PUBLIC CONSULTATION ON MULTI-DISCIPLINARY PRACTICES

Submission of Kieran Fitzpatrick to the LEGAL SERVICES REGULATORY AUTHORITY –

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Category of contributor - Member of the public[2]

Deadline = no later than midday on June 16th 2017.

Submissions may be sent: By email to public119@lsra.ie Submission word-count = 2,991 words

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Introduction

In my earlier submission on partnerships I questioned the wisdom of dealing with the issue of Partnerships/MDPs at this early stage of reform, due to the more significant problems with legal costs and access to justice which I contended needed to be dealt with firstly.[3] Having read the detailed Hook-Tangaza report, I'm not persuaded to alter that view. Below, I wish to clarify why:

World Bank Reports

The Hook-Tangaza report (para 207) refers to the World Bank's Doing Business reports and by implication the cost-to-claim index therein regarding contract enforcement.

Below I have copied two graphs from the 2017 World Bank report.

The assessment of the costs to claim ratio **is particularly favourable to Ireland**, in that the specific contract (model-case) chosen for comparator purposes, happens to just fall in at a value towards the upper limit of the jurisdiction of the Circuit Court (€75k). Circuit court costs are believed to be about 2/3rds of those of the High Court.[4] Notwithstanding that, the costs for the Circuit Court are reported as being about 45% higher than the OECD average.

The model for measurement of costs used by the World Bank fails to engage with the **threat of costs** that may befall a litigant. The model does not consider the costs generated should an appeal be lodged to a Circuit Court [CC] decision. In Ireland, a *de nuevo* hearing would be heard at High Court [HC] level (and HC costs alone are about 50% above CC costs). The threat of costs would therefore be considerably higher, as the costs threat would include the opposing party costs plus own party costs for both the Circuit Court and the High Court. This amount would likely increase the threatened overall legal fees (for lawyers) from the 18.8% costs applicable to the model case[5], to about 60% of the contract value. The court fees and enforcement costs would then have to be added to the 60%, which

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[1] No confidentiality is requested in relation to my submission.

[2] I am currently a law-student and I hope to qualify as a barrister in 2018.

[3] See my S.116 submission - The Problem: "Partnerships and MDPs can reduce costs, a little bit, like perhaps between 1% and 5%, but under the current dysfunctional system, where market forces play such a muted role in the determination of legal costs, these costs will not be passed on to consumers. Dealing with partnerships before dealing with other more glaring problems, is kind of akin to putting the cart before the horse."

[4] See – Courts of Justice (No. 2) Act, 1931; Section 3(1): "…that the amount of such costs should be two-thirds of the sum to which such costs would amount if taxed as if they were costs incurred in the High Court,…".

[5] This is indicated as the lawyers' fees in the model case in the World Bank 2017 report; see below.

would increase the threat of costs to about 70% of the contract value (The contract value chosen in the World Bank model is €68,628).

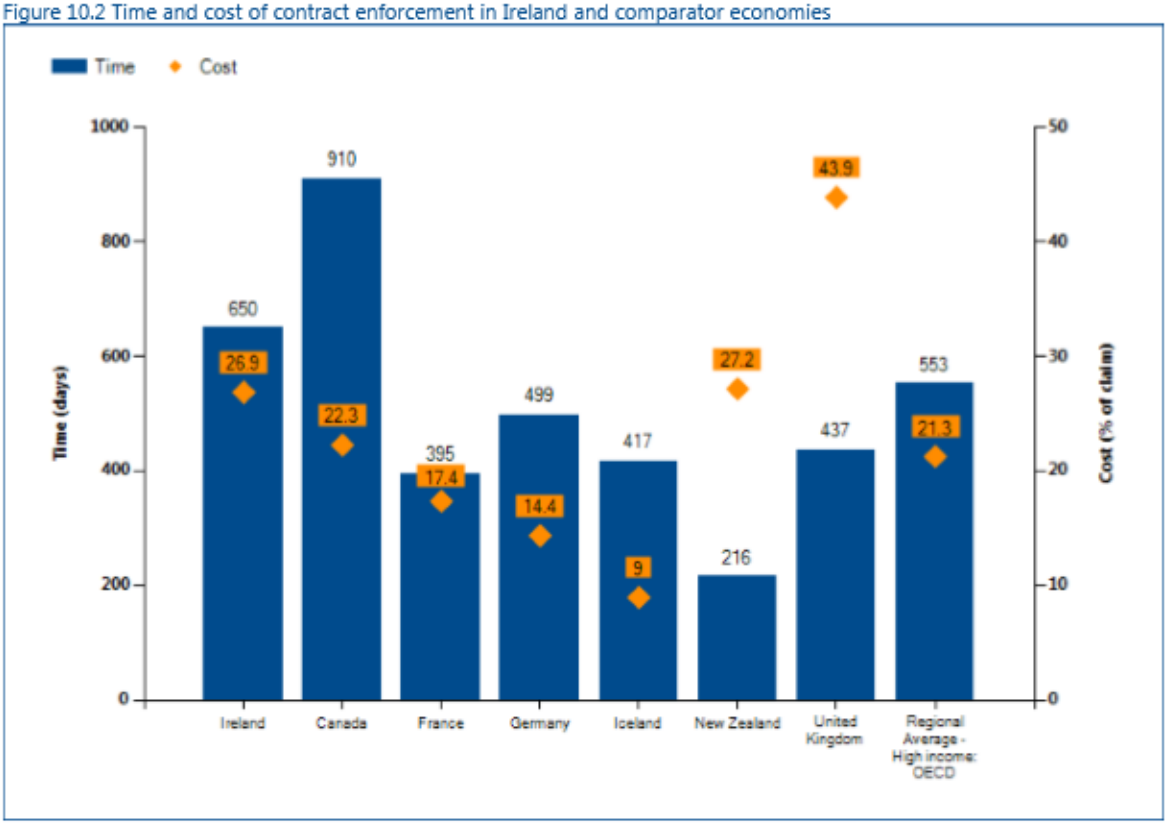
ENFORCING CONTRACTS

What are the details?

The data on time and cost reported here for Ireland are built by following the step-by-step evolution of a commercial sale dispute within the court, under the assumptions about the case described above (figure 10.2). The time and cost of resolving the standardized dispute are identified through study of the codes of civil procedure and other court regulations, as well as through questionnaires completed by local litigation lawyers (and, in a quarter of the economies covered by *Doing Business*, by judges as well).

ECONOMY DETAILS	
Claim value:	**EUR 68,628**
Court name:	**Dublin Circuit Court**
City:	**Dublin**

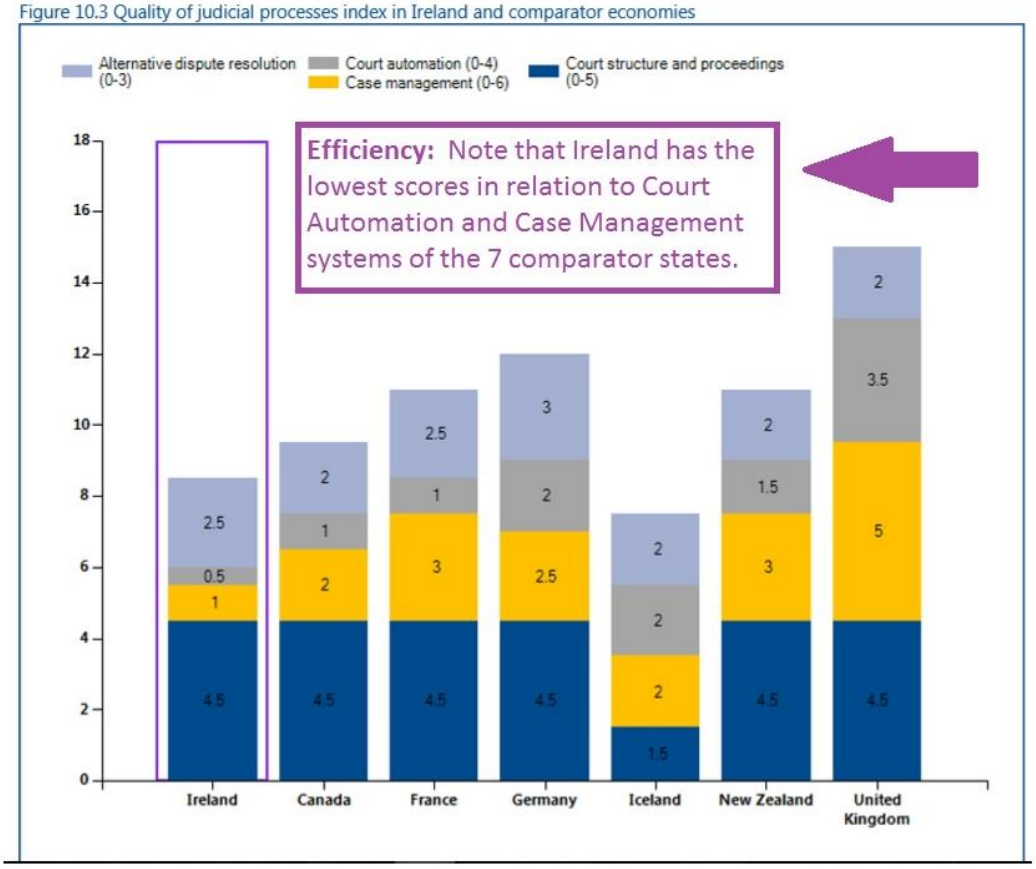
Figure 10.2 Time and cost of contract enforcement in Ireland and comparator economies



Source: Doing Business database.

However, if the model contract was for an amount about €7,000 greater, then the lawyers' fees would be about 50% higher as the case would be heard in the High Court, which could equate to about 67% of the OECD average. The threat of costs would be considerably higher again, as a High Court decision is potentially subject to two levels of appeal, first to the Court of Appeal, and then to the Supreme Court, with a litigant subject to the threat of both sides lawyers for three hearings at potentially progressively higher costs. (A litigant seeking to appeal a decision of the HC, in a case which had commenced in the CC would require leave of the court, which if granted, would further inflate **the threat of costs** for the model case).

Figure 10.3 Quality of judicial processes index in Ireland and comparator economies



The above graphs were taken from the Economy Profile 2017 for Ireland of the World Bank Doing Business 2017 Report[6]

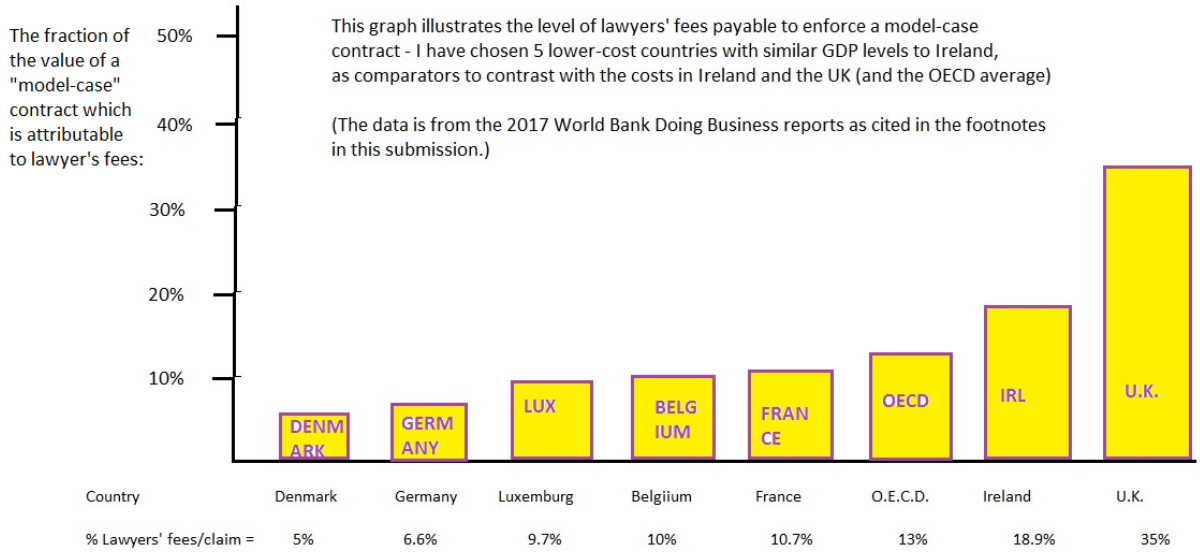
The model case also fails to factor in the costs of satellite litigation relating to legal costs adjudication which would often follow typical contract disputes; this would involve the costs of legal cost accountants and the payment of 8% stamp duty by the paying party.

Hence, it is submitted that the model case does not reflect **the real threat of costs** that potentially may befall litigants in Ireland. Additionally, the data used by World Bank seeks to reflect average costs (as estimated by local lawyers/judges) and does not reflect the upper tail end of the bell-curve distribution of costs, which better defines the threat of costs that may befall (would-be) litigants. For example, newspapers reported in one high profile High Court contract dispute that that *Security of Costs* order (which usually represents about 1/3rd of projected costs) was in excess of the value of the contract in dispute.

Thus, while average costs provide some useful data, it is the upper limit of **the threat of costs** which most determines whether small businesses or persons of moderate wealth can risk litigating any dispute.

[6] World Bank. 2017. Doing Business 2017: Equal Opportunity for All. Washington, DC: World Bank. DOI: 10.1596/978-1-4648-0948-4. License: Creative Commons Attribution CC BY 3.0 IGO ; Available here: http://www.doingbusiness.org/reports/global-reports/doing-business-2017

Let's look at some other countries in the World Bank Index:



Country	Denmark	Germany	Luxemburg	Belgiium	France	O.E.C.D.	Ireland	U.K.
% Lawyers' fees/claim =	5%	6.6%	9.7%	10%	10.7%	13%	18.9%	35%

The above graph raises the question as to why lawyer's fees[7] are seven times higher in London than Copenhagen, or why fees are almost three times higher in Ireland than Germany?

Why are fees almost twice as high in London than Dublin?[8] And how can this data be reconciled with assertions by UK insurers that legal fees in Ireland are much higher in Ireland than the UK?[9]

The Council of Europe produces a detailed report on efficiency of justice among 47 states, but fails to report the costs of litigation in member states. Similarly, the EU Commission's Scorecard on Efficiency of Justice fails to tabulate any data on litigation costs.

I have to therefore suggest that policy decisions should preferably only be made based on reliable data that is both accessible and verifiable. While the World Bank's assessment is very much welcome as an effort to analyse legal costs, and to provide a comparator database, caution needs to be exercised in over-extrapolating the limited and very focused data presented in its reports.

Thus, it is important that there should be transparency in all legal costs outcomes. In my view, all settlements (which engage state adjudicative processes) and all judgements should be published. Also, all state bodies should be required to publish all legal costs payable in all matters involving litigation, on their respective websites. The lack of open justice statutes in Ireland, and generally in Europe, hampers access to relevant reliable data.

Ideally, the introduction of reforms should be assessable as to their impact. Therefore, I contend that the first reform that needs to be introduced is to publish a database of all legal costs outcomes for the last three years for all courts from the Circuit Court to the Supreme Court. As reforms are introduced, one can then better estimate the efficiency impacts of such reforms.

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[7] Note: the percentage for costs in the earlier graph consists of three elements (lawyers' fee, court fees and enforcement costs), and I have carved-out the 'lawyer's fees' element alone for comparative purposes. This information is extracted from the country specific reports.

[8] World Bank data for the US indicates that some cities have significantly higher costs, and high living costs and office rental costs in London may be one factor inflating the London fees.

[9] See article by Paul Cullen in *The Irish Times* – 'Legal costs in Ireland are now highest in Western World' -- *"The UK-based Medical Protection Society (MPS), which provides indemnity cover for most Irish consultants, says Irish legal costs are far higher than anywhere else in the western world."*, *3rd January 2015.*

I outlined above the huge variance in legal fees between EU member states. Why costs vary by up to seven-fold, needs to be researched in greater detail. In this context, the few percent in costs that MDPs may facilitate being saved is of relative unimportance, and suggests that a focus on issues other than MDPs should be the priority. Secondly, as the Hook-Tangaza report recognises, an MDP regulatory regime could impose additional costs which may nullify any cost savings.

The Loser-Pays rule

The system of adjudication of legal costs impacts on market forces and will influence whether any savings which an MDP system may facilitate are fed into reduced legal fees. In litigation, and in consideration of litigation, a person has to evaluate their own costs and those of their opponent should they lose (due to loser-pays rule). The loser-pays rule creates perverse incentives; both sides to a legal dispute believe that they will win and will seek to pressure their opponent by maximising the threat of costs that they believe they will be able to impose upon them (when they win). The chairman of the Fair Trade Commission in its 1990 report said that under a loser-pays system, "usual market forces cannot operate", and that, "the problems for those of moderate means will persist". The "no foal, no fee" system further dis-incentivises costs reduction.

The rules both currently and as proposed (under LSRA 2015) do not allow a Legal Costs Adjudicator (or Taxing Master) to take account of any costs savings that might be obtained by an MDP, by operating as an MDP, as opposed to the current Solicitor – Sole trader Barrister model.

Hence, winning litigants will be able to pocket all the savings due to any efficiencies which may be derived from an MDP model structure. In other words, the benefits will primarily accrue to the MDPs.

Section-68 Letters

The Hook-Tangaza report highlights[10] the problems identified by the Lay Members of the Law Society Complaints and Client Relations Committee in relation to estimates of legal fees. The report comments that, 'If the Section 68 model is not working, the Authority could use an MDP model to pilot better approaches.'

It seems that vague references to how costs may be calculated are often substituted for any detailed estimates. The prohibition on linking fees to the value of a legal action also hampers the ability of a consumer to engage some proportionate cap. The unfairness of the legal costs adjudication system, then places clients in a seriously disadvantageous position once a dispute arises. The one-sixth rule, the imposition of 8% stamp duty, and the one-way-costs-shifting for legal-costs-accountants in favour of lawyers, coupled with the general non-publication of outcomes, wrongfoots clients.

The new provision in the LSRA (2015) is similarly problematic. Even though Section 150[11] itemises several requirements which a lawyer must follow in regard to the provision of an estimate of likely costs, any failure to adhere to these requirements **can** be disregarded in assessing the lawyer's fees, **if** this is in the interests of justice,[12] as this failure is not one of the factors within the list of factors to

[10] Para 231 of H-T report.
[11] Legal practitioner to provide notice of conduct of matter, costs, etc.
[12] See the disregard in S. 157(6) - "**unless**"… "… in the interests of justice…".

be considered.[13] All the matters to which the Legal Costs Adjudicator has to have regard to, do not include such a failure, but includes a multiple of other factors, many of which are likely to inflate the costs.[14] In this context, it is important to recall the findings of the Competition Authority that most persons do not reach any written agreement in advance – "…solicitors and barristers generally don't quote a fixed price".[15] Fixed costs, such that any increase in costs/expenditure requires the prior express consent of a client, as I understand it, is more normal across Europe. The Irish system, which allows lawyers to present legal-bills to clients, post the provision of services, should be outlawed. Any fees in excess of €1000, should require the written consent of clients BEFORE any work is done.

Will MDPs introduce Mixed Legal Remedies?

If an MDP provides a mix of services, such as legal services and accountancy services, then how will a dispute over a mixed service be resolved? Currently, a contract dispute relating to accountancy services are resolved via normal courts, with normal contract law being applicable. However, legal fees can only be challenged via the Taxing Master (or LCA system post the LSRA), which applies a different set of rules.

It is difficult to see how mixed service disputes can be resolved, if a different contract is not negotiated for the legal services and any other "bundled" services. Ideally, legal costs disputes should be treated similarly to any other contract dispute, rather than being subjected to the unfair rules of the legal costs adjudicative system. However, the LSRA currently, makes no provision for such harmonisation.

It has also to be questioned, that should an MDP system be introduced (without grappling with the split system of contract dispute resolution) requiring a consumer to instigate two legal remedies, for an MDP dispute, one via the courts, and one via the LCA process, would such a system be in compliance with EU law, as regards an effective remedy?[16]

It seems to me that the LCA process needs to be reformed significantly before MDPs are viable. Open justice needs to be at the heart of any meaningful reforms.

Conclusion

There is a low take-up of MDPs in every jurisdiction so far.[17] This suggest that any costs savings achieved, once additional obligatory regulatory costs are factored in, are minimal.[18] Even in England/Wales with a population 15 times greater than Ireland, the regulatory cost burden of ABS

[13] This approach could be assessed as a breach of the unfair terms of contracts directive or the unfair omissions section of the Unfair Commercial practices directive of the EU (both transposed into Irish law). However, there appears to be no judicial remedy available to plead these claims, under Irish Law, as all contract disputes relating to legal costs are directed to a determination by the LCA process.

[14] The number of factors to be considered are scattered within the Act; see S. 155 (Subs 1 to 6) and the ten or so items outlined in Schedule 1 of the Act. (Near the end of Act).

[15] See page 28 of the CA report (2006-Competition Authority).

[16] See - Case C-268/06 *Impact v Minister for Agriculture*, CJEU (15 April 2008); "…if it is established that the obligation on that applicant to bring, at the same time, a separate claim based directly on the directive before an ordinary court would involve procedural disadvantages liable to render excessively difficult the exercise of the rights conferred on him by Community law…".

[17] The H-T report states, 'Lastly, the experience of other jurisdictions suggests that MDPs are always likely to represent a small share of the total market for legal services.'

[18] See para 210 of H-T report.

models has been high. The **per practitioner** costs of introducing or even contemplating introducing a regulatory structure for MDPs in Ireland would be considerably higher, meaning that any costs savings will be lower, and perhaps marginal at best. As the Hook-Tangaza report states,' There is no point in having a gold-standard of protection if no one can afford to benefit from it.'[19]

There are so many other reforms of far greater importance which need to be introduced, that getting bogged-down in the complexities of MDP regulation may not be an optimal use of the LSRAs' time. The Authority should "triage" the reforms such that those with maximum impact are implemented earlier.[20]

Similarly, the focus on creating meaningful access to civil justice, needs be on bringing the costs down, on allowing lawyers the opportunity of earning a living, and on bringing transparency and fair rules to the adjudication of legal costs. Even if significant reforms are introduced, it will take a number of years for the trust of the public to be established in a fair and accessible civil legal system; until then, the faith of students in pursuing a legal career will not be realised. And even when faith is restored, it will take a couple of years for this to feed into more lawyers competing for work, resulting in the drop of litigation costs. In the meantime, any costs saved by MDPs will simply be pocketed by the MDP shareholders, and not passed on to consumers.

There is a danger that introducing and monitoring complex regulations for MDPs, in the near future, could result in additional costs for the LSRA authority, which may add to the establishment costs of lawyers, further reducing competition, by the further wipe-outs of lawyers unable to pay the additional fixed costs (of additional regulation) imposed on them. As I understand it, all regulatory costs of the LSRA must be borne by current practitioners.

Rather, attention needs to focus on the main inflators of legal costs, such as the inefficiencies of the justice system: The failure to facilitate electronic filing of cases, of access to court documents[21], and of outcomes; the adherence to out-of-date procedures, excessive formalities of little benefit, multi-lawyer representation, excessive dependence on court-oral presentations (particularly of case-law) etc. (The World Bank report highlights Ireland's low score in regard to Court Automation and Case Management).

For these reasons, I submit, that any further consideration of MDPs should be delayed for a period of three years, post the implementation of much more important reforms such as dealing with direct-access to barristers, facilitating partnerships (with minimum regulation) and the reform of legal costs rules and court procedures. Any regulatory costs in either the establishment of MDP regulations, or the ongoing implementation of such regulations should not be imposed on lawyers.

Kieran Fitzpatrick 16 June 2017

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[19] Para 211 of H-T report.

[20] To use an athletic analogy, pursuing MDP implementation, at this stage, is equivalent to trying to get a runner to run a sub-one-minute mile, when the "patient" still has a Plaster-of-Paris on his broken leg. Rather, the focus needs to be on getting the "patient" to walk.

[21] Seth Barrett Tillman, 'Time to open up courts and let justice be seen', Irish Independent (12 August 2012); - "Attorneys who wish to practise in a specialty which is new to them lack access to a library of written filings to use as models. Ultimately, this bids up the price for legal services at the expense of overall consumer welfare." http://www.independent.ie/opinion/analysis/seth-barrett-tillman-time-to-open-up-courts-and-let-justice-be-seen-26889857.html