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THE NEW COMMERCIAL COURT GUIDE

This briefing examines the changes brought in by the 11th edition of the English Admiralty and Commercial Court Guide, which has just been published, with a focus on the changes to the Commercial Court practice.

Speed Read

The 11th edition of the Commercial Court Guide¹ (the Guide) published on 3 February 2022 replaces the previous 10th edition published in 2017. Five years is a long time in terms of developments in practice and technology, even more so given the need to adapt to a remote world as a result of Covid.

The 11th edition of the Guide takes account of the way in which parties, their lawyers, and the courts have all now learnt to work.

In detail

The 11th Guide continues to follow the spirit and ambitions of the Commercial Court when it was established in 1895 with the aim of enabling commercial parties to litigate in a more efficient way. It continues to develop the practices adopted in the Commercial Court, as embodied in the 1st edition published in 1986.

The Guide supplements the Civil Procedure Rules (**CPRs**), in particular CPR Part 58 and the associated Practice Directions (**PD**), which in addition to the Rules contained in the more general CPRs, sets out the procedures for cases in this specialised court.

Before looking at the key changes in detail, we should first establish the role of the Guide.

What is the Guide intended to be?

- a. The Guide is not part of the CPRs in that it is neither a Rule nor a Practice Direction, and is therefore not strictly speaking binding on litigants. It is more of a best practice approach to litigation in the Commercial Court.
- b. However, parties should be aware that Commercial Court judges will expect them to follow it, and will take non-compliance into account when exercising their discretion, for example in relation to the awarding of costs.
- c. In practice, the provisions set out in the Guide are usually followed, especially when the court makes case management orders and sets procedural timetables.

Rather than set out each and every revision, we have instead reviewed by category and themes.

The overriding theme is modernisation. The Guide has been amended to reflect the current ways of working, and the cost and time efficiencies that those bring.

Key changes brought in by the 11th Guide include:

1. Increased use of technology, the new Guide:
 - a. endorses the use of virtual or hybrid hearings, and the need for evidence by remote means to avoid witnesses having lengthy journeys and where their evidence is expected to last no more than half a day;
 - b. references the impact of the Disclosure Pilot (PD51U), introduced in 2019, and which requires the use of electronic disclosure (eDisclosure), and applies to nearly all Business and Property Courts, including the Commercial Court (a notable exception is the Admiralty Court). For further information, please see our Disclosure Pilot Client Guide;² and

¹ <https://www.judiciary.uk/wp-content/uploads/2022/02/Commercial-Court-Guide-11th-edition.pdf>

² [003563-HFW-Client-Guide-Disclosure-Pilot.pdf](https://www.hfw.com/003563-HFW-Client-Guide-Disclosure-Pilot.pdf)

- c. endorses the benefits of using electronic bundles (**eBundles**) in place of hard copy or paper bundles, and requires parties to use eBundles for trials and hearings.

2. Efficiencies introduced by the Guide:

- a. in order to overcome its increased workload resulting in a lack of capacity and lengthier hearing and trial waiting times, the Commercial Court has increased the number of judges and, as the Guide makes clear, will also be looking to transfer cases to other courts, where it is appropriate to do so. Parties can now expect the court to consider transfers out at the Case Management Conference (**CMC**) stage for cases where the financial value, factual, technical, or legal issues that arise are better suited to other courts. For example, cases with a lower financial value (usually in the region of less than £5million³) are likely to be transferred to the London Circuit Commercial Court, and similarly cases that involve competition issues will likely be transferred to the Competition Appeal Tribunal;
- b. a requirement for parties to consider whether a case is suitable for the Shorter Trials Scheme or the Flexible Trials Scheme;
- c. updated references on the need to follow the new rules concerning the provision and use of trial witness statements brought in under PD57AC, which applies to most of the Business and Property Courts;
- d. encouragement by the Commercial Court of the parties to actively review from an early stage the question of what evidence (both documentary and witness) is needed to resolve the issues;
- e. changes to timetables for lodging CMC skeletons and orders, and increases in thresholds before leave is required, for example leave is required for statements of case over 40 pages rather than 25;
- f. encouraging the use of junior advocates, for example at CMCs, and trials;
- g. introducing costs penalties for overly lengthy Disclosure Review Documents, encouraging parties to avoid using too many different disclosure models, and requiring greater co-operation between the parties to reduce party and court time dealing with issues;
- h. the use of designated judges where appropriate; and
- i. clarification on the process for urgent or emergency hearings.

3. Foreign law and jurisdiction provisions are updated:

- a. the provisions referencing service out on parties in EU member states following Brexit have been updated;
- b. new guidance is given on the options for proving foreign law, with reference made to the Supreme Court decision in *Brownlie v FS Cairo (Nile Plaza) LLC*⁴; and
- c. there is a new process for the summary determination of jurisdiction challenges in arbitration.

4. Updated language is used which:

- a. adopts gender-neutral language;
- b. ends a distinction between solicitors and barristers by instead referencing all as "advocates"; and
- c. recognises that the use of "alternative" to describe "Alternative Dispute Resolution" is outdated and changing the reference to "Negotiated Dispute Resolution".

What does this mean for you?

The best practice provisions set out in the Guide support the recent CPR changes and will provide Commercial Court users with a more dynamic and efficient process within which to resolve their disputes.

Many of the changes support not only greater efficiencies but also help to reduce the carbon footprint generated by all users of the English courts. HFW is a proud founding member and signatory of the Greener Litigation Pledge, the aim of which is to reduce the environmental impact of dispute resolution. Please do consider joining us and the many other users of the English courts in signing the Pledge⁵.

³ [Work | Courts and Tribunals Judiciary](#)

⁴ [2021] UKSC 45

⁵ <https://greenerlitigation.org>

If you would like to comment on the Guide please do send your feedback to the Commercial Court Users Committee, by e-mail to comct.listing@justice.gov.uk, or to the authors of this briefing who will be happy to forward it for you.

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