

Ireland set to unveil new strategy to win post-Brexit international legal business as competition heats up within EU

Since Britain announced its intention of leaving the EU lawyers throughout Europe have developed plans for winning a share of the international commercial business that is likely to depart that jurisdiction. A number have already opened up English speaking courts. But Ireland has been quietly and deliberately developing its own strategy, confident that its status as a common law, English speaking location gives it a clear long-term advantage. JOHN STANLEY reports on the progress that is being made with the establishment of an Implementation Group late last year. He depicts the long game being sketched out by members of the Implementation Group, including the Bar Council's Patrick Leonard SC.

Just before Christmas the Netherlands revealed plans for a new pre-insolvency tool, the WHOA, which is designed to combine the best of the UK Scheme of Arrangement with the US Chapter 11 procedure. It represents a further escalation in the growing competition within the EU to secure a share of opportunities in the international legal services business expected to result from Brexit.

This competition has already seen the Netherlands, Germany and France opening English language commercial courts over the past two years. Using judges trained in the English common law system, France has already handled 50 cases so far.

From the outset Ireland has regarded itself as the most obvious and logical beneficiary of any Brexit opportunities in this area, consistently citing use of the English language and a common law system as providing two clear competitive advantages.

But while Ireland publicly threw its hat into this ring in January 2018, it was only four months ago that the Government finally established an Implementation Group, chaired by former Taoiseach John Bruton, to progress these ambitions.

According to members of this working group and other stakeholders, that apparent delay belies the essential detailed process of consultation and strategy development undertaken since the end of 2017. Quick to rebut any suggestion of complacency or inaction, they emphasise the long-term nature of their quest and the overriding importance of identifying at the outset the



Implementation Group member Patrick Leonard SC, the Bar Council.

right key objectives and the support infrastructures needed to achieve them. Their work of the past two years was reflected in a milestone meeting of the Implementation Group, which took place at the end of January, at which a final fine tuning of the strategy was considered ahead of the commencement of the implementation phase in earnest.

With around two thirds of litigants in cases before the English Commercial Court coming from outside England and

Wales, London is the global giant of international commercial, insolvency and dispute resolution legal business. Brexit, and the UK's withdrawal from the EU's capital markets system, had naturally opened up options for the drift of this business into other jurisdictions. Ireland, as the Chief Justice has pointed out at *Finance Dublin* events in the past two years, sees itself as a Common Law jurisdiction in particular, as one of those alternative EU27 centres in contention for such international business in Irish Courts.

According to Patrick Leonard SC, member of the Bar of Ireland and one of its two nominees on the Implementation Group, this is an aspiration that could only have been made real by Brexit and the prospect that in the future UK judgments may no longer be enforceable in other countries in the EU.

Ireland's formal interest in developing a strategy to capture Brexit-related business in legal services began in late 2017 when the Department of Justice & Equality asked the Bar of Ireland to undertake a SWOT style analysis of the possible

opportunities and put forward proposals in the context of the Government's broader Brexit strategy.

That initial work was launched in January 2018 by the Minister for Justice and Equality, Charlie Flanagan, who said the UK's withdrawal from the EU would give rise to a changing landscape, including the field of legal services. The initiative, supported by the IDA and the legal community, 'will help put Ireland on a firmer footing to benefit from any

opportunities that arise from the UK's departure from the EU, leaving Ireland the only English speaking common law jurisdiction in the Union,' he said.

He added that the Government was keen to encourage legal professionals in Ireland 'to work in a unified way to develop and progress a strategy to increase trade in legal services to the international sector' and pledged to bring the proposal to Cabinet and seek formal Government endorsement of and support for an implementation group.

Over the following 12 months the Bar of Ireland, the Law Society of Ireland and a variety of stakeholders in Government departments and the large commercial law firms worked on developing a practical, long-term strategy. The following January Taoiseach Leo Varadkar pledged the Irish Government's support for the legal profession's proposal, while the Justice Minister said the initiative would now form part of the Government's Brexit strategy and an implementation group would be established to move forward the initiative with the participation of all key stakeholders, including Government departments and IDA Ireland.

Explaining the apparent delays, Leonard says it is important to remember that this project has a lifespan of 10 to 20 years. 'It is not something you can rush into. As a consequence there's been an enormous amount of consultation with the stakeholders and I don't think that's a bad thing. Some people will always think it should be moving quicker but we think the way we've gone about it is more likely to result in extra business in Ireland than the way some other countries have gone about it.'

Leonard is adamant that the starting point had to be securing unequivocal Government backing for the project. He points out that when the idea was first pitched in late 2017, the Department of Justice & Equality's remit did not extend to the promotion of legal services, unlike those of similar government departments in the UK and Singapore, for example. Yet the experience in the latter clearly pointed to the value of such engagement. 'They (Singapore) commenced their drive to market as a jurisdiction 20 years ago and for the first 10 years nothing happened. But now it is a leading centre for international services. There are a lot of reasons for that, but a key one is unquestionably the high level of government support.'

So the Bar of Ireland, along with the Law Society of Ireland, engaged with line departments, including the Departments of the Taoiseach, Finance, Public



Chief Justice Frank Clarke addressing FCSDublin 2019 on progress in Court developments.

Enterprise and Reform, Foreign Affairs & Trade, Business & Enterprise to persuade them of the value of the initiative. Through 2018 and into 2019 the Council also engaged with up to 50 people across all the large law firms in Dublin, obtaining information to support the proposal. 'We went about it that way because we wanted to be able to show government that we actually have something real here, this isn't pie in the sky,' Leonard says.

'When we came to this project first we needed the experience of the corporate lawyers. Traditionally, unlike the UK Bar, which has been at the forefront of the promotion of English law, the Irish Bar has not had a role in the promotion of Irish legal services internationally. The 20 or 30 years experience of promoting Irish law internationally, therefore, resides with the large legal firms in Dublin. It would be impossible to conceive of this project without their expertise and experience.'

This detailed work also helped determine those areas of greatest potential opportunity. 'There's no point in simply

saying: "We've a great legal system, come and do your contracts here." You need to identify the areas in which you have a product to sell,' Leonard says.

'So since 2017 we've been going out to the corporate firms in Dublin asking them to identify for us those areas in which we can ultimately sell Ireland, rather than taking a blunderbuss, scattergun approach.' In the Corporate Law areas aviation financing, funds and derivatives, banking & finance, life sciences and technology contracts are all areas in which there is a tremendous amount of industry knowledge in Dublin, he says, while considerable knowledge has been gained in recent years in alternative energy corporate law.

On the Dispute Resolution side three big areas of opportunity have been identified – commercial litigation, commercial arbitration and insolvency & restructuring. Through the corporate law firms, the large accountancy firms provided significant valuable input into the last of these, which actually straddles the areas of corporate advice



Former Taoiseach, and first EU Ambassador to the USA, John Bruton: chair of the Implementation Group to progress the Irish law project.

and dispute resolution.

‘When we look at this project we have to think of the immediate way to market it, which is what we’re working on, but we also have to be conscious of very long term trends that are likely to affect the market,’ Leonard says.

‘For example, some European financial services legislation requires either the contractual law to be a member state law or for there to be a dispute resolution clause with a member state court. As that type of legislation comes more and more from Europe, some financial services contracts in either insurance or the pure financial services field, which might have been subject to English law or the courts of England or Wales, must change. That’s a slow, long-term outlook, over 15, 20 or 25 years, but it’s important for us now to position ourselves to be a jurisdiction of choice in that period.’

Leonard is neither complacent about nor unduly concerned by the progress being made by competitors in the international legal space. He notes, for example, that in a recent update the Netherlands Commercial Court conceded that the four cases it handled in its first year was ‘less than initially projected’.

‘We have a common law, English speaking system and this is the type of work typically done, for a lot of historical reasons, by common law lawyers in the English language. It’s not so much that we

are “in competition” with England it’s that we are an “easy and familiar alternative”.

The Law Society’s Ken Murphy shares his confidence. Acknowledging that this is a contested space, with other EU jurisdictions, notably France, Germany and the Netherlands positioning themselves to avail of any opportunities that may result from London losing some of its pre-eminence as a legal centre he insists: ‘That message has to be delivered persuasively, and to the right people.’

Selling that message has already begun, with visits by the Chief Justice and the Attorney General to Dallas, Texas and Washington DC last year providing opportunities to spread the word.

‘We’re not trying to “steal” work from England; there’s a certain amount that will leave London anyway as a consequence of Brexit and it’s about identifying where that work goes,’ Leonard continues. ‘We think that if a European corporate has a choice of sending that work to Frankfurt, Dublin, Holland or Paris, we are an easier alternative because we already have a dispute resolution sector that is well established, an existing commercial court, and a pool of lawyers here who can do that work already.’

In the future, he adds, the Irish Bar intends to be at the forefront of the promotion of Irish legal services, working hand-in-hand with the Law Society. But he is also confident that the

foundations of the project have been well laid and he welcomes the commitment provided by the Government and the judiciary.

‘We’re very lucky to have people like the Chief Justice (Frank Clarke), the President of the High Court (Peter Kelly) Robert Haughton, (who managed the Commercial Court list in the High Court before his elevation to the Court of Appeal last October) and David Barniville (President of the Association of Judges of Ireland, a past Chair of the Irish Bar and head of the Commercial List), who are willing to speak internationally about the Irish courts system. I don’t think, in the past, members of the Irish judiciary would really have seen that as their job,’ Leonard says.

There is tangible evidence of Government support, too, he says. ‘In the area of dispute resolution, for example, over the last three years some of Ireland’s top commercial barristers have been appointed to the bench, so that gives us a top class product to sell.’ In addition the Government has increased the Court of Appeal by six judges to ensure there are no delays at appellate level.

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The identified task of the Implementation Group established last October is to push Irish choice-of-law as a post-Brexit forum for international dispute resolution. Welcoming the appointment of John Bruton as its chairman, Law Society of Ireland director general Ken Murphy described him as a ‘heavyweight leader. Reflecting the consensus achieved for the proposals, other members of the group include Leonard and Paul McGarry SC of The Bar of Ireland, Michele O’Boyle and Liam Kennedy of The Law Society of Ireland, Shane Nolan and Eleanor Treanor of IDA

Ireland, the Attorney General, Séamus Woulfe SC, and senior officials from the departments of the Taoiseach; Justice and Equality; Finance and Public Expenditure and Reform; Foreign Affairs and Trade and of Business, Enterprise and Innovation.

In addition to the benefits that will result from planned Government expenditure on a new Courts IT system for the legal system as a whole, including selling its services internationally, additional Government funding will be required. ‘There’s no doubt about that because if there’s an increase in, for example, cases to the commercial list you need to have extra judges,’ Leonard says. ‘But we are absolutely satisfied that if you increase the legal services market in Dublin it is a win-win for Irish jobs and payroll, because the cost of investing in our courts system to support this type of work will be more than paid back by the fees generated.’

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‘If you have a dispute about a derivatives contract that takes four days, where you’ve got international banks on either side both funding their lawyers, then 23 per cent of those fees are going to the Exchequer by way of VAT and on average it’s take of PAYE/PRSI is probably 50 per cent. So this work is more than paying for itself.’

Other initiatives already under way are designed to capitalise on likely opportunities. The Bar Council, for example, has changed its Code of Conduct to make it easier for European and foreign lawyers to instruct barristers and obtain opinions on Irish law directly. Over the next couple of months the Council intends improving its website to provide more information about individual Irish barristers.

With some English law schools already reducing the teaching of EU law, Leonard also identifies good opportunities for Irish law schools. ‘London is currently the second largest centre of EU law expertise after Brussels and we hope to work with the law schools to ensure the

right international training is available here on trade, arbitration and securities law.’

Emphasising the ‘slow burn’ nature of the project, Leonard believes there are already some positive straws in the wind that are the basis for in the project. ‘In terms of long-term change, there is evidence of a “sentiment” factor. Up to now many European commercial transactions were routinely done subject to English law. But we know from the evidence that has been given to the House of Commons and House of Lords justice committees ... that since the Brexit referendum European counterparties are routinely objecting to the use of English law.’

Pointing to the impetus of European user demand which led to the introduction of an Irish law version of the International Swaps and Derivatives Association Master Agreement in 2018, he also notes that other European FS transactions, including loans, have recently been written under Irish law that would never have been before. ‘So it is happening already,’ he says.

Indeed, the launch of the Irish law version of the ISDA agreement was a highly significant endorsement of Ireland’s legal infrastructure. It demonstrated that Irish law is an attractive option for complex financial transactions post-Brexit, particularly when the preference is for an agreement made under the law of an EU member state and a common law system.

The continued arrival of large UK firms in Dublin, along with the dramatic increase in the number of England and Wales-qualified solicitors joining the Irish roll in anticipation of Brexit, also provide further evidence that Ireland is a strong contender for international work moving out of London.

With the need to recruit senior experienced staff, the latest arrivals in Dublin from London, and the US, including such leading firms as Dentons, Simmons & Simmons and DLA Piper, are creating a degree of difficulty for their longer-established Irish counterparts. But at the same time, as each new name is announced it adds to the international credibility of Dublin as the ‘easy alternative’ referred to by Leonard.

It is notable, too, that data from the Law Society of Ireland shows that while between 2016 and September 2018 a total of 1,644 England and Wales-qualified solicitors joined the Irish roll in anticipation of Brexit, that trend accelerated over the following 12 months to 1,877 in 2019.

Commenting specifically about the opportunities for Ireland in business recovery services in the *Finance Dublin Yearbook 2019*, PwC partner Declan McDonald observed: ‘What has been missing heretofore is the opportunity and arguably the confidence to profile Ireland on the world restructuring stage. Brexit has changed this and there is now a concerted effort among the profession in Ireland to highlight our processes as a viable alternative to the UK and other jurisdictions.’ He, too, referenced the contribution of Chief Justice Clarke in support of this endeavour by speaking at various international conferences and events (which includes keynote addresses at *Finance Dublin’s* Financial Centres Summits in 2019 and 2018).

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But McDonald identified a potential fly in the ointment. ‘Obviously, we are not the only EU member state that recognises the opportunity to compete for some of this international business. The direction of travel of the European Insolvency Regulation in terms of harmonising insolvency regimes across the EU has prompted a number of member states, most notably the Netherlands and Spain, to update their insolvency laws to incorporate processes which are more aligned to our examinership and have aspects of the English law scheme of arrangement.

‘It is important therefore that we put our best foot forward in extolling the virtues of our insolvency and restructuring regime that has been around for a long time and is tried and tested. It is also important that we don’t forget the relationship we have with our nearest neighbour, given that many cross border cases originating in Ireland will require recognition and assistance from the UK courts regardless of how a Brexit deal transpires’ he said.

Ireland occupies a unique position relative to other EU member states in the UK Insolvency Act 1986. Section 426 of that Act deals with the UK Courts assisting courts in other jurisdictions with similar legal systems and principles to English law. The relevant territories are generally commonwealth countries but also includes the Republic of Ireland, one of the many factors that potentially give Ireland a long term advantage in the attraction of this mobile legal business compared with its EU counterparts.