

New Edition of the Commercial Court Guide Brings Important Updates

15 February 2022

The [11th edition of the Commercial Court Guide](#) was published on 3 February 2022, bringing with it a variety of changes to practice in the Commercial Court.

Many of these changes are a response to the way in which litigation in the Commercial Court has been conducted as a result of the COVID-19 pandemic. We have previously written about the conduct of [virtual trials and the challenges they pose](#).

The new guide makes provision for the use of electronic bundles—hard copies of bundles for hearings and trials are only to be filed if expressly requested—and parties are strongly encouraged to make use of technology beyond electronic bundles at trial. The new guide emphasises that the Court will expect proposals on the wider use of technology as well as on the appropriate allocation of costs for the use of this technology to be made at a Case Management Conference. The new guide also includes greater emphasis on witness evidence being given remotely. The Court has the power to grant permission for witness evidence to be given via video link or telephone and states that this should always be “*at least considered*” for those witnesses who are required to travel a substantial distance for the hearing and whose evidence is expected to last no more than half a day.

Other changes introduced by the updated Commercial Court Guide reflect innovations intended to refine the litigation process itself, such as the Disclosure Pilot Scheme (“PD51U”) and the introduction of Practice Direction 57AC (“PD57AC”) on trial Witness Statements. The importance of PD51U is demonstrated in the fact that the Disclosure section of the Commercial Court Guide now assumes the application of PD51U, noting that it “*applies to most proceedings*” in the Commercial Court, with cases that are not subject to PD51U now inserted into Appendix 15.

In relation to PD57AC, the new guide now expressly states that, unless the Court directs otherwise, PD57AC is to apply and witness statements for trial should be prepared in accordance with it. Indeed, although the guide notes that PD57AC does not apply to witness statements for interim hearings, it states that its principles should still be kept in mind, such that witness statements for interim hearings should be confined to fact

only, with any argumentative elements left for skeleton arguments (which can then be developed orally at hearing).

There are two other areas to which the Commercial Court Guide is keen to draw attention. The first is expert evidence in relation to foreign law, an area which the guide notes “*features in a significant proportion of Commercial Court trials*”. The new provisions relating to proving foreign law are intended to reflect the Court’s view that full expert reports and cross-examination of experts is not necessary, especially where it relates to a common law jurisdiction. For example, the Court may limit expert evidence to identification of the relevant sources of foreign law only, as well as encouraging parties to consider the need for a foreign law expert where they have retained foreign lawyers. The second is that the Guide now encourages parties to improve efficiency by obtaining advice on evidence at an early stage, which may help to inform the disclosure process.

The new edition also places emphasis on the role of junior advocates, especially in relation to many case management issues, where the Court is of the view that junior advocates are experienced enough to assist the Court and that the presence of more senior advocates is often not necessary. Equally, the guide dispenses with gendered language and refers only to “advocates” so as not to distinguish between barristers and solicitor advocates.

There are also changes to Section O of the Commercial Court Guide dealing with arbitration claims, most of them to deter frivolous challenges to arbitral awards:

- The Court has clarified that an arbitration claim form should represent a “*complete, particularised statement of the case to be advanced*” and any supporting witness statement should not be used to argue the party’s case.
- The Court has noted that parties should bring challenges under section 68 of the Arbitration Act 1996 on grounds of serious procedural irregularity only where there are serious grounds to do so. Similarly, parties should bring challenges to a tribunal’s jurisdiction under section 67 only where there are serious grounds to do so.
- Significantly, the Court has expanded its power to dismiss challenges without a real prospect of success on paper to jurisdictional challenges under section 67. In the previous edition of the Commercial Court Guide, this power was restricted to procedural irregularities challenges under section 68 only. This could become a particularly important weapon in a respondent’s armoury in circumstances where a section 67 jurisdictional challenge, if not dismissed, would involve a complete rehearing of the issues.

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- Security for cost applications in the context of arbitration claims must be heard “*very promptly*” and usually on the first available Friday after the issue of an arbitration claim form.

Changes made by the new guide come into effect from 6 April 2022.



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