

The Irish Commercial Court:

# an inside view

It is now ten years since the Irish Company Law Review Group (CLRG) formally recommended to government that a "Commercial Division should be established within the High Court to deal with business-to-business and business-to-state litigation." Ireland had been in a sustained period of economic growth since the early 1990s driven in part by the technology sector and the development of Dublin as a financial services hub. A commercially focused court was needed to provide an adequate forum for dispute resolution for an increasingly international business since the sleepy pace of the existing court lists was clearly no longer adequate.

Eight years after its foundation, the Commercial Court has garnered a reputation for dealing with complex commercial litigation in a practical, speedy and cost-effective manner.

The rules which apply to cases in the Commercial Court set out the manner in which the Court deals with cases, issues directions to the parties and how it conducts proceedings once at trial. These rules are designed to encourage litigating parties to agree as many issues as possible and to narrow down the issues in dispute before the case goes to trial so that the hearing can focus on relevant issues that remain in dispute and speed up the trial process. Where suitable, the Court can also seek

to encourage the parties to resolve their differences through alternative dispute resolution including mediation and arbitration.

### Why establish a commercial court?

Prior to the setting up of a commercial division of the High Court in Ireland commercial litigation was costly, burdensome and lengthy with the system struggling to cope with the volume and specific demands of complex litigation.

The CLRG looked at the examples of England, New Zealand, and Delaware amongst others and referred to the reports recently published by Lords Irvine and Woolf on the topic. It concluded that moves were afoot in a number of other jurisdictions "for the dedicated treatment of commercial/company law cases in order to achieve efficient and effective dispute resolution" and given the recent "huge increase in economic activity" in Ireland, similar measures were appropriate here. They called for the "establishment of a Commercial Division within the High Court which would deal with a Companies list as well as other commercial cases."

This was echoed by the judiciary with Keane CJ in the case of *Orange Communication v The Director of Telecommunications Regulation and Meteor Mobile Communications Ltd* [1999] 10 JIC 0401, pointing out that the "absence of appropriate case management structures in the High Court...[the problem]



**John O’Riordan of Dillon Eustace** looks at why Ireland is increasingly being regarded as the forum of choice for resolving international commercial disputes

can indeed be acute.” Having taken these views on board and considered the position in other jurisdictions the Commercial Court was set up in January 2004.

**Entry into the Commercial Court List**

Commercial Court proceedings begin life as High Court cases simpliciter and an application to have a case admitted to the commercial list can be made at any time prior to the close of pleadings. In practice, however, the view is taken that if a party considers a matter of sufficient importance and urgency that it should be dealt with by the Commercial Court then almost immediate steps should be taken to apply for transfer.

To be included in the commercial list, the proceedings must fall within the definition of “commercial proceedings” as defined in the Commercial Court rules. As a starting point is it generally accepted that the claim

disputed must be for a minimum of EUR 1 million and relate to issues such as disputes over:

- a business document, business contract or business dispute;
- the purchase or sale of commodities;
- the export or import of goods;
- the carriage of goods by land, sea, air or pipeline;
- insurance or re-insurance;
- the provision of services (not including medical, quasi-medical or dental services or any service provided under a contract of employment);
- the operation of markets or exchanges in stocks, shares or other financial or investment instruments, or in commodities;
- business agency; or
- a dispute concerning intellectual property.

It is important to note that the Commercial Court judge hearing the application has an overall discretion to allow or refuse to enter a case onto the Commercial List. The value threshold is not

a hard and fast rule for entry and the judge can decide not to admit a case which meets that value threshold for various reasons.

**Initial directions hearing**

The judge will make a number of initial directions at this initial stage including timing for the exchange of pleadings, exchange of requests for particulars and discovery. These deadlines are typically very strict and failure to comply with these directions can result in a costs penalty against the offending party.

**Case management**

Cases admitted to the Commercial Court are also, in the majority of cases, subject to close case management. This is especially so where the complexity of the case, the number of issues or parties involved or the volume of evidence requires it. The purpose of the case management system is to streamline the preparation of the case

- ▶ for trial, deal with any pre-trial issues that may arise and ensure full pre-trial disclosure.

Case management consists of a conference or series of conferences where the parties appear before a Commercial Court judge. Commercial Court judges have a wide discretion as to the directions that can be made and the sanctions that can be ordered for non-compliance.

### Pre-trial conference

A pre-trial conference must be held before any commercial proceeding can be listed for hearing. This applies whether or not the case is case managed. At this conference, the judge establishes what steps remain to prepare the case for trial, if any special arrangements are required for the trial and the likely length of the hearing.

### Alternative dispute resolution

The Judge may, at any time, if he/she considers it advantageous, direct that the proceedings, or any particular issues within them, be sent for mediation, conciliation or arbitration. The judge can adjourn proceedings for up to 28 days to enable the parties to pursue one or more of these forms of alternative dispute resolution.

### Success of the commercial court

The Commercial Court statistics from its establishment in 2004 clearly highlight the success of the Court. From a slow start there has been a huge increase in the volume of cases progressing through the Court with the number of cases being entered annually growing from 43 in 2004 to an all-time high in 2009 of 373. The court provides a more satisfactory framework within which to conduct commercial related litigation in Ireland. Proceedings are overseen by judges with established commercial backgrounds. The initial directions hearing, judicial case management and pre trial conference procedures have required parties to cull the non-material issues at an early stage and to focus only on the material issues in dispute. This has resulted in shorter trials and is unquestionably a more precise and efficient mechanism of disposing of commercial disputes.

**T**he overriding aim of the Commercial Court was to speed up commercial litigation and while the number of cases in the system has increased significantly, the Court has maintained a swift turnaround time. As per the most recently available statistics over 90% of cases entered into the list conclude within a year. It has been the experience of practitioners that the close case management, tight timetables and the fact that witness evidence can not be withheld until trial all militate to create the conditions for settlement in a large amount of cases. The main driver of the Commercial Court since its inception is Mr Justice Peter Kelly. He was recently quoted describing the keys to its success:

*"You can avoid excursions into blind alleys, there are no adjournments, every time the case comes in something happens. There is much more focused discovery [of documents]. We have the ability to require the parties to consider ways to resolve the dispute. The incidence of mediation has increased and the success rate has increased. For example, cases involving shareholders claiming the oppression of a minority are often successfully resolved by mediation. When we get to trial it is only on the issues that require adjudication. There is a strike-out procedure for dud cases. We are much faster than the other commercial courts in the EU." ■*

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### About the author



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