

# Commercial Litigation Association of Ireland

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Judicial Planning Working Group  
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## CLAI Submission on Judicial Numbers in the Commercial Court

Dear Colleagues

### 1. Introduction

- 1.1 The Commercial Litigation Association of Ireland (“CLAI”) is a joint initiative of solicitors and barristers that was launched on 1 July 2010. The CLAI provides a forum for practitioners to engage in commercial litigation, supports best practice in the litigation of commercial disputes in Ireland and provides legal education and training for practitioners.
- 1.2 As the Committee of the CLAI, we are pleased to make a submission to the Judicial Planning Working Group in respect of the number of judges required to ensure the efficient administration of justice over the next five years. Given the purpose of our Association this submission is focussed specifically on the user experience of practitioners (and their clients) of the Commercial Court.

### 2. Positives

- 2.1 Since its establishment in 2004, the Commercial Court has been an excellent addition to the courts system, providing a dedicated case managed forum for the streamlined resolution of high value and important commercial business disputes. From its inception, the Court proactively case managed all cases, setting and enforcing strict timetables for the effective progression of cases in its list. The Court was in a position to allocate trial dates to matters

without any delay once they were ready for hearing and this pattern continued over the first 8 years of the Commercial Court's operation.<sup>1</sup>

- 2.2 The efficiency of the Court enabled practitioners to confidently estimate the average period required to resolve cases in the Commercial Court and to advise clients accordingly. This was a very positive development, enabling practitioners to promote the Court's attributes to both domestic and international clients and encourage the inclusion of both Irish choice of law and jurisdiction clauses in commercial contracts.
- 2.3 In addition to dealing with its regular case load the Commercial Court has always been responsive in terms of seeking to allocate time to deal with urgent matters even when the Court has been dealing with a full diary of case management hearings, routine interlocutory applications and trials. A recent example was the Court's excellent handling of an urgent scheme of arrangement in respect of *Ballantyne Re*. In that case, despite the scheme being contested, given the urgency of the matter the Court delivered a three-hour *ex tempore* judgement the day after the hearing concluded. The Court's expedited handling of this case was a superb advertisement of the Court's capabilities to an international audience of clients and foreign practitioners involved in the case.
- 2.4 It is worth noting the return to the Exchequer arising from the successful operation of the Commercial Court. In terms of taxes, every case admitted to the Commercial Court generates €5,000 in stamp duty payable on the entry application. Stamp duty is payable on other court filings made during the course of the case. While there are no published statistics available on the level of costs incurred in prosecuting and defending a case in the Commercial Court, our practitioner experience is that it would typically be not less than €100,000 per party to close of pleadings. (This is often a point at which settlement is reached). Other forms of taxation, being VAT and income tax, are levied on those costs. By way of basic example, every €100,000 in professional fees results in VAT of €23,000 being charged (being 23% applied to the professional fee) together with an income tax charge. Income tax, usually on the higher rate of 40%, together with PRSI and USC (making an effective rate of greater than 50%), is payable by the relevant professionals.

### 3. Negatives/Delays

- 3.1 In recent years cases admitted to the Commercial Court have often been complex, requiring significant court time at trial (if they do not settle). By way of example a review of the current legal diary for the Commercial Court shows that between now and October 2022:
  - (i) 5 cases are listed for one week or more;
  - (ii) 8 cases are listed for two weeks or more;
  - (iii) 5 cases are listed for four weeks or more
  - (iv) 1 case is listed for ten weeks or more;
  - (v) 1 case is listed for 14 weeks or more and;

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<sup>1</sup> Courts Service Annual Report 2005: page 165, confirms that there was no wait time for a hearing date in the Commercial Court as "Date immediately available". Courts Service Annual Reports for 2006 to 2012 also stated "Date immediately available".

(vi) 1 case is listed for 16 weeks or more.

3.2 The average length of proceedings in the Commercial Court (being the time it takes from start to finish of a case) has been increasing over the last number of years according to the annual reports published by the Courts Service:

- In 2017, the average length of proceedings in the Commercial Court was 287 days.<sup>2</sup>
- This increased to 321 days in 2018<sup>3</sup> and increased further to 539 days in 2019<sup>4</sup> (an increase of 218 days in the space of a year).
- Last year, the average length of proceedings in the Commercial Court decreased slightly to 427 days.<sup>5</sup>

3.3 There is now on average at least a 6-month delay to secure a trial date in the Commercial Court. Given the complexity of the cases when they do proceed to a full trial, the work involved in writing judgments is very significant, yet the Judges have no allocated 'writing time' and the ability to provide for that in the management of the Court is constrained by the limited number of Judges and the volume of work of the Court. In recent years practitioners have experienced increased delays in receiving judgments, (with several outliers in excess of 12 months).

3.4 As a result of the pressures on the Court its capacity to get through its caseload with the efficiency that it did in the past is constrained. By way of example:

- In 2007, 196 cases were admitted to the Commercial Court with 173 of them resolved within the year (88%) and in 2008, 243 cases were admitted to the Commercial List with 205 of them resolved within the year (84%).<sup>6</sup>
- Whereas in 2019, 172 cases were admitted to the Commercial Court with 95 of them resolved within the year (55%) and in 2020, 185 cases were admitted to the Commercial Court with 133 of them resolved within the year (71%).<sup>7</sup>

3.5 Such delays - in terms of securing a trial date and/or in receiving judgments - undermine all the good work of the Commercial Court in dealing expeditiously with its workload. From a practitioner's perspective, it is abundantly clear that the ability of the Commercial Court to manage its caseload has become very stretched in recent years, due to the nature of the caseload and the limited resources of the Court. Currently there are only 4 Judges sitting in the Court, following Mr Justice Barniville's elevation to the Court of Appeal.

3.6 The 2021 European Commission Rule of Law Report presents an analysis of the justice system in 27 member states. According to the report, the number of judges in Ireland per

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<sup>2</sup> Courts Service Annual Report 2017, page 94

<sup>3</sup> Courts Service Annual Report 2018, page 101

<sup>4</sup> Courts Service Annual Report 2019, page 100

<sup>5</sup> Courts Service Annual Report 2020, page 150

<sup>6</sup> Courts Service Annual Report 2008, page 69

<sup>7</sup> Court Service Annual Reports for 2007, 2008, 2019 and 2020

inhabitant remains the lowest in the EU.<sup>8</sup> The report further states that in Ireland, “challenges relating to the length of proceedings have aggravated”.<sup>9</sup>

3.7 The Commercial Court has traditionally provided an excellent centre for the resolution of both domestic and international commercial business disputes. Ireland as a choice of venue post Brexit is of heightened relevance given it is the only member of the European Union that operates a court system that is both English speaking and based on the common law and the doctrine of precedent.

3.8 However, the impact of the length of proceedings (from start to finish) and delays in delivery of judgments, is affecting the Commercial Court’s offering and hindering the ability of practitioners to continue to promote the Commercial Court as a consistently highly efficient option, in particular for international dispute resolution.

#### **4. Competition for International Disputes Post Brexit**

*Commercial Court’s delays are a threat*

4.1 Attracting high profile and high value commercial litigation to Ireland post Brexit would have a very significant positive economic impact to the Exchequer and would also significantly enhance the brand of *Ireland Inc.* as a sophisticated commercial centre.

4.2 However our UK colleagues, aware that they are at a disadvantage due to the difficulties in enforcing their judgements post Brexit, have pivoted and are now extolling the virtues of arbitration, by way of example before the London Court of International Arbitration.

4.3 Given this development, as a Committee we believe that if the Irish judiciary are not supported to increase efficiencies and improve the speed with which they are in a position to deal with disputes, parties will opt for arbitration as an alternative and more expeditious way to deal with their disputes.

4.4 The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides an established enforcement regime for international arbitration awards. The vast majority of states have signed up to the New York Convention, and there are very few grounds for a signatory state to refuse to recognise an arbitration award. National courts will therefore recognise an arbitral award made in England under the New York Convention, even if they no longer recognise an English court judgment.

4.5 Arbitration can allow the parties to tailor procedures to the needs of a particular dispute and is generally thought to allow the parties more freedom to agree a suitable procedure, and have a greater influence over procedure than is possible in court proceedings. However, in reality many commercial parties tend to opt for institutional arbitration and simply adopt the standard rules and procedures of their chosen institution (e.g. the London Court of International Arbitration, which recently adopted new rules). From 2013 to 2016, the median duration of an LCIA arbitration was 16 months.

4.6 This therefore represents a real time saving option when compared with the current time lines experienced in the Commercial Court.

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<sup>8</sup> 2021 Rule of Law Report: Country Chapter on the rule of law situation in Ireland, page 6

<sup>9</sup> Ibid, page 9

*Commercial Court's established attributes create an opportunity*

4.7 On a more positive note, post Brexit, given the experience, expertise and profile of its Judges, the Commercial Court is well placed to attract international high value restructuring and insolvency work, previously dealt with in London. That work is often both complex and time sensitive, requiring immediate dedication of judicial resources. To date, the Commercial Court has shown itself to be ready and willing to meet those challenges (for example as it did in the *Nordic Aviation* case).

## **5. Technology**

5.1 The operation of the Commercial Court during the covid pandemic was maintained in no small part due to the use of technology for the conduct of remote hearings, both interlocutory and full trials.

5.2 In this context, the Commercial Court required all case papers/filings and authorities to be provided electronically. For trials those papers were accessible through the Courts Service's platform (Pexip) or other approved platforms such as Trialview. The advantages of using such technology should not be lost post pandemic.

## **6. Suggestions**

6.1 To support the excellent work of the Commercial Court and ensure its offering maintains its positive attributes of consistently high efficiency in dealing with its caseload we submit that the Court should be supported in the following ways:

- By the appointment of 2 additional Judges so that there are 6 Judges appointed to the Court.
- By affording the Judges designated writing time to assist with the timely delivery of judgments. Whether this is an allocation of several days following the completion of a hearing or a week a month or a period of time per judicial term is a matter the Court is best placed to decide.<sup>10</sup> Unless additional Judges are provided it would not be possible for the Court to allocate designated writing time to its Judges without this further impacting the already lengthy waiting time for a trial date.
- By affording appropriate dedicated secretarial support to the Court.<sup>11</sup>
- By supporting the Court in its continued deployment of technology for greater efficiency, in terms of its filings and continuing with virtual lists and call overs.

Yours faithfully

**The Committee of the  
Commercial Litigation Association of Ireland**

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<sup>10</sup> Our member practitioner firms with international partnerships or networks confirm that in other common law jurisdictions such as the UK and Australia writing time is provided for, with arrangements differing between the courts from the allocation of two days post a hearing to enable the Judge commence drafting their judgment to the allocation of writing time on a monthly or yearly basis.

<sup>11</sup> We understand that there are only 4 secretaries available to support over 40 High Court Judges.