



**Chambers
Ireland**
Advancing business together



Economic Evaluation of Options for the Control of Litigation Costs Consultation

Submission by Chambers Ireland

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Introduction

Chambers Ireland is Ireland's largest business organisation with a network of Chambers of Commerce in every major town and region in the country. As a truly all-island organisation, we are uniquely well-placed to understand the concerns and interests of businesses based in Ireland, and those who are based abroad and want to set up in Ireland. In the context of Irish legal services, we help promote Ireland as a uniquely well-placed jurisdiction in the European Union, in which to do business.

Earlier this year, the European Commission published its third annual report,¹ which singled out Ireland's litigation costs. It was recommended that Ireland continues actions aimed at reducing litigation costs to ensure effective access to justice, taking into account European standards on disproportionate costs of litigation and their impact on access to courts.

The lack of predictability of costs was cited as problematic for victimless claims, such as environmental claims, where litigants are not aiming to gain an economic benefit from their legal action, and instead act in the public interest. As a business organisation, we can draw a parallel between this scenario and the lack of predictability for business, which arises chiefly from the prolonged length of time it takes to enforce contracts. One of the issues cited in the report was that this situation is aggravated due to the limited range of possibilities for, and uptake of alternative dispute resolution (ADR) in Ireland. Per available data from the EU Justice Board 2022, Ireland ranks poorly (the third lowest in the EU) in promoting and incentivising ADR methods.² Government clearly needs to set a better example in this regard, if litigation costs are to decrease.

High litigation fees are compounded by a lack of certainty in our courts system and infrastructural investment deficits

The ever-present lack of certainty represents a weak point in the Irish legal system. In the context of planning, this has held back numerous projects of national importance such as the Metrolink and the ambitions of the National Development Plan, which would benefit our communities, and the businesses servicing those communities. Spurious claims regularly clog up an under-

¹ https://ec.europa.eu/info/sites/default/files/20_1_194011_coun_chap_ireland_en.pdf

² Figure 29, [THE 2022 EU JUSTICE SCOREBOARD \(europa.eu\)](#)

resourced courts system, putting back these projects and prolonging their date of commencement. Timelines for completion are hence delayed unnecessarily - in some cases indefinitely - which along with the consequent indirect costs, increases the cost of doing business in Ireland.

A balance must therefore be struck between having in place access to justice, which is an obligation laid down under International and EU law, and ensuring that we have the capacity to resolve cases, provide a fair outcome and ensure judicial reviews do not prolong this uncertainty.

Similarly, judicial review proceedings can be complex and require plenty of time to ensure procedure is followed. Unfortunately, the court system in Ireland is not adequately equipped in terms of capacity to deal with the sizeable number of judicial review proceedings; be they planning-related or otherwise. This is an issue that is not unique to Ireland; it has been highlighted on multiple occasions at EU level in relation to access to justice cases in environmental law, with various propositions – such as a dedicated environmental law court at EU level - put forward to deal with capacity issues.

In the context of commercial cases, Chambers Ireland has consistently advocated for a court system that has the capacity to process and hear objections relating to the projects in question, without infringing on the right of our citizens to enjoy access to justice.³ We have been steadfast in our support for the courts expanding their capacity to deal with these cases.⁴ A lack of infrastructural investment has translated into delays which create extra costs and risks for businesses. This is substantiated by available data which shows that Ireland ranks unfavourably low when compared to European counterparts in terms of government investment in the courts.⁵ Because of the court's backlogs that have arisen during Covid-19, under-resourcing ensures that our access to justice remains severely limited unless there is a great expansion in the number of courts and in the number of justices (Ireland currently ranks the lowest per 100,000 inhabitants in the EU)⁶ that are available to serve in those courts.

³ <https://www.chambers.ie/news/judicial-system-needs-significant-extra-resources-to-avoid-costly-infrastructure-delays-says-chambers-ireland/>

⁴ <https://www.chambers.ie/wp-content/uploads/2021/11/Chambers-Ireland-submission-to-the-Department-of-Justice-on-the-Judicial-Planning-Working-Group-1.pdf> ; and <https://www.chambers.ie/news/judicial-system-needs-significant-extra-resources-to-avoid-costly-infrastructure-delays-says-chambers-ireland/>

⁵ Figure 35, [THE 2022 EU JUSTICE SCOREBOARD \(europa.eu\)](#)

⁶ Figure 36, [THE 2022 EU JUSTICE SCOREBOARD \(europa.eu\)](#)

Urgent, increased resourcing in An Bord Pleanála should be a priority. Investment in the quality of administration within the planning authorities is likely to see the typical standard of planning decision being raised, which will subsequently lead to a quicker process. A lack of resources in organisations like An Bord Pleanála arguably results in requests to defer Court proceedings. Improved use of alternative dispute resolution mechanisms (as discussed later) would mitigate this problem.

Nonetheless, we must expect that the number of objections will continue to rise in line with the number of developments, regardless of the quality of the decision-making. Therefore, the courts services will have to accommodate a massive increase in the number of planning permission cases which will be taken because of the ambition of the National Development Plan, along with the scale and range of housing projects that will be needed if we are to be able to deliver the homebuilding programme that is key to Housing for All.

Additionally, Brexit has meant that Ireland is now the sole English-speaking common law jurisdiction within the Union. This makes Ireland the jurisdiction of choice for many third countries that seek to trade with the EU, and for US companies in particular, Ireland is now the preferred legal hub companies doing business in Europe. The “Ireland for Law” project highlighted this as recently as September 2022, where Ireland’s unique attributes as a centre for international disputes resolution was put to a US audience of legal practitioners and executives.⁷ This puts further weight behind the proposition that resourcing must be prioritised across the board, especially as extra demands will be placed upon our Commercial Court.

The enforcement of contracts

Per the World Bank’s most recent report, Ireland remains an expensive location in which to enforce a business contract, and is the 8th most expensive in the OECD³². Although Irish cities are among the best performers in the European Union in the areas of starting a business and dealing with construction permits, we nonetheless lag behind when it comes to registering property and enforcing contracts. The World Bank stated that it takes a significant length of time (650 days) to enforce a contract in Ireland, compared with an OECD average of 538 days.⁸ This is the 7th longest within the OECD³², and the ranking was flagged by the National

⁷ <https://www.irelandforlaw.com/newyork>

⁸ https://data.worldbank.org/indicator/IC.LGL.DURS?locations=IE&most_recent_year_desc=false

Competitiveness Council as seriously hindering our ability to compete on the global stage and our reputation as a business-friendly jurisdiction.

One of the ways of mitigating these statistics is for the State to facilitate the increased use of alternative dispute resolution (ADR) in commercial or contractual disputes. Chambers Ireland emphasised this point on numerous occasions.⁹ Similarly, we collaborated with a number of European Chambers of Commerce and European Association of Judges for Mediation, to develop the “Mediation Meets Judges” project, which was implemented in numerous partner countries in Europe to promote mediation in commercial cases.¹⁰ This aimed to promote mediation to SMEs in particular as the first option where commercial disputes arise.

The introduction of the Commercial Court and the appointment of an arbitration judge have all helped to speed up the resolution of commercial disputes. However, ADR mechanisms, like mediation and arbitration in commercial disputes, save businesses time, money, and help to maintain constructive business relationships. In the context of reforms to the legal system, Chambers Ireland additionally stressed that subsequent Government should commit to active management of cases by courts and other governance reforms. At the time of writing, the Legal Cost Working Group recommended that court rules should include a specific order facilitating supervision by the court of the pace of litigation; the purpose of the recommendation was to contain measures to penalise unnecessary delays.

The intervening six years have seen the enactment of the Mediation Bill 2017. The Act ensures the statutory basis of mediation into Irish law as a “confidential, facilitative and voluntary process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute.” We advocated heavily for this, bearing in mind the considerable benefits for businesses that need their issues resolved without the arduous process of going through the courts.

In line with our previous point regarding resourcing, we view mediation as particularly preferential over litigation in commercial disputes, as it saves businesses time and money, while helping the parties to maintain constructive business relationships. Contrastingly, a consequence of court actions often means that the parties involved end their business relationships

⁹ <https://www.chambers.ie/vision-2021-alternative-dispute-resolution-and-competitiveness/>

¹⁰ <https://www.chambers.ie/services/alternative-dispute-resolution/mediation-meets-judges/>; and <https://www.mediationmeetsjudges.eu/>; and <https://www.chambers.ie/news/chambers-ireland-welcomes-publication-of-the-mediation-bill-2017/>

soon after the action. Engagement between the parties is facilitated by a neutral, independent mediator, and because the parties themselves decide if, when and how their dispute is resolved, they avoid many of the risks and costs associated with court action. We also view confidentiality as a key advantage of mediation. Because all communications between the parties and the mediator are protected by confidentiality, they happen with a view to resolving disputes, meaning they may not be used or referred to elsewhere if matters are not resolved during mediation.

The fact that mediation is a flexible process which can be organised at short notice is another advantage. This allows the parties to conclude a resolution agreement in a relatively short time and is much faster than is usually possible by court actions. As going to court can be an adversarial experience, mediation offers the opportunity to preserve business relationships. Parties may continue their previously successful contractual or other relationship, as the experience is not as polarising as it often is via the courts. This is a fact that should be promoted across the board, not least for the purpose of decreasing litigation costs and by extension making Ireland a better place in which to do business.

A summary of our asks are as follows:

- Increase infrastructural investment in our courts, at a minimum in line with our peers at European level;
- Increase the number of Justices available to improve systematic capacity;
- Urgent, increased investment in the quality of administration within the planning authorities, so they are better resourced to process decisions, and to reduce court delays;
- Increase promotion of ADR mechanisms such as mediation in commercial disputes, particularly for SMEs.