IRELAND
FOR LAW

DUBLIN INTERNATIONAL DISPUTES WEEK

REPORT 2022

INTRODUCTION

Dublin International Disputes Week 2022 (DIDW2022), a new forum for international practitioners and general counsel took place from June 13-16. The Conference programme was designed by Ireland's top litigators to capture the essence of the latest issues in cross-border litigation in 2022, and the various events showcased prominent international & domestic practitioners specialising in litigating complex, cross-border disputes. Recognising the specialist nature of the strategic management of international litigation, DIDW2022 provided a fantastic programme of panel sessions, which focused on the key issues facing litigators and corporate litigants, including: insolvency and cross-border restructuring; fraud and asset recovery; intellectual property; product liability; tech and data disputes; international arbitration; post-Brexit enforcement; and, judicial co-operation, with practical perspectives and strategic analysis from a wide range of subject matter experts. Part of the Ireland for Law initiative, the week featured a range of physical/virtual events and a formal conference dinner and lunch. Irish legal firms and associations, such as the Commercial Litigation Association of Ireland, the EU Bar Association, and the Construction Bar Association, hosted a series of complementary in-person and virtual events, promising to be an annual event providing delegates the opportunity to network with other specialists, share ideas and build new contacts in this ever-changing field. DIDW2022 became a reality due to the commitment and active contribution from our sponsors and corporate partners whose contribution is vital in hosting such an event. We would like to take this opportunity to thank you all once more. Dublin International Disputes Week 2023 is scheduled to take place the week commencing June 5, with the main conference sessions taking place at the Printworks, Dublin Castle on June 7/8, 2023. Registration/programme details will be made available shortly. We look forward to welcoming you all to Dublin in 2023.

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OPENING ADDRESS

Karyn Harty, McCann FitzGerald.

Chief Justice of Ireland, Mr Justice Donal O'Donnell.

From left: Liam Kennedy, Partner ALG, Mark Garrett, Director General, Law Society of Ireland, Michelle Ní Longáin, President, Law Society of Ireland, Minister for Justice Helen McEntee TD; Karyn Harty, McCann FitzGerald; and, Patrick Leonard SC, The Bar of Ireland.

KARYN HARTY of McCann FitzGerald began the event by welcoming delegates and introducing the Chief Justice, Mr Justice Donal O'Donnell, who gave the opening address.

MR JUSTICE DONAL O'DONNELL, Chief Justice of Ireland, in welcoming the Ireland for Law initiative and Dublin International Disputes Week, spoke initially about the structures and capacity of the Irish court system and its development as a venue for international disputes.

As an English-speaking common law system, Ireland offers a unique venue where there is both consistency and confidence in the administration of justice. Chief Justice O'Donnell said that Ireland offered not only a point of intersection between Europe and the common law system for commercial transactions, but also a vibrant, flexible and agile legal economy set in a well-established, stable and robust legal system. He spoke about the rootedness and stability of the legal system in Ireland in a common law tradition spanning over 100 years. That system has developed and pivoted into a robust commercial law system over the past 20 years in particular, since the formation of the Commercial Court and the creation of the new Court of Appeal. The first case heard remotely at the Supreme Court following the Covid-19 pandemic was a commercial dispute of more than US$500 million. This was argued and considered in great detail and judgment was delivered in less than two months.

The Chief Justice said that he is both confident and optimistic in the central role of Ireland as a venue for international dispute resolution, either through the court system or through the often-preferred processes of mediation and arbitration.

PANEL 1: NAVIGATING JURISDICTION, ENFORCEMENT AND SANCTIONS IN CROSS-BORDER DISPUTES

From left: Sarah Murphy, A&L Goodbody; Mr Justice David Barniville; Caren Geoghegan BL; Elizabeth Prewitt, Latham & Watkins; and, Jane Shvets, Debevoise & Plimpton.

SARAH MURPHY of A&L Goodbody chaired this opening session and introduced the speakers. Sarah spoke of the context of a trifecta of Brexit, Covid-19, and the continuing war in Ukraine, stating that all of these factors have a profound impact on how we do business.

MR JUSTICE DAVID BARNIVILLE of The Court of Appeal set out the commercial landscape in Ireland, saying that 15 of the top 25 financial services companies in the world are based here together with most, if not all, of the top tech and social media companies. This is alongside 18 of the top 20 pharmaceutical companies, who together export more than €45 billion in products and services per annum, making Ireland the largest net exporter of pharmaceutical products in the world. Against that landscape, many complex and important cases are coming before the Commercial Court in Ireland. Examples include the Madoff litigation and the Facebook/Schrems litigation on the transfer of private data between the EU and the United States. This was initiated in Ireland, leading to two landmark judgments of the Court of Justice of the European Union. Disputes on international financial services, financial instruments and restructuring, technology, and intellectual property have all featured heavily in the Irish Commercial Court in recent years. These cases often involve huge detail, value, and complex international dimensions and cross-border issues. Many of the judges in the Irish courts have their own direct experience as practising lawyers in these sectors, and bring a wealth of expertise and understanding to the assessment of the arguments, and the efficient and timely dispatch of the cases. Mr Justice Barniville spoke of the increased collaboration and communication between judges in different jurisdictions where cases have an international dimension. On the issue of sanctions, he said that this is quite controversial at present and far-reaching in terms of the administration of justice and public policy.

ELIZABETH PREWITT of Latham & Watkins brought a unique insight in her contribution as a result of her previous work as a criminal prosecutor with the US Justice Department for 16 years. However, she was speaking in a personal capacity at the conference. She said that the proposed framework for a global enforcement of judgments under the 2019 Hague Convention is likely to be a long way off, and "I wouldn't be holding my breath" before it commences. She also spoke about the experience in the US on prosecution of anti-trust activities and price fixing, bid rigging, and market allocation. These are criminal offences for both individuals and corporations in the US and in many jurisdictions including the EU, where they are receiving increased focus. The emphasis in recent years in the US has shifted to public procurement investigations. Elizabeth said that anti-trust enforcement and bid rigging is something that Ireland may well experience a lot more of in future as a result of increased international enforcement and co-operation, and not only as result of disclosures by whistleblowers and self-reporters.

JANE SHVETS of Debevoise & Plimpton spoke of the situation in the UK post Brexit, saying that as the UK is not affected by the *Achmea* decision, it could become an investment protection haven for those seeking to invest in countries with which the UK has bilateral investment treaties. She spoke also of the possibility of anti-suits injunctions from the English courts post Brexit, and on exclusive jurisdiction clauses in arbitration agreements. She agreed with Elizabeth Prewitt's comments that the investigative and resolution procedures used in the UK by the Serious Fraud Office under the Foreign Corrupt Practices Act, and the relatively recent Bribery Act, reflect the overall US Department of Justice 'carrot and stick' approach on anti-trust prosecutions. This common approach on investigation and prosecution between jurisdictions, including the EU, leads to increased co-ordination and collaboration among enforcement bodies, and also communications between the courts in different jurisdictions. In relation to sanctions, particularly on Russian businesses and individuals, Jane said that the UK went beyond the EU in various restrictions and bans on investments and services with Russia and related companies and individuals, and has a host of restrictions for that purpose in the UK capital markets. However, the EU is actually putting its money where it's mouth is: six packages (of sanctions) have all been enacted and legislated for. There is a proliferation of different sanctions regimes across the US, the EU, the UK, and other jurisdictions. This can be challenging to navigate and enforce.

CAREN GEOGHEGAN BL spoke of the significant changes following Brexit and the administration of law in Ireland and the EU. She mentioned the biggest development as Brussels 1, Recast, in that it no longer applies to a UK-domiciled defendant for disputes since January 1, 2021. This means that application must be made to the Irish courts for leave to issue and serve proceedings against a defendant in the UK, but based on a relatively modest arguable case threshold. As the UK is not party to the Lugano Convention post Brexit, Ireland is in a unique position in the enforcement of Irish judgments in international disputes. This is because such judgements are enforceable under Brussels 1, Recast in relation to other EU member states. This is a unique situation for Ireland as the only common law system that can offer such enforceability at present. On sanctions, Caren said that the Irish courts have a long tradition of respecting the principle of comity between international jurisdictions and with foreign courts. She expressed concern at the Russian legislation that permits a Russian court to disregard an exclusive jurisdiction clause. She also said that courts will be concerned if a party has not taken steps immediately to assert their entitlements under an exclusive jurisdiction clause, and that any delay can be problematic for enforcement.

AIDAN EAMES
Clark Hill LLP

Aidan has extensive experience in commercial litigation, regulatory inquiries, defamation/reputation litigation M&A, and technology-related disputes.

PANEL 2: CROSS-BORDER RESTRUCTURINGS THROUGH IRELAND

From left: Ruairi Rynn, William Fry; Mr Justice Michael Quinn; Debora Hoehne, Weil, Gotshal & Manges LLP; Patrick Corr, Faegre Drinker Biddle & Reath; and, Kieran Wallace, KPMG.

RUAIRI RYNN of William Fry – Dublin moderated a very engaging discussion on cross-border restructurings through Ireland. He noted that this is an area where the judiciary in Ireland have something substantial to offer. He mentioned that the recent Norwegian Air Shuttle ASA (*"Norwegian"*) case addressed cross-border restructuring involving Chapter 11. He said that the world is coming out of a period of disruption due to Covid-19, that we are in a period of high inflation, and mentioned the war in Ukraine, and said that while the impact of all these factors is unclear, it is likely to lead to an increased need for restructuring and Ireland is in a good position as a jurisdiction to be considered.

MR JUSTICE MICHAEL QUINN of the High Court of Ireland spoke about how cross-border examinership in Ireland had gained momentum and was not something new in this jurisdiction. He noted that an advantage for Ireland is the many cases since the introduction of examinership, which provide plenty of precedents, therefore creating a facility to pick and choose. He stated that the scheme of arrangement in Part VII of the Companies Act 2014 is virtually similar to the English version. He mentioned that Irish case law offers a lot of precedents regarding the unfair prejudice test. He also highlighted that Part 9 of the scheme of arrangement would have wide recognition under the EU regulation, Chapter 11 in the US, and the Insolvency Act 1963. Interestingly, Judge Quinn pointed out that when Brian Cowen, the then Minister for Finance, was asked about the timeline in regard to examinership being too short, he responded: "If the company is worth saving, it is worth staying up all night for". Mr Justice Quinn noted that there is real value in the deadlines involved in examinership, referring to the examinership of Eircom, which was completed in 50 days.

DEBORA HOEHNE of Weil, Gotshal & Manges LLP, New York, explained how the US courts have shown flexibility in enforcing and recognising foreign plans. She outlined that it is possible to get a release enforced against US debtors and referenced the Ballantyne Re PLC (*"Ballantyne"*) case as a good example of this. In that case there was a release of the guarantor and the US courts looked to Ireland to get that specific release, which was binding on US creditors under Chapter 15. Debora stated that the US courts are familiar with the Irish system and that the US is very receptive to supporting cross-border restructuring. Debora stated that in the *Norwegian* case the holding company was able to avail itself of the reconstructing process in Ireland, which offered a very quick timeline, and this was a huge advantage. She highlighted that being able to utilise this process in Ireland is key in restructuring.

PATRICK CORR of Faegre Drinker Biddle & Reath, London, noted that he has always been a big supporter of examinership, stating that: "It is the US Chapter 11 on steroids". He emphasised how practitioners have 100 days to get the matter done with examinership in Ireland, and that it is favourable that the process is done cheaply and comes with everything that is needed. Another benefit is that it can be used for foreign entities. Patrick emphasised that it should not be understated that the Irish system has professionals who know how to carry out the process of examinership, and these professionals can play a lead or a support role. He highlighted that this is only possible because there is a judiciary in place that takes a common sense approach. He noted that the decisions of the judiciary have been very encouraging to other jurisdictions. Patrick referred to the case of *Ocean Rig*, where it was held by Mr Justice Barniville that the process should not differ from the wishes of the majority unless it is clear that an honest, reasonable, and intelligent member of the class would never have voted for that scheme. The question of release of a third-party guarantee arose and Judge Barniville looked at the UK and Australian precedents. Patrick noted that this recent development demonstrated the fact the judiciary in Ireland are prepared to have regard to international precedence.

KIERAN WALLACE of KPMG Ireland spoke about the benefits of implementing international cross-boarder examinership. He noted that examinership was introduced in haste in 1990 for Eircom and gained international recognition. He stated that it is a tried and tested process and has a strong practitioner base. He also spoke about the accountancy profession playing a role in examinerships where they do not in other jurisdictions. He also noted that we have dedicated judges involved in the process. He explained how examinership is very cost effective in comparison to other jurisdictions, and stated that examinership is very logical and easy for companies to understand. Kieran also spoke about the practicality, predictability and flexibility of the Irish process. He noted that in the *Norwegian* case a flexible process was required. He stated that if they did not have a process that was flexible and practicable, they would not have been able to deal with the issues. He felt the process worked so well that people coming from other jurisdictions can understand it. He noted that in the *Norwegian* case the disputes were split into customer disputes and then technical disputes, third party leases, etc., and the correct expert was put in place to deal with those particular disputes, which the client was impressed by.

RACHEL SHANLEY
Addleshaw Goddard

Rachel is a partner in the disputes team at Addleshaw Goddard, specialising in both commercial and finance litigation. She acts on behalf of various companies and financial institutions before the High Court, include the commercial division, dealing with actions for specific performance, enforcement, asset recovery, breach of contract and injunctions. Rachel also regularly represents clients at mediation and arbitration.

PANEL 3: COLLECTIVE REDRESS, PRODUCT LIABILITY AND TRANSNATIONAL TORT

From left: Peter Johnston, Mason Hayes & Curran; Martin Davies, Latham & Watkins LLP; Sylvie Gallage-Awis, Signature Litigation; Keelin Kavanagh, DLA Piper; and, Eva Nagle, Meta.

PETER JOHNSTON of Mason Hayes & Curran, Dublin, moderated the third session on 'Collective Redress, Product Liability and Transnational Tort'.

MARTIN DAVIES of Latham & Watkins LLP opened the session by speaking broadly about what collective redress is and why it has become more prevalent in the UK. He noted that this is due in no small part to the fact that there is now more regulation in place in the UK surrounding the process. He outlined the three avenues for bringing a collective redress action in the UK, and reiterated the importance of parties to the same action having the same interest when pursuing a claim. He also explained how collective redress in the area of data protection is becoming more common.

SYLVIE GALLAGE-AWIS of Signature Litigation, Paris, discussed the collective redress regime in France and recounted the differing trends regarding the process in continental Europe. She also spoke about what types of collective redress claims can be brought in France and how they have evolved from consumer law claims to claims regarding health products, data privacy, and environmental and discrimination issues. She also discussed the Dutch collective redress process, which offers specific mechanisms for dealing with collective redress claims that are very attractive for resolving mass claim disputes.

EVA NAGLE, EMEA Disputes, Meta, Dublin, discussed the trends occurring in the industry today regarding collective redress, and described the landscape in Europe as being very disharmonious, explaining that applications for petitions across Europe vary enormously. She also acknowledged that class actions do not currently play a significant part in the litigation culture of Ireland, but that this may change once the EU Directive on Representative Actions is adopted.

KEELIN KAVANAGH of DLA Piper, New York, spoke about aspects of the US federal regime for class actions and explained the merits of having a multi-jurisdictional mechanism under Rule 83. She also provided some interesting statistics surrounding class actions in the US based on a survey that is undertaken every year. She described how 10,000 new actions are filed every year and that the commercial spend in 2018 on class actions was approximately $2.5 billion, with that figure expected to reach $3.7 billion by the end of 2022.

Peter Johnston, MHC.

Amy Brick (left) and Ciara Fitzgerald of McCann FitzGerald LLP.

DEIRDRE MURPHY
Ogier Leman

Deirdre is a Senior Associate in Ogier Leman's Litigation and Dispute Resolution Team. She advises a range of clients engaged in complex litigation before the High Court, the commercial division of the High Court, the Court of Appeal and the Supreme Court. Deirdre has considerable expertise in corporate restructurings, insolvency, and has advised both Irish and international insolvency practitioners, financial institutions and investors.

PANEL 4: EUROPE: WHAT'S IN STORE FOR INTERNATIONAL COMMERCIAL ARBITRATION

From left: Gordon Nardell QC, Twenty Essex; Philippa Charles, Stewarts; Nicola Dunleavy SC, Matheson; and, Paul McGarry SC, The Bar of Ireland.

PAUL MCGARRY SC opened the session by proposing to divide the topic in two, firstly looking at arbitration in a general sense *vis à vis* litigation, and secondly considering the impact of European law (in particular, the European Convention on Human Rights) on international commercial arbitration.

PHILIPPA CHARLES, Stewarts, London, noted that arbitration can be cheaper, more efficient, confidential, and more easily enforced than an equivalent court judgment. She also pointed out that there has been some criticism from the judiciary in England whereby concerns have been raised that the common law is developing in private by the process of arbitration. However, it was her view that the issue of confidentiality is an important factor for certain industry sectors such as pharma and defence, and for those clients confidentiality is an essential element, which arbitration can protect by virtue of agreement. She noted the attraction of having autonomy in an arbitration in the context of choosing the right judge with the right expertise. She also discussed the notable move at European level for greater transparency in investor-member state arbitrations.

NICOLA DUNLEAVY SC of Matheson, Dublin, discussed Ireland as a location for international commercial arbitration. She outlined the modernisation of the legislation, and in particular the Arbitration Act 2010, which adopted the UNCITRAL model law. She noted that Ireland does not provide for an appeal of an arbitral award. She provided an overview of the Irish judicial system in the context of arbitration and the resources available, such as a designated arbitration judge who can deal with the enforcement of an arbitration award. She also noted the importance of incorporating the right dispute resolution clauses when drafting agreements, and that the failure to do so may have implications for the parties at a later date.

GORDON NARDELL QC, Twenty Essex, London, and The Bar of Ireland, considered the issues arising in different jurisdictions through the English Arbitration Act, 1996. He noted that, unlike the Arbitration Act 2010, which was inspired by UNCITRAL, the English Arbitration Act, 1996 "wears its principles on its sleeve". Noting that in contrast to the Irish position, section 69 of the English Arbitration Act, 1996, permits an appeal on a point of law arising from an arbitral award. He also expressed the view that institutional arbitration can be intensely bureaucratic and a hybrid model is much more beneficial. He then discussed the judgment of the European Court of Human Rights in *BEG S.P.A v Italy*, which considered Article 6(1) of the European Convention on Human Rights in the context of standards of independence and impartiality as applied to arbitral tribunals where a party has waived a human right that is guaranteed by the Convention (in that case, the European Court of Human Rights held that the arbitrator's impartiality was capable of being open to doubt and concluded that there had been a violation of Article 6(1)). He observed that if a waiver is to apply it must be expressed willingly, lawfully and unequivocally, and must attract minimum safeguards commensurate with its importance.

Henk Milne of Aballi Milne Kalil, Miami greeting delegates.

The panel discussed whether third-party funding is permissible for arbitration and noted that there are conflicting views as to whether such funding offends the law on maintenance and champerty, and that given the advantages for the court system of encouraging greater use of arbitration it would ease the pressure on the courts if this point were clarified by way of legislation.

ANTHONY QUINN
Dillon Eustace
Anthony is legal counsel in the Litigation and Dispute Resolution Department of Dillon Eustace. He specialises in commercial litigation and dispute resolution, acting for financial institutions, private equity funds, companies and individuals in matters including enforcement and recovery actions, landlord and tenant, and general litigation.

PANEL 5: INTERNATIONAL JUDICIAL PANEL

From left: Mr Justice John Hedigan; Ms Justice Caroline Costello; the Right Honorable Lord Hope; Judge Frank Gentin; and, Judge Duco Oranje.

MR JUSTICE JOHN HEDIGAN moderated the panel discussion on dispute resolution from a judicial perspective, and invited each of the panellists to describe their own courts and how they operate in their forms and procedures.

JUDGE DUCO ORANJE, President, Court of Appeal, Netherlands Commercial Court, outlined the recent history of the Netherlands Commercial Court (established in 2019) and the demand in the Netherlands for proceedings in English, where most of the steps take place digitally (except for the hearing itself). The proceedings are based on Dutch procedural rules but tailored for international disputes. The notable features of the proceedings are that cases begin with a case management conference to determine the issues (which can happen before the defence is even filed), and all motions must be brought together. Cases are heard by three judges (with the panel being drawn from various courts within the Dutch system and the judges working part time in the Netherlands Commercial Court). Documentary discovery does not play a large part, and lawyers are only permitted to speak for 10 minutes at the hearing (with most of the submissions being made in advance in writing). Judge Oranje pointed out that Dutch and EU lawyers have rights of audience, but lawyers from England and other non-EU jurisdictions must go through the formality of needing the supervision of a Dutch lawyer.

JUDGE FRANK GENTIN, Former Président of the Paris Tribunal de Commerce, spoke about the French commercial court, whose judges are primarily CEOs or others from business backgrounds. The Court, which dates back to mediaeval times, approaches disputes as business cases, not legal cases. In commercial disputes, the law can be quite simple but the facts can be complex, and so judges from a business background are well placed to analyse and understand the facts, and then apply the law. Judge Gentin explained how the judges focus on finding a fast decision; a case lasting more than a year would not be acceptable in this court (even if the amounts at stake are huge). The hearings are very interactive and take place in a small room. Only 12% of decisions are appealed. Responding to questions from the other judges on the panel, Judge Gentin noted that for witness evidence, the court seeks the highest levels of efficiency and credibility, and there is an increasing role for witnesses. However the cross-examination is not like the common law process, and in France the lawyers will assist the judge in asking the right questions.

THE RT. HONOURABLE LORD HOPE, Abu Dhabi, recounted the recent origins of the Abu Dhabi Global Market (ADGM) Courts, which operate on an island in Abu Dhabi designated as a financial centre and free zone (and is a common law island in a civil law ocean). Lord Hope explained that while the United Arab Emirates operates civil law, he was invited to establish a common law court in response to the preferences of businesses operating in the ADGM. The system is based on English common law and equity, but importantly it does not follow the English law practice of discovery (and is closer to the Scottish and Netherlands systems). Lord Hope pointed out that the ADGM courts were, procedurally, the purest and most self contained, because there is no appeal beyond a Court of Appeal and parties do not have recourse to the domestic courts (which operate a civil code mixed with Sharia law). This contrasts to similar courts in other comparable jurisdictions. The Court is also entirely paperless and has benefited from generous funding in setting up its IT system. The Court enters into memoranda of understanding with other jurisdictions, which provide for cross-border enforcement of its judgments. In response to questions from the panel, Lord Hope noted that the Court has a good relationship with the domestic courts, and there is no issue with the Court having female judges or employees. Judges are brought onto the ADGM courts by invitation, and are sought from among retired judges from common law jurisdictions (judges from Australia, New Zealand, Hong Kong, England and Scotland currently sit on the court). Rights of audience are granted to any lawyer who can establish that they are fully qualified in their own jurisdiction, and Lord Hope noted that an Irish barrister, coming from the common law tradition, would feel entirely at home in the ADGM courts.

MS JUSTICE CAROLINE COSTELLO, Court of Appeal, Ireland, described the dual purpose of the Irish Commercial Court as: 1. to expedite hearings in commercial cases; and, 2. to have procedures that focus the issues with a view to early settlement or mediation. Judge Costello noted that an important success statistic is how many cases are not disposed of by court judgment (which Judge Costello's continental colleagues found to be a novel approach). Judge Costello recalled a critical part of the early procedure, where the first judge (Judge Kelly) allowed parties to select how long the case hearing would require (which the parties then strictly had to adhere to). But this became problematic when really enormous litigation arose, with six- or nine-month hearings listed, which would take a judge out of the list for almost a year. Judge Costello emphasised the criticality of cross-examination, which brings out the weaknesses of the other side's case (or, if the cross-examination failed, the strengths). She remarked that in a pilot project of five jurisdictions for the European Network of the Council for the Judiciary, Ireland did extremely well on deciding first instance cases (but did not do as well on appellate cases because there were fewer judges on the Court of Appeal at that stage). The analysis was that case management was the critical factor (which does not exist as such a strong process in other jurisdictions)

MARCUS WALSH
DLA Piper

Marcus is a Legal Director in the Litigation and Regulatory Department of DLA Piper's Dublin office. He advises on a broad range of litigation and regulatory matters, with an emphasis on high-value commercial litigation in the Irish courts, and international and cross-border disputes. He has particular expertise in tech and data disputes, financial services and fintech, product liability, regulatory investigations (particularly health and safety), and reputational risk.

PANEL 6: BUILDING A MULTI-JURISDICTIONAL ASSET RECOVERY TEAM

From left: Karyn Harty, McCann FitzGerald; Sandrine Giroud, Lalive; Hendrik G. Milne, Aballi Milne Khalil; and, Rhymal Persad, Mishcon de Reya.

KARYN HARTY, McCann FitzGerald LLP, Dublin, chaired the sixth discussion on 'Building a Multi-Jurisdictional Asset Recovery Team'. The panel discussed their experiences in cross-border fraud and asset recovery from the perspectives of Ireland, the United Kingdom, the United States, and Switzerland, the panel's respective home jurisdictions.

RHYMAL PERSAD, Mishcon de Reya, London, noted that a key consideration when choosing an expert local lawyer is whether it would be easy for both sides to work together collaboratively. Rhymal explained that in some instances, a local lawyer may be asked to look for a remedy where they had no prior experience of obtaining such remedy in their local court. It is therefore important that the local lawyers considered are open and willing to try something new. He also shared his experience of a recent case he was involved in, which covered multiple jurisdictions to recover crypto assets worth approximately $16 million. A disclosure order was made in Singapore against Binance for information that related to accounts, IP addresses and know your client (KYC) documents. For the first time ever, a disclosure order was also made in Singapore against an employee of the crypto agency who controlled a telegram address. The disclosure of such information resulted in separate sets of proceedings in Hong Kong and the United States.

HENDRIK G. MILNE, Aballi Milne Kalil, Miami, spoke about the importance of discovery in fraud litigation. He explained how a section 1782 Action (an application for discovery in the United States for use in a foreign proceeding) can be used by litigants outside of the United States as a tool for discovery. Where a witness is located in the US, a party can make an *ex parte* application to a federal court to obtain evidence for use in the non-US proceeding.

Hendrik also gave a comprehensive explanation of contingent fees in the United States and their use in proceedings. He noted that while US lawyers can work on contingency, this tends to be concentrated on areas such as personal injury and medical malpractice. This led to a wider discussion of litigation funding and the absence of it in jurisdictions such as Ireland and Switzerland. In the case of litigation funding, Hendrik stated that it was important to have a funder with a good deal of experience on a range of issues.

SANDRINE GIROUD, Lalive, Switzerland, explained that working across both common and civil law jurisdictions requires a mixture of tactical and psychological skills. She explained that there are a number of factors to consider when choosing a jurisdiction in which to bring proceedings. To this end, it was crucial that all parties listened to one another to prevent one jurisdiction from conflicting with another, and to ensure that parties can

Rhymal Persad of Mishcon de Reya.

accurately make a financial assessment of each claim. Sandrine stated that if victims of fraud wished to pursue a claim based on morals and principles, then it is important that they have sufficient funding to fight the case. In many instances, she noted that it may be preferable to make a criminal complaint from a cost efficiency point of view.

> *While US lawyers can work on contingency, this tends to be concentrated on areas such as personal injury and medical malpractice*

PETER GALLAGHER
Associate, Dublin
Peter is an associate in the Dentons' Dublin office. He is a member of the dispute resolution and insolvency practice. He has advised on insolvency and corporate recovery-related litigation, and shareholder disputes. He has experience wor king on large international schemes of arrangement with large aircraft lessors and international financial institutions. He has also acted for insolvency practitioners in a variety of formal insolvency processes.

PANEL 7: CROSS-BORDER CHALLENGES IN IP REGULATION

From left: Olivia Mullooly, Arthur Cox LLP; Naoise Gaffney, GH Research Ireland; Mr Justice Cian Ferriter; Judith Krens, Pinsent Masons; and, Rebecca Swindells, Jones Day.

OLIVIA MULLOOLY, Partner and Head of Intellectual Property in Arthur Cox LLP, moderated Panel 7, which focused on the particular nuances of cross-jurisdictional intellectual property (IP) regulation and litigation that must be navigated in today's highly interconnected and interdependent legal world. Key themes raised throughout the panel session were: strategy in international IP litigation; cost-effectiveness; judicial and legal expertise in IP disputes; timeliness of cases; the upcoming Unitary Patent Court (UPC); any influence Brexit may have; and, the differences in procedures and divergence of outcomes between jurisdictions.

NAOISE GAFFNEY, GH Research Ireland, spoke about the importance of considering the industry you are working in and the ultimate commercial objective. Naoise said that there is a heavy geopolitical influence in some IP litigation, such as telecommunications, with a proliferation of anti-suit injunctions, and courts in different parts of the world jostling among themselves for primacy. In relation to the much-awaited UPC, Naoise was optimistic that it has the potential to deliver dramatic change and a 'one-stop-shop' option for IP litigation in the EU. The UPC may become the first port of call for such litigation.

MR JUSTICE CIAN FERRITER, Judge of the High Court, Ireland, likened cross-border IP disputes to a global chess game commenting that: "When the claim is filed in the Commercial Court in Ireland, you may have already lost a bishop in London". He then discussed some notable features of the Irish litigation landscape that tended to shape discussions, including discovery and the use of disclosure, which can be a lot wider in comparison with other jurisdictions and, accordingly, the potential for a 'smoking gun' that has not been found in litigation elsewhere. Judge Ferriter remarked that Irish trials tend to be longer, with more of a focus on cross-examination and experts in the stand, particularly as experts owe a duty to the Court. He welcomed the recent introduction of the IP and technology list in Ireland's Commercial Court, and the newly designed case management conference rules for that list, which he believed would deliver on cost-effectiveness. He also spoke about the civil law versus common law distinction, and was of the view that it had become an overplayed binary distinction; Ireland has been a member of the EU for close to 50 years and our system is now almost akin to a hybrid system. He called for more references to judgments from EU countries to take advantage of the knowledge and expertise of those jurisdictions. He praised Ireland as a global hub for the IP, life science, and software industries and, as a result, a 'hot centre' from an IP litigation perspective. This, combined with the huge pool of IP litigation experience in the legal profession, and a judiciary with significant experience, puts Ireland in good stead for further IP litigation.

JUDITH KRENS, Pinsent Masons, the Netherlands, spoke about her US-based clients and that litigation tended to start there, before moving on to the EU, noting that there is an element of forum shopping once the litigation moves to Europe, with the UK, Germany and the Netherlands top of the list. Key considerations for clients include where a case will be litigated fastest, cheapest and with a good result, and that litigation is often commenced in a staggered way country by country, she said. Judith observed that the experience of the judges in the Netherlands is a significant pull factor for IP litigation. She noted that, over time, courts in different jurisdictions are influencing each other, and that this is leading to more consistent decision-making. Judith's experience of the courts nowadays is that they will clarify why they have not followed a decision of a foreign court in circumstances where the underlying subject of the dispute, such as a patent, is the same.

REBECCA SWINDELLS, Jones Day, London, spoke about injunctive relief and that in her experience, clients focus on where they might get quick injunctive relief. She noted that in a recent case, she secured injunctive relief in France that would not have been available in Ireland or the UK, where the thresholds are much higher. She referenced the Intellectual Property Court in the UK as a massive success in delivering cheaper and faster IP litigation. She also made the point that as there are different causes of action and differences in procedures depending on the jurisdiction, these can have a significant impact on a case and lead to a divergence in outcomes between jurisdictions. She raised the Shorter Trials Scheme in the UK as being a tempting option for IP litigation, but the trade-off is that one might not get a dedicated IP judge going down that route. She also spoke about Brexit and how recent UK judgments have relied on and endorsed existing interpretations of law based on EU jurisprudence, and she was of the view that there will still be alignment with existing EU law, as the UK courts are conscious of providing legal certainty for businesses and minimising the impact of Brexit.

> *When the claim is filed in the Commercial Court in Ireland, you may have already lost a bishop in London*

CIARA GERAGHTY
Eversheds Sutherland LLP

Ciara is an Associate in Eversheds Sutherland LLP and specialises in public and administrative Law. She has significant experience acting for and advising a number of statutory bodies on all aspects of their statutory framework, with a particular focus on minimising legal risks attaching to the exercise of these powers. She represents clients in all court jurisdictions regarding challenges against decisions made by them, and has experience advising clients on contentious data protection matters.

PANEL 8: TECH AND DATA DISPUTES: A CROSS-BORDER VIEW

From left: Michael Byrne, Matheson; Ronan Lupton SC, The Bar of Ireland; Ian Felstead, Latham & Watkins; and, Gráinne Varian, Meta.

MICHAEL BYRNE, Matheson, Dublin, moderated the eighth and final panel session concerning a cross-border view on tech and data disputes, and commenced the session by noting the real growth and prominence of disputes in this area.

RONAN LUPTON SC discussed a number of seismic decisions of the Court of Justice of the European Union (CJEU), which emanated from the Irish courts, including the *Schrems I* and *Schrems II* decisions. Echoing the Chief Justice's remarks, he outlined that this demonstrated that Ireland punches above its weight in the context of such disputes. Ronan also spoke about the limited case law touching on non-material loss claims under the General Data Protection Regulation (GDPR) and the value of such claims, as well as a number of preliminary references to the CJEU from other member states on this issue, which are awaiting determination. Ronan observed that claimants in lower courts were reticent to progress such cases, which were frequently being met by effective use of the lodgement procedure by defendants. Ronan then discussed the hurdles facing class actions under Article 80 of the GDPR in Ireland, including satisfying the proofs required, organising such actions, as well as the legislative work that needs to be done in relation to the EU Directive on Representative Actions, and litigation funding in Ireland. In terms of future developments, Ronan foresaw further litigation similar to *Schrems*, due to the differences between the protections under US law and the EU's Charter of Fundamental Rights, and highlighted the potential impact of the EU's proposed Digital Services Act on online platforms.

IAN FELSTEAD, Latham & Watkins, London, spoke about coming developments in the UK, particularly the reform to data protection laws by way of the Digital Reform Bill. He also flagged the approach of the UK's Information Commissioner's Office (ICO) to enforcement post reform as an area of interest, and noted that there was much talk about the ICO looking to move more quickly and to provide more certainty to businesses. Ian discussed recent UK decisions, including the Supreme Court's decision in *Lloyd v Google* [2021] UKSC 50, in which it rejected a representative (opt-out) action for damages for non-material breaches involving "loss of control".

He observed that this may dampen down enthusiasm for bringing class actions, particularly due to the limitations of representative actions and the requirement for an individual assessment of damages. Ian also spoke about the English High Court decision in *Rolfe v Veale Wasbrough Vizards* LLP [2021] EWHC 2809 (QB) and the requirement for a *de minimis* level of harm for non-material damage claims. He noted that, while claimants have been creative in trying to bring claims, the economics of running such claims, coupled with the strict approach of the UK courts to non-material damage, meant that it may be a while before they see a significant amount of class actions on data protection law grounds.

GRÁINNE VARIAN, Associate General Counsel, Regulatory, Meta, Dublin, similarly observed the lack of an established position in respect of non-material damage claims, and noted that the lack of harmonisation on a European level was problematic from an in-house perspective. She highlighted the juxtaposition between the decision in *Rolfe*, particularly the imposition of the "ordinary fortitude" test, and the approach of some EU member states. While she welcomed the numerous referrals to the CJEU on this issue, and the persuasive authorities in the UK, she was hopeful of some guidance coming from within Ireland. Gráinne outlined that access, deletion and modification rights under the GDPR were growing as a sector, and highlighted the requirement for a balance to be struck when it comes to data subject access requests, particularly given the consuming nature of requests made to businesses. She also noted governance and compliance structures as a potential regulatory trend going forward, and spoke about a potentially greater confluence between Data Protection Commissioner (DPC) inquiries and effective administrative law, noting that the fair procedure rules under Irish law were a significant litigation and defence tool. Finally, Gráinne highlighted the metaverse as another future area of regulatory enforcement and, in that context, emphasised the requirement for controls in terms of personal data, user safety and integrity, and the importance of collaboration in both a regulatory and industry context.

> *In terms of future developments, Ronan foresaw further litigation similar to Schrems, due to the differences between the protections under US law and the EU's Charter of Fundamental Rights*

KYLE NOLAN
Maples and Calder
Kyle is a senior associate in Maples and Calder's Dispute Resolution & Insolvency team in the Maples Group's Dublin office. He advises both domestic and multinational clients on complex commercial disputes across a broad range of areas, including banking, financial services, public procurement, and corporate and shareholder disputes. He also regularly advises clients on regulatory investigations and related litigation.

DUBLIN INTERNATIONAL DISPUTES WEEK

IRELAND FOR LAW

CLOSING REMARKS: MINISTER FOR JUSTICE, HELEN McENTEE TD

Minister for Justice, Helen McEntee TD.

Helen McEntee TD, Minister for Justice, officially closed the conference. She thanked the organisers of the event and acknowledged the work that was being done by the Ireland for Law initiative, which promotes Ireland as a leading centre for legal services to the international business community. She noted that, as Ireland was the only English-speaking common law jurisdiction in the EU, the enforceability of Irish decisions offered a very welcome level of certainty to international businesses, and that this was something that the Department of Justice would be championing.

The Minister then provided an outline of some of the work that had been undertaken by the Department of Justice to that end. She emphasised that it was a priority for her to ensure that the courts were adequately resourced. In that regard, she highlighted the independent review of judicial resources commissioned by the OECD, which is to form part of the report to be presented by the Judicial Planning Working Group in the autumn.

The Minister also noted the recent increase in the number of High Court judges in the interim, which she hoped was a significant signal of the type of investment that was intended.

Other initiatives highlighted by the Minister included the establishment of the Judicial Council, the introduction of the Personal Injuries Guidelines, the publication of the Judicial Appointments Commission Bill, and a review of barriers to entering the legal profession.

Finally, the Minister spoke about what she considered to be two key areas of reform. Firstly, the implementation of recommendations from the 2020 Report on the Review of the Administration of Civil Justice in the State. Secondly, matching the proposed reforms with an ambitious modernisation programme within the justice and legal system, in particular through the use of technology to modernise courts systems and structures.

The Minister congratulated everyone involved and expressed her hope that Dublin International Disputes Week would be an important date in everyone's calendar each year.

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