INTERNATIONAL ASSOCIATION OF JUDGES
SECOND STUDY COMMISSION
CIVIL LAW AND PROCEDURE

RESPONSE by THE UNITED KINGDOM (England and Wales; and Scotland)
to the
2009 QUESTIONNAIRE
TREATMENT OF COMMERCIAL CASES

I. ORGANIZATION/STRUCTURE

1. What law applies to commercial activities in your legal system? Are there special statutory provisions?

England & Wales and Scotland. There is no separate body of law applicable specifically to commercial cases. These are governed by the ordinary rules of the civil law – though obviously certain provisions of the civil law by their nature operate essentially in a commercial context. The law applicable to commercial activities consists of both statute law (eg. The Sale of Goods Act 1979 or The Carriage of Goods by Sea Act 1992) or the common law, which is the law enunciated by judicial decisions.

2. How are your courts structured to hear commercial cases? (For example, are your commercial cases heard in courts where the judge’s are generalists, regularly adjudicating on a broad range of topics; do judges with more extensive commercial experience hear your commercial cases; or, do you have “specialist” courts where judges with special expertise adjudicate exclusively commercial cases?)

England & Wales: There is a specialist Commercial Court, the judges of which are specialists in Commercial Law. (Before they became judges they have all been advocates in the Commercial Court, specialising in Commercial Cases). The Commercial Court was founded in 1893 specifically to deal with cases involving international trade, finance, shipping, insurance and reinsurance, banking and the oil and gas industries. 50% of all cases heard in the Commercial Court involve no UK party; the parties to the litigation are all from outside the UK. 80% of cases in the Commercial Court involve at least one non-UK party. The cases are of high value, often involving US$ millions. (The largest claim so far was for about US$ 3 billion). There are other specialist courts. First, the Admiralty Court, which dates from the 14th century. It deals nowadays principally with collisions and salvage cases. There is also a Technology and Construction Court, which specialises in cases involving the building industry and (to a
lesser extent) information technology. There is a specialist Patents Court which hears cases concerning patents, copyright, trade marks and other intellectual property cases. For smaller claims, there is a Mercantile Court, which sits in the large centres outside London, such as Birmingham, Cardiff, Manchester, and Leeds.

Scotland: The Court of Session, which has first instance territorial jurisdiction throughout Scotland, has special rules of procedure which apply in commercial cases. One of the judges of the Court sits full-time as a “commercial judge” and there are also a further two commercial judges, who may be described as part-time in the sense that they also do other judicial work such as personal injury claims or criminal trials. The commercial judges have no special judicial training but those selected by the president of the court to serve as commercial judges will generally have had extensive experience of commercial work while in practice at the Bar. Although colloquially reference is frequently made to “the commercial court” there is constitutionally no separate court; it is simply part of the Court of Session.

In the sheriff courts (i.e. local courts) in the larger cities there are similarly special rules of procedure which may be used and similarly selected “commercial sheriffs”.

3. Do you have special arbitration tribunals for commercial disputes? Are there circumstances where a matter must proceed to mediation or arbitration before the parties can access the courts or continue with a case after starting it?

England & Wales: There are a number of arbitration tribunals which have their seat in London, to which the parties to a contract may agree to refer disputes, if they wish. The best known is the London Court of International Arbitration (“LCIA”), to which more than a thousand commercial disputes are referred every year. Most involve non – UK parties. There is no “state run” arbitration system, although High Court Judges may be permitted to sit as arbitrators if they can be freed from other work. (They are not paid the arbitrators’ fees, which go to the Treasury). If the parties agree that their disputes will be determined by arbitration then they must do so.

Scotland: There are no special arbitration tribunals for commercial disputes, nor are there circumstances in which, as a prior requirement to resort to litigation, the parties must go to mediation.

4. What kinds of commercial cases do your courts hear? (e.g. contracts, intellectual property, securities, insolvency/bankruptcy, corporate reorganizations etc.) What kind of commercial cases do your courts hear most frequently?

England & Wales: The type of case which is heard in the Commercial Court is defined by the court rules, although there is flexibility of the type of case heard by the court. The majority of cases involve international trade and commerce, shipping, insurance and reinsurance, banking and oil and gas. As already noted, other specialist courts deal with other special types of case. Corporate insolvency and reorganisation is dealt with by the Companies Court. It is not possible to say what type of commercial cases the
courts hear most frequently; the specialist courts hear all the types of case for which they were set up to hear.

**Scotland:** The definition of a commercial action is a broad one – “…an action arising out of, or concerned with, any transaction or dispute of a commercial or business nature…”\(^1\). It is not mandatory to bring such a dispute as a commercial action. Generally the pursuing party will elect to raise proceedings as a commercial action, but the court may, if requested, transfer a commercial action to the ordinary civil roll and vice versa. Contractual disputes are probably the most frequent subject matter of commercial actions. All company law matters are also dealt with by the commercial judges.

**II. PROCESS/PROCEDURE**

1. **Do you have special procedural rules for commercial disputes (for example those dealing with pre-trial document discovery, questionnaires, depositions)? Are these rules judge-made or statute-based? Are the rules sufficient to deal with complex commercial cases?**

**England & Wales:** The Common Procedure Rules have special procedural rules for the specialist courts: the Commercial Court; the Admiralty Court; the Technology and Construction Court and the Patents Court. These rules are a form of “delegated legislation” made by a Rules Committee which has a statutory power to make Rules of Court. All specialist courts also have Guides, which are non – statutory rules but are expected to be obeyed by lawyers who practice in the specialist court concerned. The Guides and the Rules of Court for the specialist courts are, effectively, drafted by the judges and practitioners of those courts. They are specifically designed to deal with complex commercial cases.

**Scotland:** The Court of Session rules of procedure and the sheriff court rules each contain a special chapter devoted to procedure in commercial actions. However the procedures are flexible and, after hearing the views of parties, the commercial judge will determine the procedure to be followed. It is thus possible to adapt procedures, and timescales, to meet the needs of the particular case.

In the Court of Session there is a pre-action protocol requiring parties to endeavour to identify the true nature of the dispute and the matters which are in contention before the action is brought.

2. **Where the plaintiff’s claim in a commercial case is not a particularly large monetary value, are there different procedural rules that apply? Would the matter be heard by a different court?**

**England & Wales:** If the claim is “commercial” in the sense of being a business dispute, but is of small value, it will be brought in the Mercantile Court, to which

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\(^1\) Court of Session rules of procedure – RCS 47.1
different procedural rules will apply, although their effect is similar overall to that of the specialist courts dealing with larger claims, such as the Commercial Court or the TCC.

Scotland: There are no particular commercial procedure rules which are dependent on or related to the amount of money being claimed. Claims of less than £5000 (approximately 5700 Euro) however cannot be brought as commercial actions.

3. a) Does your system list commercial matters for trial more quickly than other matters? If so, is there also an expedited process for listing appeals?

England & Wales: The specialist courts maintain their own lists. Usually, trials are listed more speedily than in non-specialist lists, but it will depend on the size of the case and the estimated time for the trial. Very large commercial trials can last up to 1 year.

Scotland: In general terms commercial actions do proceed more speedily than ordinary actions. Although there are provisions for the early disposal of appeals, these are not specifically applicable to commercial actions as a class. For practical reasons – namely that early disposal appeal hearings are often set down at very short notice, when parties’ chosen counsel may not be available – commercial actions do not usually receive expedited hearing on appeal.

b) Do your courts generally schedule evidentiary hearings from day to day or are hearings scheduled far apart? Is the practice any different for commercial litigation?

England & Wales: There are usually seven or eight Commercial Court judges sitting at any one time: one judge per case/court. There are directions hearings before the trial, where the parties have to estimate how long the trial will take and, if the judge agrees, he will allot time accordingly. As already stated, all the specialist courts maintain their own lists.

Scotland: In civil proceedings in which oral evidence is required a diet of a given number of days (estimated by the parties) is fixed in the court diary. The same practice is generally followed in commercial causes, but there is a separate commercial court diary.

4. Do you have any time limits for the release of commercial judgments (informal judicial policy, judge-made, or statutory imposed time limits)?

England & Wales: Generally (whether it is a commercial case or not) judges are expected to produce their judgment within 3 months of the completion of the hearing of evidence/submissions. If a case is long/complex, the judgment may take longer to complete. This is an informal judicial policy only.

Scotland: No.

5. Do your courts have the power to impose time limits on pre-trial proceedings or in the trial itself for commercial cases? (e.g. setting time-frames for when certain pre-trial
matters must be complete, or setting time limits for opening argument, examination of witnesses, etc.) What are the consequences of failure to comply with such limits, if any?

**England & Wales:** The judge who manages the pre-trial procedure will set time limits for, eg. the production of pleadings, witness statements, expert reports, disclosure of documents. The time limits must be adhered to; if not, the party who has failed to do so may suffer consequences, such as payment of costs wasted, or may be debarred from pursuing or defending a claim if a failure is particularly serious.

**Scotland:** For most pre-trial procedures the commercial judge managing the case will set a time-limit for performance. The consequences of failure to comply will vary, for example, there may simply be an oral expression of judicial displeasure; or the court may refuse to allow the pleading or the document to be filed late; or a sanction may be applied in the form of awarding of expenses against the party who has not complied timeously.

6. **Do your courts ever assign more than one judge to a commercial case where it is anticipated to be particularly complex?**

**England & Wales and Scotland:** No. In England a judge can sit with an assessor, but, except in the Admiralty Court (where the judge may sit with Nautical Assessors to deal with specialist seamanship issues), sitting with assessors is almost unknown in English Commercial cases.

7. a) **Do special rules of evidence apply in commercial litigation (e.g. admissibility, cogency)?**

**England & Wales and Scotland:** The ordinary rules of the law of evidence apply, save that the commercial judge has greater practical freedom to allow matters to be dealt with by affidavit, witness statement or documentary evidence, as opposed to oral evidence of witnesses.

b) **Do your courts place special weight on "expert opinions" and testimony in commercial litigation?**

**England & Wales:** Expert evidence is frequently called in commercial litigation of all varieties. Experts are chosen by the parties, not the court. However, a party must have the permission of the court before it can be introduced and the issues to be considered by the experts have to be carefully defined by the court. The judge will pay great attention to the expert evidence given, because the duty of the expert witness is to assist the court, not to win the case for the party appointing him/her.

**Scotland:** Not to any significantly greater extent than in other civil litigation.

**III. INTERNATIONAL/CROSS-BORDER**
1. Do you have special courts to deal with international commercial disputes?

**England & Wales:** As already mentioned, the Commercial Court deals largely with international commercial disputes. Other specialist courts, particularly the Patents Court, also deals with international disputes.

**Scotland:** No.

2. Roughly what proportion of your commercial cases have at least one party from another country?

**England & Wales:** As already noted, about 50% of all cases in the Commercial Court involve parties which are all from outside the UK. In 80% of all Commercial Court cases at least one party is from outside the UK. These figures have been steady now for about 20 years.

**Scotland:** Only a small proportion of commercial cases in Scotland have a party based outwith the United Kingdom.

3. Do the parties in your international commercial cases take issue with whether the case would be better tried elsewhere? If so, roughly how often does this become an issue?

**England & Wales and Scotland:** All courts in the UK have to abide by the restrictions flowing from the European Community jurisdictional rules (Regulation EC No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). In the English courts at least, if Regulation 44/2001 does not apply, a party can only start a case in the English courts against a foreign party if certain conditions are fulfilled. These are laid down in Rules of Court. Even if those rules are complied with, a defending party may plead *forum non conveniens.* In practice the plea is not frequently encountered in Scotland, but more frequently in the English courts when a foreign party wishes to avoid having to fight litigation in the English courts.

4. Are your courts equipped to provide professional interpreters in examination of foreign nationals?

**England & Wales and Scotland:** Yes, by engaging professional interpreters from commercial interpreting agencies

5. Do your courts permit the special appearance of foreign attorneys in international litigation and, if so, what special rules, if any, apply?

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2 For a discussion of the nature and scope of the plea reference may be made to *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460
**England & Wales and Scotland:** Subject to the relevant European provisions, lawyers qualified in another Member State of the EU may appear but otherwise foreign lawyers may not be given audience.

**IV. MISCELLANEOUS**

1. a) Do your courts have the power to award costs and attorneys' fees to discourage the parties from behaving unreasonably? If so, do your courts make use of that power in commercial cases?

   **England & Wales and Scotland:** As in other civil cases the Court has power to award expenses (costs) and that power is usually exercised in commercial, as in other, cases. The usual basis for awarding expenses is success in the litigation, irrespective whether there has been any unreasonable behaviour. A party may also be found liable for the costs incurred in a particular step in the proceedings (e.g. amendment of his written pleadings) if he has made that step necessary.

   The normal level of expenses awarded is “party and party”, that is to say only such fees and expenses as were reasonable for the litigant to have incurred. Where however a litigant has conducted the litigation unreasonably or irresponsibly he may be found liable to pay expenses on a full indemnity basis.

   b) Do your courts generally make use of this power and if so on what basis are costs and attorneys' fees awarded?

   See above

2. Does your highest court deal with commercial issues frequently? Are any of your highest court judges specialists in commercial law?

   **England & Wales and Scotland:** Yes.

3. To what extent does technology play a role in your commercial cases? For example, do you have any “paperless” trials, or have they been considered? Do you allow parties to appear by satellite video?

   **England & Wales and Scotland:** Electronic filing and exchange of pleadings, witness statements, expert evidence and other documents is allowed in commercial actions. Witnesses, including a party who is a witness, may give evidence by video link but parties’ lawyers appear personally.
**Case Study**

Jean, a citizen of France but resident in Switzerland, is the sole shareholder and general manager of B Corporation registered in Germany but which has offices in Italy and Latvia. Working out of his Italian office he placed an order for machinery with X Ltd., a company registered in Spain, that is a distributor of E Ltd., the Swedish manufacturer of the machinery.

At the time of placement of the order, Jean emphasized that timely delivery of the machinery was essential in order for B. Corporation to produce and timely deliver to D. Inc., an American company, a large quantity of a copper wire manufactured by Jean's company. X Ltd. Promised to ship the machinery no later than June 1 by ship from a port in Sweden. The contract stated that Spanish law would apply to the transaction but made no specification as to the venue for hearing any dispute that might arise.

Due to a strike of the general labour union in Sweden, the machinery ordered was not ready for shipment by June 1 and the next available cargo ship was to sail only on August 1. As a result, Jean was in breach of his contract with D. Inc.

D. Inc filed a lawsuit against B Corporation in the federal court for the Southern District of New York.

**Questions** *(Answered on the basis that Scottish law/procedure applies).*

1. B. Corporation wants to file a third party claim against X Ltd. Is such a procedure possible in your court system? If so, could X Ltd. file a fourth party claim against the Swedish manufacturer for failing to deliver the machinery by the date stipulated in the purchase order?

On the assumption that B Corporation was properly subject to the jurisdiction of the Scottish Courts, it would be open to B Corporation to convene X Ltd as a Third Party and for X Ltd to proceed likewise as respects E Ltd – see Regulation EC 44/2001, art 6 (2).

2. If D. Inc. was a company registered in your country rather than in the USA, would your courts require each of the parties wishing to file a lawsuit against a foreign defendant to serve the lawsuit in the language of the defendant?

Yes (the place of incorporation of D. Inc would not be relevant.)

3. What special rules for service of process to the various parties in the different countries would apply, if any?

Since both X Ltd and E Ltd have their seat in another Member State of the EU, service could be effected under the provisions of Regulation EC No 1393/2007 on the service in the Member States of judicial and extra-judicial documents in civil and commercial matters. The Rules of Court also provide for a variety of methods of service abroad, such as registered post, or by an
huissier, provided that the method of service is one recognised in the State in which service is to be effected.

4. Would your courts grant additional time for filing and/or responding to the various pleadings, motions etc. because the parties are residents of different countries?

Where the defendant is in Europe the standard period of notice for entering appearance in the action is 21 days. If the defendant is outwith Europe and service is effected by an huissier (or equivalent officer) the period is also 21 days from the date of service. But if service is effected by some other method, the period furth of Europe is 42 days.

5. Are their special rules and procedures in your countries for honouring judgments issued by foreign courts? What rules apply for honouring foreign arbitration awards?

Judgments in commercial cases delivered by the courts on another Member State of the EU may be recognised and registered for enforcement under the provisions of Regulation (EC) No 44/2001. Judgments from most courts of many other countries can be registered for enforcement in terms of reciprocal provisions made under the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal Enforcement) Act. It is also possible to bring, at common law, a separate action “for decree conform”, that is to say an action for recognition of the foreign judgment and a court decree replicating the terms of the foreign court order. Such an action may also be adapted to the enforcement of an arbitral award. Additional in the case of awards made under arbitrations to which the UNCITRAL Model Law applies, there is a simplified registration procedure.

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3 “Europe is not defined but unquestionably includes the UK and other Member States.”