are the same.

Stephen Dowling SC (*The Bar of Ireland/TrialView – Dublin*) spoke about the changes that AI can bring to arbitration and the tools that AI offers to practitioners. He noted that while we are unlikely to see any radical change brought on by AI in the next couple of years, the foundations are currently being laid for radical change to take place. He argued that the radical change caused by AI will very much affect the dispute resolution sector. He said that when we talk about AI, we are generally referencing a type of AI known as large language model or LLM. This refers to the abilities of machines to replicate human language in a human-like way. He submitted that this type of AI is going to affect any profession that uses language as its primary tool. However, he also noted that AI cannot replicate or change everything that lawyers do – these machines merely replicate language, they do not actually understand language. As such, human understanding and appreciation remain very important and will continue to play a part in persuasion and adjudication.

Sanaa Babaa (*EY – London*) spoke about AI from a quantum and forensic accounting perspective. She identified three areas where AI has potential to be useful or is being used already. The first area she identified is in fraud investigations and/or compliance reviews generally. In this use case, AI can quickly investigate documents and identify yellow and red flags. The second area she identified relates to analytics. She noted that AI can be used to process big data in organisations by developing code and assisting in the understanding of trends in the data. Thirdly, she pointed to the ability of AI in respect of valuation or financial modelling. Here, generative AI such as ChatGPT is combined with tools used by experts, such as Excel, as a tool in analysing financial data. After noting the benefits of AI, she then outlined four big issues: cyber breaches; confidentiality; transparency; and, accuracy of information. In respect of accuracy of information, she noted that for experts, a lot of work is conducted validating and verifying inputs as they are not going to issue a report that is not verified. As a result, there is still a role for the junior members on her team for the foreseeable future.

From left: Matthew Draper, Draper & Draper LLC; Nessa Cahill SC, The Bar of Ireland; Jeremy Wilson, Covington & Burling LLP; Colleen Parker Bacquet, International Court of Arbitration; and, Susan Ahern BL, The Bar of Ireland.

Matthew Draper, Draper & Draper LLC.

SESSION 4 – ESG ISSUES IN ARBITRATION

Susan Ahern BL *(The Bar of Ireland – Dublin)* chaired the fourth panel of the conference on environmental, social and governance (ESG) issues in arbitration, and introduced the speakers.

Jeremy Wilson (*Covington & Burling LLP – London*) spoke on how ESG is relevant to arbitration practitioners. In particular, he noted that the three pillars of ESG are the three main topics that companies are expected to report on – environmental, social and governance. He submitted that ESG is increasingly relevant to all arbitration practitioners due to higher ESG expectations held by investors, regulators, consumers, employees, etc. These demands have led to the implementation of voluntary standards by companies. Arbitration is increasingly being used to hold companies accountable to their voluntary ESG commitments. He provided an example of how voluntary ESG clauses/agreements can be implemented by outlining the Bangladesh Accord. In particular, he noted how such agreements need to balance the need for transparency surrounding ESG issues with the confidentiality of the subscribing parties. This creates tension between maintaining confidentiality while also offering transparency as to how the ESG expectations of the public are addressed. A way in which this tension can be resolved is by being creative in international arbitration.

Nessa Cahill SC *(The Bar of Ireland – Dublin)* spoke on ESG issues in arbitration from a litigator's perspective. She noted that there has been an explosion of litigation relating to ESG issues. For example, climate change litigation has seen an unprecedented growth. In her opinion, the environmental aspect of ESG looms the largest. However, she also noted a lot of lessons to be learned from the way in which arbitrations, international arbitrations and the courts have dealt with social ESG issues. She also outlined the Corporate Sustainability Reporting Directive as an EU legal measure, which demonstrates how soft law measures are hardening and becoming non-optional. She opined that arbitration can best deal with the challenges presented by these types of issues and disputes.

Matthew Draper *(Draper & Draper LLC – New York)* spoke on ESG issues through the prism of business and investors. He noted that ESG is important both to business and to customers. He also referred to the mitigation of risk and gave the example of how suppliers and supply chains being affected by ESG issues presents a business risk that could prevent a company from being able to perform its obligations. He then outlined a concern – that international arbitration is ready to rush in and embrace a new source of disputes. However, there are always going to be some new challenges as well. For example, how do we arbitrate a private commercial arbitration? How do we arbitrate human/environmental rights concerns? How do we deal with the issue of transparency versus confidentiality? In his opinion, these are challenges that the major arbitral rules are not ready for. He noted, therefore, that this suggests that parties will need to be smarter when drafting their contracts.

Colleen Parker Bacquet *(International Court of Arbitration – Paris)* spoke about the attitude of the International Court of Arbitration (ICC) towards ESG issues. She noted that the ICC plays a dual role in relation to ESG issues and is well placed to address these from both the business and the dispute resolution side. She outlined how businesses can be provided with a rating as to their social responsibilities and a scoring system implemented so there is public representation of how well a business is upholding its purported beliefs or commitments. She also raised the question as to how ESG disputes differ from other types of dispute and how the ICC can be ready with rules to adapt and provide for effective dispute resolution mechanisms. She highlighted how the ICC is tapping into the fact that it is an international body with various professionals and a vast array of experiences. By creating task forces to identify what is being seen on the ground, the ICC is able to develop tools to provide guidance for practitioners when they are confronted with these issues. She noted that currently, the ICC is looking at how these issues arise

Louis Flannery KC, Mishcon de Reya LLP.

The Hon. Mr Justice David Barniville, President of the High Court, Ireland.

under contracts that were written before the current wave of ESG concerns, and how it can provide tools to address more explicit commitments that are arising both on the international level and in private contracts.

SESSION 5 – QUICK-FIRE ROUND

The Hon. Mr Justice David Barniville *(President of the High Court – Dublin)* chaired the fifth and final thought-provoking panel, featuring nine speakers who each discussed a distinct topic relevant to current issues affecting international arbitration.

Louis Flannery KC *(Mischon de Reya – London)* spoke on the new Arbitration Bill 2023 in England and Wales. He noted that this is going to amend the Arbitration Act, which is currently in place in 14 ways. He highlighted five ways in which the Bill will amend the current Act. Firstly, under section 67 the two bites rule is going to be introduced to appeals of arbitral proceedings that are heard before the courts. This will result in a reduction to the evidence and arguments that can be raised in the appeal proceedings before the courts, thus saving time and money. Secondly, he noted another amendment under which emergency arbitrators will have the power to provide peremptory orders. Thirdly, the arbitral tribunal will be given the power to make summary awards – meaning faster and cheaper arbitration. The Fourth amendment is to impartiality and the duty of disclosure, which will now apply from the moment an arbitrator is approached in respect of a prospective arbitration. The final change in the law that he highlighted relates to choice of law – where there is no express law chosen within the arbitration agreement. then it is the law of the seat and not of the contract.

Niamh Leinwather *(Vienna International Arbitration Centre – Vienna)* spoke about sanctions from the perspective of arbitral institutions. She outlined the impact of the first wave of Russian sanctions, which were introduced last year, and then highlighted two issues that are still being tackled. She noted that following the EU's fourth sanctions package on March 15 last year, the arbitration community expressed concern about the scope of the application of these regulations and the potential negative repercussions on access to arbitral proceedings. However, Regulation 1269 provides an exemption to transactions that are necessary to ensure access to judicial, administrative or arbitral proceedings. She then highlighted two ongoing issues. Firstly, there is currently a freeze on arbitral awards that were rendered after the date of the sanctions. As such, arbitral proceedings may proceed but arbitral awards are still restricted. Secondly, the EU Commission is preparing a draft directive, which will require violations of sanctions to be reported. There is an exemption of this obligation for client–attorney relationships within judicial proceedings. The current draft of the directive does not include such an exemption for arbitrators and this will have a significant impact on arbitral proceedings.

Bree Taylor *(Alius Law – London)* spoke about the issue of sanctions with particular reference to the position in Russia. She noted that the sanctions introduced last year had the desired effect of restricting the movement of funds that could be used to assist the Russia. However, the sanctions are blunt instruments, which have caused some collateral damage to innocent parties. She gave the example of a small airline that had a Russian UBO. This prevented the airline from being able to fly its leased aircraft around the EU. She also highlighted the disputes that arose when aircraft owners sought to repossess their aircraft to prevent them from being taken into Russian territory and then stranded. She outlined an issue that arose for the prospective arbitrations in these cases, whereby lawyers had to find a way to be paid for their services when the sanctions prevented this. As a result, licences had to be sought to permit certain actions to continue and certain payments to be made.

Back row (from left); Louis Flannery KC, Mishcon de Reya; Anya George, Schellenberg Wittmer; Florian Stefan, Vavrovsky Heine Marth; Daragh Brehony, Pérez-Llorca; Kieran John McCarthy, Gateley; and, James Coleman, Goldman Ismail Tomaselli Brennan & Baum LLP.
Front row (from left): Niamh Leinwather, Secretary General, VIAC; The Hon. Mr Justice David Barniville, President of the High Court, Ireland; Paul McGarry SC, President, Arbitration Ireland/The Bar of Ireland; Bree Taylor, Alius Law; and, María Paula Jijón, CIAM.

Kieran John McCarthy *(Gateley – London)* spoke about the COP28 conference and the implications for arbitration. He outlined some points that will be of interest to arbitration practitioners in particular. Firstly, an ICCA panel of experts has been tasked with developing a Paris Agreement Conciliation Annex. He noted that while this means that there is no arbitration of State/State Paris Agreement disputes, there is a potential for conciliation proceedings. He outlined the current means of dispute resolution under the Paris agreement; namely, by going to the ICJ or to arbitration. However, only two states have issued consent to arbitrate: the Netherlands and the Solomon Islands. He also outlined the proposed provisions for conciliation, which include a conciliation committee that can create workable solutions for the future relations between two countries in respect of their climate obligations

Anya George *(Schellenberg Wittmer – Zurich)* spoke on the recent developments in the area of disclosure, independence and impartiality. She noted that there has been renewed interest in an arbitrator's duty to disclose circumstances that may give rise to issues of independence and impartiality. She focused on a Swiss/French twist to this issue – namely, whether an arbitrator has a duty to disclose facts that are already in the public domain. She provided an overview of the *Sun Yang* decision of the Swiss Supreme Court. She noted that in this case, social media posts made by the presiding arbitrator called their independence and impartiality into question. The Court determined that the tweets could be relied upon to demonstrate that the arbitrator was not impartial. She also outlined a different approach taken by the French Court of Appeal in *Delta Dragon v BYD*. Here the Court held that failure of an arbitrator to disclose that he was a member of the advisory board of the parent company of one of the parties was not sufficient to overturn the arbitral award. The Court found that this information was available if the parties researched the arbitrator.

Darragh Brehony *(Pérez-Llorca – Madrid)* spoke on recent developments in Spain in the area of arbitrator immunity. He referred to a controversial decision from 2022 in the context of arbitrator responsibility amenity. He noted that this case was an *ad hoc* arbitration between the heirs of a Sultan to a Philippines island and an alleged breach of contract by the State of Malaysia for the exploitation of resources on this island. The arbitrator found in favour of the claimants and awarded nearly $15 billion. The arbitrator was appointed by the High Court in Madrid. The arbitrator chose Madrid as the seat of arbitration. The Spanish High Court then tried to change its decision so the arbitrator moved the arbitration to Paris. A criminal prosecution was filed against the arbitrator for contempt of court. He contrasted this with Irish law noting that Ireland has a stronger form of immunity for arbitrators than in Spain. He noted that the immunity here is almost quasi-judicial. As such, he questioned how the scenario would have played out in Ireland and other jurisdictions.

Maria Paula Jijón *(Centro Internacional de Arbitraje de Madrid – Madrid)* spoke about the new rules that provide for expedited arbitrations within her institution. She noted that her institution, CIAM, was founded in 2020 when the three main arbitral institutions in Spain merged. She outlined their latest project: the development of a high expedited arbitration procedure. She explained that this type of procedure is developed to further improve one of the main appeals of arbitration – swiftness. As a result of this project, CIAM is able to resolve disputes by means of a final award within three months from the filing of the statement of claim. She then explained how this is possible. In particular,

From left: Stavros Pavlou, Patrikios Pavlou & Associates LLC; Diora Ziyaeva, Dentons, New York; Ronnie Barnes, Cornerstone Research; Shawn Conway, Conway & Partners; and, Matthew H. Adler, Troutman Pepper.

she outlined the fixed procedural calendar for this process, meaning that deadlines for written memorandum are already defined and run parallel to the appointment of arbitrators. She concluded by noting that expeditiousness must not compromise the fairness and integrity of the arbitration process. As such, CIAM may refuse the application of the expedited process if it considers that the dispute is not compatible due to, for example, increased complexity.

Florian Stefan *(Vavrosky Heine Marth – Vienna)* spoke on a recent judgment of the Hong Kong Court of First Instance in the area of public policy. He noted that the case related to how the Court views the enforcement of arbitral awards from mainland China on public policy grounds, in particular where there are grounds of serious irregularities in the conduct of the arbitrator. He detailed that in this case, the arbitrator attended via video conference and was the only person to do so. The Hong Kong Court found that the arbitrator was not focused on the hearing and it highlighted that it was paramount for justice to be seen to be done. Even though counsel did not raise these issues during the arbitration, the Hong Kong Court still refused to give recognition to the award. It was noted that this decision highlights the importance of the appearance of impartiality and the independence of the Hong Kong Courts.

James Coleman *(Goldman Ismail Tomaselli Brennan & Baum LLP – Chicago)* spoke about a recent judgment in England concerning the enforcement of arbitral awards. He outlined the English judgment in *Payward v Chechetkin*, which has ramifications for all who practice international arbitration. He noted that in this case the English High Court refused to recognise an award issued by an arbitral tribunal seated in California. It was argued that enforcing the award in England would be contrary to English public policy. The Court agreed and considered three points in denying the enforcement sought: firstly, whether the parties were consumers under English law; secondly, whether the English Court is estopped from considering issues decided by arbitrators in another jurisdiction; and, thirdly, whether enforcing the award would be contrary to English public policy.

The implications of the ruling were also highlighted, including the fact that it is becoming increasingly difficult for English courts to defer to foreign arbitrators in relation to consumer claims. As such, companies may be better off incorporating arbitration clauses that call for arbitration in other jurisdictions if it relates to contracts with consumers.

CLOSE OF CONFERENCE

Paul McGarry SC *(The Bar of Ireland – Dublin)* closed the conference by thanking the panellists for their contributions and the delegates for attending. Particular thanks was given to the Executive Director of Arbitration Ireland, Rose Fisher, for her hard work and dedication in organising this event.