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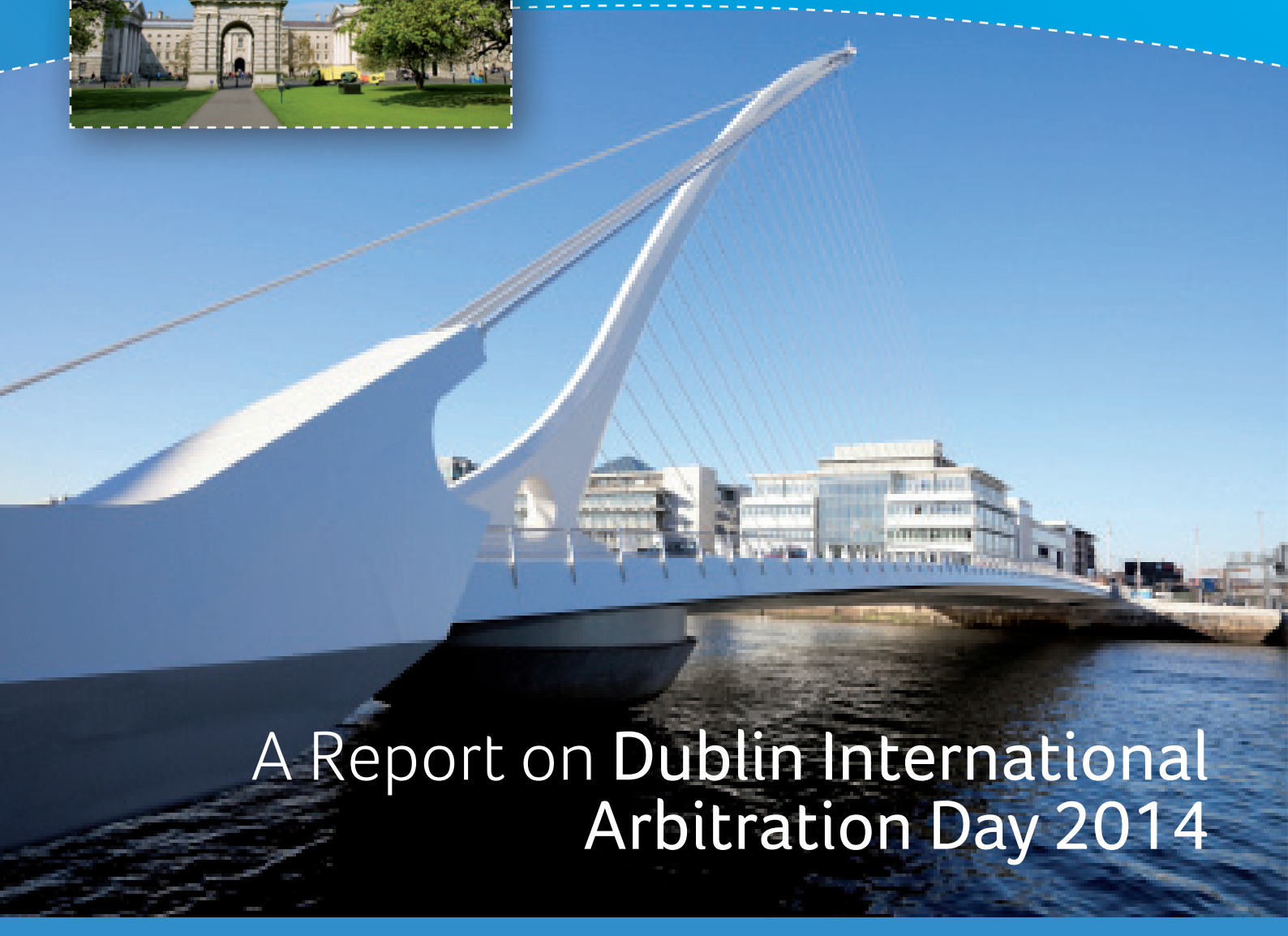

A Report on Dublin International Arbitration Day 2014

On Friday 7th November, 2014, Arbitration Ireland welcomed 100 colleagues and distinguished guests for the 2nd annual Dublin International Arbitration Day at the Dublin Dispute Resolution Centre. Delegates were welcomed by Michael Carrigan of Eugene F. Collins and President of Arbitration Ireland (2012 – 2014). Michael gave a brief history of Arbitration Ireland and detailed its strategy for promoting Ireland as a seat for international commercial arbitration.

The conference was made up of four lively panel discussions, which addressed the following topics:

"The interaction between National Courts and International Arbitration"

"Document Production in International Arbitration: Is it worth the cost and effort?"

"The Future for Investor-State Dispute Settlement: can reform allay concerns?"

"What can Sports Arbitration teach the Arbitral Community?"

"The interaction between National Courts and International Arbitration"

The keynote address on this topic was delivered by **David Williams QC** of Auckland, New Zealand and Essex Court Chambers, London. He began by providing delegates with a comprehensive historic overview of the courts' relationship with arbitral tribunals, best exemplified by the quote of Professor Jan Paulsson: *"The great paradox of arbitration is that it seeks the cooperation of the very public authorities from which it wants to free itself. Therefore an harmonious relationship between the courts and the arbitration process is vital."* His speech focused on the role of national courts in respect of arbitral proceedings under the provisions of the UNCITRAL Model Law. Specifically, he addressed whether the courts retained an inherent jurisdiction to intervene notwithstanding the provisions of Article 5. After a brief synopsis of some of the more important decisions from New Zealand, he concluded that the retention of an inherent jurisdiction to control abuses of process is critical and so long as it is exercised carefully it will be a positive result for arbitration.

Mr. Justice Brian McGovern, the recently appointed 'Arbitration Judge' on the High Court then introduced the remaining panelists for the morning session: Lord Hoffman, Jeremy Gauntlett QC and Michael Collins SC.

Lord Hoffman gave a fascinating insight into the interaction of the national courts and arbitral proceedings, having been a national court judge for 24 years and an international arbitrator for 5 years. Lord Hoffman prompted a lively discussion on the issuing by national courts of anti-suit injunctions in order to give effect to agreements to arbitrate. He considered particularly the *West Tankers* case where the ECJ considered whether such an order could be made to restrain proceedings in the courts of a member State of the European Union or a State party to the Lugano Convention. The ECJ took a political and theoretical view in holding, essentially, that member states must be trusted to come to the right decision in the case that is before it, including whether there is a valid arbitration agreement. This had a range of practical repercussions, not least that the decision of the national court on the validity of the arbitration agreement would be *res judicata*. This prompted a new Brussels regulation due to come into force this year which will insert a new recital that a ruling on the validity of the arbitration agreement is not required to be recognised by the courts of other member States. Just like the euro, Lord Hoffmann added: "*a triumph of theory over practice*", where everyone has to be relied upon to behave correctly.

Jeremy Gauntlett QC continued the panel discussion by describing to the delegates in detail the machinations of the recent prolonged *Yukos* case. The case threw up interesting questions on the "nationality" of arbitral awards and what can be done in circumstances where the national courts in the seat of the arbitration behave in a less than independent manner. If the court of the seat sets aside an award, it is invalid *ex tunc*, as if the award had never happened. However, ultimately the English courts held in *Yukos* that it would be unsatisfactory and contrary to international conflict of law principles if it were bound to recognise a decision of a foreign court which offended against basic principles of honesty, natural justice and domestic concepts of public policy. The judgment of the Moscow court was procured by fraud and as such interference could not be recognised, the award stood.

Michael Collins SC concluded the morning's session with an extremely interesting analysis of how public policy and mandatory rules can intrude on an international arbitration. Michael specifically addressed the difficult question of whether there was an obligation on an arbitral tribunal to raise particular issues at its own motion, for instance if a certain matter arising in an arbitration was contrary to treaties, US anti-trust legislation or mandatory EU rules. He noted the duty of arbitrators to act fairly and also to render an award which is enforceable. He believes there is scope for some sort of scrutiny not unlike judicial review whereby the courts would decide whether the arbitral tribunal had had cognisance of the mandatory provision in question. However, if the arbitral tribunal had addressed its mind to the law, then the courts should retreat and trust the arbitration process.

"Document Production in International Arbitration: Is it worth the cost and effort?"

The morning's second session was a spirited discussion on the various issues that arise in the context of document discovery in international arbitration. The session was expertly chaired by **Edward G. Kehoe** of King & Spalding (New York), with the panel being made up of John Fellas of Hughes Hubbard (New York), Timothy Foden of Quinn Emmanuel (London), Louis Flannery of Stephenson Harwood (London), and Mark Appel, Senior Vice President at the ICDR.

John Fellas was of the view that there was no right as such to document production in international arbitration and that any problems would be eliminated by having the parties agree a clause as to "no discovery". He failed to see how this would not be enforceable. Unfortunately, he admitted it would be rare that parties would agree to such a clause despite the increasing costs of e-discovery.

Document production is a "necessary evil" according to **Timothy L. Foden**, not only in fighting the other side's case but also in order to "know your own case". However, Timothy noted that there is a lot of pressure on junior lawyers who are expected to review copious documents in various languages in the hope of discovering a 'smoking gun'. He agreed that this was a problem: although we sell a dispute resolution system to clients on the basis of purported efficiencies, most of their complaints revolve around disclosure issues.

Louis Flannery also agreed that disclosure in international arbitration can be problematic and is no longer the system it once was with the advent of email and attendant explosion in documentation. He noted that there was an entire industry devoted to searching key words and wondered whether a tribunal should step in to halt such processes. Ultimately he believed that the tribunal's function was to "get to the truth" and so if the document were relevant, disclosure should be ordered.

Mark Appel, Senior Vice President at the ICDR bemoaned the advent of 'arbigation', whereby lawyers tend to stick to procedures with which they are familiar causing a migration of techniques to arbitration which are more suited to US courts, *e.g.* depositions and interrogatories.

Edward G. Kehoe posed questions to the panel on the obligation to disclose documents harmful to one's case. Louis Flannery believes you are bound by your own professional ethical rules and noted that discovery requests cannot be 'spray gunned' due to the enormous costs involved. John Fellas felt that if discovery had not been eliminated upon drafting of the arbitration clause, then they should hand over any documents that are asked for to which there is no valid objection. Louis Flannery noted that ethical guidelines in international arbitration was a hot topic in London and that the new LCIA rules touched on this. Mark Appel noted that guidelines must be converted into binding rules as a problem arises when players play on the same pitch by different rules. He noted that the ICDR rules now address this and that a code of conduct is imminent. Klaus Reichert SC gave a history of the work of the IBA in the context of the rules of evidence and the tensions between the common law and civil law considerations on disclosure.

"The Future for Investor-State Dispute Settlement: can reform allay concerns?"

The afternoon session began with a panel discussion on investor-state arbitration. **Colm Ó hOisín SC**, who chaired the discussion, gave a brief introduction to investor-state dispute settlement and the various relevant institutions such as ICSID and the PCA.

Audley Sheppard of Clifford Chance (London) spoke of the concerns for transparency in investor-state arbitration. He noted that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("TITA") are losing momentum but that there is a hunger for debate in the area. As it affects the taxpayer's purse, the process should be public and transparent. Costs are also an issue, particularly the influence of third party funding. Audley Sheppard was concerned about a consequent creation of a claimant bar or a rash of inadvisable claims. He also expressed concern that tribunals were made up of commercial lawyers leading to a bias in favour of commercial parties, *i.e.* investors, and that decisions may be inconsistent as a result. He noted a lack of consistent jurisprudence and awards and referred to a general perception that the system prefers investors. On the other side of the coin, many of the experts on public international law are professors who have a state-based bias and there is a perception that they may not appreciate the commercial realities.

Fedelma Claire Smith gave an institutional perspective of investor-state arbitration based on her experience at the Permanent Court of Arbitration in The Hague and detailed the ways in which a treaty case may find itself before the PCA. She discussed transparency concerns and noted that the TITA rules are a work in progress and it may take some time for them to become applicable

Niall Meagher, Executive Director of the Advisory Centre on WTO Law in Geneva, gave a brief history of the World Trade Organisation and GATT, its predecessor. Under GATT, dispute settlement was optional. There was then an explosion in the number of cases between 1995 and 2000. Developing countries began to believe they were locked out of the process being unable to afford lawyers. However, the push for transparency is coming from developed countries. Niall Meagher underscored the multilateral, consensus-based and diplomatic character of the WTO. However, he noted that lawyers are now encroaching on this system and slowly legalising the process.

George Burn of Vinson & Elkins (London) spoke of reform in the area of investor-state arbitration and the fact that South Africa is seeking to effect change by potentially diluting compensation levels and rights to international arbitration in the hope of involving the courtsmore frequently. He noted complaints that states often lose out to well-funded investors and multinationals, whereas investors require greater transparency. He also observed cultural bars to claims, *e.g.* there is a tendency not to sue China as it will affect business going forward. He concluded that the bilateral investment treaties work best for small to medium sized business and states as the larger countries do not require such mechanisms.

"What can Sports Arbitration teach the Arbitral Community?"

Following a brief coffee break, **Gavin Woods** of Arthur Cox introduced a panel of experts in the sports arbitration arena and expressed his admiration of the flexible and expeditious nature of the sports arbitration process.

Philippe Cavalieros of Winston & Strawn (Paris) outlined the Court of Arbitration for Sport's (CAS) 'closed list' system which places a restriction on the freedom to appoint arbitrators and wondered whether it necessarily guarantees the 'lex sportive'.

David Casserly, Barrister, noted that as well as being the main institutions through which sports arbitrations are held, CAS is also the basis for the rules adopted in other tribunals. Sports arbitration is known for its expedited procedures and he outlined examples of efficiencies in his professional experience.

Louise Reilly, Barrister and former Managing Counsel and Head of Mediation at CAS, gave the audience an idea of the costs involved in sports arbitrations, from institutional administration to arbitrators' expenses.

Ben Rutherford, Legal Counsel at the International Rugby Board described how its dispute resolution processes comprise a mixture of both adversarial and inquisitorial procedures which allows a greater degree of flexibility. One of its primary advantages is that decisions are made by persons with an understanding of the game.

Proceedings concluded with a reception and dining in the hallowed halls of the Honorable Society of King's Inns followed by a traditional Irish music 'seisiún' in 'The Sheds' at the Bar Council of Ireland's Distillery Building.

Arbitration Ireland was delighted with the success of the 2014 Conference and wishes to sincerely thank all of the distinguished speakers who contributed to the day's sessions. The 2015 Dublin International Arbitration Day will be aheld on Friday, 6th November. Make sure to put the date in your diary!

Details on the 2015 Conference will be available on the Arbitration Ireland website: www.arbitrationireland.com

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