The New Commercial Court Guide: what litigators need to know

Quadrant CHAMBERS

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The 11th edition of the Commercial Court Guide was published on 9 February 2022. This is the first revision since the 10th edition, which was published in 2017 to coincide with the introduction of the Business and Property Courts.

This article explores the key themes in the Guide, before summarising the main changes in the following areas: (1) case management, (2) disclosure, (3) junior advocacy, (4) applications, (5) arbitration appeals, (6) expert evidence as to foreign law, (7) witness statements, (8) trials, and (9) negotiated dispute resolution.

Introduction and key themes

The new Guide, while retaining the status, structure and much of the content of the previous version, contains some significant changes. Some of these changes reflect important developments in Commercial Court practice that have taken place in the 5 years since the last edition, including the introduction of the Shorter Trials and Flexible Trials schemes (Practice Direction 57 AB), the disclosure pilot (Practice Direction 51 U), the new regime for trial witness statements (Practice Direction 57 AC) and, of course, the effects of the Covid pandemic, which has accelerated the move towards remote hearings and paperless trials.

More broadly, the new Guide signals an important shift in the way the judges want litigation to be conducted in the Commercial Court. That shift is itself designed to further the goals of the Woolf Reforms, encapsulated in the Overriding Objective in CPR Part 1, of dealing with cases justly and at proportionate cost, which involves managing cases in ways which save expense, are proportionate to their value, importance and complexity; ensure that they are dealt with expeditiously and fairly; and allot them an appropriate share of the court's finite resources. A number of the changes in new Guide discussed in this article, are designed to better achieve these aims by encouraging the Court, with the parties' assistance, to manage cases in more considered, bespoke, flexible ways which avoid one-size-fits-all solutions and box-ticking exercises.

One striking feature of the new Guide is that, in a number of areas, it marks a return to the old ways, and reimposes boundaries that have become blurred in recent decades. This is not procedural purism for its own sake, but reflects the judges' experience of what makes for good case management in the Commercial Court. This trend can be seen most clearly in three areas:

(i) ***Statements of case***: The new Guide re-emphasises that pleadings should not contain general introductions or argument, but should be confined to primary allegations – now defined to mean "only those factual allegations which are necessary to establish the cause of action, defence or point of reply being advanced" – and particulars of those allegations.

(ii) ***Trial witness statements***: The detailed guidance about trial witness statements in the previous edition of the Guide has been jettisoned in favour of a straightforward provision that parties must comply with Practice Direction 57AC, which contains rules to ensure that statements only contain the evidence in chief that the witness of fact would have given orally, normally in their own words, and to prevent them from being used as written advocacy by the lawyers to narrate the documents or argue the case.

(iii) ***The trial itself***: The Guide seeks to solve the old problem of how to ensure that the trial judge reads the documents in the case properly, without narrating them in writing in the witness statements or in massively expanded skeleton arguments, and without introducing them for the first time in cross-examination, by reviving the old, long-form, oral opening. Alongside this change, it also introduces new regimes for trial listing and judge's reading time, and a new Agreed Factual Narrative document, which will contain much of the uncontroversial material that would otherwise be contained in witness statements and skeleton arguments. These and other important changes to trial practice and procedure are examined more closely later in this article.

(1) Case management

The following three themes underpin the "new approach" to case management in the new Guide: (1) judicial "activism"; (2) the more efficient use of limited judicial resources; (3) the need to consider carefully, from an early stage and throughout proceedings, what reasonable steps will be sufficient for a fair trial of the case. Overall, there is a move away from a "one-size-fits-all" approach to case management to a more bespoke one.

An example of the first theme is that the Court aims to "triage" all claims of its own motion prior to the CMC, to consider whether it is suitable for transfer out to the London Circuit Commercial Court or one of the Circuit Commercial Courts. If the case is not transferred out then it may be transferred out later at the CMC (see B13.5 and the guidance in Appendix 14).

The second theme is apparent from, amongst other matters: (i) the updated Case Management Information Sheet (see D7.4 and Appendix 2); (ii) new rules on the provision of draft directions (see D7.8); (iii) the new checklist for applications for service out of the jurisdiction (see Appendix 9); and (iv) the new approach to time estimates. As to the latter, there is now to be a "block" estimate, inclusive of pre-reading, and the trial estimate needs to take account of the time likely to be required for the judge to read the parties' written closing argument before oral closings (see F.5). (see more detail below under the heading "Trials").

The third theme is exemplified by the fact that advice on evidence is encouraged at an early stage (see C6.1) and there is an ongoing obligation upon the parties to give careful consideration to how they will prove their case/refute their opponents' case (see E5.1 and E5.2). It also informs – and is expressly tied into – statements of case. The key changes here are: (i) a renewed emphasis that only "primary allegations" – i.e. the essential elements of a cause of action – should be pleaded, and that evidence and background information should not be pleaded (see C1.1); and (ii) the page limit before permission is required has been increased from 25 to 40 pages (but the ambition should be not more than 25 pages) (see C1.2).

(2) Disclosure

The emphasis is on cooperation between the parties and avoiding disclosure looming too large as an issue, thus wasting court time and ratcheting up costs.

The key changes to disclosure are as follows:

(i) There is an express emphasis on the need to limit disclosure to that which is necessary to deal with the case justly (see E1.1).

(ii) To that end, the Disclosure Review Document ("DRD") should be kept simple and concise (in particular the List of Issues for Disclosure). The Court may disallow the costs of overly-long and complex DRDs (see E2.2).

(iii) Parties should give careful consideration in every case, whatever its financial value or general complexity, to whether it may properly be treated as a "Less Complex Claim" for the purpose of disclosure so as to be dealt with pursuant to Appendices 5, 6 and 7 of PD51U (see E2.6).

(iv) Parties are obliged to cooperate: PD51U §3.2; they should not allow the settling of the DRD to become contentious, time-consuming, or expensive (see E2.6).

(v) In achieving that goal, the use of multiple disclosure models is discouraged (see E2.2).

(vi) The Court now expects to approve the DRD in no more than 1 hour within the first CMC (see E2.7).

(3) Junior advocacy

The new Guide encourages junior barristers to take advocacy work in led cases, particularly at case management and costs hearings:

(i) See for example encouragement of junior advocacy at D7.1, E1.4 and J13.3.

(ii) The Guide also makes clear that where a party has retained more than one advocate (e.g. leading and junior counsel), there is no requirement that all attend. Rather, juniors are encouraged to attend because they are often well placed to assist the Court.

This approach is consistent with the Court's commitment to improving the quality of oral advocacy at the Commercial Bar.

(4) Applications

There are three key changes in the Guide in relation to application hearings:

(i) Time estimates for different types of applications have been revised (see F5.5).

(ii) The Guide reiterates that parties should not be arguing interim applications in their witness statements (see F8.2).

(iii) The Guide states that where heavy interlocutory applications are likely to involve expert evidence, this should be brought that to the Court's attention as soon as possible so that it can be appropriately managed (see F8.6).

Note also that the deadlines for providing application bundles and skeleton arguments to the Listing Office have changed. They must be provided by 12pm (and not 1pm as was the case previously) (see F6.4, F6.5 and J6.2).

(5) Arbitration appeals

The Commercial Court has always been discerning before it allows a challenge to an arbitration award to go forward. Consistently with that approach:

(i) The new Guide contains a reminder about the limited parameters of s.67 and s.68 challenges (see O8.3 and 8.4).

(ii) The summary dismissal process has been extended to s.67 appeals (see O8.6).

If an appeal is knocked out summarily, the applicant does have a right to apply to the Court to set aside the order and seek directions for the hearing of the application. Note however that if such an application is made and dismissed after a hearing, the Court may award costs on an indemnity basis (see O8.7).

(6) Expert evidence as to foreign Law

It should be noted at the outset, that the law has not changed: the content of foreign law remains a matter of fact which must be proved. However, how it is proved is a matter of procedure and this must be approached with fresh eyes. It will not be necessary in every case for formal expert reports to be exchanged.

The new provisions at H3 of the Guide reinforce two themes, (i) a bespoke approach to commercial litigation; (ii) the need for the parties to co-operate from the outset and certainly in advance of the CMC.

Key changes to expert evidence as to foreign law are as follows:

(i) There are a various alternative options to formal expert evidence, including (i) expert evidence being limited to the identification of the relevant sources of foreign law, and of any legal principles as to the interpretation and status of those sources, with advocates making submissions at trial with reference to those sources and (ii) the Court taking judicial notice, or accepting the agreement of the parties as to the nature and importance of sources of foreign law, again with trial advocates making submissions at trial (H3.3). The approach here will be informed, in part, by whether the foreign law in question is that of a civil or, common law country. In the case of the latter, the

Court is less likely to need the assistance of detailed, formal expert evidence (H3.4(d)).

(ii) Where a party has already retained a foreign lawyer, it may not be necessary to instruct a separate foreign law expert to provide expert evidence (H3.5).

(iii) Where oral evidence of foreign law has previously been directed, consideration should be given at the PTR (if there is one) as to whether oral evidence is still reasonably required (H3.7).

(7) Witness statements

The Guide has been updated to include a reference to the new Practice Direction on Trial Witness Statements at PD 57AC (H1.1). Reference now needs to be made to that PD to ensure the contents of trial witness statements are compliant.

The Court is likely to be more open to evidence being given remotely. The Guide expressly provides that video link evidence should always be at least considered for a witness who will have to travel a substantial distance, including from abroad and whose evidence is expected to last no more than half a day (H4.1)

(8) Trials

The important changes can be summarised as follows:

(i) An agreed detailed narrative may be required, setting out the uncontentious, relevant facts, chronologically, or in a logical structure of chapters, with each chapter to be chronological. There is encouragement in the Guide to make this as full as possible and perhaps, an overly optimistic statement that the process of agreeing the document should not become a substantial additional burden, or involve argument over whether the content should be treated as agreed (J6.5). The hope is that the agreed detailed narrative will include the lowest common denominator in terms of agreement between the parties, leaving skeletons to focus on the contentious facts and the law.

(ii) Trials will be listed in a block and will include pre-reading, so that the first day of the trial is the day on which pre-reading commences (J3.3). However, pre-reading will not always take place in one isolated chunk: the Court may decide to pre-read for a period, followed by opening submissions, followed by further pre-reading (J8.3).

(iii) The deadline for skeletons is now 12pm, rather than 1pm (J6.2).

(iv) Parties and legal representatives shall minimise the use of paper at trial. The default is no hard copy bundles (J2.2).

(v) A return to more traditional openings, to be used to introduce the trial Judge to the important documents. The Guide contains a warning that cross-examination is not the time to introduce the judge to the significant documents (J8.1)

(9) Negotiated Dispute Resolution

Alternative Dispute Resolution (ADR) has been re-named, “Negotiated Dispute Resolution” or “NDR” (Section G and Appendix 3). This change is intended to reflect that “NDR” is no longer to be viewed as an alternative, discrete exercise, but is to exist alongside litigation, throughout the life of a case. It is not clear from the Guide whether and how NDR will differ from ADR, but parties can expect more engagement with the Court, presumably at the CMC, as to their appetite for settling and the best way to go about exploring settlement.

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John Kimbell QC specializes in aviation, shipping law and international personal injury law. In September 2018, he was appointed a Deputy High Court Judge (sitting in both the Chancery and Queen's Bench Divisions). In addition to his work in the High Court, he represents a wide range of clients in commercial arbitration (LMAA, GMAA, ICC, LCIA and DIS). He also acts a commercial arbitrator and mediator.

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Tom is a leading commercial barrister specialising in shipping, shipbuilding, energy, international trade, insurance and international arbitration. He is recognised as a leading practitioner by the Legal 500 in Commodities and Shipping, and by Chambers & Partners in Shipping & Commodities.

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Nicola specialises in civil fraud, insolvency, company law (particularly shareholder disputes) and banking litigation. Nicola's practice has a strong international element; she was called to the Bar of the BVI in 2012, in the Cayman Islands in 2016 (limited admission) and many of her cases raise cross-border and jurisdictional issues. Nicola has a wealth of trial experience both as sole counsel and as part of a team.

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Maya Chilaeva

Maya Chilaeva joined Quadrant Chambers on 1 October 2021 following the successful completion of her pupillage. She is developing a broad commercial practice in line with Chambers' profile.

From October 2019 to August 2020, Maya spent ten months as a judicial assistant to the Commercial Court, sitting with a number of judges on matters ranging from without notice applications for freezing injunctions to an eight-week trial in the case of PCP Capital Partners LLP v Barclays Bank [2021] EWHC 1852 (Comm). This experience, as well as the training received during pupillage, informs her approach to case preparation and advocacy as a junior barrister.

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