

COMMERCIAL COURTS: A TWENTY FIRST CENTURY NECESSITY?

ALVIN STAUBER *

INTRODUCTION

In the last several years, the number of specialised courts in the United States that handle cases involving commercial matters has increased substantially. At present, twelve states—Florida, Georgia, Illinois, Maryland, Massachusetts, Nevada, New Jersey, New York, North Carolina, Oklahoma, Pennsylvania, and Rhode Island—are operating commercial courts in either selected cities or on a statewide basis.¹ One of the most recent additions to the commercial court line-up is the Orlando, Florida Business Court (known officially as the Orange County Complex Commercial Litigation Division), which commenced operations in January 2004.² At the very same time that the Orlando Business Court was established, Ireland's Commercial Court likewise came into being. Aside from their identical start date, these two courts have a shared philosophy that a separate commercial court can achieve worthy objectives such as creating judicial expertise in complex commercial matters, fostering consistency in case management, and expediting cases.³

The purpose of this article is to: (1) briefly describe the history of commercial courts in the United States; and (2) review and analyze the operation of the Business Court in Orlando, Florida and the Commercial Court in Ireland.

* Professor of Business Law, College of Business, Florida State University, Tallahassee, Florida, United States of America.

¹ Bach and Applebaum, "A History of the Creation and Jurisdiction of Business Courts in the Last Decade," 60 *Business Lawyer* 147 at 151 (2004).

² Krueger, "Roche Takes Reins of First Business Court," *Orlando Business Journal*, 31 October 2003. The Fulton County [Atlanta] Business Court began operations in December 2005 and appears to be the most recently established Business Court. See also Land, "Georgia Justices Clear Way for Business Court," *New Jersey Law Journal*, 13 June 2005.

³ See "Address by Michael McDowell T.D., Minister for Justice, Equality & Law Reform at the Commercial Court and Mediation Conference on 24 March 2004," available at www.justice.ie.

I. HISTORY OF COMMERCIAL COURTS IN THE UNITED STATES

A. *Benefits*

The impetus for creating commercial courts in the United States was a growing recognition that courts specializing in business matters offered numerous benefits to both the legal and business community. These benefits included the following:

1. *Expertise.* Courts that consistently deal with business, corporate, and other commercial disputes develop expertise, experience, and knowledge.
2. *Efficiency.* As Business Courts become more experienced in handling commercial disputes, they will be able to perform their judicial functions more rapidly and efficiently.
3. *Resource Availability.* The more efficient handling of business cases frees judicial resources to handle other pressing matters.
4. *Stability.* Business Courts provide consistency and predictability to litigants and lawyers. Instead of having numerous judges making unpredictable and inconsistent rulings, one or two judges specializing in commercial cases can bring stability to an otherwise uncertain environment.
5. *Economic Development.* New businesses can be recruited to an area more easily if they know that a specialized Business Court is in place to resolve disputes.⁴

B. *Business Court Pioneers*

Although not designated as a “business court,” the Delaware Court of Chancery has, for decades, been, in essence, a business court of the first order, currently handling approximately 500 business cases a year.⁵ As the late Chief Justice Rehnquist

⁴ See generally Bach and Applebaum, “A History of The Creation and Jurisdiction of Business Courts in the Last Decade”, *supra* note 1.

⁵ Veasey, “The Drama of Judicial Branch Change in this Century,” 17 *Delaware Lawyer* 4 at 5 (1999-2000).

stated, the Chancery Court is “an important contributor to our national system of justice.”⁶ Court observers have remarked that the Delaware Court has earned its reputation through “the depth and precision of [its] written opinions” and its “thorough understanding of corporate issues.”⁷

The first of the modern business courts was established in New York in 1993. Its objective was “to concentrate expertise in commercial litigation, so that business disputes [could] be resolved better and more efficiently.”⁸ Although initially operating in Manhattan only, the business court concept soon expanded to several counties throughout the state. In just a few years, dramatic improvements in efficiency were evident. For example, in New York County, the average disposition rate in contract cases had fallen from 648 days in 1992 to 412 days in 2000, a 36 percent improvement.⁹

At the same time that the New York business court was gearing up, the Cook County [Chicago] business court was established. At first, three judges were assigned to the “Commercial Calendar”, but by the end of 2001, eight judges were handling commercial cases, a group that is “larger than any single county business court nationally.”¹⁰ In contrast to this large contingent of business court judges, North Carolina—which began its business court operations in 1995—has a single business court judge, known as a “Special Superior Court Judge for Complex Business Cases.”¹¹ Through 2003, this judge had handled 179

⁶ Rehnquist, “The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice,” 48 *Business Lawyer* 351 at 354 (1992).

⁷ See Bach and Applebaum, “A History of the Creation and Jurisdiction of Business Courts in the Last Decade,” 60 *Business Lawyer* 147 at 217 (2004).

⁸ The Council on Judicial Administration, “Report on the Chief Judge’s Court Restructuring Plan,” 52 *Record* 929 at 948 (1997).

⁹ Porcellio, “Innovation, Successes for Litigation,” *New York Law Journal*, 22 January 2001, at 3.

¹⁰ See Bach and Applebaum, “A History of the Creation and Jurisdiction of Business Courts in the Last Decade,” 60 *Business Lawyer* 147 at 163 (2004).

¹¹ O’Brien, “The North Carolina Business Court: North Carolina’s Special Superior Court for Complex Business Cases,” 6 *North Carolina Banking Institute Journal* 367 at 375 (2002).

cases from thirty-three different North Carolina counties.¹² This court recently entered into a partnership with the Elon University School of Law whereby the Court will house its offices in the law school facility.¹³

New Jersey's business court began with pilot programs in Bergen and Essex Counties (New Jersey's most populous counties) in 1996. Since 2000, however, all counties in New Jersey have qualified for a tracking designation for "complex commercial cases."¹⁴ Although some individuals have taken the view that legislation is not necessary to establish a business court in New Jersey, business court proponents have nevertheless introduced legislation to formally create such a forum. Such legislative efforts have not yet been successful, as opponents argue that the current system is satisfactory.¹⁵ Following the example of its neighbour New Jersey, the city of Philadelphia in 2000 established—by the order of the Administrative Judge of the Court of Common Pleas—a business court known as the "Commerce Case Management Program."¹⁶ The number of cases handled by the program has exceeded 500 per year.¹⁷

In October 2000, a business court pilot program was begun in Suffolk County, Massachusetts. The program has now become permanent and has expanded to three additional counties.¹⁸ Business courts in Las Vegas and Reno, Nevada, were also established in late 2000, and the following year Rhode Island

¹² North Carolina Business Court, *Report on Activities of the North Carolina Business Court 2002 to 2003*.

¹³ See "A legal center," available at <http://www.elon.edu/e-web/academics/law/greensborocampus.xhtml>.

¹⁴ See Bach and Applebaum, "A History of the Creation and Jurisdiction of Business Courts in the Last Decade", 60 *Business Lawyer* 147 at 171 (2004).

¹⁵ Haines, "Business Court is a Misguided Concept," *New Jersey Law Journal*, 5 September 2005. See also Weiss, "Legislation Isn't Necessary to Create a Business Court", *New Jersey Law Journal*, 15 October 2001.

¹⁶ Lichtman, "A Court of Their Own: Purely Business Disputes to be Handled by New Philadelphia C.P. Commerce Case Program", *The Legal Intelligencer*, 14 October 1999, at 1.

¹⁷ Rodier, "Attorneys Impressed with Commerce Court", *The Legal Intelligencer*, 6 August 2003, at 1.

¹⁸ Qualters, "Business Court to Expand to Other Counties", *Boston Business Journal*, 14 February 2003.

established a “Business Calendar” in two counties.¹⁹ The latest entries to the business court arena are Maryland, Florida, Oklahoma, Michigan, and Georgia.²⁰

The reaction of the legal community to Business Courts has been very positive. Indicative of this favorable attitude are the results of a survey of lawyers taken in relation to the Massachusetts Business Court. Among the findings are the following:

- 88 percent were extremely or very satisfied with the Business Court;
- 83 percent indicated that the Business Court improved legal service to clients;
- 94 percent were extremely or very satisfied with the judges;
- 97 percent indicated they would recommend the Business Court to other colleagues and clients.²¹

II. THE ORLANDO, FLORIDA, BUSINESS COURT

A. Creation

Prior to the creation of the Business Court in Orlando, Florida, there were unsuccessful attempts to create business courts in Miami and Fort Lauderdale.²² The creation of the court in Orlando followed the recommendation of a committee of circuit court judges in Orlando that a Business Court would provide “standardized procedures, more consistency and predictability of rulings on recurring issues, and even an economic stimulus.”²³ The court became a reality when Belvin Perry, Jr., Chief Judge of the Ninth Judicial Circuit, signed an order on June 26, 2003, establishing the Business Court “to hear

¹⁹ See Bach and Applebaum, “A History of the Creation and Jurisdiction of Business Courts in the Last Decade,” 60 *Business Lawyer* 147 at 188 (2004).

²⁰ *Ibid.* at 190-201.

²¹ Business Litigation Session Resource Committee, *The Business Litigation Session Massachusetts Superior Court: A Status Report* (February 2003).

²² Krueger, “Roche Takes Reins of First Business Court,” *Orlando Business Journal*, 31 October 2003.

²³ *Ibid.*

complex business cases.”²⁴ In his order, Judge Perry cited numerous reasons why the Business Court should be established, which are set out below.²⁵

1. Reasons for establishment of Business Court

- Specialization within the legal profession has resulted in the more efficient delivery of high quality legal services in complex matters.
- The litigation and resolution of complex business, corporate, and commercial disputes has become an area of specialization within the legal profession;
- A court that consistently hears business, corporate and other commercial disputes can be expected to develop expertise, experience, and knowledge, enabling it to perform its functions more proficiently, rapidly and confidently;
- A Business Court will provide consistency and predictability to litigants and counsel;
- The more efficient handling of these cases will free judicial resources to handle other important matters;
- The establishment of a Business Court may become one more factor in helping our community to attract new businesses that are looking to re-locate;
- The need for a Business Court has been studied by the Ninth Judicial Circuit Business Court Committee and it has passed its resolution urging the establishment of a Business Court;
- A Review of the current case load in the Civil Division of the Circuit Court in Orange County, Florida indicates that there are more than 3,000 cases currently pending that are suited to referral to a Business Court.

²⁴ Administrative Order No. 2003-17. In the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, June 26, 2003.

²⁵ *Ibid.*

2. *Business Court jurisdiction*

In his order, Judge Perry then proceeded to set out the jurisdiction of the Business Court, explaining that “all jury, non-jury, injunction and class action cases filed on or after January 2, 2004, shall be assigned to the Business Court if they are among the [following] types of actions.”²⁶

- Disputes between two or more business enterprises relating to:
 - a. Uniform Commercial Code transactions;
 - b. Purchases or sales of businesses or the assets of businesses;
 - c. Sales of goods or services by or to business enterprises;
 - d. Non-consumer bank or brokerage accounts;
 - e. Surety bonds;
 - f. Purchases/sales of commercial, real, or personal property;
 - g. Franchisor/franchisee relationships;
- Actions relating to trade secret or non-compete agreements;
- “Business torts”, such as claims of unfair competition;
- Intellectual property disputes;
- Actions relating to securities or antitrust;
- Shareholder derivative actions and class actions;
- Actions relating to corporate trust affairs;
- Malpractice claims involving business enterprises and professionals;
- Insurance disputes.

So as to avoid any confusion, Judge Perry’s order also set out those types of cases that would not come within the jurisdiction of the Business Court²⁷:

- Appeals from the County Court;
- Personal injury, product liability, or wrongful death matters;

²⁶ *Ibid.*

²⁷ *Ibid.*

- Matters involving occupational health or safety;
- Environmental claims not involved in the sale or disposition of a business;
- Eminent domain;
- Malpractice claims, other than those brought by business enterprises;
- Employment law;
- Administrative agency, tax, zoning, and other appeals;
- Change of name, mental health act, guardianship, or elections;
- Individual residential real estate and non-commercial landlord-tenant;
- Suits to collect professional fees;
- Insurance coverage for a personal injury or property damage;
- Proceedings to enforce a judgment;
- Actions by insurers to collect premiums or rescind policies;
- Domestic relations;
- Criminal matters.

B. Operation

One of the rationales for the creation of the Business Court was the expeditious handling of cases.²⁸ To that end, Judge Perry's order directed that the parties in a Business Court case would be required to attend a Case Management Conference (CMC) within ninety days of the filing of the complaint. Subsequent to the CMC, the Business Court Judge would assign the case to one of three tracks, as shown in Table I:²⁹

²⁸ See "Address by Michael McDowell T.D., Minister for Justice, Equality & Law Reform at the Commercial Court and Mediation Conference on 24 March 2004," *supra* note 3.

²⁹ Administrative Order No. 2003-17. In the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, 26 June 2003.

Table I: Business Court Tracks

Type of Case	Target Trial Date
1. Business Expedited	Within 13 months of Complaint
2. Business Standard	Within 18 months of Complaint
3. Business Complex	Within 24 months of Complaint

Judge Perry's order noted that "only exceptionally complicated cases should be designated Business Complex," with the Business Court Judge authorised to schedule status conferences at six-month intervals.³⁰

Orange County Circuit Judge Renee Roche was chosen to be the first—and only—Business Court Judge when operations commenced on January 2, 2004. Judge Roche viewed the establishment of the Business Court as "an opportunity for Orlando, and for Florida for that matter, to demonstrate its commitment to achieving an efficient and meaningful resolution of business disputes."³¹ In its first two years of operation, the Business Court was very busy but was also very efficient, as shown in the tables below detailing resolution of cases.³²

*1. Resolution of Cases*³³

Table II: Total Cases Since Inception of Complex Business Litigation Court

Total Cases Pending	380
Total Cases Closed	871
Total	1251

³⁰ *Ibid.*

³¹ Krueger, "Roche Takes Reins of First Business Court," *Orlando Business Journal*, 31 October 2003.

³² Ninth Judicial Circuit of Florida, *Business Court Activity Report*, January 2004-December 2005.

³³ *Ibid.*

Table III: Resolution of Cases according to Time Period

Time Period	Open Cases	Closed Cases	Total Cases
1992-1999	8	15	23
2000-2003	86	307	393
2004	108	446	554
2005	178	103	281
Total	380	871	1251

Table IV: Cases resolved prior to Case Management Conference

Closed	Total	Percentage
562	871	64.52

Table V: Total cases closed

Closed	Total	Percentage
871	1251	69.62

These tables include several cases prior to the court's starting date of 2004 because many existing cases that were appropriate for the Business Court were transferred to the Business Court in 2004.³⁴ What the tables also show is a very high closure rate on cases being handled by the Business Court—and almost 70% of the 1251 cases have been resolved by the one judge in the Business Court. According to Circuit Judge Thomas B. Smith, “that closure rate is perhaps the court's key bragging point.”³⁵ Equally significant is the fact that of the 871 cases that were closed, 562, or almost 65% of the cases, were closed prior to the Case Management Conference (CMC).³⁶ The new Business

³⁴ Krueger, “Roche Takes Reins of First Business Court,” *Orlando Business Journal*, 31 October 2003.

³⁵ Baldas, “Business Court Has a Booming Business,” *National Law Journal*, 17 October 2005, at 4.

³⁶ Ninth Judicial Circuit of Florida, *Business Court Activity Report*, January 2004-December 2005.

Court procedures clearly have led to early settlement of many cases since, as indicated earlier, the CMC is usually held within 90 days of the filing of the complaint.³⁷

C. Changes in the Business Court

Since the inception of the Orlando Business Court three years ago, several changes have taken place:

1. *Name.* Although informally known as the Orlando Business Court, the court's official name (as indicated in the Administrative Order creating the court) was "The Business Court Sub-Division of the Civil Division of the Circuit Court of the Ninth Judicial Circuit of Florida."³⁸ That name eventually changed to the "Orange County Complex Commercial Litigation Division," a moniker that more aptly describes the court's focus on complex business cases.³⁹
2. *Jurisdiction.* Inasmuch as the Business Court was a division of the Circuit Court, the jurisdictional amount in controversy had to exceed \$15,000 in order for a case to be heard. That amount was changed, however, to \$150,000. There was even a possibility that the threshold amount would be raised even higher (some lawyers had complained that small-level business matters were clogging the docket and had lobbied for the increased threshold amount). When the volume of Business Court cases began to decline markedly, the jurisdictional minimum was revised downward to \$75,000.⁴⁰
3. *Staffing.* To deal with the increasingly overbooked docket, a second judge, Robert Evans, was added to hear Business Court cases and a staff attorney was recruited to assist the two

³⁷ Administrative Order No. 2003-17. In the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, 26 June 2003.

³⁸ *Ibid.*

³⁹ Krueger, "Big Changes Being Made To Biz Court," *Orlando Business Journal*, 30 September 2005. See also Administrative Order No. 2003-17, *supra* note 37.

⁴⁰ *Ibid.* See also "Business Court Success=Growth," 4 *Court Illustrated* 16 (2005).

judges.⁴¹ The Ninth Circuit estimates that approximately 15% of the 13,000 civil cases filed in Orange County each year are eligible for assignment to the Business Court, so increased staffing is a necessity.⁴²

D. Reaction to the Business Court

The reaction of the legal and business community to the Business Court has been overwhelmingly positive. A sampling of comments follows:

From all the comments I've had from the people who use it, it has met with rave reviews. It's been an overwhelming success.⁴³

It's been wonderful...As you know, businesses like predictable results. And at least we can get some predictability when you have two judges agreeing [instead of the 8 to 10 judges who are inconsistent and unpredictable in their rulings].⁴⁴

The proof that it's working is the chief judge made the decision to expand it from one judge to two judges next year.⁴⁵

III. IRELAND'S COMMERCIAL COURT

A. Creation and Operation

In a serendipitous display of synchronicity, Ireland's Commercial Court was established at the very same time that

⁴¹ *Ibid.*

⁴² See Business Court, Ninth Judicial Circuit, available at www.ninjab9.org/Courts/Business/Index-BC.htm.

⁴³ Chief Judge Belvin Perry, Ninth Judicial Circuit, Florida. See Krueger, "Big Changes Being Made To Biz Court," *Orlando Business Journal*, 30 September 2005.

⁴⁴ Attorney Jerry Linscott, Orlando Litigation Lawyer. See Baldas, "Business Court Has a Booming Business," *National Law Journal*, 17 October 2005, at 4.

⁴⁵ Judge Thomas B. Smith, Ninth Judicial Circuit, Florida. See Krueger, "Big Changes Being Made To Biz Court," *Orlando Business Journal*, 30 September 2005.

Orlando's Business Court began operations. The Court's creation followed on the heels of a report by The Committee on Court Practice and Procedures that recommended the court's establishment "as a matter of urgency."⁴⁶ That report and the Court's establishment were greeted with enthusiasm by Mr. Justice Joseph Finnegan, then President of the High Court.⁴⁷

The substantial investment and commercial development in Ireland reinforce the notion that Commercial Courts play a critical role in attracting and retaining businesses. With Ireland's robust economy—growth averaged a hearty 7% in 1995-2004, and per capita GDP is the second highest in the EU behind Luxembourg—it is not surprising that Irish leaders want to implement initiatives that will result in the continuation of this economic success.⁴⁸

The Commercial Court—known officially as the "Commercial List in the High Court"—was established by the Rules of the Superior Courts and by the Practice Direction of the 12th January 2004. A judge was designated to supervise the Commercial List and two judges, Mr. Justice Peter Kelly and Ms. Justice Mary Finlay Geoghegan, were named to try cases.⁴⁹ The types of cases that are deemed proper for the Commercial List are:⁵⁰

1. Cases where the value of the claim is not less than €1 million in respect of :
 - a business contract or business dispute/construction of a business document;

⁴⁶ See Bach and Applebaum, "A History of the Creation and Jurisdiction of Business Courts in the Last Decade," 60 *Business Lawyer* 147 at 203 (2004).

⁴⁷ Wood, "First commercial court gets down to business," *Sunday Business Post*, 18 January 2004.

⁴⁸ See CIA World Factbook, "Economy – Ireland", available at <https://www.cia.gov/cia/publications/factbook/geos/ei.html#Econ>.

⁴⁹ See "Address by Michael McDowell T.D., Minister for Justice, Equality & Law Reform at the Commercial Court and Mediation Conference on 24 March 2004," *supra* note 3.

⁵⁰ McCann FitzGerald solicitors, "Ireland's New Commercial Court in Action," available at www.mccannfitzgerald.ie.

- the purchase or sale of commodities/export or import of goods;
 - the carriage of goods by land, sea, air or pipeline;
 - the exploitation of oil or gas reserves or any other natural resource/the construction of any vehicle, vessel or aircraft;
 - 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.
2. Cases, irrespective of their monetary value, involving:
- intellectual property cases;
 - an appeal or application for judicial review of a regulatory decision where the judge considers that the appeal or application is appropriate for entry in the Commercial List;
 - proceedings which the judge of the Commercial List, having regard to the commercial and any other aspect thereof, considers appropriate for entry in the Commercial List.

B. Commercial Court Procedure

The essential steps in a Commercial Court case are shown in Table VI.⁵¹ As indicated in Table VI, cases in the Commercial List are subjected to a considerable degree of case management. Lawyers are expected to be prepared, issues are expected to be identified, and all preliminary matters are expected to have been

⁵¹ See *infra* at p. 170.

attended to.⁵² The Commercial Court brochure explains (in an excerpt below) the rigorous nature of the case management system and also points out the benefits as well:

A key feature of the Commercial List has been the introduction of a system of rigorous case management. Strict deadlines are imposed for the exchange of pleadings, correspondence, and précis of evidence and legal submissions and penalties on costs may be imposed for non-compliance. In addition, the requirement for parties to lodge case booklets in advance of each listing results in the Commercial List Judges being fully apprised of the current situation in each case in advance of any application.

The Rules provide for directions hearings, case management conferences and pre-trial conferences. This system has not heretofore been a feature of litigation in Ireland. It has enabled cases to be disposed of rapidly through the pinpointing and narrowing of issues, identifying the type of evidence to be adduced and the exchange of legal submissions in advance of a hearing. The outcome has been the achievement of an average waiting period from the date of issue of proceedings to the allocation of a trial date of just five weeks. It is envisaged that the use of pre-trial conferences, pre-trial questionnaires and video conferencing will further contribute to the efficient disposal of cases in the Commercial List.⁵³

⁵² See "Address by Michael McDowell T.D., Minister for Justice, Equality & Law Reform at the Commercial Court and Mediation Conference on 24 March 2004," *supra* note 3..

⁵³ Court Service, *The Commercial Court*, 18 October 2004, at p. 3. Available at [http://www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/20CE12A5BD13310B80256FC50059178F/\\$FILE/Commercial%20Court%20brochure.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/20CE12A5BD13310B80256FC50059178F/$FILE/Commercial%20Court%20brochure.pdf).

Some practitioners, while viewing the court's operation as "excellent," nevertheless concede that it is a "challenging forum in which to litigate."⁵⁴ Much of the challenge can be traced to the speed with which cases are processed. As one group of solicitors remarked:

Five weeks is the average time from entry into the Commercial List to allocation of a date for trial. (...) For unprepared plaintiffs and reluctant defendants this element of speed has been an influencing factor in the early resolution of cases in the Commercial Court."⁵⁵

The rapid pace of processing cases is a real plus, according to at least one commentator in the intellectual property field. He states:

Historically, cases that would have taken between two and three years to get to full trial, can now be disposed of in two to three months. Given the speed with which cases are dealt with, and the fact that IP disputes are often multijurisdictional, this enables companies to strategically choose Ireland as the jurisdiction in which to litigate based on the likely completion date for trial ...The Commercial Court is not afraid of new challenges in this area either. Last year it had before it one of the first attempts in Europe to enforce the unregistered community design right and it impressively took less than four months to progress the contested case to trial.⁵⁶

⁵⁴ McCann FitzGerald solicitors, "Ireland's New Commercial Court in Action," available at www.mccannfitzgerald.ie.

⁵⁵ *Ibid.*

⁵⁶ Whelan, "The Intellectual Choice," 27 March 2006, available at www.thelawyer.com/cgi-bin/item.cgi?id=115321&d=122&h=24&f=46.

Table VI: Essential Steps in a Commercial Court case

Step 1: Issue proceedings in Central Office of High Court as usual



Step 2: Either party applies to transfer the case to the Commercial List

This application requires a hearing (even if on consent) as the judge has discretion regarding whether to admit a case into the Commercial List. Costs may be awarded against the applicant if the application is declined by the judge.

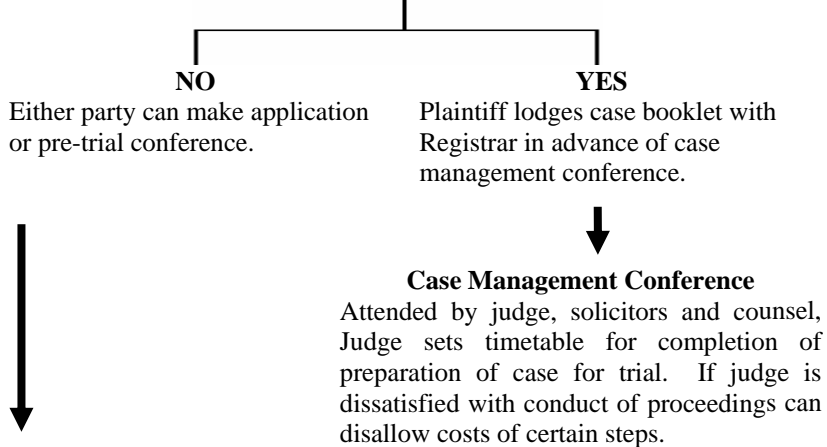


Step 3: Initial Directions Hearing

Judge can give directions regarding inter alia the exchange of pleadings, defining issues, directing expert witnesses to consult each other, adjournment of proceedings for parties to consider mediation, conciliation or arbitration, provision of information on witnesses.



Step 4: Does the Court direct or do the parties request case management?



Step 5: Pre-Trial Conference

Each party must complete pre-trial questionnaire. Judge to establish length of trial and arrangements for trial. If judge satisfied case is ready to proceed to trial it will fix a hearing date. Judge can request parties to consult and agree documents for trial.



Step 6: Trial

C. Statistics

The Commercial Court Registrar has compiled statistics (shown in Tables VII-X) that provide a snapshot of court operations during the two-year period 12 January 2004 to 12 January 2006.

Table VII: Cases

Cases entered into List	149
Cases refused Entry	21
Cases disposed of	80
Cases outstanding	69

Table VIII: Average waiting periods

From entry to List to allocation of hearing date	8.5 weeks
From entry to List to conclusion of action	11 weeks

Table IX: Time periods for case conclusion

Less than 5 weeks	21 cases
5 – 10 weeks	23 cases
10- 20 weeks	21 cases
More than 20 weeks	15 cases

Table X: Manner in which cases disposed of

Interim Motion	8
Settled after entry	7
Settled after directions hearing	20
Settled after hearing date fixed	12
Settled after pre trial conference	1
Settled at hearing	16
Full hearing	16

As these tables show, 149 cases have entered the Commercial List with 80 (or 54%) already disposed of. Only 21 cases (or 14%) were refused entry into the List. The most remarkable statistics in this table refer to the speed with which cases are processed. The average waiting period from entry to the List to allocation of a hearing date and to conclusion of the action are only 8.5 weeks and 11 weeks, respectively. Moreover, of the 80 cases disposed of, more than half were concluded within 10 weeks, and only 15 cases (or 19%) took more than 20 weeks to be resolved. The statistics also show that—as predicted by many observers—the stringent case management requirements have resulted in the overwhelming majority (80%) of those 80 cases being resolved by settlement prior to a full hearing.⁵⁷

Of the cases admitted into the Commercial List, Table IX shows that almost 60% dealt with a business document, business contract or business dispute involving €1,000,000 or more. The second most frequently occurring category was the discretionary category; *i.e.* those cases which the Judge determines are appropriate for entry into the Commercial List. Twenty-six cases (or 18%) fit into this category.⁵⁸

Table XII, below, provides comparisons of cases entered and caseload disposal for 2004 and 2005 and also provides a comparison of waiting times for trial date and waiting times for disposal of action for 2004 and 2005. Not surprisingly, the number of cases entering the Commercial List more than doubled from 2004 to 2005 as the List became more established. In like manner, the number of cases disposed of in 2005 was twice that of 2004. The average waiting time for a trial date—5 weeks in 2004—increased to 8 weeks in 2005. Similarly, the average waiting time for disposal of the action lengthened from 6 weeks in 2004 to 11 weeks in 2005, perhaps due to the increased volume of cases and the consequent strain on court resources.⁵⁹

⁵⁷ The statistics set out in Tables VII-XII were provided to the author by Niamh Dermody, Commercial Court Registrar, for cases from 12 January 2004 to 12 January 2006 (on file with author).

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

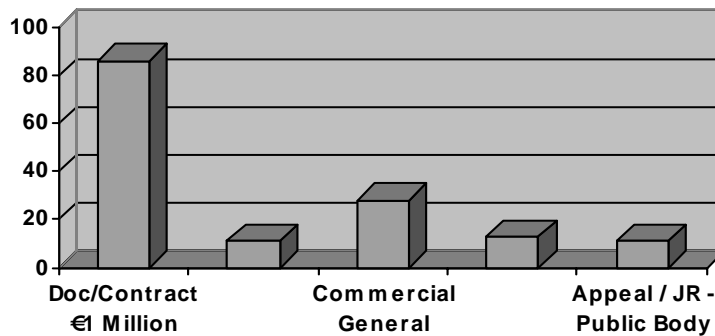
D. Reaction to the Commercial Court

The reaction to the Commercial Court has been quite positive, as illustrated by the following statement:

The Commercial Court has undoubtedly provided a more satisfactory framework within which to conduct business related litigation. Commercial proceedings have been presided over by Judges with established commercial backgrounds. The initial directions hearing, case management and the pre trial conference mechanisms have forced parties to reduce and focus on the issues in dispute at an early stage and have lead to shorter run-in times to trial and shorter trial hearings.

As it has only recently been established, the Court's backlog of cases is relatively small. Its increasing popularity among business and lawyers may impact on that. However, its success has ensured its longevity and the speedy disposal of cases will continue to be the norm.⁶⁰

Table XI: Breakdown of Case Type admitted into the Commercial List in the Commercial Court, Ireland

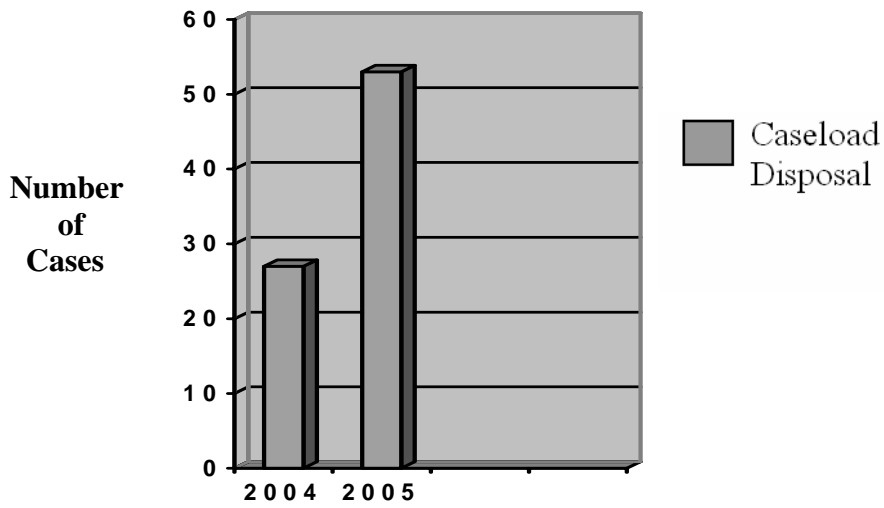
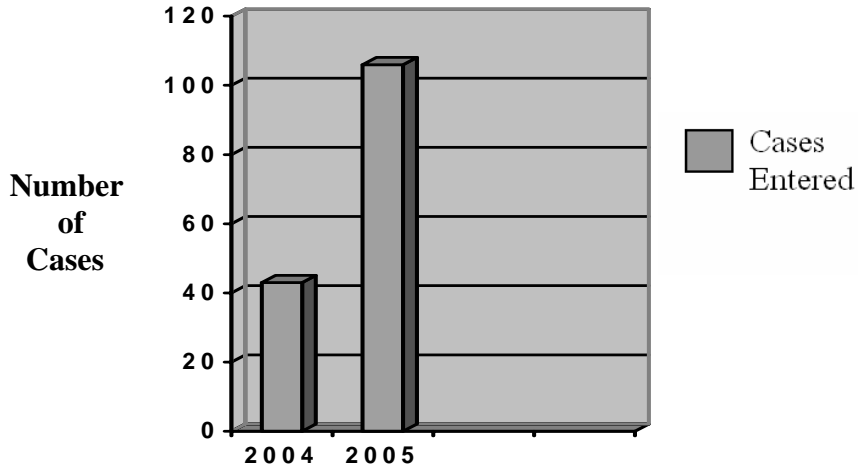


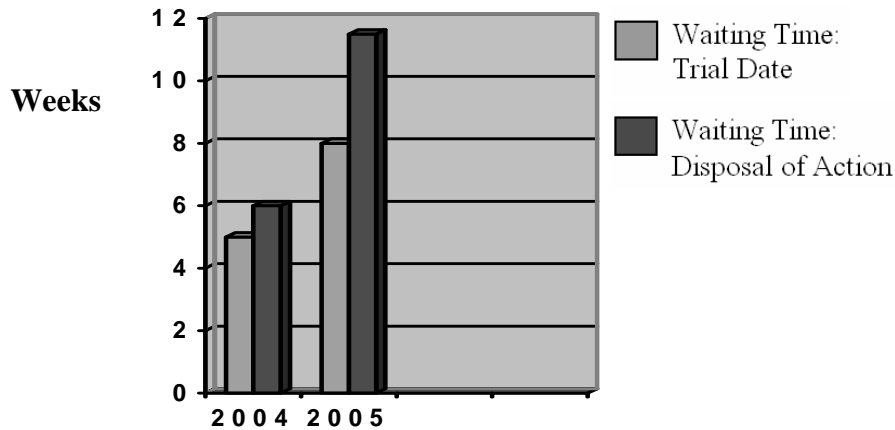
⁶⁰ William Fry solicitors, "Commercial Court", available at <http://www.williamfry.ie/files/indexfile.asp?id=109>.

Rule 1	Proceedings	Number
(a) (i)	a business document, business contract or business dispute where the value of the claim or counterclaim is not less than €1,000,000	86
(a) (ii)	the determination of any question of construction arising in respect of a business document or business contract where the value of the transaction the subject matter thereof is not less than €1,000,000	3
(a)(vii)	insurance or re-insurance where the value of the claim or counterclaim is not less than €1,000,000	4
(a) (viii)	the provision of services (not including medical, quasi-medical or dental services or any service provided under a contract of employment) where the value of the claim or counterclaim is not less than €1,000,000	4
(b)	proceedings in respect of any other claim or counterclaim, not being a claim or counterclaim for damages for personal injuries, which the Judge of the High Court Commercial List, having regard to the commercial and any other aspect thereof, considers appropriate for entry in the High Court Commercial List	26
(d)	any proceedings instituted or any application or reference made or appeal lodged under the provisions of the Patents Act, 1992, not including an application under section 108(4) of that Act	2
(e)	any proceedings instituted, application made or appeal lodged under –	4
	(i) the Trade Marks Act, 1996;	
	(ii) the Copyright and Related Rights Act, 2000;	
	(iii) the Industrial Designs Act, 2001	
(f)	any proceedings instituted for relief in respect of passing off	7
(g)	any appeal from, or application for judicial review of, a decision or determination made or a direction given by a person or body	11

authorised by statute to make such decision or determination or give such direction, where the Judge of the High Court Commercial List considers that the appeal or application is, having regard to the commercial or any other aspect thereof, appropriate for entry in the High Court Commercial List

Table XII: Commercial Court, Ireland: 2004 / 2005 Comparison





Discussions about extending the reach of the Commercial Court have already begun. Suggestions have been made that the Commercial List might need to expand soon to accommodate the increasing presence of electronic commerce. The Committee on Court Practice and Procedures has recommended that “e-courts should be developed throughout the court system and that the development of an e-commercial court would underpin and reinforce Ireland’s position as an e-commerce hub.”⁶¹

CONCLUSION

The Business Court in Orlando, Florida and the Commercial Court in Ireland share many similarities:

- a common inception date;
- two Business Court judges who hear cases;
- a shared philosophy that commercial courts provide benefits such as judicial expertise in complex commercial matters, consistency and stability in decision-making, expediting cases, and economic stimulus;
- a rigorous case management system;

⁶¹ See “Address by Michael McDowell T.D., Minister for Justice, Equality & Law Reform at the Commercial Court and Mediation Conference on 24 March 2004,” *supra* note 3.

- focus on complex litigation; and
- expeditious handling of cases with a substantial early settlement rate.

The most glaring difference relates to jurisdiction. After experimenting with jurisdictional minimums of \$15,000 and \$150,000, the Orlando court settled on \$75,000 as the minimum amount in controversy that would make a case eligible for the Business Court. Ireland, on the other hand, has been consistent in its minimum jurisdictional amount of €1,000,000 (subject to the aforementioned discretionary power of judges to admit cases into the Commercial List regardless of the amount in controversy); this sends a clear message that “minor” business disputes should be resolved by other judicial forums.

Is the Commercial Court a necessity for the 21st century? The answer in many states of the United States and in Ireland seems to be a resounding “yes”.