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Latest Commercial Court Guide Reflects A Shifting Landscape

By **Elizabeth Warwick** (April 1, 2022, 5:33 PM EDT)

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A great deal has changed in litigation since the first Commercial Court Guide was published in September 1986, an era before personal computers, the internet and mobile phones were commonplace. Indeed, many have complained about the stubbornness of some of the arcane practices of civil litigation to be swept away as analogue vestiges in a digital world.

Then COVID-19 hit.

The first lockdown arguably did more to revolutionize the pomp and ceremony of court proceedings in a few short weeks than centuries of the old normal had. Plenty has been written about the learning curve, but the latest incarnation of the Commercial Court Guide, published almost two years into the pandemic in February, offers some small but notable changes that reflect the experiences of locked-down litigation.

The new framework, the first update since 2017, sharply focuses on the future of litigation, both culturally and practically. Coming in, if you printed it out, at 162 pages, the guide covers many aspects of litigation procedure — too many to document here.

However, in terms of big picture themes, there are some interesting points to be made on the evolution of disputes. Arguably, some of the changes are primarily linguistic, but they are symbolic and reflect shifting dynamics.

Digital or Nothing — Embracing Tech

Technology has, of course, advanced and integrated into disputes' mechanisms. Electronic bundles, testimony via video link and even limited televised trials had all arrived, but the last two years has seen for the first time exclusively virtual proceedings. It is little surprise that tweaks are being made to take the key lessons.

The new guide has renamed "evidence by video link" to "evidence by remote means", for instance. It may seem a small linguistic twist but the shift from video link to remote means — which now includes reference to internet videoconferencing or telephone — gives a nod toward the technological advances.

The previous guide also said video link should be considered to "balance any potential savings of costs against the inability to observe the witness at first hand when giving evidence." The new guide now

actively endorses remote evidence, stating it should always be at least considered for "a witness who will have to travel a substantial distance, including from abroad, whose evidence is expected to last no more than half a day."

The efficiency and effectiveness of remote evidence in addition to the costs, it would seem, is something the courts have found beneficial from virtual hearings.

Virtual or hybrid hearings, however, do not appear to be the new normal, at least not yet. Indeed, the general rule under Rule 33.2(1) of the Civil Procedure Rules provides that any fact which needs to be proved by the evidence of a witness is to be proved at trial by their oral evidence given in public.

In United Technology Holdings v. Chaffe,[1] heard by the Commercial Court in January, the court's position was unequivocal, with Judge Mark Pelling determining that there was no "reason why the court should adopt an entirely novel approach to the determination of its business by directing remote hearings simply to suit the convenience of a party who has chosen to litigate in England but is unwilling to travel here."[2]

In Jackson v. Hayes and Jarvis (Travel) Ltd.,[3] heard three days after United Technology, the court applied United Technology and confirmed that witnesses are expected to attend trial in person unless there was a good reason for them not to. In Jackson, a witness living in Kenya was refused permission to give oral evidence at trial via videolink. Hearings were not heard remotely simply for the convenience of the parties prepandemic, nor should they be now.

The guide stresses that the right to use video-link evidence is not automatic. A party proposing to call evidence by video link should prepare and serve on all parties, and file with the court, a memorandum that (1) deals with the matters outlined in the videoconferencing guidance contained in Annex 3 to PD 32, and (2) sets out the proposed arrangements.

Likewise, the old guidance said that the use of information technology at trial was "strongly encouraged" where it is likely to save time and cost or to increase accuracy.

In a bid to go paperless, now parties and their legal representatives should not only "seek to minimise the use of paper at trial" but also that "no hard copy trial bundle, only electronic trial bundles" should be lodged for use by the court unless specifically requested.

Bundles should only include documents that the judge will be asked to read or that are expected will be shown to the court at trial, and not be an exercise in collecting all of the disclosed documents.

An Alternative Name for a Familiar Process

You can be forgiven for not instantly recognizing the NDR acronym, or assume it is some variant of an NDA, such as "nondisclosure redaction." Alas, it is simply the rebranding of alternative dispute resolution, or ADR, as a negotiated dispute resolution.

On a practical level, trying to rebrand a well-established and widely accepted legal term seems unnecessary, in the same way it would be with terms such as M&A or IP. Even so, the old ADR order has been relabeled an NDR order to underscore the point.

Whichever acronym you prefer, ADR has been an increasingly popular mechanism for the courts to

pursue to resolve disputes, covering mediation for disputes ranging from divorce to multibillion-pound spats.

Alongside the relabeling, ADR has also been given a subtle reordering and scale-back in the latest guide. The previous version stressed that the Commercial Court "remains an entirely appropriate forum for resolving most of the disputes," laying out the various benefits to ADR, such as cost and time saving, preserving commercial relationships and market reputation, and — of course — freeing up valuable court time. This has been removed.

The consolidated version also elevates the section regarding applying for ADR directions at any stage (previous G1.5) as the very first G1.1 point, with the duty of lawyers in all cases to consider with their clients ADR now second.

Speaking of ADR, the guide introduces a new restriction regarding Section 67 and Section 68 applications under the Arbitration Act.

The change, intended to dissuade parties from launching frivolous claims, means Section 67 applications can only be issued where there are "serious grounds for a contention that the matters relied on do affect the substantive jurisdiction."

Further, the latest edition of the guide reiterates the court's power to dismiss an arbitration claim without a hearing for Sections 67 and 68 applications that have "no real prospect of success," with a right to apply to have such a decision set aside.

Star Track — The Next Generation of Advocates

One of the most encouraging aspects of the new guide, and one that underscores the theme of looking to the future, is the recommendation for more advocacy from junior lawyers.

It is hard to know how much the intense virtual hearings have played a role, but the recommendation clearly has a knock-on effect of not only giving more advocacy experience to junior lawyers but also providing an effective way to streamline costs.

The guide points specifically to the court experience on many case management issues, in which junior advocates may be "well placed to assist the Court." Parties are asked to consider in every case:

- Whether attendance by the more or most senior advocates instructed in the case is reasonably required; and

- Whether, even where that is the position, at least some of the matters arising may appropriately be dealt with by the more or most junior advocates.

The court also suggests that it may be appropriate for oral argument about costs or other consequential matters to be undertaken by a junior advocate. As the word "junior" did not appear in the previous guide, the goal seems to be trying to encourage parties to consider the seniority of an advocate in appearing at the most appropriate stages of a dispute.

Time Is of the Essence

12 p.m. is the new 1 p.m. Ordinary applications must now be filed by 12 p.m. one clear day before the hearing, and skeleton arguments must now be filed by 12 p.m. two clear days before the start of the trial by the claimant and by 12 p.m. the following working day by the defendant.

Parties must also take note that prereading time before trial is no more. If there is to be any reading time prior to the first sitting day of the trial, that reading time will start on the first date of the trial and not before.

In a further efficiency measure, the parties should seek to agree on a detailed narrative, setting out uncontentious, relevant facts in chronological order. The aim is that, where relevant, trial skeleton arguments can then take the agreed detailed narrative as read and focus on the dispute in hand.

The theme of front-loading the trial is continued with respect to oral openings, as the new guide confirms that the judge should be introduced to important documents at that stage. Cross-examination of witnesses should not be used as a vehicle for taking the court through the significant documents in the case.

And, when it comes to witnesses, Practice Direction 57AC governs. The court requires a return to the prelapsarian state and will be applying PD 57AC with vigor — witness statements are again not to be used as a vehicle, this time for legal submissions.

Conclusion

While the latest version of the Commercial Court Guide perhaps doesn't reflect the huge changes prompted by the pandemic, it does show that the courts are — in their own measured way — adapting to the new environment. Yes, moving litigation to a virtual format was literally an overnight revelation, but a full revolution can take more time to achieve.

And it is achieved one step at a time.

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[1] United Technology Holdings v. Chaffe, [2022] EWHC 151 (Comm).

[2] See [8] [2022] EWHC 151 (Comm).

[3] Jackson v. Hayes and Jarvis (Travel Ltd), [2022] 1 WLUK 321.