ArbitrationIreland
The Irish Arbitration Association

Dublin International Arbitration Day 2015 Report

Dublin International Arbitration Centre
Distillery Building
145-151 Church Street
Dublin 7

IDRO Irish Dispute Resolution Observatory

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Gwen Malone Stenography Services

Dublin International Arbitration Day took place on Friday, 6th November 2015, at the Dublin Dispute Resolution Centre.

The Event was attended by 100 colleagues and distinguished guests. In welcoming the delegates, Colm Ó hOisín SC, President of Arbitration Ireland remarked that whilst the calendar for international arbitration conferences was very crowded he believed Dublin International Arbitration Day was a unique event.

Its hallmarks were high quality conference sessions and discussions with interaction between the panels and the audience as well as a vibrant social programme. The conference has an important role to play in establishing the profile of Ireland and Dublin as a seat for international arbitration and in strengthening the links between the domestic Irish legal community and the international arbitration community and in particular with the '*Irish international arbitration diaspora*'.

Keynote Address:

The conference opened with a keynote address from ***Donald Donovan*** of Debevoise & Plimpton, and now incoming President of ICCA. Referring to the publication of the text of the Transpacific Partnership (on 5th November 2015), he noted that it was a good time to consider developments in the investor-state arbitration system, which is no longer a discussion between scholars but has become an 'intense political debate'.

Donald traced the contribution that the system had made to the rule of law in the international sphere and the development of a line of jurisprudence that has contributed significantly to the marketplace of ideas. While the system could be described as a 'radically horizontal structure' in comparison with national systems, it does not exist in an enforcement vacuum, and the inclusion of arbitration provisions and enforcement 'gives the substantive treaty standards real teeth'.

Looking to emerging trends, Donald observed a move towards greater transparency and an emphasis on a state's right to regulate. He suggested that, while certain states have withdrawn from or unilaterally terminated existing treaties, the trend is more often one of recalibration. Some states are seeking greater certainty by greater specificity, while others have recalibrated by eliminating provisions that are usually included. Recalibration by procedural means is also evident, such as in the consideration of an appellate body in the US and in the EU. He observed that states are considering the extent to which they will subject their regulatory bodies to international scrutiny, but that this assessment is not of itself a bad thing.

In conclusion, he stressed that the system must remain impartial and independent to be successful and that stakeholders must work to preserve the integrity of this international and transnational justice system.

Session 1:
Anti-suit injunctions: Are they back on the menu following the Gazprom case?

The first session was chaired by the ***The Hon. John D. Cooke SC*** (former judge of the General Court of the EU and the Irish High Court).

Paschalis Paschalidis, Référendaire at the Court of Justice of the European Union, set the scene with a recap of what the Court of Justice had held in *West Tankers* and then focused on the implications of the more recent decision in *Gazprom*. He concluded that whilst anti-suit injunctions of the kind at issue in *West Tankers* were still not allowed, *Gazprom* effectively gave arbitral anti-suit injunctions the '*blessing of the court*'. He suggested that the recast Brussels Regulation pushes judgments ruling on the validity of arbitration agreements outside the scope of the Regulation, and that this enables, in principle, a court to issue an anti-suit injunction, although any sanctions that apply on enforcement, such as those which distinguished *Gazprom* from the decision in *West Tankers*, may need to be looked at.

David Lewis QC (20 Essex Street, London) took the view that courts are still prevented from issuing anti-suit injunctions, and that there is no serious prospect of a reversal of West Tankers. He then considered the likelihood of securing declaratory relief and damages in the court of the seat and in the court of competing foreign proceedings and concluded that, while possible, they are unlikely to be enforceable in the state of competing proceedings. Enforcement of such awards in the court of a third Member State would be a race to the line, and observed that 'we lawyers love a good race'.

Michael Collins SC agreed that Gazprom had not overturned the decision in West Tankers. He suggested that, while the 'gallows shadow of West Tankers' still falls across court-ordered anti-suit injunctions, arbitral anti-suit injunctions are in a stronger position. He then discussed the proper characterisation of such injunctions as either independent or incidental disputes, the jurisdiction of the arbitrator and of the enforcing court, and the question of public policy.

Session 2:
Practical issues relating to costs and interest in international arbitration

The second session was chaired by David Barniville SC, the Chairman of the Bar Council of Ireland.

Christopher Newmark (Spenser Underhill Newmark – London) who is also Chair of the ICC Commission on Arbitration, spoke about the soon to be published report of the ICC Commission taskforce on decisions as to costs. The report which was to be published in Paris on the 1st December 2015 looked at ways in which a tribunal's cost allocation powers might be used as a case management tool to encourage better conduct by the parties so that the proceedings would run more efficiently. The report also discussed a number of issues, including the question of whether there should be discussion at the outset with the parties, as to what presumptions on costs (for example, loser pays) would be applied by the tribunal, whether costs orders should be made 'on a pay as you go basis' (i.e. at the conclusion of any interim applications or awards), issues in relation to the costs of in-house counsel or management time and issues in relation to third party funding.

Philippa Charles (Stewarts Law – London) focused on the issue of cost budgeting. The aim that Lord Justice Jackson had in mind when introducing cost budgeting was to produce a fairer and more predictable cost outcome for both the successful and the unsuccessful party by introducing transparency into the future costs of a process at a very early stage. In implementation, however, that aim had been perhaps slightly lost.

Notwithstanding her criticisms of the manner in which cost budgeting was operating in the UK court system, Philippa

nonetheless raised the issue of whether one might consider some type of cost budgeting in an arbitration context. Cost is frequently a big factor for the parties, particularly in any settlement talks. Litigation funders find it more difficult to commit funding to arbitration because of the lack of certainty in relation to costs and are keen to see an equivalent to cost budgeting. Furthermore, it may be that an ambitious arbitration institution might decide that provisions on cost budgeting in its rules could be a unique selling point.

Robert Deane (Borden Ladner Gervais – Vancouver) focused his attention on the types of materials that should be presented by parties to an arbitration tribunal in support of an application for costs. In his experience, there can be very different approaches. Some tribunals simply require a one-page sheet with a summary of legal fees, expert fees and disbursements. On the other end of the scale, other tribunals could require detailed post-hearing submissions, complete with schedules of receipts, and redacted statements of account showing the time spent by each timekeeper, hours and rates. In his view there was a danger of 'judicialising' arbitral costs awards. The awards of tribunals, made following very lengthy submissions on costs, were not necessarily any better than the awards made on a more summary basis.

Concluding the session, ***James Hosking*** (Chaffetz Lindsey – New York) discussed the practice in New York seated arbitrations in relation to costs and interest. There is a perception sometimes that by choosing New York as the seat, one is adopting a so-called American rule on costs where there is little or no opportunity to recover attorneys' fees. That, however, is a misconception. New York law recognises that arbitral tribunals may award costs (including attorney's fees), unless that discretion has been excluded by the arbitration agreement.

Session 3: The EU and US TTIP negotiations – what it means for ISDS

This session was chaired by ***David Herlihy*** (Skadden – London). David opened the session by observing that 50 years ago when the Washington (ICSID) Convention was signed, '*Eight Days a Week*' was No. 1 in the charts and the world population stood at 3.3 billion. The landscape had changed very significantly since then and as Donald Donovan had earlier described, we are now at an inflection point in investor-state arbitration. Concerns had been expressed from some quarters about the legitimacy of the current system. Others saw TTIP as a potential model for future Treaties.

Ian Talbot, Chief Executive of Chambers Ireland, noted that given the furore about TTIP, one might be forgiven for thinking that this Treaty was about dispute resolution rather than the reality which was that it was about trade. The European economy was predicted to grow by €119 billion per year if TTIP was agreed and that was a figure worth fighting for. The Philip Morris plain packaging case taken in Australia was referred to frequently by the critics of TTIP. In Ireland's case, it was clear that you didn't need ISDS to sue the Government in relation to plain packaging. These types of cases can be brought in any event in the domestic courts.

Michael McDowell SC, former Attorney General and Tánaiste (Deputy Prime Minister) whilst being ideologically pro-trade, nonetheless had concerns in relation to the delegation to private arbitral tribunals of power to adjudicate on matters of government policy. He was concerned that international capital was getting increasingly mobile, powerful and dominant vis-à-vis small states. Michael was concerned as to whether anybody in Ireland at government level was addressing the issues which have arisen and which touch on national sovereignty.

Brian Jensen, Political and Economic Section Chief in the US Embassy in Dublin, spoke in favour of the ISDS system. One of the reason the US Government wants ISDS in the TTIP is because of the standard it will set for other trade agreements in the future. That transcended the argument that neither the US nor the EU need ISDS because their respective court systems are solid and reliable.

Janet Whittaker (Simpson Thacher – Washington DC) opened by referring to sensationalist headlines about ISDS and about some of the misconceptions in the debate. In her view, the debate had not been very well balanced. The opponents of ISDS investor-state arbitration had been very well organised. The business community had been much less vociferous in defending its interest in having a mutual international arbitration forum. It was a misconception that investors always win or that they reap huge windfalls. The majority of cases do not involve challenges to domestic policy or domestic legislation. Most challenges concern cancellation or alleged violation of contracts with governments or the revocation or denial of licences. Investor cases typically do not threaten legitimate state regulatory conduct and it was difficult to think of a case where a tribunal found in favour of an investor other than where there had been arbitrary or discriminatory treatment. Many of the concerns that have been raised have actually been addressed by the drafters of the newer treaties, for example, the Canada/EU Trade Agreement.

Session 4: Issues for in-house counsel in international arbitration

This session was chaired by ***Richard Breen*** (William Fry). He first posed the question as to whether there was sometimes a nervousness about the use of international arbitration in corporate circles.

Karl Hennessee (Halliburton – Houston) described in-house counsel as intermediaries between the board representing the shareholders and the community of law. Karl spoke about the importance of managing expectations, about explaining what arbitration is like, how it works and what its advantages and its drawbacks are. Studies such as that from Queen Mary showed that generally speaking a high proportion of users are happy that arbitration leads to a fair and just result and a well written award can be a useful tool, even for the losing side.

Clyde Lea (formerly of ConocoPhillips – Houston and now with Reed Smith) indicated that the choice of whether to go to arbitration could be a complex decision, depending on the type of dispute and whether the local courts were a satisfactory alternative.

Karl Hennessee felt that one of the most important factors is to ensure that there was the same dispute resolution approach in the suite of contracts involved and, perhaps, contracts with suppliers, customers and service providers. The worst situation is to find yourself in a fractured set of dispute resolution mechanisms. Another important factor was the preservation of relationships. In his experience, arbitration was better for preserving relationships than litigation. Ultimately, however, no single factor predominated.

The panellists also touched on the issue of third party funding. Karl Hennessee was of the view that arbitrators had not adapted quickly enough to deal with the issues raised by third party funding including issues of confidentiality and issues of security for costs. Clyde Lea also spoke about the danger for arbitration in following American litigation, particularly in relation to issues such as discovery. This increased the costs and the length of proceedings. It was important for the counsel retained by the corporation to make every effort to handle cases efficiently and as though it involved their own money.

In discussing their perspective on Ireland as a seat for arbitration the panellists agreed that Ireland was well placed to succeed as a recognised seat for international arbitration. What was required was persistence in communicating that message to the international arbitration community.

Social Programme

After the closing remarks by Colm Ó hOisín SC the delegates adjourned to the Honorable Society of Kings Inns for dinner and the evening continued on at 'the Sheds bar' where there was traditional music and Irish dancing until the early hours.

Dublin International Arbitration Day 2015 certainly lived up to high standard of previous years.

2016 Conference

The organisation of this year's event is already underway and will take place on the 18th November 2016 (on the eve of the Ireland vs. New Zealand All Blacks rugby match in the Aviva Stadium in Dublin.)

We look forward to seeing you there!

Young Practitioners Event

This year's event was preceded on the evening of the 5th November 2015 by a Young Practitioners Event chaired by Audley Sheppard QC (Clifford Chance, London). A number of panels discussed the topics:

- The role of the arbitral secretary in international arbitrations
- The conduct of counsel in international arbitrations
- The enforcement of arbitral awards in the European Union

The speakers included:

- Tim Foden (Quinn Emmanuel – London)
- Shane Daly (Bredin Prat – Paris)
- Niamh Leinwather (Freshfields – Vienna)
- Gillian Cahill (Barrister, Référendaire – Court of Justice of the European Union)
- Jerry Healy (Slaugher and May – London)
- Fedelma Clare Smith (PCA – The Hague)
- Paul Bassett (Mason Hayes & Curran)
- Eimear Caher (A & L Goodbody)
- Maria Kennedy (Matheson)


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