Ministry
of Justice

Enhanced Court Fees

The Government Response to Part 2 of the Consultation on Reform of Court Fees and Further Proposals for Consultation

January 2015

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The Government Response to Part 2 of the Consultation on Reform of Court Fees and Further Proposals for Consultation

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

January 2015

Cm 8971

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Contents

Ministerial Foreword

I am proud that we live in a country which operates under the rule of law, and where we have such a strong tradition of access to justice. We have some of the finest judges and access to some of the best legal services in the world. That is why so many people and organisations choose to bring their disputes here.

It is vital that these principles and qualities are preserved so that people can continue to have ready access to the courts when they need it. I believe that a key aspect of ensuring that access to justice is protected is to ensure that the courts are properly funded.

We can only have properly funded public services if we have a strong economy. This Government has made economic recovery our first priority. This has meant that we have had to make some difficult choices, but the tough action we have taken is working and the economy is getting stronger.

Our work is not finished, and delivering further reductions in public spending will continue to be necessary over the coming years.

There can be no exceptions for the courts, and those who use them. We must continue the drive for efficiency and where necessary we will invest to save. We have already announced that we will be investing £375 million over the next five years to modernise our services and improve efficiency, because this will enable us to make long-term and permanent savings worth over £100 million each year by 2019/20.

There is, however, only so much that can be achieved through cost efficiency measures alone. If we are to protect access to justice, and all the benefits that brings, I am convinced that there is no alternative but to look to those who use the courts to contribute more towards their running costs where they can afford to do so.

We consulted on proposals to introduce enhanced fees last year and this Government response sets out how we intend to proceed. The measures set out in this Government Response will deliver an estimated £120 million per annum in additional income, with every pound collected retained by the courts to deliver a better service for everyone who uses them.

Respondents to the consultation were particularly concerned about raising the fee for a divorce. We have listened to those concerns and we have decided not to pursue this measure for the time being. We have also listened to those who were concerned about the potential impact of the higher fees for commercial proceedings, and we have decided not to implement either of the options on which we sought views.

However, while we have decided not to proceed with a number of the consultation proposals, this has not changed the financial imperative to increase the income to the courts from fees. The Government Response therefore also seeks views on proposals for raising fee income from possession claims and general applications in civil proceedings.

Increasing court fees will never be popular or welcome. But I am sure that those who choose to litigate in our courts will continue to recognise the outstanding qualities our legal services offer and the excellent value for money they provide.

Shailesh Vara

Executive Summary

Part 1: the Government Response to the consultation on enhanced fees

The Government has decided to increase the fee to issue proceedings for the recovery of money to 5% of the value of the claim for all claims over £10,000. The fees for claims of less than £10,000, which represent over 90% of all money claims, are unaffected by these proposals and will remain at their current levels. The maximum fee to issue proceedings will be £10,000.

Discounts of 10% will apply to these fees where the claim is initiated electronically using the Secure Data Transfer facility or Money Claims Online.

Having listened to the concerns of those who responded to the consultation proposals, the Government has decided not to implement the proposed increase to the fee for a divorce, or either of the options for charging higher fees for commercial proceedings.

This has not, however, changed the financial imperative to increase income to the courts from fees. This Government Response therefore also seeks views on proposals for raising fee income from possession claims and general applications in civil proceedings

Part 2: the Government's further proposals for consultation

Questions

Question 1: Do you agree with the proposal to raise the fee for a possession claim by £75? Please give reasons.

Question 2: Do you agree with the proposal to increase the fee for a general application in civil proceedings from:

- **£50 to £100 for an application without notice or by consent; and**
- **£155 to £255 for an application on notice which is contested.**

subject to an exemption for:

- **applications to vary or extend an injunction for protection from harassment or violence;**
- **applications for a payment to be made from funds held in court; and**
- **applications made in proceedings brought under the Insolvency Act 1986.**

Question 3: Are there other types of case in which a general application may be made which you believe should be exempted from the proposed fee increases? Please provide details.

Question 4: We would welcome views on our assessment of the impacts of the proposals for further fee increases on those with protected characteristics. We would in particular welcome any data or evidence which would help to support these views.

Introduction

1. This publication sets out the Government's response to Part 2 of the consultation paper, *Court fees: proposals for reform*,[1] which sought views on proposals for charging enhanced fees for certain proceedings in the civil courts in England and Wales.

2. In Part 1 of this response, we set out those measures we intend to implement following the consultation. In Part 2, we seek views on further proposals to raise fee income from court proceedings. The deadline for providing responses to the further consultation is 27 February 2015.

The case for reform

3. The case for reform is based firmly on the need to protect access to justice. This principle is a vital component of an effective and functioning democracy, helping to maintain social order and to support the efficient running of the economy.

4. The role of the courts is to provide access to justice for those who need it. This covers a wide range of circumstances, including: people accused of criminal offences; children who are considered to be at risk of harm; couples who need help in making arrangements for their separation and individuals or businesses involved in contractual or other disputes. In all of these cases, the courts are there to ensure that rights are protected and that cases are dealt with fairly, leading to a just outcome.

5. The Government has made the economic recovery our highest priority. We have started to tackle the unsustainable levels of borrowing by taking measured and proportionate steps to reduce public spending. These measures are clearly working, and the economy is getting stronger.

6. The Ministry of Justice, in common with most other public bodies, must continue to reduce its spending to meet its spending review settlements. Enhanced fees form part of our plans to meet the settlement. The measures we intend to implement, set out in this Government Response, will contribute an estimated £120 million per annum in additional income.

7. This is less than the income we estimated would be generated by the measures on which we originally consulted. The financial imperative to increase income to the Courts from fees has not changed and this Government Response therefore also seeks views on further proposals for increasing fee income from court fees. These measures, if implemented, would generate up to a further £55 million in annual income.

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[1] *Court fees: proposals for reform*, Cm 8751, December 2013

The financial context

8. Since 2010, the Ministry of Justice, in line with most Government departments, has had to make substantial savings in its spending:

    - we have reduced spending on legal aid so that the scheme is more affordable;
    - we have closed inefficient prisons, and we have outsourced facilities management services and benchmarked others to drive greater efficiencies; and
    - we have reduced staffing levels in our headquarters functions, and in the headquarters of our agencies.

9. Her Majesty's Courts & Tribunals Service (HMCTS) is also playing its part in contributing to these savings. Since 2010:

    - we have consolidated under-utilised court buildings;
    - staff numbers have been reduced by 3,500 through organisational restructuring; and
    - common services, such as estates, finance and IT, have been rationalised to reduce the cost of overheads and improve overall efficiency.

10. There is scope to go further, and we will be investing £375 million over the next five years to modernise court services, which is estimated to realise steady state savings of over £100 million by 2019/20.

11. There is, however, a limit to how much can be achieved through cost cutting measures alone. The Government believes that these reforms must be complemented by increases in the contributions from those who use the courts, if access to justice is to be protected and the overall cost of the courts to the taxpayer is to be reduced in line with spending review commitments.

12. The measures set out in this Government Response, when implemented, will deliver estimated additional income worth £120 million per annum as a contribution towards the departmental savings required from 2015/16.

Legislation

13. The normal rule, set out in *Managing Public Money*,[2] is that fees for public services should be set at a level designed to meet the full cost of those services. The fee reforms introduced on 22 April 2014 were designed to ensure that the fees charged in the civil courts were broadly at full cost levels (less remissions).

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[2] *Managing Public Money*, HM Treasury, July 2013.

14. In order to go further, we have taken a power, at section 180 of the *Anti-social Behaviour Crime and Policing Act 2014*, which allows fees to be set at a level above the costs of proceedings to which they relate. Under these provisions, the income from enhanced fees must be used to provide an efficient and effective system of courts and tribunals. The Lord Chancellor is also required to have regard to a number of factors before prescribing enhanced fees. In addition to the requirement to have regard to the principle that access to justice must not be denied (section 92 (3) of the Court Act 2003), he must also have regard to:

    - the financial position of the courts and tribunals service including the costs incurred by the courts and tribunals that are not being met by fee income; and
    - the competitiveness of the legal services market.

The consultation

15. In December 2013, the Government published proposals for using the enhanced fee power. These were set out in Part 2 of the consultation paper: *Court fees: proposals for reform*, which was published on 3 December and closed on 21 January 2014.

16. The consultation proposed enhanced fees for three categories of case:

    - money claims;
    - commercial proceedings; and
    - divorce.

17. We received 162 responses to the consultation. A list of the organisations which responded to the consultation is set out at Annex C.

18. The main points raised by consultees, and the Government's responses, are summarised in the following chapters and full details are contained at Annex A.

Research

19. One of the key concerns of introducing enhanced fees was that they might act as a barrier to justice. To seek to understand the likelihood and impact of this risk, two pieces of research were commissioned to support the development of the consultation proposals published alongside the consultation paper.

Potential impact of changes to the court fees on volumes of cases brought to the civil and family courts[3]

20. This study was undertaken by MoJ's Analytical Services team. Although a small scale study, it provides a valuable insight into the attitudes of those who bring the more routine types of case before the courts.

21. In summary, it found that court fees were not a primary factor influencing decisions to take cases to court: other factors, such as the prospects of success and likelihood of recovery, were more influential. Broadly, the current court fee structure was perceived favourably, and for these reasons, the proposed increases in court fees were not considered likely to impact on the volume of cases.

Competitiveness of fees charged for Commercial Court Services: An overview of selected jurisdictions.[4]

22. Queen Mary, University of London, were commissioned to undertake a quick and simple study to compare services and court fees charged in a small number of other jurisdictions. These were: Singapore, New York, Delaware, Australia, and Dubai. The comparison was based on a typical scenario of a claim with a value of more than £500,000, heard over four days.

23. The study concluded that:

    - the London courts enjoyed a competitive advantage over most of the jurisdictions in the study, including Singapore, Australia and Dubai; but
    - they did not enjoy a similar advantage over the courts of New York.

24. Further research has been undertaken during the course of the consultation. In particular, we have commissioned two further pieces of qualitative research:

    - IPSOS MORI were commissioned to undertake a study on the reasons why people and businesses bring cases to courts;[5] and
    - the British Institute of International Comparative Law (BIICL) have completed a study on international cross border litigation.[6]

25. These reports are available on our website, and are considered in more detail in the following section of this Government Response.

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[3] https://consult.justice.gov.uk/digital-communications/court-fees-proposals-for-reform/supporting_documents/feesresearch.pdf

[4] https://consult.justice.gov.uk/digital-communications/court-fees-proposals-for-reform/supporting_documents/competitivenessofcommercialcourts.pdf

[5] *The role of court fees in affecting users' decisions to bring cases to the civil and family courts: a qualitative study of claimants and applicants*, IPSOS MORI, April 2014

[6] *Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts*, British Institute of International Comparative Law, January 2015.

26. In Part 1 of this publication, we summarise the key issues raised in the consultation, the Government's response to those issues, and how we have decided to proceed. Further details of the issues raised in the response to the consultation are set out at Annex A.

27. In Part 2, we set out our further proposals for raising fee income for the courts. We would welcome views on these further proposals. The measures we are proposing are simple and straightforward reforms to existing fees. For this reason, we consider that a consultation period of six weeks provides adequate time to understand the proposals and to provide a response.

28. The deadline for responding to the consultation is 27 February 2015.

Impacts

29. We estimate that the measures contained in this Government Response will deliver additional income worth £120 million per annum from 2015/16. The further measures, on which we are seeking views, would additionally deliver £55 million per year if they were implemented. Full details are set out in the Impact Assessments, published alongside the Government Response.[7]

30. We have also undertaken an assessment of the impact of these reforms and proposals on people with protected characteristics. These are summarised in the following chapters and our more detailed assessments are contained in the Equalities Statements at Annexes D and E.

[7] See: https://consult.justice.gov.uk/digital-communications/court-fees-proposals-for-reform

Part 1: The Government Response to the consultation

Introduction

31. This section sets out the Government's response to the consultation proposals for introducing enhanced fees. The consultation paper sought views on three sets of proposals for raising enhanced fees:

    - money claims;
    - commercial proceedings; and
    - divorce.

1. Money claims

32. Money claims represent the majority of the business of the civil courts. In 2013/14, there were some 1.2 million money claims issued through the courts of England and Wales.

The proposal

33. Currently, the fee to issue a money claim depends on the value of the claim. The current fees are fixed within fourteen separate fee bands. The Government's proposal was to introduce a fee to issue proceedings for the recovery of money of 5% of the value of proceedings for claims worth £10,000 or more. Claims of less than £10,000, which represent over 90% of money claims, would be unaffected by the proposals, and would continue to attract the current fee.

34. We also proposed that the fee should be subject to a cap to avoid the fee becoming unaffordable or potentially giving rise to concerns about access to justice. The consultation proposed a cap of £10,000, the fee payable for a claim of £200,000.

35. We also proposed that specified and unspecified claims should be subject to the same fees regime. Nevertheless, we recognised that this would mean that some personal injury claims could be subject to very high fees and we therefore sought views on whether a lower maximum fee of £5,000 should be applied to unspecified money claims.

36. In line with current practice, we proposed that applications issued electronically either via the Secure Data Transfer (SDT) facility or Money Claims On Line (MCOL) should continue to be subject to the 10% discount.

37. It was also proposed that the same fee structure should apply to counterclaims.

Summary of responses

38. A number of respondents who answered these questions disagreed with the proposal to charge a fee of 5% of the value of the claim. They argued that the proposed fees did not represent the costs of proceedings, pointing out that higher value claims did not necessarily mean they were more complex or costly cases. Some respondents argued that for claims of £25,000 or more, the court fee would become too expensive, inhibiting access to justice.

39. Respondents also felt that enhanced fees were wrong in principle. The civil courts were, they argued, essential to a democratic society and should not generate a surplus. There was no rational argument for charging some users more than the cost of proceedings to subsidise other users of the courts.

40. Those involved in international litigation were concerned that the proposed fee increases would damage London's position as a leading centre for commercial dispute resolution.

41. However, those who agreed suggested that bigger claims tended to be more complex and took up more court time so a higher fee would reflect the cost of the service.

42. Most respondents, whether they agreed with the proposal or not, agreed that there should be a cap on the fee to issue proceedings. Those who disagreed with the proposals argued that the proposed cap of £10,000 was too high.

43. Although a majority of respondents disagreed that an unspecified money claim should attract the same fee as a specified money claim, they tended to do so because they opposed the introduction of enhanced fees for money claims altogether. Some respondents recognised that if enhanced fees were to be introduced, there was no reason to treat unspecified money claims differently to specified money claims. However, some respondents argued that if enhanced fees were to be introduced for money claims, they should all attract the lower £5,000 cap.

44. Some respondents argued that it would be difficult to apply the proposed fee to unspecified money claims because the value of the claim could not be known with any certainty.

The Government's response

45. The Government believes that there is a strong justification for the fee reforms. These proposals make a significant contribution to the Ministry of Justice's financial plans for 2015/16 and beyond. They are estimated to provide some £120 million per annum in additional income, reducing the cost of HMCTS to the taxpayer, helping to ensure that the courts are properly resourced and assuring access to justice for those who need it.

46. We recognise that some respondents were concerned that the fees bore little resemblance to the cost of proceedings. However, under the powers contained section 180 of the *Anti-social Behaviour, Crime and Policing Act 2014*, court fees are not limited by the cost of proceedings.

47. The Government agrees with those who argued that there was no reason in principle to distinguish between the fees charged for specified money claims, and those for unspecified money claims, and that there should be a common approach. We accept that there is some uncertainty at the outset of proceedings about the value of unspecified money claims. However, it is currently the case that the fee for issuing these proceedings is based on an estimate provided by the claimant. The Fees Order also provides that where the claim (or counterclaim) is amended, the party making the change must also pay any difference between the fee paid, and the fee due.[8]

48. The Government does not accept that the proposals could lead to difficulties in some people being able to access the courts. The research we have undertaken indicates consistently that fees are a secondary consideration in the decision to litigate, with the prospects of success and the likelihood of recovering the debt being primary considerations. Fees represent a small proportion of the overall costs of litigation and can, in successful civil proceedings, be recovered from the losing party. In addition:

    - the fee to commence the large majority of money claims will remain unchanged under these plans. 90% of money claims are for sums of £10,000 or less;
    - the fee is proportionate to the sums in dispute and is capped at £10,000;
    - fee remissions are available for those who qualify;
    - money claims can be brought under a “no win no fee” conditional fee agreement; and
    - in limited circumstances, legal aid remains available.

49. For these reasons, the Government does not believe that the fee reforms are likely to result in people being denied access to justice.

International Competitiveness

50. There was particular concern among some respondents about the potentially damaging impact that the fee increases might have on legal services in this country, and in particular on high value international litigation.

[8] See the note to fees 1.1 and 1.5 of Schedule 1 to the Civil Proceedings Fees Order 2008.

51. The Government commissioned the British Institute of International Comparative Law (BIICL) to undertake a study specifically into the attitudes of those involved in international, cross border litigation. The study, which is published alongside this Government Response, gathered views from legal professionals involved in this type of litigation and legal academics. There were 161 responses to an online survey; 54 in-depth interviews and a workshop with around 60 participants.

52. The study confirmed some widely held views on the strengths that London offers:

    - English law is the prevalent choice of law in commercial transactions because of its quality, certainty and efficiency;
    - the popularity of the English courts is mainly based on the reputation and experience of judges.

53. Around a quarter of respondents did not expect the consultation proposals to have an effect on the litigation market, principally due to the high quality of litigation services in the English courts.

54. However, 53 of the respondents to the BIICL study felt that MoJ's proposals were likely to affect London's position as the leading commercial dispute centre and a further 44 felt this was very likely. The concerns centred on the fact that commercial litigation was already perceived as expensive and there was an increasing sense of competition from foreign courts. In addition, there was a fear that wider reforms to civil procedure would increase the costs of litigation.

55. However, the study reinforced that court fees were not currently considered to be a factor in deciding whether and where to litigate.

The Government's response

56. The Government recognises that there are concerns about the risk of damage to legal services in this country and London's reputation as the leading commercial dispute resolution centre. However, no firm evidence could be produced to support these views, and we are confident that such concerns are misplaced.

57. We recognise that, when viewed in isolation, increasing court fees may raise general concerns about the cost of litigation and the threat from competitive jurisdictions. But our plans need to be considered in their full context. The principal reason why London is a popular centre for resolving these types of disputes is not related to the cost, but to the excellent value for money on offer. As the BIICL report demonstrates, people choose London because of the quality of legal services, the strength and independence of the Judiciary, and the particular suitability of English law for these types of proceedings.

58. Commercial litigation is expensive but court fees are a fraction of overall litigation costs. For example, based on data submitted to the Jackson Review, court fees amounted to less than one per cent of the value of a 'typical' personal injury or commercial claim worth more than £300,000.[9]

59. Furthermore, arbitration is already a popular alternative to litigation for many would-be litigants, even though the fees are often much higher than those for commercial litigation. This is because it delivers the desired outcome while maintaining confidentiality. This is further evidence that fees are not the deciding factor for people when choosing how to resolve commercial disputes.

60. This demonstrates that while commercial dispute resolution is expensive, it is a price that people are prepared to pay.

61. It is not therefore surprising that most people who took part in the BIICL research were unconcerned about court fees. Most respondents were unaware of the current level of court fees and considered them a non-factor for decisions about where to litigate. Over half of respondents (77 out of 108) said that court fees had little relevance, or no relevance at all, to the decision to use the English courts, and only two respondents said that court fees were a decisive factor.

62. When the proposed fees increases are considered against this background, it is clear that court fees are a minor consideration for most people, and that they are, and will remain, a very small fraction of the overall costs of litigation. We do not therefore believe that the fee increases on the scale we are planning are likely to make any difference to decisions on where to litigate.

63. Neither has any firm evidence been provided to support or quantify the risk that raising fees would damage legal services in this country, or adversely affect the contribution this sector makes to the economy.

64. For the reasons set out above, we do not believe that the fee increases are likely to damage London's competitive position.

Conclusion

65. Having considered carefully the responses to the consultation, the Government has decided to proceed broadly as set out in the consultation. Specifically we will:

    - introduce an enhanced fee to issue money claims of 5% of the value of the claim;
    - set a maximum fee to issue proceedings of £10,000 for claims with a value of £200,000 or more; and

[9] LJ Jackson (2009). Review of Civil Litigation Costs: Preliminary Report (vol.1): Graph 7.1, p66,

- continue to apply a discount of 10% to claims lodged electronically using the Secure Data Transfer (SDT) facility or Money Claims OnLine.

66. This fee structure will apply to all money claims, both specified and unspecified, as well as counterclaims with a value of £10,000 or more. Further details of the enhanced fee regime are set out in the schedule of fees for money claims at Annex B.

Costs between parties

67. In their response to the consultation, the senior judiciary pointed out that in some cases, the claimant may not succeed on the whole of his claim and may only be awarded judgment on part of it. If enhanced fees were introduced, they argued that the amount of the fee recoverable from the losing opponent should be limited to the fee that would have been payable on the amount of the claim which succeeded, rather than the fee paid (if that was different).

68. The Government believes that there is merit in this proposal, but we would like to take some time to consider all of the potential impacts and consequences before deciding what action to take.

2. Commercial proceedings

Introduction

69. London is the most popular centre for international cross border dispute resolution, with a reputation for providing high quality legal services. Commercial proceedings are dealt with by specialist judges operating in the Rolls Building. This is a state of the art facility, with 31 courts rooms, three "super courts" with modern IT and video conferencing facilities and 55 consultation rooms available to litigants and their legal advisers.

70. In commercial proceedings there are usually significant sums of money at stake, and a large proportion of these cases involve at least one party which is based abroad. Unlike the standard claims dealt with in the civil courts, these are cases in which the parties often choose to be governed by English law, and to have their disputes decided in the English courts.

The proposals

71. Under the current arrangements, these cases are subject to the same fee structure as all other money claims, which means that the highest fee to issue proceedings is currently £1,920 (the fee to issue proceedings for claims of £300,000 or more).

72. Most commercial claims are claims for money and will therefore be subject to the general increases to fees for money claims set out earlier. However, in the consultation paper, we argued that there was a strong case for charging more for commercial and similar proceedings. The consultation paper put forward two proposals:

    - a higher maximum fee. The consultation proposed capping the fee at either £15,000 or £20,000; or
    - a higher hearing fee: the consultation proposed a fee of £1,000 per day.

73. The consultation recognised that it was likely to be difficult to enforce a different fee structure if it only applied in the Commercial Court, as it was likely to encourage parties to issue proceedings in other jurisdictions. The consultation therefore proposed that the proposed fee structure should apply to money claims in all jurisdictions in the Rolls Building: i.e. the Admiralty and Commercial Court; the Chancery Division; and the Technology and Construction, and the Regional District Registries for these jurisdictions.

74. The consultation paper also recognised that the purpose of the Mercantile Court was to deal with lower value and less complex commercial disputes quickly and efficiently. It therefore also sought views on whether the proposals for fees in commercial proceedings should apply in the Mercantile Court.

Summary of responses

75. Most respondents (around 60%) agreed that these cases should attract higher fees. The main points made by these respondents were that commercial claims were by their nature more complex than standard money claims, consumed more resource and should therefore pay more. They pointed out that in these cases the court fee would be a fraction of the legal costs incurred.

76. Those disagreeing argued that:

    - the proposals were unfair. There was, they felt, no justification for charging some types of court user more so that others paid less, or nothing at all;
    - the courts provided a public benefit that could not easily be reconciled with generation of surpluses;
    - these jurisdictions did not deal exclusively with high value international litigation, and lower value domestic proceedings would also be captured.

77. Those who disagreed with the proposals also argued that fees at these levels would damage the UK's competitive position in the international legal services market. They feared that increased fees, combined with other factors, would increase the perception that London was an expensive place to settle disputes, and would encourage parties to choose alternatives.

78. They pointed out that legal services exports make a significant contribution to GDP, generating a trade surplus of £3.3 billion in 2011.[10] Raising fees for commercial proceedings, as proposed in the consultation, could, they argued, put that contribution at risk. In their view, the risks outweighed the potential benefits and they advised a precautionary approach.

79. Most respondents also felt that the Government's proposals would raise practical difficulties. The senior Judiciary in particular felt that the proposed fees would be unworkable as it would be impossible to define commercial proceedings tightly, and that the parties would be able to avoid paying the fee if they wanted to.

80. On the specific options presented in the consultation:

    - 60% of respondents preferred the option of a daily trial fee for commercial proceedings;
    - of those who preferred the higher maximum fee, slightly more preferred the option of a maximum fee of £15,000 rather than £20,000.

[10] *Legal Services 2013*, The CityUK, http://www.thecityuk.com/assets/Uploads/Legal-Services-2013-F.pdf

81. The majority of respondents felt that the same fee structure should apply in the Mercantile Court.

The Government's response

82. The concerns about the potentially damaging impact of the fee increases on legal services, and London's position as an international litigation centre are considered in section 1. For the reasons set out above (see paragraph 54 on), we do not believe that the fee increases are likely to damage London's competitive position.

83. The Government recognised that there were practical difficulties in applying higher fees for commercial proceedings and that there was a risk that this could have unintended consequences. It was for this reason that we proposed that the higher fees should apply to all jurisdictions using the Rolls Building, including therefore the Admiralty and Commercial Court, the Technology and Construction Court, the Chancery Division and the Mercantile Court.

84. As many respondents pointed out, this would have the effect of capturing many non-commercial type cases under the higher fee structure. However, it would continue to be possible to avoid paying the higher fees by issuing proceedings in the Queen's Bench Division.

Conclusion

85. Having considered the consultation responses the Government accepts that there are practical difficulties to be overcome before either of the proposed options for charging higher fees for commercial proceedings could be implemented. We have therefore decided not to implement either of these options, and commercial money claims will therefore be subject to the same enhanced fee regime as standard money claims.

3. Divorce

Introduction

86. There are around 120,000 applications for a divorce each year. In 95% of cases, the divorce is not contested.

The Government's proposal

87. In the consultation, the Government proposed that the fee for an application to issue a divorce should be raised from £410 to £750. In doing so, we acknowledged that the current fee was already above the estimated costs of these proceedings of £270.

The consultation responses

88. Most respondents to the consultation did not agree with the Government's proposal.

89. The main reasons why respondents criticised the proposal were:

- the consultation had advanced no persuasive justification for increasing the fee;
- it was wrong in principle to seek to increase the cost of court proceedings associated with the breakdown of a family relationship;
- the fee was excessive and would deter people from seeking a divorce;
- this could result in people being trapped in unhappy or violent marriages. Alternatively, they would be unable to form new relationships which benefitted from the full protection of the law;
- some people would struggle to pay the fee: recent reforms to fee remissions meant that fewer people would qualify;
- it was potentially discriminatory: more women than men sought a divorce and it would therefore have a disproportionate impact on women.

The Government's response

90. This proposal attracted the highest level of criticism among respondents to the consultation. Having taken account of these concerns very carefully, the Government has decided to not to implement the proposed increase to the divorce fee, which will be maintained at £410.

91. However, this decision has not changed the financial imperative to increase income to the courts from fees. We are therefore also seeking views on proposals for raising fee income from possession claims and general applications in civil proceedings. These proposals are set out in Part 2 of this publication.

4. Other fees

92. In the Government Response to Part 1 of the consultation,[11] we highlighted three categories of fees which were already at a level which exceeded the costs of proceedings. Those fees were:

    - the fee for an application for a divorce (fee 1.2 (a) of Schedule 1 to the Family Proceedings Fees Order 2008)[12], which is currently £410;
    - the fee to fix a date for the trial of a case allocated to the fast track (fee 2.1 (a) of Schedule 1 to the Civil Proceedings Fees Order 2008), which is currently £545;[13] and
    - the multi track hearing fee (fee 2.1 (b) of Schedule 1 to the Civil Proceedings Fees Order 2008), which is currently £1,090.[14]

93. As set out in section 3 above, we have decided not to increase the fee for an application for a divorce, which will be maintained at £410.

94. In the current financial climate, we do not believe that a reduction in any fee can be justified, and we therefore also intend to maintain the fees for a multi-track or fast track hearing at their current levels.

[11] *Court Fees: Proposals for reform. Part one consultation response: Cost Recovery*, Cm 8845, April 2014

[12] SI 2008/1054 (as amended).

[13] SI 2008/1053 (as amended).

[14] Idem

Part 2: Consultation on proposals for further reforms to court fees

Introduction

95. This section of the Government response sets out the Government's further proposals for raising income from court fees. The specific areas in which the Government is proposing fee increases are:

    - the fees to commence applications for the recovery of land (possession claims);
    - the fees for general applications in civil proceedings.

96. The current fees for these proceedings are full cost levels and the proposed increases would therefore be made using the power at section 180 of the *Anti-social Behaviour Crime and Policing Act 2014*.

Applications for the recovery of land

97. Proceedings for the recovery of land are generally brought in two sets of circumstances:

    - by mortgage lenders, where the borrower has fallen into arrears on their mortgage payments; and
    - by landlords, whose tenants have fallen into arrears.

98. They also cover proceedings brought to evict trespassers.

99. The fees currently charged to commence these proceedings were last increased on 22 April 2014, and represent the average cost of providing access to the courts. The current fees are:

    - £480 to commence proceedings in the High Court;
    - £280 to commence proceedings in the County Court; and
    - £250 to commence proceedings online using the Possession Claims Online facility (PCOL).

100. The large majority of these proceedings are brought in the County Court. A claim for possession may only be brought in the High Court if there are exceptional circumstances, including, for example, that the case:

    - involves complicated disputes of fact; or
    - raises issues of law of wider public interest.

101. Practice Direction 55A of the Civil Procedure Rules provides guidance on starting possession claims.

102. Our proposal is to increase the fees charged in County Court proceedings for the recovery of land, including proceedings initiated using PCOL, by £75. We estimate that this would generate an additional £17 million per annum in income.

103. We believe that such an increase is justified, in view of the requirement to ensure the courts and tribunals are adequately funded, while at the same time reducing the cost of the courts and tribunals to the taxpayer. The factors influencing decisions on whether to bring these claims are very similar to those which apply to money claims:

- fees are generally a secondary consideration in the decision on whether to litigate, and other factors, such as the likelihood of success and the likelihood of the debtor being able to satisfy the judgment are more influential;
- fee remissions are available for those who qualify;
- the proposed fees would continue to be low compared to the overall costs of litigation; and
- in successful proceedings costs, including the fee, would in most cases be added to the debt to be recovered from the losing opponent.

104. For these reasons, we believe that it is reasonable that those bringing these proceedings should pay a higher fee, where they can afford to do so.

Question 1: Do you agree with the proposal to raise the fee for a possession claim by £75? Please give reasons.

General Applications

105. General applications are applications made to the court in both civil and family proceedings and can cover many different types of application. They can include, for example, applications to amend pleadings in proceedings, vary directions, adduce fresh evidence, extend time or strike out claims or defences. Such applications may also be made to extend or vary the terms of an injunction.

106. These applications attract a generic fee: the fee for which no other fee is specified.[15] The current fees, for both civil and family proceedings are:

- £50 where the application is made without notice to the opponent (an ex parte application), or where the opponent has indicated that he or she consents to the application; and
- £155 where the application is on notice and contested.

107. There are around 700,000 general applications made to the court each year, of which the large majority are made in civil proceedings. Of these around two thirds are ex parte applications, or applications made by consent, and the remainder are contested. Further details are set out in the Impact Assessment which accompanies this consultation exercise.

108. We accept that increasing the fee for a general application in family proceedings is likely to lead to similar concerns to those raised in response to the proposal to increase the fee for a divorce. For this reason, we are not considering fee increases to general applications in family proceedings.

109. However, we do believe that there is a good case for increasing the fees for these applications when they are made in civil proceedings. Two thirds of these applications are made in money claims, whether specified or unspecified. In these cases, the Government believes that the justification for enhanced fees to commence money claims, which is set out in Part 1 of this publication, applies equally to the fees charged to make applications within those proceedings.

110. In summary these are that:

- the fee remains low, compared to the overall costs of litigation;
- costs are recoverable from the opponent in successful proceedings;
- claims can be brought under conditional fee arrangements; and
- fee remissions are available to those who qualify.

[15] Fees 2.4 and 2.5 of Schedule 1 to the Civil Proceedings Fees Order 2008 and fees 5.1 and 5.3 to Schedule 1 to the Family Proceedings Fees Order 2008.

111. In most cases, therefore, we believe that charging an enhanced fee for a general application in civil proceedings would be reasonable, in view of the need to make sure that the courts are adequately resourced, while also reducing public spending.

112. However, general applications may be made in a wide variety of circumstances, and in some of these, we do not consider that it would be appropriate to charge a fee which exceeds the costs of those proceedings. These are:

- where a general application is made to extend or vary an injunction to protect someone from harassment or violence. People seeking the court's protection in these circumstances are often vulnerable but may be discouraged by having to pay a higher fee;
- similar considerations apply where an application is made on behalf of a child, or vulnerable adult, for payment to be made out of funds held in court. These are often for small sums, for example, to pay for a school trip, and in many cases the proposed enhanced fee would be disproportionate to the sums involved; and
- the power to charge enhanced fees does not extend to fees charged under sections 414 and 415 of the Insolvency Act 1986 and it would not therefore be lawful to charge an enhanced fee for these proceedings.

113. There may be other circumstances in which it would not be appropriate to charge an enhanced fee for a general application, and this is something on which we would welcome views.

114. Subject to these exemptions, the Government proposes to raise the fee for a general application in civil proceedings:

- by £50 for an application without notice or by consent. The fee would therefore increase from £50 to £100; and
- by £100 for an application on notice which is contested. The fee would therefore increase from £155 to £255.

115. We estimate that these fee increases would generate £37 million in additional income each year.

Question 2: Do you agree with the proposal to increase the fee for a general application in civil proceedings from:

- **£50 to £100 for an application without notice or by consent; and**
- **£155 to £255 for an application on notice which is contested.**

subject to an exemption for:

- **applications to vary or extend an injunction for protection from harassment or violence;**

- **applications for a payment to be made from funds held in court; and**
- **applications made in proceedings brought under the Insolvency Act 1986.**

Question 3: Are there other types of case in which a general application may be made which you believe should be exempted from the proposed fee increases? Please provide details.

The Equalities Duty

116. We have, as required under the Equality Act 2010, undertaken an assessment of the impact of these proposals on people with protected characteristics.

117. The assessment is contained in the Equalities Statement attached at Annex E of this publication. In summary, our conclusion is that the proposals on which we are consulting are not directly discriminatory and are also unlikely to amount to indirect discrimination. However, we recognise that our assessment is based on limited information about court users, and we have very little information specifically on users with protected characteristics. We would therefore welcome any further views on the equalities impacts of the proposals in this consultation as well as any related data.

Question 4: We would welcome views on our assessment of the impacts of the proposals for further fee increases on those with protected characteristics. We would in particular welcome any data or evidence which would help to support these views.

Next Steps

The Government Response to the consultation

The Government has set out the measures it intends to take forward following the consultation on enhanced fees. Under the powers contained in section 180 of the Anti-social Behaviour Crime and Policing Act 2014, enhanced fees must be introduced by statutory instrument subject to the affirmative resolution procedure.

The Government will therefore prepare and bring forward the necessary legislation, with a view to the new fees coming into effect before the start of 2015/16, subject to Parliamentary time being made available.

Further consultation

The further proposals for raising fee income to make good the financial shortfall are simple and straightforward measures to address financial pressures. They will therefore be subject to a short, focussed, six week consultation period which will close on 27 February 2015.

The Government will consider the responses set out how we intend to proceed when we publish the Government Response.

About this consultation

To:	This consultation is aimed at users of the civil court system, the legal profession, the judiciary, the advice sector, and all those with an interest in the civil court system.
Duration:	From 16 January 2015 to 27 February 2015
Enquiries (including requests for the paper in an alternative format) to:	Michael Odulaja, Ministry of Justice, 102 Petty France, London SW1H 9AJ Tel: 020 3334 4417 Fax: 020 3334 2233 Email: mojfeespolicy@justice.gsi.gov.uk
How to respond:	Please send your response by 27 February 2015 Michael Odulaja Ministry of Justice 102 Petty France London SW1H 9AJ Tel: 020 3334 4417 Fax: 020 3334 2233 Email: mojfeespolicy@justice.gsi.gov.uk

Response paper: A response to this consultation exercise will be published at: http://www.justice.gov.uk

About You

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 27 February 2015 to:

Michael Odulaja
Ministry of Justice
Law and Access to Justice Group
Post Point 4.38
102 Petty France
London SW1H 9AJ

Tel: (020) 3334 4417

Fax: (020) 3334 2233

Email: mojfeespolicy@justice.gsi.gov.uk

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at http://www.justice.gov.uk/index.htm.

Alternative format versions of this publication can be requested from Michael Odulaja.

Publication of response

A paper summarising the responses to this consultation will be published in due course. The response paper will be available on-line at http://www.justice.gov.uk/index.htm.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other

things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Annex A: Detailed responses to the consultation questions

1. Money claims

Q.16 Do you agree that the fee for issuing a specified money claim should be 5% of the value of the claim?

There were 76 responses to this question. 24 (32%) agreed with the proposition, 49 disagreed (64%) and 3 (4%) responded neither agreeing nor disagreeing.

Most of those who supported the proposal did not provide detailed reasons. One argued that such an approach was justified because bigger claims tended to be more complex and would therefore take up more court time. Another respondent said that the fee would make people think before issuing formal proceedings.

Many who disagreed argued that the proposed fees bore little relation to cost, and that higher value claims did not necessarily mean that they were more complex. Some respondents argued that some fees, for example, those for claims of £25,000 and above, would start to become prohibitively expensive, particularly as the fee had to be paid in advance. At these levels, fees were likely to have an adverse impact on access to justice.

Many respondents disagreed with the principle of charging enhanced fees. The City of London Law Society said that civil courts were an essential feature of a democratic society, and should not operate as a means of making money.

Some respondents said that the proposals would see court fees operating as a form of taxation.

The senior judiciary said that they did not agree with the principle of cost recovery and that they therefore disagreed with enhanced fees. They offered no observations on the detail of the proposal, but suggested that if introduced, the amount of the fee recoverable from the losing side should be limited to the amount that would be payable on the value of the claim as determined by the court.

The Bar Council, Chancery Bar Association, and the Professional Negligence Bar Association all disagreed with the proposal to charge an issue fee of 5% of the value of the claim, and noted that it would reduce the number of claims brought by medium income individuals, and Small and Medium sized Enterprises. While the Bar Association suggested that the proposal may result in an increase in the number of disputes resolved by other, less expensive means, they remained opposed to the proposition.

Although the City of London Law Society, the Commercial Bar Association and the Commercial Court Users Committee disagreed with the proposal of enhanced fees they did suggest an alternative approach based on a banded fees solution. In particular the Commercial Bar Association wanted to see tiers

for thresholds above £300,000. Both also noted the proposal would hinder the competitiveness of the Commercial Court.

Other points raised included:

- there was no reason given to justify why 5% was the right amount;
- the value of claims may change during proceedings, and in any event, may not be the amount the court finally determines;
- the evidence relied on was a small scale research project which did not support the contention that claimants would not be deterred from bringing claims;
- many of the claims affected would be those brought by small businesses which may no longer be able to afford to do so.
- the proposals would also affect claims brought by insolvent businesses, for the benefit of their creditors. They may be similarly unable to afford such claims in future;
- the proposals ran counter to the thrust of the Jackson reforms, which sought to ensure that the costs of litigation were proportionate; and
- the increase in the costs of litigation could exacerbate existing problems where many parties, including Small and Medium sized Enterprises (SMEs), were choosing to litigate without legal representation, increasing the workload for the courts, judges and opponents.

Some respondents said that the proposals would complicate the fee structure, and that HM Courts and Tribunals Service's IT systems would need to be adapted to be able to handle the changes to the fees.

Q17. Do you agree that there should be a maximum fee for issuing specified money claims, and that it should be £10,000?

71 respondents answered this question. 27 (38%) agreed with the proposal and 44 (62%) disagreed.

Many of the respondents who agreed with the proposal agreed that a cap was appropriate, but that the proposed level was too high.

Equally, many of those who disagreed with the proposal, including, the Bar Council, the Commercial Bar Association, the Commercial Court Users' Committee and the Technology and Construction Court Users' Committee, did so because they felt that £10,000 was too high. In particular, the Commercial Court Users' Committee believed that the high cap would affect the Commercial Courts in the international market.

The Chancery Bar Association disagreed with the imposition of a cap as they felt that this would unfairly disadvantage individuals or SMEs wishing to bring a claim to court who would be forced to pay high sums in absolute terms for relatively modest claims in comparison to large corporations who issue substantial claims.

The senior judiciary agreed that a cap would be appropriate but had no observations on the level at which it should be set.

While disagreeing with the proposal of enhanced fees in general, if implemented the Law Society believed it would be necessary to implement a cap.

Q18. Do you believe that unspecified claims should be subject to the same fee regime as specified money claims? Or do you believe that they should have a lower maximum fee of £5,000?

There were 64 responses to this question. 21 (33%) agreed with the proposal, 42 (66%) disagreed and one responded neither agreeing nor disagreeing.

Those who agreed tended to agree that there was no reason in principle why an unspecified money claim should be charged a fee on a different basis from a specified money claim even if they disagreed with the proposal to charge an enhanced fee. Many who disagreed did so because they disagreed with the principle of charging enhanced fees, and some disagreed because they felt that a cap of £5,000 was too high.

The senior judiciary and the Chancery Bar Association agreed that £10,000 might deter people from bringing unspecified claims, although they agreed that there was no logical reason for treating specified and unspecified claims differently. The senior Judiciary indicated that if the proposals on enhanced fees were to be implemented, they would not disagree with a cap of £5,000.

Some respondents argued that personal injury claims should be exempt from enhanced fees as the increase was likely to lead to an increase in insurance premiums. The Bar Council noted that although personal injury claims required the losing party to cover the costs, the claimant would still have to pay a substantial fee at the beginning. Some respondents also pointed out that the burden of increased fees would, in some cases, be transferred to other public bodies who were defendants in these types of case, such as the National Health Service, or on the legal aid fund which provides funding in certain types of case.

Some respondents argued that the proposed fee would present practical difficulties in the case of unspecified money claims, as the value of the claim could not be known with any certainty at the outset of the case.

Q.19 Is there a risk that applying a different maximum fee could have unintended consequences?

There were 53 responses to this question and the majority of respondents agreed that there was a risk of unintended consequences. Most of those who responded identified that the main risk was that claimants might seek to present their case as an unspecified claim in order to pay a lower fee. In particular, the Chancery Bar noted that this might create artificiality and was contrary to normal practice.

Others suggested it might drive work away from the courts or to pursue alternative litigation strategies, such as insolvency.

2. Commercial Proceedings

Q. 20 Do you agree that it is reasonable to charge higher court fees for high value commercial proceedings than would apply to standard money claims?

Most respondents to this question agreed that high value commercial claims should pay higher fees. 47 respondents (59%) agreed, 30 (38%) disagreed and 3 (3%) responded neither agreeing nor disagreeing.

Those who agreed said that commercial claims were by their nature more complex than standard money claims and should therefore pay more. They also pointed out that the court fee would be a fraction of the legal costs incurred in these types of proceedings.

Some respondents argued that if higher fees were charged, the income should be retained within the courts and used to invest in better services.

Those who disagreed argued that the proposal was unfair:

- it sought to charge some users more so that others would pay less
- the courts were not a business and should not seek to make profit;
- while commercial cases often involved large multi-national corporations and/or wealthy individuals, some did not and could involve, for example, claims brought by Small and Medium sized Enterprises.

The senior judiciary argued that the proposed approach to enhanced fees for commercial proceedings was mistaken, in that it failed to appreciate how the courts operated in practice which would have undesirable and unintended consequences, and was, in their view, unworkable.

They pointed out that the Rolls Building also heard claims in the Chancery Division. These represented a broad spectrum of claims (and not just high value commercial claims) and in many cases, there was little or no choice on the appropriate forum. They said that the proposals conflated two distinct concepts: commercial/non commercial proceedings and high value claims. They also argued that it would be relatively simple to avoid the fee by issuing proceedings in the Queen's Bench Division which had jurisdiction to hear commercial claims, and that there was, in any event, no justification for imposing higher fees for cases brought in one part of the High Court.

Finally, they said that there could be no justification for increasing fees unless:

- the income was retained within the court system for the benefit of court users; and
- funding was made available for investment in modernising and improving the court system.

The City of London Law Society strongly disagreed with the proposals for many of the reasons identified by the senior Judiciary. They argued that there was no good reason to surcharge commercial users. They also pointed to increased competition from arbitration and from other jurisdictions, and expressed a concern that the proposals risked undermining the UK's position in international dispute resolution.

The Bar Council did not support the proposal to charge enhanced fees, but agreed that if they were to be introduced at all, it should be for high value commercial claims.

Q.21 We would welcome views on the alternative proposals for charging higher fees for money claims in commercial proceedings. Do you think it would be preferable to charge higher fees for hearings in commercial proceedings?

There were 63 responses to this question. Of those who responded, the majority (38 respondents or 60%) favoured the proposed hearing fee, with 19 (30%) disagreeing and 6 who responded neither agreeing nor disagreeing.

The main reasons given by those who supported the proposal were that:

- the cases which took up more court time should pay more;
- it would encourage parties to settle, or to ensure that their cases were pursued proportionately;
- cases requiring longer hearings were generally more complicated and it was therefore reasonable to charge more; and
- the hearing fee spread the cost more evenly rather than requiring front loading the fees, in line with the approach generally taken in arbitration.

Some who supported this proposal argued that the hearing fee proposed looked very low. In comparison, arbitrators charged up to £700 per hour.

Those who disagreed generally did so because they were opposed to charging more for commercial proceedings, or charging enhanced fees at all.

The City of London Law Society disagreed for all the reasons set out above, and also noted that charging fees based on hearing times was contradictory to the MoJ aims of simplifying the fee court system as each would vary in time and therefore, cost. Additionally, they argued that international litigants would be discouraged from coming to the English courts if fees increased, and this ran counter to the policy of promoting the UK's legal services.

The Civil Court Users Committee noted the risk of damage to the UK's reputation, and added that difficulties would arise in collecting hearing fees after the hearing if fees are based on hearing time.

Q.22 Could the introduction of a hearing fee have unintended consequences? What measures might we put in place to ensure that the parties provided accurate time estimates for hearings, rather than minimise the cost?

There were 51 responses to this question, and the majority (70%) felt that there was a risk of unintended consequences.

The main risk identified was that it would reduce the number of cases litigated through the courts.

The other concern identified was that the parties might lower their time estimates to reduce the court fee. They also pointed out that time estimates were not an exact science, and could be affected by the behaviour of the other side.

Others highlighted the risk that parties would be encouraged to issue proceedings in Queen's Bench Division.

Some respondents pointed out that cost budgeting, introduced as part of the Jackson reforms, had not been introduced for commercial proceedings with a value greater than £2 million. It was felt that the discipline of cost budgeting would help to encourage parties to provide accurate time estimates.

Another concern noted by the Civil Court Users Committee was the disincentive for the case to be settled outside of court when paying a hearing fee if there were no refund available.

Some who did not believe that there would be unintended consequences as a result of the hearing fee noted that this largely relied on the appropriate case management by the courts to ensure that the party's estimate reflected actual hearing times.

The Law Society noted that the introduction of a hearing fee could not be opposed on principle, but suggested that if introduced to commercial proceedings it would have to be reasonable; not set at the level of cost recovery or enhanced fees.

Q.23 If you prefer Option 2 (a higher maximum fee to issue proceedings), do you think the maximum fee should be £15,000 or £20,000? - 15,000/20,000

Generally, respondents did not favour this option over the option for a hearing fee.

There were 22 responses to this question, with slightly more (12) preferring the maximum issue fee of £15,000, with 10 respondents supporting the £20,000 issue fee.

The main arguments given by those who disagreed with this option were:

- it would prove to be a disincentive for users to go to the Rolls Building;

- the costs are far higher than in other relevant jurisdictions;
- it would negatively impact on UK competitiveness in the legal market; and
- Option 1 (the daily hearing fee) was more appropriate and better attuned to actual costs.

Q. 24 Do you agree that the proposals for commercial proceedings are unlikely to damage the UK's position as the leading centre for commercial dispute resolution? Are there other factors we should take into account in assessing the competitiveness of the UK's legal services?

There were 52 responses to this question. Around a third of respondents agreed the proposals were unlikely to damage the UK's competitive position, and around two thirds disagreeing.

Those who agreed pointed out that the fees proposed would be a small fraction of the overall costs of litigation and therefore unlikely to make a real difference to parties' decisions on where to litigate.

Most respondents, however, disagreed. The City of London Law Society pointed to the value of commercial legal services and the contribution this sector made to the UK's GDP. These proposals, they argued, risked creating the perception that the courts were a means for making money, making our courts less attractive and potentially encouraging them to migrate to competitor jurisdictions, such as New York. They also argued that the policy was inconsistent with the MoJ's stated goal of promoting the UK's legal services abroad.

The view that this would affect the UK's reputation internationally was also supported by the Law Society, Bar Council, the Civil Court Users Association, the Commercial Bar Association, the Committee of the London Common Law and Commercial Bar Associations, and the Technology and Construction Courts Solicitors Association. However, the Law Society did acknowledge that fees were but one factor as to why the UK is an attractive place to bring commercial claims.

Those who disagreed also said that the conclusion that fees would not damage the legal sector was based on very limited research.

Q.25 Do you agree that the same fee structure should be applied to all money claims in the Rolls Building and at District Registries?

There were 50 responses to this question. 36 (72%) agreed that the fees, if implemented, should apply to all money claims in these jurisdictions. 9 (18%) disagreed and 5 responded neither agreeing nor disagreeing.

Most respondents who agreed said that it would be impractical to charge different fees as this would encourage forum shopping. Those who disagreed did so mainly because they disagreed with the principle of charging higher fees for high value commercial claims.

Q. 26 What other measures should we consider (for example, using the Civil Procedure Rules) to target fees more effectively to high value commercial proceedings while minimising the risk that the appropriate fee could be avoided?

There were 6 responses to this question, with the majority offering no opinion on other measures to be considered.

Some respondents said that Judges already had wide powers under the Civil Procedure Rules, particularly following the Jackson reforms, to manage cases and should make greater use of them.

Q.27 Should the fee regime for commercial proceedings also apply to proceedings in the Mercantile Court?

There were 42 responses to this question. 29 (69%) agreed that the fee regime should also apply to the Mercantile Court, 11 disagreed (26%) and 2 responded neither agreeing nor disagreeing.

Those who agreed said that proceedings in the Mercantile Court were, by their nature, commercial and should therefore be subject to the same fee regime. Where the claims were of lower value that would be reflected, at least to some extent, in the issue fee.

Those who disagreed argued that claims before the Mercantile Court often involved small or medium-sized enterprises who would struggle to pay the enhanced fees.

3. Divorce

Q. 28 Do you agree that the fee for a divorce petition should be set at £750?

There were 65 responses to this question. Most respondents were opposed to the proposal. 8 respondents (12%) agreed with the proposal, 58 disagreed (87%) and 1 responded neither agreeing nor disagreeing.

Most who disagreed pointed out that no persuasive rationale for charging above cost for a divorce had been advanced in the consultation paper. Some argued that that the current fee was already too high and that the proposed fee was excessive. The fee would have to be paid at a time when the parties were often in financial difficulties and therefore many would struggle to pay the fee. Recent reforms to the remissions scheme meant less support was available than before.

Some argued that it was wrong to seek to make a profit from the breakdown of a relationship. Other points made included that:

- those who wished to dissolve their marriage had no choice but to apply to the court for a divorce;
- it could lead to parties being trapped in unhappy or violent marriages;
- it might discourage people from getting married, or they may be prevented from remarrying, and would therefore be without the protection the law affords to married couples; and
- the fee would affect women more than men as more women than men initiated divorces. It was therefore discriminatory.

The senior judiciary, while disagreeing with the proposals of charging enhanced fees for divorce proceedings, noted that the current divorce fee was above cost, and that given the current financial climate accepted that it would not be feasible for the Government to reduce divorce fees to the cost recovery level.

Those who agreed pointed out that the additional income from divorce would help to cover the deficit in other areas of family proceedings.

Annex B: Schedule of fees to issue proceedings for money claims

Claim value				Current fee		New fee	
				Filed at a court centre	Filed via SDT/MCOL	Filed at a court centre	Filed via SDT/MCOL
Up to	£300			£35	£25	£35	£25
Greater than	£300	but no more than	£500	£50	£35	£50	£35
Greater than	£500	but no more than	£1,000	£70	£60	£70	£60
Greater than	£1,000	but no more than	£1,500	£80	£70	£80	£70
Greater than	£1,500	but no more than	£3,000	£115	£105	£115	£105
Greater than	£3,000	but no more than	£5,000	£205	£185	£205	£185
Greater than	£5,000	but no more than	£10,000	£455	£410	£455	£410
Greater than	£10,000	but no more than	£15,000	£455	£410	5% of the value of the claim	5% of the value of the claim, less 10%
Greater than	£15,000	but no more than	£50,000	£610	£550		
Greater than	£50,000	but no more than	£100,000	£910	£815		
Greater than	£100,000	but no more than	£150,000	£1,115	N/a		N/a
Greater than	£150,000	but no more than	£200,000	£1,315	N/a		N/a
Greater than	£200,000	but no more than	£250,000	£1,515	N/a	£10,000	N/a
Greater than	£250,000	but no more than	£300,000	£1,720	N/a	£10,000	N/a
Greater than	£300,000			£1,920	N/a	£10,000	N/a

Annex C: List of organisations which responded to the consultation

Administrative Law Bar Association (ALBA)

Anthony Collins Solicitors

Association of District Judges

Association of Lawyers for Children

Association of Personal Injury Lawyers (APIL)

Bar Council

Barrister, 12 King's Bench Walk Chambers

Belmont & Lowe

Berwins Solicitors Limited

Birkett Long LLP Solicitors

Blandy & Blandy LLP Solicitors

BNI Solicitors

Bray & Bray Solicitors

Bridge McFarland Solicitors

Chartered Institute of Arbitrators

Chartered Institute of Legal Executives (CILEX)

Chief Bankruptcy Registrar of the High Court

Children's Services and Education (St Helens Council)

City of London Law Society

Civil Court Users Association

Civil Justice Council

Civil Mediation Council

Civil Subcommittee of HM Council of Circuit Judges

Clifford Chance LLP

Coffin Mew LLP Solicitors

Colette Stroud Solicitors and family mediators

Commercial Bar Association

Commercial Court Users Committee

Committee of the London Common Law and Commercial Bar Associations

Council of Mortgage Lenders (CML)

Court of Appeal (Civil Division)

Cripps Harries Hall LLP Solicitors

Crocels CMG CYF (Voluntary sector/Community group)
Discrimination Law Association
Dunne and Gray Solicitors
East Sussex County Council
Employment Lawyers Association
Enyo Law LLP
Family Justice Council
Family Law Bar Association
Family Law Clinic Ltd
Family Law in Partnership
Felton's Law Solicitors
Forum of Insurance Lawyers (FOIL)
Fosters Mediation
Frettens LLP Solicitors
Glanvilles LLP Solicitors
Graham & Rosen Solicitors
Green Light Mediation Ltd
Griffins (Insolvency Practitioner)
Harland & Co Solicitors
Herbert Smith Freehills LLP Solicitors
Hertfordshire County Council Legal Services
HMCTS
HMRC, Central Policy
Hogan Lovells
Immigration Law Practitioners' Association
Institute of Credit Management
Irwin Mitchell
Kew Law LLP Solicitors
Kingston upon Hull City Council
KK Law Solicitors
Lane & Co Solicitors
Law Society
Leeds University
Lester Morrill Solicitors

London Solicitor's Litigation Association
Lovetts PLC (Debt Recovery and Commercial Litigation)
McMillan Williams Solicitors
Miles & Partners
Millersands Solicitors
Mind
Minim Law Ltd
Mishcon de Reya
Money Advice Trust
Moon Beaver Solicitors
Motor Accident Solicitors Society (MASS)
Mott MacDonald (Engineering Company)
Mullis & Peake LLP Solicitors
Myerson Solicitors LLP
NHS Litigation Authority
Norton Rose Fulbright LLP
Online Legal Services Ltd
3PB Barristers
Paragon Group (Finance Company)
Pardoes Solicitors
Personal Capacity Response
Personal Injuries Bar Association
Pickerings Solicitors
Prince Family Law
QS Rubin Lewis O'Brien Solicitors
R3
Rayden Solicitors
Rees Wood Terry Solicitors
Relate and Marriage Care (Voluntary sector/Community group)
Resolution - First for family law
Ries Solicitors and Mediators
Robinsons Solicitors
Royal Bank of Scotland
Rudlings Wakelam Solicitors

Saracens Solicitors
Sembcorp Bournemouth Water Limited
Senior Judiciary of England & Wales
Sheffield City Council
Shoosmiths LLP
Sinclair Taylor Debt Management Limited
Society of Trust and Estate Practitioners (STEP)
Stewarts Law
Technology & Construction Bar Association
Technology and Construction Court
The Chancery Bar Association
The Family Law
The Insolvency Service
The Professional Negligence Bar Association
The Technology and Construction Courts Solicitors Association
The Thomas Higgins Partnership Solicitors
TheCityUK
Thompsons Solicitors
TWM Solicitors LLP
Whitehead Monckton Solicitors
Wilkins Kennedy LLP
Williscroft & Co
Women's Aid

Annex D: Equalities Statement Government Response to consultation

1. Introduction

1.1 This Equality Statement considers the impact of the Government's plan to increase the fee to commence certain money claims (i.e. those with a value greater than £10,000) against the duties in the Equality Act 2010.

1.2 A separate assessment has been undertaken on the impact of the further proposals on which we are consulting on fee increases for Possession claims and the fee for general applications within existing civil proceedings.

2. Policy objective:

2.1 The Government response to the consultation on enhanced fees sets out the background to, and rationale for, introducing enhanced fees. The main policy objectives are:

- to ensure that the courts are adequately and properly resourced; and
- to reduce the net cost of the courts and tribunals to the taxpayer.

2.2 In this way, we will reduce public spending and promote the economic recovery while at the same time ensuring that access to justice is protected for those who need it.

3. Equality duties

3.1 Section 149 of the Equality Act 2010 ("the Act") requires Ministers and the Department, when exercising their functions, to have 'due regard' to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct prohibited by the Act;
- advance equality of opportunity between different groups (those who share a relevant protected characteristic and those who do not); and
- foster good relations between different groups (those who share a relevant protected characteristic and those who do not).

3.2 Paying "due regard" needs to be considered against the nine "protected characteristics" under the Act, namely: race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

3.3 The Ministry of Justice (MoJ) has a legal duty to consider how the proposed policy proposals are likely to affect those people with protected characteristics and, in particular, to take proportionate steps to mitigate or justify the most negative effects and advance the positive ones.

4. Summary

4.1 Consideration has been given to the impact of the planned increase in the fees to commence money claims against the statutory obligations under the Act. These are outlined below.

4.2 ***Direct discrimination***: our assessment is that the planned increases in fees is not directly discriminatory within the meaning of the Act as they will apply equally to all claimants irrespective of whether or not they have a protected characteristic. We do not consider that the proposals would result in people being treated less favourably *because of* their protected characteristic.

4.3 ***Indirect discrimination***: our assessment, based on the information available, is that the increase in fees is unlikely to amount to indirect discrimination under the Act. There are limitations in the data available to us, and for this reason it is possible (although we judge it unlikely) that some groups with protected characteristics may feature disproportionately among those bringing certain types of proceedings subject to enhanced fees. However, we consider that the impact is mitigated by the availability of fee remissions because people with protected characteristics remain relatively over-represented among lower income groups.

4.4 Even if the availability of fee remissions was not sufficient to mitigate the impact of fee increases, we consider that the measures we are taking are unlikely to result in anyone who shares a protected characteristic being put at a particular disadvantage, compared to those who do not share that protected characteristic. Furthermore, the Government considers the preferred option to be a proportionate means of achieving the legitimate aims of the policy objective set out at paragraphs 2.1 and 2.2 above.

4.5 ***Discrimination arising from disability and duty to make reasonable adjustments***: in so far as this policy/legislation may affect claimants with disabilities, we believe that the policy is proportionate, having regard to its aim. We will continue to provide reasonable adjustments for claimants with disabilities to ensure appropriate support is given.

4.6 ***Harassment and victimisation***: We do not consider there to be a risk of harassment or victimisation as a result of these plans.

4.7 ***Advancing equality of opportunity***: Consideration has been given to how these plans may impact on the duty to advance equality of opportunity by meeting the needs of those bringing proceedings subject to enhanced fees who share a particular characteristic, where those needs are different from the needs of those who do not share that particular characteristic. We consider the availability of fee remissions will help ensure equality is advanced for those with protected characteristics who bring proceedings subject to enhanced fees.

4.8 ***Fostering good relations***: we do not consider that there is scope within the policy of setting and charging court fees to promote measures that foster good relations. For this reason, we do not consider that these plans are relevant to this obligation.

5. Population Pool

5.1 To assess whether the planned fee increases have a differential impact on the protected groups (outlined above) a population pool has been defined. Guidance from the Equality and Human Rights Commission (EHRC) states that this assessment should define the pool as being those people who may be affected by the policy (adversely or otherwise) and that the pool should not be defined too widely.

5.2 We have defined the population pool as those who commence money claims as the fees for these proceedings are set to increase under the enhanced fees plans and these are the groups that would have to pay the higher fees. In money claims, it is likely that the cost of the fee will be passed on to the debtor where the claim is successful and in those circumstances the population pool also includes defendants to money claims.

5.3 Due to the limitations in the data available in some cases, we have had to make assumptions about the likely impact on people with protected characteristics based on the type of cases they may be pursuing.

6. Fee remissions scheme

6.1 The fee remissions scheme is designed to protect access to justice. Eligibility for a fee remission is based on an individual's ability to pay, and the scheme is targeted towards those in households on low incomes who are in receipt of certain state benefits. Eligibility is also subject to an assessment of the value of the applicant's disposable capital assets (e.g., savings) with a higher threshold applying to those aged over 61 years of age.

6.2 As we only have limited data on the characteristics of court users we assume any adult in England & Wales is equally likely to go to court. In reality, certain groups are more likely than others to go to court and eligibility within these groups is also likely to vary. Whilst we acknowledge the limitations of this approach, we consider it the best available.

6.3 Therefore, to assess whether the fee remissions scheme helps meet our obligations, we have used survey household income data[16] to look at the household distribution of income of individuals with certain protected

[16] DWP (2014) Households Below Average Income: An Analysis of the Income Distribution 1994/5-2012/13. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/325416/households-below-average-income-1994-1995-2012-2013.pdf

characteristics. This splits the population into five equally sized groups ('quintiles') with those in the bottom quintile being in households with the lowest incomes while those in the top quintile have the highest. These data have also been adjusted for the size of the household and take housing costs into account. However, this approach does not allow us to assess the impact on eligibility under the disposable assets test and so probably overstates eligibility for fee remissions.

6.4 As individuals living in households in the bottom quintile are the most likely to be in receipt of state benefits (DWP, 2014, Chart 2.5, p30) we can use the distribution of individuals within this quintile to help assess the extent to which the fee remission scheme protects those with protected characteristics. The available data allow us to do this for sex, ethnic group, disability and age. We present the results in Table 1.

Table 1: Distribution of Income by Protected Characteristics

% Individuals	Net equivalised disposable household income (after housing costs)					
	Bottom quintile	Second quintile	Middle quintile	Fourth quintile	Top quintile	All (millions)
Gender						
Adult male	19	18	20	21	23	24.1
Adult female	18	20	20	21	21	25.4
Ethnic Group*						
White	18	20	21	21	21	55.3
Non-White	37	22	15	13	13	7.1
Disability						
Disabled	23	25	22	18	12	12.1
Non-Disabled	19	19	20	20	22	50.7
Age						
16-24	38	22	16	15	10	5.7
25-29	26	23	16	20	16	4.0
30-39	17	16	19	22	26	8.2
40-49	19	17	20	20	24	9.0
50 to Retirement Age	20	16	18	21	24	10.6
Pensioners	12	24	24	21	18	11.9
All Individuals	**20**	**20**	**20**	**20**	**20**	**62.9**

Source: MoJ calculations based on DWP (2014) Households Below Average Income 2012-13, Tables 3.1db & 5.2db.

* By ethnicity of head of household, non-white households based on a three year rolling average.

6.5 The results reported in Table 1 can be summarised as follows:

- **Sex**: Males and females appear equally eligible for either a full or partial fee remission. This is because eligibility is based on an assessment of household income. However, when members of the household have a contrary interest in the proceedings, they are assessed on their individual means. In these circumstances, the applicant with lower income is more likely to qualify for a fee

remission. Due to differences in gender earnings, this is more likely to be a female member;[17]

- **Ethnic Group**: Those living in households headed by someone from a non-white ethnic group are over twice as likely to live in a household in the **bottom** quintile compared to those headed by someone from a white ethnic background;
- **Disability**: Adults with a disability are more likely than the average to live in a **household** in the bottom quintile compared to adults with no disability;
- **Age**: Individuals under 30 years of age, and especially those aged under 25, are more likely to live in low income households and so are more likely to qualify for a fee remission.

6.6 In summary, and on the basis of the data set out above and our assumptions, we conclude that the fee remission system is likely to provide protection to a higher proportion of individuals with the protected characteristics of ethnicity, disability and age subject to the limitations on data about disposable capital assets.

7. Potential equalities impacts of enhanced fee proposals on users in the civil court system and mitigations.

7.1 Any impact on different groups will primarily be financial. Data on court users who will be affected by the proposal have been collected where possible. However, the government acknowledges that it does not collect comprehensive information about court users generally, and specifically information regarding their protected characteristics.

Key fee groups affected

Money Claims:

7.2 We plan to increase the issue fee for money claims with a value of £10,000 or more to 5% of the value of the claim up to a maximum fee of £10,000. Our assessment is that this is not directly discriminatory within the meaning of the Act as the increases apply equally to all claimants irrespective of whether or not they have a protected characteristic. In addition, the planned increase to fees for money claims is unlikely to amount to indirect discrimination under the Act because for those affected, they are unlikely to result in anyone sharing a protected characteristic being put at a particular disadvantage, compared to those who do not share that protected characteristic.

[17] See ONS (2014) Annual Survey of Hours and Earnings, 2014 Provisional Results, Figure 8. http://www.ons.gov.uk/ons/rel/ashe/annual-survey-of-hours-and-earnings/2014-provisional-results/stb-ashe-statistical-bulletin-2014.html

7.3 To assess whether there is the potential for discrimination, we have compared the characteristics of those who will be affected by the changes to the general population. Based on previous research[18], we assume that around 50% of all specified money claim cases issued in the County Court which are set to incur fee increases are issued by businesses, such as banks, credit card companies and utilities companies while the remainder are issued by individuals. However, due to a lack of data about court users, we cannot say whether these individuals have particular protected characteristics. In any case, we consider that the remission system protects against any adverse equality impacts arising from these plans (see section 5).

7.4 Based on previous research we have also assumed that 20% of all unspecified money claims cases are issued by businesses. This is because, for unspecified money claims, a high proportion of claims are for personal injury, and in some of these cases, the claimant may have a disability. Although we do not have data on the protected characteristics of those bringing unspecified money claims, or claims for personal injury, it is possible that more people with disabilities will be affected by the increase in the fee for an unspecified money claim. However, to the extent that this is the case, the impact is mitigated by the fee remission scheme. Certain disability benefits are excluded from the capital and the income test, and the analysis at section 5 indicates that those who are disabled are more likely than non-disabled people to be eligible for either a full or partial fee remission. The analysis also indicates that eligibility for a fee remission for disabled people increases as the level of fee increases.

7.5 The normal rule in civil litigation is that the losing party will be ordered to pay the successful party's costs (including the court fees incurred), subject to the court's general discretion on costs. Data from Her Majesty's Courts and Tribunals Service's case management systems indicate that claimants are successful in around 80 per cent of cases. In most cases, therefore, the cost of the enhanced fee will be transferred to the defendant, to whom fee remissions are not available.

7.6 However, as we do not routinely collect data on the protected characteristics of defendants to these proceedings we cannot determine whether the policy of charging enhanced fees for money claims will have a greater impact on people with particular protected characteristics.

[18] See p14 of the Consultation Stage Impact Assessment http://www.legislation.gov.uk/ukia/2013/238/pdfs/ukia_20130238_en.pdf

Equality Impacts across the whole package

7.7 The Government acknowledges that we do not collect comprehensive information about court users generally, and specifically information regarding their protected characteristics. This makes it difficult to determine the impact of the enhanced fees reforms on those in the population pool with protected characteristics. Nevertheless, our assessment based on the information available, is that these proposals are not directly or indirectly discriminatory.

7.8 While there is a risk that some of the proposals may have a disproportionate impact on some groups with protected characteristics, we believe the remissions scheme, and in limited circumstances the availability of legal aid, provide sufficient mitigation for that risk. However, even if the availability of fee remissions and legal aid were not sufficient to mitigate the impact of fee increases, we consider the enhanced fees policy to be a proportionate means of achieving the legitimate aims set out at paragraphs 2.1 and 2.2 above.

Annex E: Equalities Statement Further Consultation

1. Introduction

1.1 This Equality Statement considers the impact of the Government's proposals to increase court fees for certain proceedings. The proposals are:

- to increase the fee for an application for the recovery of land by £75; and
- to increase the fee for a general application made in civil proceedings by £50 for an application made without notice, or by consent; and by £100 for an application made on notice which is contested.

1.2 The current fees for these proceedings are set at full cost and any increase would therefore need to be made using the powers at section 180 of the *Anti-social Behaviour Crime and Policing Act 2014* to prescribe fees in excess of cost.

2. Policy objective:

2.1 The Government proposals for raising fees for these proceedings are contained in the Government Response to the consultation on enhanced fees. This sets out the background to, and rationale for, introducing enhanced fees. The main policy objectives are:

- to ensure that the courts and tribunals are adequately resourced; and
- to reduce the net cost of the courts and tribunals to the taxpayer.

2.2 In this way, we will reduce public spending and promote the economic recovery while at the same time ensuring that access to justice is protected for those who need it.

3. Equality duties

3.1 Section 149 of the Equality Act 2010 ("the Act") requires Ministers and the Department, when exercising their functions, to have 'due regard' to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct prohibited by the Act;
- advance equality of opportunity between different groups (those who share a relevant protected characteristic and those who do not); and
- foster good relations between different groups (those who share a relevant protected characteristic and those who do not).

3.2 Paying "due regard" needs to be considered against the nine "protected characteristics" under the Act, namely: race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

3.3 The Ministry of Justice (MoJ) has a legal duty to consider how the policy proposals are likely to affect those people with protected characteristics in particular, to take proportionate steps to mitigate or justify the most negative effects and advance the positive ones.

4. Summary

4.1 Consideration has been given to the impact of the proposed fee increases against the statutory obligations under the Act. These are outlined below.

4.2 ***Direct discrimination***: our assessment is that the proposed increases in fees would not be directly discriminatory within the meaning of the Act as they would apply equally to all claimants irrespective of whether or not they have a protected characteristic. We do not consider that the proposals would result in people being treated less favourably because of their protected characteristic.

4.3 ***Indirect discrimination***: our assessment, based on the information available, is that the increase in fees would be unlikely to amount to indirect discrimination under the Act. There are limitations in the data available to us, and for this reason it is possible that some groups with protected characteristics may feature disproportionately among those bringing certain types of proceedings subject to these proposals. However, if that were the case, we consider that the impact would be mitigated by the availability of fee remissions. As our analysis suggests that people with protected characteristics are more likely to be represented in lower income groups they are therefore more likely to benefit from fee remissions.

4.4 Even if the availability of fee remissions was not sufficient to mitigate the impact of the proposed fee increases, we consider that the measures under consideration would be unlikely to result in anyone who shares a protected characteristic being put at a particular disadvantage, compared to those who do not share that protected characteristic. Furthermore, the Government considers that the options would be a proportionate means of achieving the legitimate aims of the policy objectives set out at paragraphs 2.1 and 2.2 above.

4.5 ***Discrimination arising from disability and duty to make reasonable adjustments***: insofar as this policy may affect claimants with disabilities, we believe that the proposals would be proportionate, having regard to the aim. We will continue to provide reasonable adjustments for claimants with disabilities to ensure appropriate support is provided.

4.6 ***Harassment and victimisation***: We do not consider there to be a risk of harassment or victimisation if these proposals were implemented.

4.7 ***Advancing equality of opportunity***: We have considered how these proposals may impact on the duty to advance equality of opportunity by meeting the needs of those bringing proceedings subject to enhanced

fees who share a protected characteristic, where those needs are different from the needs of those who do not share that characteristic. We consider the availability of fee remissions would help to ensure equality of opportunity was advanced for those bringing proceedings with protected characteristics, if these measures were introduced.

4.8 ***Fostering good relations***: we do not consider that there is scope within the policy of setting and charging court fees to promote measures that foster good relations. For this reason, we do not consider that these proposals are relevant to this obligation.

5. Population Pool

5.1 To assess whether the proposed fee increases would have a differential impact on the protected groups (outlined above) a population pool has been defined. Guidance from the Equality and Human Rights Commission (EHRC) states that this assessment should define the pool as being those people who may be affected by the policy (adversely or otherwise) and that the pool should not be defined too widely.

5.2 We have defined two population pools, one for each of the proposed fee increases:

5.2.1 those who commence possession claims; and

5.2.2 those who make applications within civil proceedings to which the general application fee applies.

5.3 In possession claims the court will normally order the losing side to pay the successful party's reasonable costs, and general applications may be made by either side in the proceedings. For this reason, the population pools also include defendants to proceedings. This is considered in further detail in section 7 below.

5.4 Due to the limitations in the data available in some cases, we have had to make assumptions about the likely impact on people with protected characteristics based on the type of cases they may be pursuing.

6. Fee remissions scheme

6.1 The fee remissions scheme is designed to protect access to justice. Eligibility for a fee remission is based on an individual's ability to pay, and the scheme is targeted towards those in households on low incomes who are in receipt of certain state benefits. Eligibility is also subject to an assessment of the value of the applicant's disposable capital assets (e.g. savings) with a higher threshold applying to those aged over 61 years of age.

6.2 As we only have limited data on the characteristics of court users we assume any adult in England & Wales is equally likely to go to court. In reality, certain groups are more likely than others to go to court and eligibility within these groups is also likely to vary. Whilst we acknowledge the limitations of this approach, we consider it the best available.

6.3 Therefore, to assess whether the fee remissions scheme helps meet our obligations, we have used survey household income data[19] to look at the household distribution of income of individuals with certain protected characteristics. This splits the population into five equally sized groups ('quintiles') with those in the bottom quintile being in households with the lowest incomes while those in the top quintile have the highest. These data have also been adjusted to take into account the size of the household and housing costs. However, it does not allow us to assess the impact on eligibility of the disposable assets test and so probably overstates eligibility for fee remissions.

6.4 As individuals living in households in the bottom quintile are the most likely to be in receipt of state benefits (see DWP, 2014, Chart 2.5, p30) we can use the distribution of individuals within this quintile to help assess the extent to which the fee remission scheme protects those with protected characteristics. The available data allow us to do this for gender, ethnic group, disability and age. We present the results in Table 1.

[19] DWP (2014) Households Below Average Income: An Analysis of the Income Distribution 1994/5-2012/13. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/325416/households-below-average-income-1994-1995-2012-2013.pdf

Table 1: Distribution of Income by Protected Characteristics

% Individuals	Net equivalised disposable household income (after housing costs)					
	Bottom quintile	Second quintile	Middle quintile	Fourth quintile	Top quintile	All (millions)
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Adult female	18	20	20	21	21	25.4
Ethnic Group*						
White	18	20	21	21	21	55.3
Non-White	37	22	15	13	13	7.1
Disability						
Disabled	23	25	22	18	12	12.1
Non-Disabled	19	19	20	20	22	50.7
Age						
16-24	38	22	16	15	10	5.7
25-29	26	23	16	20	16	4.0
30-39	17	16	19	22	26	8.2
40-49	19	17	20	20	24	9.0
50 to Retirement Age	20	16	18	21	24	10.6
Pensioners	12	24	24	21	18	11.9
All Individuals	**20**	**20**	**20**	**20**	**20**	**62.9**

Source: MoJ calculations based on DWP (2014) Households Below Average Income 2012-13, Tables 3.1db & 5.2db.

* By ethnicity of head of household, non-white households based on a three year rolling average.

6.5 The results reported in Table 1 can be summarised as follows:

- **Sex**: Males and females appear equally eligible for either a full or partial fee remission. This is because eligibility is based on an assessment of household income. However, when members of the household have a contrary interest in the proceedings, they are assessed on their individual means. In these circumstances, the

applicant with lower income is more likely to qualify for a fee remission. Due to differences in gender earnings, this is more likely to be a female member[20];

- **Ethnic Group**: Those living in households headed by someone from a non-white ethnic group are over twice as likely to live in a household in the bottom quintile compared to those headed by someone from a white ethnic background;
- **Disability**: Adults with a disability are more likely as the average to live in a household in the bottom quintile compared to adults with no disability;
- **Age**: Individuals under 30 years of age, and especially those aged under 25, are more likely to live in low income households and so are more likely to qualify for a remission in fees.

6.6 In summary, and on the basis of the data supplied above and our assumptions, we conclude that the fee remission system is likely to provide protection to a higher proportion of individuals with the protected characteristics of ethnicity disability and age subject to the limitation on data on disposable capital assets.

7. Potential equalities impacts of enhanced fee proposals on users in the civil court system and mitigations.

7.1 Any impact on different groups will primarily be financial. Data on court users who would be affected by these proposals has been collected where possible. However, the Government acknowledges that it does not collect comprehensive information about court users generally, and specifically information regarding protected characteristics.

7.2 We first analyse the equality impacts of the proposals by each key affected fee group. We then make a cumulative assessment to determine whether, across the whole package there are any equality impacts.

Key fee groups affected

7.3 In both proposals, the proposed fee increases would, if implemented, apply equally to all and would not therefore be directly discriminatory.

[20] See ONS (2014) Annual Survey of Hours and Earnings, 2014 Provisional Results, Figure 8. http://www.ons.gov.uk/ons/rel/ashe/annual-survey-of-hours-and-earnings/2014-provisional-results/stb-ashe-statistical-bulletin-2014.html

Possession claims

7.4 Our proposal is to increase the fee for a possession claim in the County Court by £75, raising the fee:

- from £280 to £355 for a paper application; and
- from £250 to £325 for a claim filed using Possession Claims Online.

7.5 Initially the impact of the fee increase would be borne by people and organisations bringing possession claims. However, the normal rule is that the court will order the losing party to meet the claimant's reasonable costs, including any court fees he or she has incurred. As recent court data shows that claimants are successful in around 75 per cent of possession claims we anticipate that in a large number of cases the costs will be added to the debt and be borne by the defendant.

7.6 We do not routinely collect information on those who bring possession claims, and those against whom proceedings are brought. We therefore do not know whether the increase in fees would have a greater impact on people with protected characteristics compared with those who do not share them. However, as there is no intrinsic reason to believe that the proposed fee increase would be more likely to affect a group or groups with protected characteristics, we do not believe that the proposal represents indirect discrimination.

General applications

7.7 The consultation also seeks views options for increasing fees for most general applications in civil proceedings:

- from £50 to £100 for ex parte applications, or applications made by consent; and
- from £155 to £255 for applications on notice and which are contested.

7.8 Under the government's proposals, applications made in certain types of proceedings would be exempt from the fee increase. These are:

- applications made by a victim to extend or vary the terms of an injunction providing protection from harassment;
- applications made on behalf of a child or other vulnerable applicant for funds to be paid out of monies held in court; and
- applications made in proceedings under the Insolvency Act 1986.

7.9 The consultation also seeks views on whether there are other circumstances in which a general application is made which should be exempted from the fee increase.

7.10 General applications may be made by either side in proceedings, and in most cases the costs, including fees, will be determined by the outcome of the substantive litigation. The impact may therefore be borne by any party involved in proceedings in which a general application is made. We

do not know the characteristics of court users, whether claimants or defendants, and we cannot therefore assess the extent to which the proposal might have a disproportionate impact on a group or groups of users with protected characteristics. However, there is nothing to suggest that an increase in the fee for a general application would be intrinsically likely to affect a group or groups with protected characteristics.

Equality Impacts across the whole package of proposals

7.11 The Government acknowledges that we do not collect comprehensive information about court users generally and, more specifically, information regarding their protected characteristics. This makes it difficult to determine the impact of the enhanced fees reforms on those in the population pool with protected characteristics. Nevertheless, our assessment based on the information available, is that these proposals would not be directly or indirectly discriminatory, for the reasons set out above.

7.12 However, there is therefore a risk that our proposals taken together may have a disproportionate impact on some groups with protected characteristics. If it were the case that a group or groups with protected characteristics would be affected disproportionately, we believe the remissions scheme would provide sufficient mitigation. This is because the analysis presented above suggests that people with protected characteristics are over-represented in lower income groups and are therefore more likely to qualify for a fee remission

7.13 However, even if the availability of fee remissions and legal aid was not sufficient to mitigate the impact of fee increases, we consider that the imposition of a higher fee would be unlikely to result in a particular disadvantage for people with protected characteristics. Furthermore, we believe that the proposed fee increases would be a proportionate means of achieving the aims set out at paragraphs 2.1 and 2.2 above.

7.14 In view of the lack of data about court users, and specifically their protected characteristics, we have included a question in the consultation about our assessment of the equalities impacts of these proposals and we will take these views into account in developing these proposals as part of our ongoing duty under the Equality Act 2010.

Ministry
of Justice

Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts

Eva Lein, Robert McCorquodale, Lawrence McNamara, Hayk Kupelyants, José del Rio

British Institute of International and Comparative Law

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Contents

List of tables and figures

1. Summary

Aims and Context of the Project

This project was undertaken to improve the Ministry of Justice's understanding of drivers behind the decisions of litigants to initiate commercial litigation, and where to litigate (London or elsewhere). The aim of the project was to gain an understanding of litigants' and legal professionals' experience of litigating commercial disputes through the English civil justice system and to develop an evidence base of the factors that influence decisions to seek redress in the London-based courts under English law.

The project was commissioned alongside the Ministry of Justice's consultation *Court Fees: Proposals for Reform.* The consultation document proposed reforms that would increase court fees, based on the principle that those who can afford it should contribute more to the costs of the courts. This project considered in more detail the perspectives of those involved in high-value commercial litigation regarding the proposed court fee changes. It sought views from a variety of stakeholders, including: international litigants; law firms; barristers' chambers; the judiciary; legal organisations/associations; and academics with the aim of improving the understanding of the drivers behind decisions of litigants to choose to initiate commercial litigation in the English courts and the competition that English courts are facing in the globalised market of legal services.

Participants and Data

Data regarding the various areas of interest were collected via three methods:

The primary method was interviews with individuals active in the field of international commercial litigation. Approximately 200 contacts with highly relevant expertise and experience were invited to participate. There were 54 interviews conducted. They explored views on the factors influencing decisions to litigate in England, and to what extent they felt a change to the current court fee structure might impact on those decisions. Interviewees included judges, barristers, solicitors and in-house counsel with substantial experience in international commercial litigation and arbitration.

Secondly, a web-based survey was conducted. To capture those legal practitioners with the most relevant expertise and experience, the survey was sent to several thousand contacts through a combination of direct emailing to the BIICL database and distribution through legal subscription databases held by other organisations. Within this group, the targeted contacts were legal practitioners, companies and organisations, based in the UK and abroad, involved in international litigation and arbitration. Members of the judiciary and academics with

expertise in international litigation were also invited to participate. There were 161 respondents.

Thirdly, individuals were brought together at an event run by BIICL to debate the various issues relevant to this project. This event, entitled “Litigating in the UK, Why or Why Not?”, was attended by 60 participants.

This report reflects the views of the 215 individuals with relevant expertise and experience who agreed to participate in this study (questionnaire and interview respondents) as well as those from event participants, some of whom had also responded to the questionnaire and/or participated in an in-depth interview.

It is not possible to draw conclusions about how representative these views are of the wider legal community. The study does not express the views of BIICL or of its project team. Where appropriate, the report has been supplemented with findings of other published studies, reports and official court statistics.

Scope of the Project

The respondents were asked to reflect upon the following areas:

- experience with, and views on, London as a litigation centre;
- potential impact of increased court fees on the litigation market;
- competing jurisdictions;
- potential consequences of increased court fees for arbitration; and
- services offered by the Rolls Building.

Key Findings

Experience with and views on London as a litigation centre

London was considered to be a popular and natural jurisdiction for the litigation of high value cross-border disputes. Reasons for this included:

- First and foremost, the reputation and experience of English judges; alongside
- English law, which was described as the prevalent choice of applicable law in international commercial transactions due to its quality, certainty and efficiency in commercial disputes. The combination of choice of court clauses with choice of law clauses in favour of English law was reported to be very popular, due to both the strong reputation of the courts and the quality of the law.

Other drivers for London-based litigation included:

- The well-established reputation of the English courts across a range of business sectors

- Efficient remedies
- Procedural effectiveness; and
- Forum neutrality

However, respondents sensed increasing competition in the international dispute resolution market with other jurisdictions marketing themselves to attract disputes traditionally adjudicated in London.

Potential impact of increased court fees on the litigation market

The current level of English court fees was viewed by most respondents as a "non-factor" for decisions about where to litigate commercial cases and of little relevance in the decision to agree upon or recommend the English courts, with many (over half of those responding) unaware of the precise fee levels. Other studies show that the current court fees are low compared to the overall costs of litigation and to fees charged by other litigation centres ; C. Hodges et al., *The Costs and Funding of Civil Litigation*, Hart, 2009).[1]

Just over one quarter (41 respondents, 26 %) of those who commented on this point (158 respondents) did not expect this position to change for high value commercial cases if court fees were increased, stating that under the MoJ's proposals, court fees would remain a small proportion of the overall average costs of litigation. These respondents considered that the high quality of litigation work in the English courts would remain the primary reason for bringing international commercial disputes to London. Similarly, these respondents felt that the perceived quality and impartiality of English judges outweighs the costs associated with litigating in the English courts and would still continue to do so if court fees were increased to the suggested level.

Twenty (13 %) of the respondents did not know whether or not increased court fees would affect the decision to litigate in England.

In contrast, almost two-thirds of respondents (61 %, or 97 of 158 respondents) anticipated adverse consequences of increased court fees on London as a litigation centre; 53 thought it likely there would be an impact and 44 felt such an impact was very likely. Reasons for this view included:

- Potential for reduction in the attractiveness of the English courts for the litigation of cross-border commercial disputes: litigants might switch their preferences to foreign courts and arbitration, also potentially based abroad, triggering a potential decrease in litigation work in England.
- The proposed fee rises being too high in light of the current market climate,

- Fee rises beyond full cost-recovery risked being perceived by litigants as an unjustifiable “tax-like” payment, possibly threatening the competitive position currently occupied by the English courts.
- High upfront court fees could be a disincentive in the case of lower value claims and were perceived to be inappropriate considering the frequency of settlements.
- English law could be selected less often as the governing law in international commercial transactions. This could reduce the demand for local transactional work (with the concern that transactional work would then go to law firms based in other jurisdictions) and affect related support services.
- A decrease in international cases could, over time, negatively affect the incremental development and updating of English commercial law.

Respondents advocated a precautionary approach to reform, to protect the legal market.

As to the type of court fee structure to be adopted, the preferred option was to keep upfront court fees low so as not to discourage strategic commercial litigation and to simplify in-court settlements. A combination of a fixed issue fee with variable hearing fees was most favoured.

Competing jurisdictions

Jurisdictions considered by respondents as being major competitors to the English courts and thus those that might profit most following a court fees increase were New York, Singapore and other EU Member States. Respondents highlighted that New York already provides cheaper court services and may become a strategic venue for cases that are likely to settle, avoiding the higher future upfront court fees in London. In comparison to New York, for example, court fees would be significantly higher if the suggested changes to the current fees structure were implemented. Respondents also thought that Singapore was likely to become a serious competitor once it establishes its Commercial Court. Advantages given by respondents for litigating on the European continent included: more cost-efficient litigation; the inquisitorial systems of EU Member States’ jurisdictions; and quicker results.

Potential consequence of increased court fees for arbitration

Despite the costs of arbitration as a dispute resolution method, more than half of respondents expected that more litigants may switch to (not necessarily London-based) arbitration if English court fees rose significantly, although fees were not presently a key factor in the decision-making process.

Services offered by the Rolls Building

The respondents with experience of litigating in the Rolls Building were generally satisfied with the service provided, although some felt there was room for improvement, for example, in the quality of IT services available.

2. Introduction

2.1 Aims

This project was undertaken to improve the Ministry of Justice's understanding of drivers behind the decisions of litigants to initiate commercial litigation, and where to litigate (London or elsewhere). The aim of the project was to gain an understanding of litigants' and legal professionals' experience of litigating commercial disputes through the English civil justice system and to develop an evidence base of the factors that influence decisions to seek redress in the London-based courts under English law.[2]

2.2 Context

In December 2013, the Ministry of Justice published the consultation document *Court Fees: Proposals for Reform.*[3] This document, which followed earlier initiatives,[4] stated that the civil and family courts have, when evaluated together, been operating at less than full cost recovery.[5] The consultation document proposed reforms that would increase court fees, based on the principle that those who can afford it should contribute more to the costs of the courts (details of the proposed fee increases are detailed in Annex A).

[6]

The present project was commissioned to assess why parties litigate commercial claims in England and considered the extent to which proposed court fee changes might impact the litigation market. The Ministry of Justice commissioned or undertook several earlier research projects to generate evidence as to the possible impact of court fee reforms in the context of the court fees consultation. These include:

- *Potential impact of changes to court fees on volume of cases brought to the civil and family courts*.[7] The study found that the impact of court fee increases could be minimal on the volume of cases that solicitors and their clients bring to the civil and family courts. This was because litigation was seen as a last resort, court fees were considered to be a small proportion of the overall cost of going to court and decisions to take cases to court were influenced more by other factors.
- *Public attitudes to civil and family court fees.*[8] The study found that the majority of people agreed with the principle that individuals and businesses who use civil and family court services should contribute towards the cost of these if they could afford to. However, the extent to which people felt court users should pay a fee

varied by the type of court case, court users' income and perceived ability to pay, as well as fee levels.

- *The role of court fees in affecting users' decisions to bring cases to the civil and family courts.*[9] This qualitative study of claimants and applicants concluded that participants bringing civil and family cases to court typically felt that court fees were affordable, and they would not have been deterred from starting court proceedings if court fees had been set at higher levels.
- *Competitiveness of fees charged for Commercial Court Services: An overview of selected jurisdictions.*[10] This study analysed court fees charged and services offered in a number of commercial dispute centres such as Singapore, New York, Delaware, Australia and Dubai. According to this report it is substantially less costly to bring a dispute in England under the current cost regime than in a comparable court in Singapore, Australia or Dubai, while court fees charged in New York and Delaware are lower than in England.

The consultation was accompanied by two impact assessments. The *impact assessment on court fees and cost recovery*[11] identified the costs and benefits of raising fees in the civil and family courts to full cost levels as full cost recovery is not currently achieved in these courts. In 2012/13 the deficit was over £100 million. The *enhanced court fees impact assessment*[12] proposed that in specified circumstances fees could be set at a level to recover more than the full costs of the courts. The Government believed that it was preferable that those who could afford to pay should contribute more to the costs of the courts so that access to justice was preserved and the cost to the taxpayer was reduced.

Further studies have been completed independently, which compare civil justice systems in Europe and litigation costs across a range of jurisdictions, such as S Vogenauer, *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law. A Business Survey – Final Results*, 2008; C Hodges et al., *The Costs and Funding of Civil Litigation*, Hart (2009). These studies show that English courts are a 'natural' and popular forum for the litigation of international commercial cases.[13] Various factors are cited as justifying the popularity of English courts and among those, the most prevalent are the quality of judges and courts, fairness of the outcomes and absence of corruption.

That said, commercial litigation in the English courts is not inexpensive. The overall costs of litigation (lawyers' fees and court fees) in commercial matters are one of the highest, if not the highest, both for the claimant and the defendant, in the sample of approximately 30 judicial systems selected in the Hodges study.[14] By contrast, the current court fees in

England & Wales in a commercial case are, in and of themselves, among the lowest in the same selection.[15] This ostensible discrepancy is due to the fact that lawyers' fees are the major component of overall litigation costs in the English courts.

The interrelation between court fees and lawyers' fees is somewhat reversed in other jurisdictions. This is the case, for instance, in Central and Eastern European jurisdictions where court fees seem to be comparatively higher than the current fees in England & Wales. In contrast, the lawyers' fees in those jurisdictions are considerably lower.[16]
This contrast might be partially due to the different philosophies regarding the role of the judiciary in the determination of commercial disputes. With the adversarial system in England & Wales, the burden in court is on the parties' counsel to establish and prove the case, and, hence, the lawyers' fees inevitably tend to be on the higher side. On the contrary, in jurisdictions with the inquisitorial judicial system (continental legal system) courts traditionally have a bigger role in the resolution of the case, which affects the relative proportionality between the court costs and lawyers' fees.

Under the Proposals made by the Ministry of Justice in its consultation "Court Fees: Proposals for Reform", court fees in England and Wales could rise up to £15,000-20,000. This would move them to an intermediary position in Hodges comparative analysis of court fees in commercial matters in various jurisdictions. Using a high-value comparative commercial case scenario presented there (pp. 134-156, case study 7, referring to a 2,000,000 Euro case) as a basis from which to draw a comparison with the post-reform English court fees, they would be lower in comparable cases than those charged in Austria, Bulgaria, China, Czech Republic, Estonia, Germany, Greece, and Romania; in the same range as those of Denmark, Japan, Poland, and Switzerland; and would exceed, sometimes to a high degree, the court fees in Belgium, Finland, Hungary, Latvia, Lithuania, Norway, Portugal, Russia, Spain, and Sweden.

If the circle of comparison is constrained to the international financial centres of the world (New York, Singapore, Hong Kong, Delaware, Australia, Dubai, see Centre for Commercial Law Studies School of International Arbitration, Queen Mary University, *Competitiveness of fees charged for Commercial Court Services: An overview of selected jurisdictions*, p. 3), the increase in court fees as suggested in the Reform Proposals will make English courts the most expensive courts among those jurisdictions, and the variance between the jurisdictions can be very large (for instance, the court fees in New York courts will be under £1000 for commercial cases exceeding £500,000).

3. Methodology

This project draws on data gathered from a variety of stakeholders, including: international litigants; law firms; barristers' chambers; the judiciary; legal organisations/associations; and academics. Data was collected via three methods.

The primary method was semi-structured interviews, with individuals active in the field of international commercial litigation. Just over 200 contacts with highly relevant expertise and experience were invited to participate. There were 54 interviews conducted. Interviewees included judges, barristers, solicitors, in-house counsel with substantial experience of international commercial litigation in the English courts and arbitration as well as representatives of companies or organisations drafting standard form contracts in different sectors. The interviews explored views on the factors influencing decisions to litigate in England or elsewhere, and to what extent they felt a change to the current court fee structure might impact on those decisions. The interviews were conducted between early February and mid-April 2014.

Secondly, a web-based survey was conducted. To capture those legal practitioners with the most relevant expertise and experience, the survey was sent to several thousand contacts through a combination of direct emailing to the BIICL database and distribution through legal subscription databases held by other organisations. Within this group, the targeted contacts were legal practitioners, companies and organisations, based in the UK and abroad, involved in international litigation and arbitration. Members of the judiciary and academics with expertise in international litigation were also invited to participate. There were 161 respondents.

Thirdly, individuals with relevant expertise and experience were brought together to debate their views. This was undertaken at a forum entitled "Litigating Commercial Claims in the UK – Why or Why Not?" run by BIICL on 31 March 2014 and attended by around 60 people.

This report reflects the views of the 215 individuals with relevant expertise and experience who agreed to participate in this study (questionnaire and interview respondents) as well as those from event participants, some of whom had also responded to the questionnaire and/or participated in an in-depth interview.

It is not possible to draw conclusions about how representative these views are of the wider legal community. The study does not express the views of BIICL or of its project team. Where appropriate, the report has been supplemented with findings of other published studies, reports and official court statistics.

All data gathered for this report has been anonymised. A detailed methodology is included in Annex B.

3.1 Questionnaire[17]

Questionnaire respondents

There were 161 responses received to the questionnaire. (Full details of the questionnaire contact groups and methodology are shown in Annex B).[18] As table 1 shows, most of those who chose to participate were international commercial lawyers (solicitors) based in the UK and abroad. Barristers and academics were the next largest categories of respondents, followed by international companies. Other participants included members of the judiciary and arbitrators. Please note that some participants indicated several functions.

Table 3.1: Questionnaire respondents by profession (organisation)[19]

What type of organisation do you work in?	Number of respondents	Percentage of respondents
Law Firm	68	43%
Chambers	39	24%
Academia	39	24%
Companies	11	7%
Judiciary	2	1%
Other	10	6%

Geographically, the majority of questionnaire respondents (51%) were from the UK, followed by respondents from other EU Member States (32% across Germany, Italy, Spain, The Netherlands, Sweden, Austria, Finland, Greece, Belgium, Czech Republic, France, Hungary, Lithuania, Malta, Slovakia). The remaining respondents were based in non-EU countries (United States, Albania, Canada, India, Russia, Peru, Australia, Bolivia, Brazil, Colombia, Dominican Republic, Hong Kong, Mauritius, Mexico, Saudi Arabia, Switzerland, Turkey, Uruguay).

As to the representation of different business sectors, most respondents were lawyers and barristers with clients from a variety of business sectors. A minority of questionnaire respondents indicated that they were active in specific sectors, such as financial markets, telecommunications, energy, retail, transport or manufacturing. Several respondents were academics specialising in international litigation.

Nearly all questionnaire respondents answered the questions based on their individual professional experience (90%), while the remainder responded on behalf of their

organisation (e.g. a global law firm), or a department within their organisation (e.g. the London litigation department of a global law firm).

The levels of litigation experience differed. One-third of questionnaire respondents reported they regularly litigate in English courts, another third had brought one or more claims to the English courts in the last 5 years. The remainder had not litigated a commercial claim in the English courts in the last 5 years.

The vast majority of respondents (about 88%) were involved in commercial claims as a solicitor/attorney or barrister. Other respondents stated they were involved as decision-makers (i.e. judges or arbitrators), legal experts or representatives of companies.

Questionnaire respondents were most often involved in high value commercial claims. More than half of respondents litigating claims exceeding £1,000,000 were involved in such claims in more than 60% of their cases. While about half of the participants also indicated that they deal with claims having a value of up to £300,000, these formed a smaller part (0 – 30%) of their caseload.

Half of respondents stated that more than 60% of their cases in the last five years were cross-border claims, with a quarter nearly exclusively doing cross-border work (90-100%).

The fact that these proportions of respondents were regularly working in high-value and cross-border commercial claims suggests that a well-informed and appropriate group responded to the survey.

3.2 Interviews[20]

Interviewees

There were just over 200 individuals targeted as potential interviewees. They were selected on the basis that they have highly relevant expertise and experience. A total of 54 respondents participated in face-to-face or telephone interviews.[21] The majority (42 interviewees) were international commercial lawyers and barristers based in the UK, other EU Member States and non-EU States, such as the US or Latin American countries. The remainder of the sample included members of the judiciary (5 interviewees), academia and international companies.

Table 3.2: Interviewees per profession (organisation)

What type of organisation do you work in?	Number of respondents	Percentage of respondents
Law Firms	29	54%
Chambers	13	24%
Judiciary	5	9%
Companies	3	6%
Academia	2	4%
Other	2	4%
Number of respondents	54	

Geographically, 45 interviewees were based in the UK, 6 were based in other EU Member States (Austria, Germany, Ireland, Spain, Greece) and 4 in non-EU States/ regions (United States, Russia, Latin American countries).

The vast majority were lawyers active in a variety of business sectors; a minority indicated that they were active in the shipping, manufacturing and financial sectors.

About 80% of interviewees answered the questions based on their individual professional experience while the remaining participants responded on behalf of their organisation or a department within their organisation.

Nearly all interviewees were actively involved in commercial litigation in the English courts (80% regularly), the majority as a solicitor/attorney or barrister, and several participants as judges.

Almost all interview participants involved in commercial litigation had been involved in commercial claims exceeding £1,000,000, with claims often amounting to hundreds of millions; a few interviewees were also dealing with lower value claims between £50,000 and £300,000 or between £300,000 and £1,000,000.

While many interviewees found it difficult to estimate the percentage of cross-border transactions they or their organisation carry out, nearly all who actively litigate confirmed that they had been regularly involved in cross-border claims in the last five years. Of those who gave estimates, 90% indicated that cross-border work covered more than 60% of their cases. 54% estimated that cross-border work covered more than 90-100% of their cases.

3.3 Event[22]

Contact group

Invitations were sent to all BIICL contacts active in international litigation and arbitration, including: law firms; chambers; law association contacts from the UK and abroad; members of the judiciary and of the government; legal departments of businesses based in the UK; and academics. The event was also publicised on the BIICL website.

Attendees

Around 60 people attended the event. Speakers included solicitors and barristers specialised in international litigation and competing jurisdictions, both in the EU and elsewhere (e.g. Dubai, Singapore). Attendees included international commercial lawyers (solicitors and barristers) based in the UK, in other EU Member States and in non-EU Member States; members of the judiciary; representatives of arbitration institutions; law associations; academics; and, in an observational capacity, the Ministry of Justice.

3.4 Analysis

The analysis was based on the views of 161 questionnaire respondents, 54 interviewees and 60 event participants. It does not express the views of BIICL or of its project team but summarises the collected views of the legal community involved in this project.

3.5 Terminology

Respondents

This report has been based on combined data from both questionnaires and interviews. Therefore, the term “respondents” encompasses both people who replied to the questionnaire and those who were interviewed. At times a distinction has been drawn and reference made to a specific category of respondents (e.g. interviewees), or to a specific group of respondents within that category (e.g. law firms, chambers or judiciary) for the purpose of clarification. Event findings are referred to separately.

The report refers to London as a dispute resolution centre but also uses the terminology “English courts” or “litigation in the UK”. Effectively, the relevant marketplace for international commercial litigation is London and this is what respondents were referring to.

Multiple responses and non-responses in the questionnaire

It was possible to give multiple answers to most questions. As such, the number of participants might differ from the total number of answers given to each question.

Not all project participants replied to all questions. The report highlights questions with a significant non-response rate. There may be several reasons why certain questions were not answered. Firstly, not all of the questions were intended to be answered by all groups as some were tailored to solicitors but not judges, or aimed at specific categories of solicitors such as transaction lawyers, or at practitioners rather than academics. Secondly, they may not have replied because they had no views regarding the issue at stake; insufficient experience (e.g. academic respondents could not comment on the quality of services offered by the Rolls Building courts); or could not indicate precise percentages where these were required. The number of replies to each question therefore needs to be seen in this context. Non-replies should not be viewed as detracting from the quality of the data.

4. Results

4.1 Views on the London litigation market at present

Respondents uniformly asserted that London was a popular jurisdiction for litigating high value cross-border disputes. They described London as a forum often chosen by parties from Commonwealth legal cultures and as a neutral forum for parties domiciled in foreign countries lacking strong rule of law principles, for example jurisdictions with a judiciary and/or legal framework perceived as unreliable. It was generally confirmed that London was a very popular jurisdiction for foreign litigants, with the exception of those based in the Americas where disputes were mostly litigated in the US courts. Alongside the key attractions of the quality, certainty and efficiency of English law and the reputation and experience of its judges, several other factors were described as contributing to the attraction of London including: its position as an international trading centre, its legal infrastructure and independence of its legal profession, and the role of the English language as a *lingua franca* of international commerce.

It is difficult to make precise statements about the value of commercial claims brought to the English courts and the extent to which they involve foreign parties, as data is not routinely collected. However, the Rolls Building courts were able to provide some indicative data.[23] The most comprehensive available data on foreign litigants comes from the Admiralty and Commercial Courts. This suggested that since 2010, around 80% of all Commercial Court cases each year have involved at least one foreign party.[24] In almost 50% of all cases, all parties are foreign.[25] No reliable similar data exists for the Chancery or Technology and Construction Court (TCC).

As to the value of the claims, the available data suggested:

- Commercial Court: 60% of cases have a claim value over £300,000 (the figure may often be unspecified beyond that) and a further 16% of cases have a claim value over £1,000,000. (The data available do not allow very high value claims (e.g. in excess of £10million) to be separated out).
- Technology and Construction Court: 65% of all cases have a claim value over £300,000.
- Chancery: 28% of all cases have a claim value over £350,000.

Although the data is only indicative, it clearly suggests that London is a centre for high value commercial litigation and that foreign parties are frequent litigants.

The responses to the questionnaire and the interviews paint a picture consistent with those two propositions. Law firms and barristers who participated in this study were predominantly engaged in very high value claims across a variety of sectors, both in litigation and arbitration. Claims were rarely below £1 million and regularly amounted to hundreds of millions of pounds. The same held true for participating companies/institutions.[26] Most transactions that respondents dealt with had a cross-border element and some respondents worked nearly exclusively on cross-border work.[27]

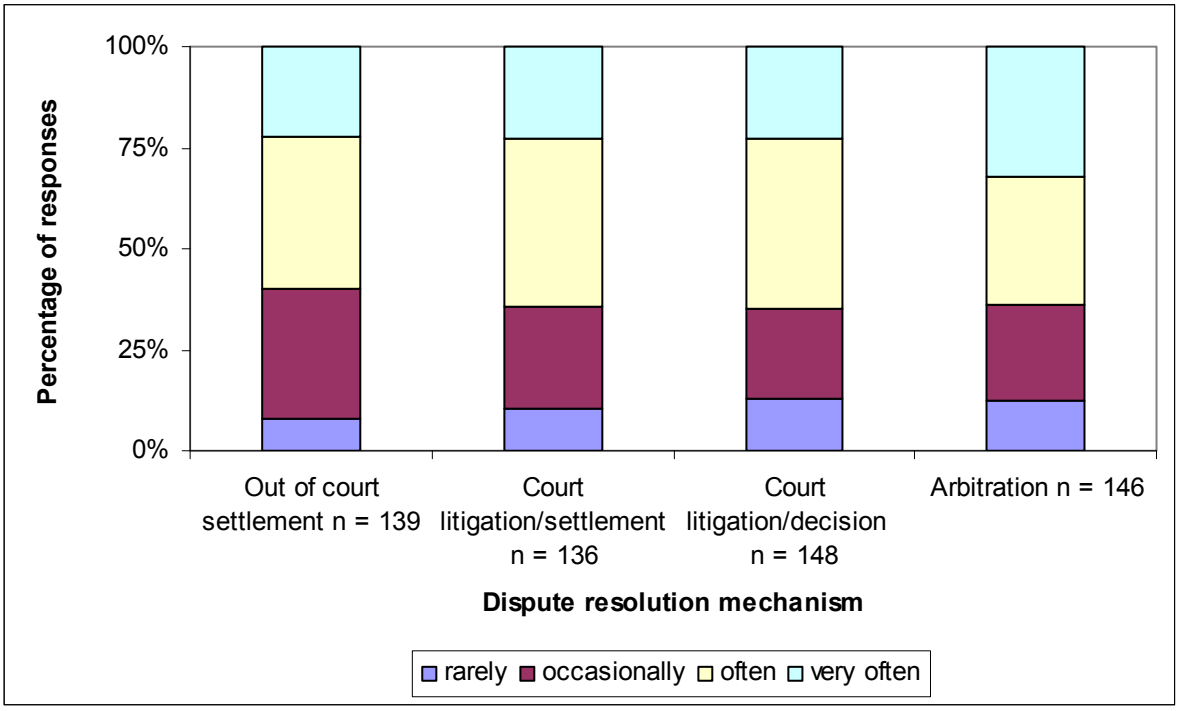
Respondents considered litigation in the English courts as one of the most popular choices for cases involving foreign litigants. Agreements to litigate in England were reported to be particularly frequent in the banking and finance sector, for shareholder agreements, insurance and re-insurance and to some extent in the shipping business. A further consideration for litigants – regardless of the sector – was whether assets were located in the UK. Respondents felt that the financial world heavily relies on London as a litigation centre, especially in the EU derivatives market, and the preference for English courts was considered to be particularly strong in the case of foreign litigants from jurisdictions considered to have a weak or partial judiciary, provided that the UK is a suitable forum from a geographical viewpoint.

Consistent with findings from the questionnaire and the interviews, event participants confirmed that London was an attractive venue for litigation for a number of reasons:

- its position as an international trading centre;
- its well-developed legal infrastructure and an independent legal profession;
- openness to foreign litigants;
- neutral venue for many parties;
- responsiveness of English law to the requirements of modern commercial transactions; and
- English language as *lingua franca* of international commerce.

However, it was also noted that there is increasing competition in the international dispute resolution market, with other jurisdictions heavily marketing themselves to attract business traditionally adjudicated in London.

Figure 4.1: Choice of dispute resolution mechanisms



Not all transactions result in disputes. Around half of respondents estimated that only up to a third of their transactions would eventually give rise to a dispute.[28] When a dispute arose to be litigated in England, UK-based legal representatives were regularly instructed to present the case.[29] Disputes were not necessarily resolved through a full trial; respondents indicated that it was often more economical and practical to settle the claims amicably through out-of-court or in-court settlements (i.e. cases settle once the parties attend a hearing). Around 60-65% of respondents said they often or very often settled claims out-of-court or in-court (see figure 4.1).

Whilst Figure 4.1 highlights that court litigation was frequent, arbitration also was a popular choice. The choice between arbitration and litigation was often driven by the sector, firm or type of agreement in dispute. Natural resources (e.g. oil & gas, mining, minerals), energy and aerospace were sectors where matters were often referred to arbitration. The choice of the seat of arbitration – the jurisdiction where arbitration is conducted – was not uniform; it varied across sectors. Respondents also pointed to recent trends such as arbitration in regional arbitration centres across different jurisdictions and P.R.I.M.E. Finance[30] arbitration in the Hague. In addition, some respondents considered mediation to be a practical dispute resolution mechanism.[31]

4.2 Factors advocating in favour of a choice of English law

English law was considered to be among the most popular choices of applicable law in commercial disputes, and that is consistent with the literature.[32] Litigation in England under a

foreign law was considered rare and needed to be justified by specific factual circumstances. Depending on the sector, English law was also viewed as a frequent choice in combination with arbitration, either at the London Court of International Arbitration (LCIA) or abroad.

Three issues related to this were explored in the survey and interviews: how often was a choice of English law recommended or agreed upon, who was influential in making that choice, and what were the reasons that influenced the choice.

Choice of law clauses in favour of English law

When asked whether they had agreed upon or recommended a choice of English law in the last five years, respondents (excluding "non applicable" answers) had mainly done so on a case-by-case basis (62%), followed by a choice for the overall business (20%), or for a specific business sector (12%).[33] Respondents commented that business sectors where English law was frequently used included marine insurance, shipping, finance, trade, construction, energy, employment, banking, shares & debts issues and pensions. For other business sectors, foreign laws can be a popular option (e.g. Swiss law for commodity contracts).

Of the 123 respondents who had chosen an English law clause in the last five years, 96 estimated how frequently there was a choice of English law.[34] Just over half said a choice of English law clause was used in 60–100% of their work. A third said that they would choose/recommend English law in less than a third of their transactions. Those who would less frequently recommend or agree on a choice of English law were mostly parties based outside the UK.

Responsibility for choosing English law

Choice of law clauses in favour of English law were most often recommended by lawyers, though they were also requested by parties based both within and outside the UK and through the use of standard form agreements that contained a choice of English law as a default option.[35]

Factors influencing a choice of English law

On the motivations for choice, English law reportedly offered advantages for international transactions due to its quality, certainty, clarity and predictability as well as its efficiency in commercial disputes.[36]

Furthermore, comments highlighted substantive aspects of the law including the unequivocal recognition of the freedom to contract, the availability of commercially-oriented remedies, and

the reluctance of courts to re-write commercial contracts, as serving to facilitate the choice of English law.

Other important factors were standard market practice; and the possibility to combine a choice of English law clause with an English litigation clause to benefit from the advantages of London as a venue for litigating commercial disputes (discussed further below).

Some interview respondents also identified UK-based counsel and English language as supporting the choice of English law.

4.3 Factors advocating in favour of litigation in England

As with choice of law, three themes were examined with regard to choice of court: how often was a choice of English courts recommended or agreed upon, who was influential in making that choice, and what were the reasons that influenced the choice.[37]

Choice of English courts

88% of the respondents (excluding "not applicable" answers) had in the last five years agreed upon or recommended a choice of English courts. The most common approach was to decide on a choice of English courts on a case-by-case basis taking into account the circumstances of the case at hand (82 respondents).[38] Nineteen respondents said they had done so for a specific business sector and 14 for the overall business. Respondents' comments confirmed that the English courts had an established reputation in specific business sectors, such as insurance, technology and construction, finance and corporate transactions, international shipping, and constituted the default choice for the transactions involving these sectors.

Of the 115 respondents who had agreed upon or recommended a choice of English court in the last five years, 95 provided an estimate of the frequency of choice: 41 said a choice of English court was made in 60-100% of their cases, 18 estimated that a choice of English court was made in 30-60% of their cases; 36 chose the English courts in up to one third of their cases.[39]

Responsibility for choosing English courts

Choice of court clauses in favour of English courts were most often recommended by lawyers, then, in decreasing order, by parties based in the UK, through the use of standard form agreements incorporating a choice of court agreement in favour of English courts, and by parties based outside the UK.[40]

Factors influencing a choice of English courts

Exploring the drivers of decisions to agree upon or recommend a choice of English court revealed a combination of influencing factors.[41]

The top two factors cited by respondents were:

- reputation/experience of judges; and
- the combination of choice of court clauses with choice of law clauses in favour of English law.

They were followed closely by:

- efficient remedies;
- procedural effectiveness;
- neutrality of the forum;
- market practice;
- English language;
- effective UK-based counsel;
- speed; and
- enforceability of judgments in foreign jurisdictions.

Supplementary factors included:

- quick interim relief (world-wide freezing orders, injunctions, equitable remedies etc.);
- neutrality, fairness and transparency of the judicial system;
- disclosure regime (although the benefits of disclosure and its scope received mixed reactions);
- great infrastructure and professional support services;
- absence of jury trials;
- absence of punitive damages;
- support for international arbitration from the Commercial Court.

A factor often stressed by respondents was that English courts had successfully established themselves as the default jurisdiction for parties that had unsatisfactory judicial and/or legal systems in their home jurisdictions or where, in the view of both parties, the choice of English courts was the acceptable compromise solution.

In many cases the decision on where to litigate would be made on a case-by-case basis. Numerous factors would be weighed, most notably: the location of assets, the applicable law, the enforceability of the judgment as against the assets of the counterparty, procedural considerations, and convenience. In contrast to positive factors that draw litigants to London, respondents also outlined a number of factors that might serve to discourage the litigation of

commercial claims in London courts. Chief among these were the overall costs of litigation[42] perceived to be driven by:

- high costs of solicitors and barristers;
- the cumbersome nature of the adversarial system (including the intensity of fact-finding which could protract the length of judicial hearings);
- costs of disclosure; and
- judicial proceedings not always being streamlined.

The adverse cost rule[43] was perceived by some as a disadvantage. English litigation was perceived to be often unpredictable in respect of its total costs, partly because of the risk of it being protracted.

Nevertheless most respondents still considered that the quality of English judgments outweighed the costs associated with them, especially where their national judicial systems were perceived to be unreliable. In the words of one practitioner, parties who want a 'Rolls Royce service' have to accept – and will accept – that they must pay the 'Rolls Royce price'. The balance was, however, thought to be a delicate one.[44]

It was also made clear by respondents that court fees *at their current level* were considered a "non-factor" in evaluating the overall costs of litigation in the English courts. Of all factors asked about, the lowest proportion of respondents reported that current court fees played a decisive role in the decision to agree upon or recommend the English courts. The majority (70%) of the 108 who indicated a view on factors influencing choice of court agreements said, that the current court fees were of very little or no relevance.

4.4 Potential impact of increased court fees on litigation in London

Awareness of the current fee structure

Of the 155 respondents who provided a response about awareness of the current fee levels in commercial matters, 73 said they were aware of them. To the remainder (more than half, 82 respondents), details about the exact court fees were not known and court fees tended to be seen as rather insignificant compared to the total legal costs.[45]

Current relevance of court fees for the decision-making process

Respondents were first asked to assess whether court fees at their current level affect decisions to bring proceedings before the English courts, once a dispute arises: 65 of the 141 respondents who expressed a view on this point reported court fees as currently having no role in this decision.[46] Thirty-seven respondents considered them 'a factor to take into account',

while only 8 said they were 'very much' a factor in decision-making.[47] While court fees are included in cost budgets, respondents indicated that they were rarely discussed with clients, except for lower value claims where there is a general pressure on fees. This was also highlighted during discussions at the event.

Table 4.1: – Relevance of current court fees for the decision making process

When a dispute arises, have court fees affected the decision whether or not to bring proceedings before the English courts?	Number of responses
Not at all	65
Yes, they were a factor to take into account	37
Yes, very much	8
Not applicable	31
No response provided	*74*
Total	*215*

While currently irrelevant for many, approximately two-thirds of respondents believed that this picture could change if higher fees are charged (see below).

Awareness of the proposal on enhanced fees

When asked whether they were aware of the Ministry of Justice's proposals for increased court fees for commercial proceedings 140 respondents provided a response, with approximately 60% of these stating they were aware of the proposed fee rises (although only about half were able to provide the correct details).[48] To enable all participants to give their views on the planned fee rises, respondents were referred to the document *Court Fees: Proposal for Reform*. It was made available to the questionnaire respondents and its main proposals were discussed in the interviews.

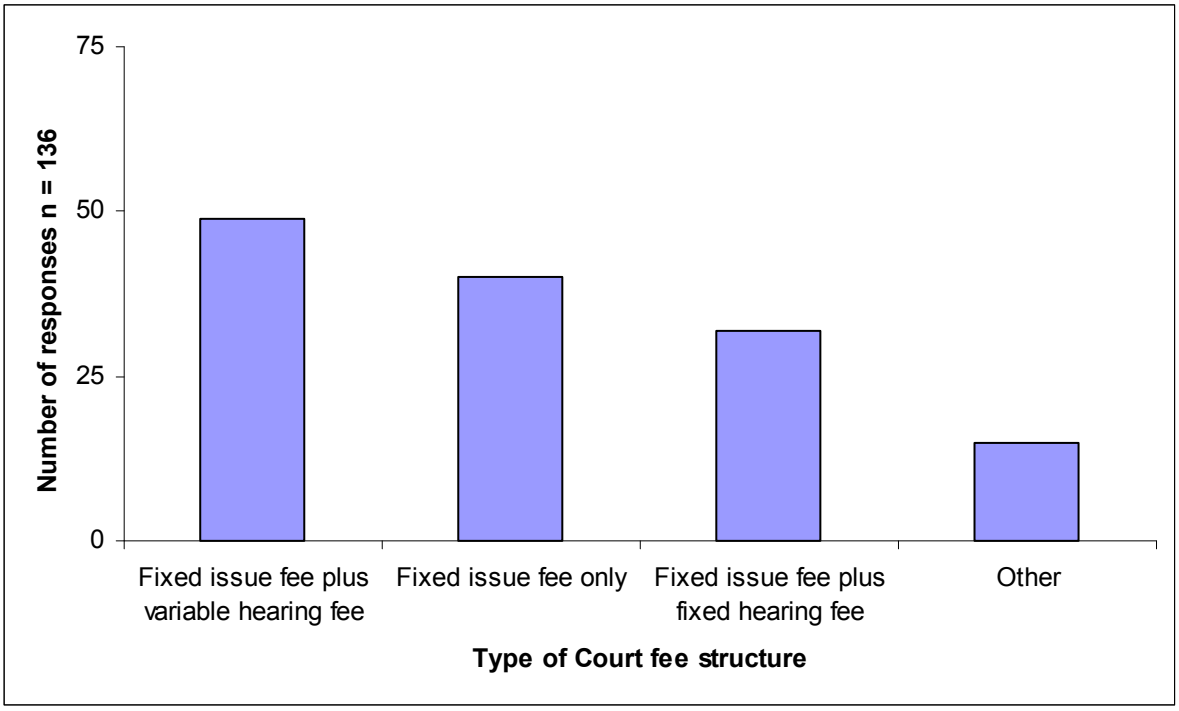
Assessment of the proposed court fee structure

Preferred fees structure - generally

Respondents were first asked to comment on their preferred court fees structure *generally*, without reference to the concrete sums suggested by the Ministry of Justice for commercial cases. Approximately two-thirds of all 136 respondents commented[49] and responses were divided between preferring a fixed issue fee plus a variable hearing fee (49 respondents); a fixed issue fee only (40 respondents); or a fixed issue fee plus a fixed hearing fee (32 respondents). The reasons cited for preferring a fixed fee model were certainty and predictability of costs. Reasons given for the combination of a fixed issue fee with a variable hearing fee were to stagger the costs according to the effective use of court time. Several respondents thought that the upfront issue fee should be low, given the large number of

settlements. Several respondents indicated a preference for retaining the current fee structure (included in the 'other' grouping in figure 4.2).

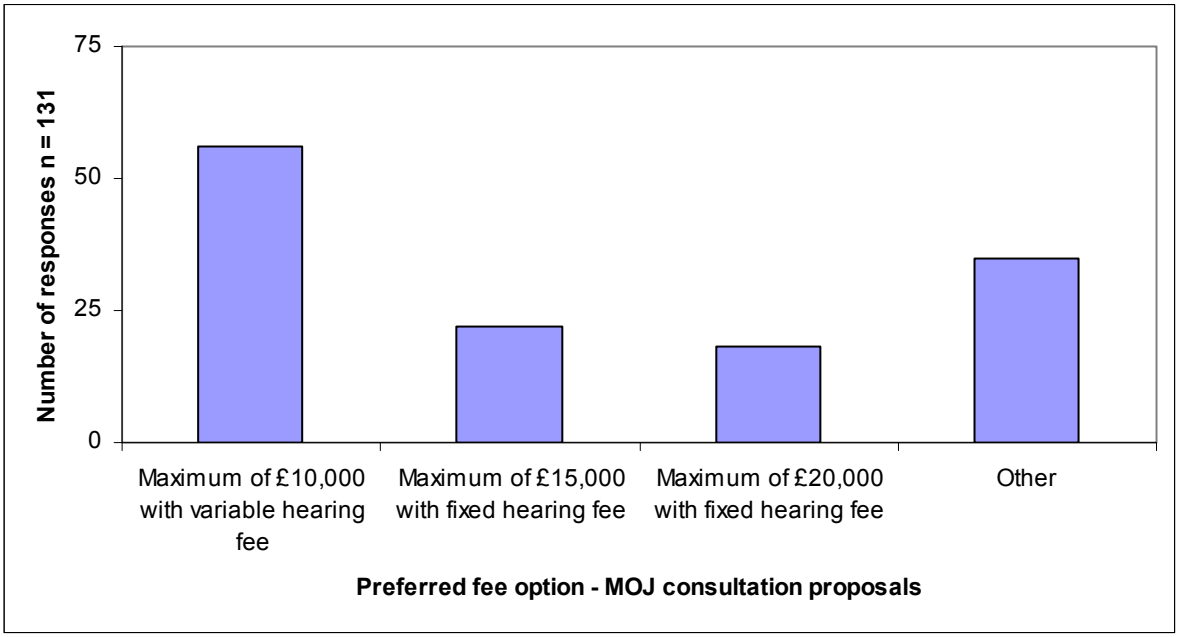
Figure 4.2: Preferred fee structure for commercial cases[50]



Preferred fees option – MoJ Proposal

When the participants were shown the specific fee options as proposed by the Ministry of Justice, the most favoured option was a fixed issue fee of up to £10,000 combined with a variable hearing fee. The capped-options of a £15,000 or £20,000 issue fee combined with a fixed hearing fee were less popular. A number of respondents did not agree with any of the options.

Figure 4.3: Preferred fee options – MoJ Proposal[51]



The issue of court fees provoked much debate, from which several key themes and concerns emerged.

Levels of proposed fees

It was often mentioned by respondents that the suggested value-dependent issue fees (5% of the value of the claim, but capped) would be too high. Even the lowest proposed figure, a maximum issue fee of £10,000, was considered by many as unrealistic in light of the current competitive market climate. This view was held especially strongly in relation to (but not limited to) lower value claims. Many respondents preferred to see "no change" to the current fee levels, expressing concern at the size of the proposed change. At most, minor changes to the current fee levels were considered justifiable, given the increasing competition with other litigation centres world-wide.

Upfront fees

Another concern of respondents related to the proposals for upfront issue fees; three main reasons were provided.

Firstly, it was pointed out that higher fees would need to be discussed with the parties more often than is currently the case when addressing legal costs. The majority of those who commented were concerned that higher fees would create a negative perception amongst the litigating parties and court fees could be converted from a "non-factor" to a "negative factor" in the decision-making process of whether to litigate or arbitrate and where to do so. Many expressed concern that court fees may act as a disincentive in cases of lower value claims. Even for high value cases, where fees are small in comparison both to the total

amounts at stake and to legal fees, a bill of thousands of pounds was felt likely to "optically" make a difference. The view was that this could adversely influence the often delicate balance between the high total litigation costs in England and the high quality of legal services. Some stated that this is especially true when higher fees are considered in combination with the adverse cost rule.

Secondly, cases frequently settle during trial, with proceedings often started just to "make the other party move" (i.e. to put pressure on the party to perform their obligations under a commercial contract) or to prevent parallel proceedings elsewhere. Many respondents therefore expressed concerns that high upfront fees charged might encourage parties to strategically choose other courts or opt for arbitration instead of litigating in England.[52]

Thirdly, observations were made that high upfront fees may present a risk for the claimant to start proceedings in situations where it is uncertain if the other party has any recoverable assets.

Rationales and justifications

The consultation proposed that fees for commercial cases are not only intended to cover the costs of the Commercial Court but also to cross-subsidise other courts. Many respondents could not find any justification as to why users of the Commercial Court should finance the shortfall of, for example, the English family courts, through enhanced fees. It was frequently said that it would be perceived as a "bad signal to the world" if fees were raised beyond being cost-covering. Enhanced fees were characterised by some as a "tax-like" payment, rather than being a realistic charge for the use of the courts.

The view was also expressed that "justice is a fundamental obligation of the State, a public service necessary for a stable society, and should not be a profit-making enterprise". It was felt that measuring justice on a profit basis "missed the point". In so far as other areas of governmental activities could be cross-subsidised by the litigating parties, the court fees proposal was considered by some respondents as a violation of the fundamental right of access to a functioning justice system.

Alternatives proposed by respondents

A frequent suggestion was that a low issue fee combined with variable hearing fees (spread and gradually rising over the duration of the trial) would potentially be better received, as the latter depends on the use of court time. Variable hearing fees might also encourage shorter trials and settlements. However, a problem was seen by some respondents regarding the calculation of hearing fees if charged in "ranges of days". When asked to suggest an issue

fee they would find more acceptable, many respondents offered an amount somewhere near to the current fees.

Some respondents preferred a fixed issue fee only model, as fees related to the duration of the process would be difficult for the parties to estimate. Some suggested that it might be possible to increase the “top end figures” but that the band idea (value span) needs to be kept. “If there were to be increased fees there should be a sliding scale, which had a shallower curve and a longer tail. That is that the peak of the fees would be for larger value claims.” In lower value claims, higher fees were felt to constitute a barrier to justice. It was emphasised that the issue fee should be limited through caps.

Other comments

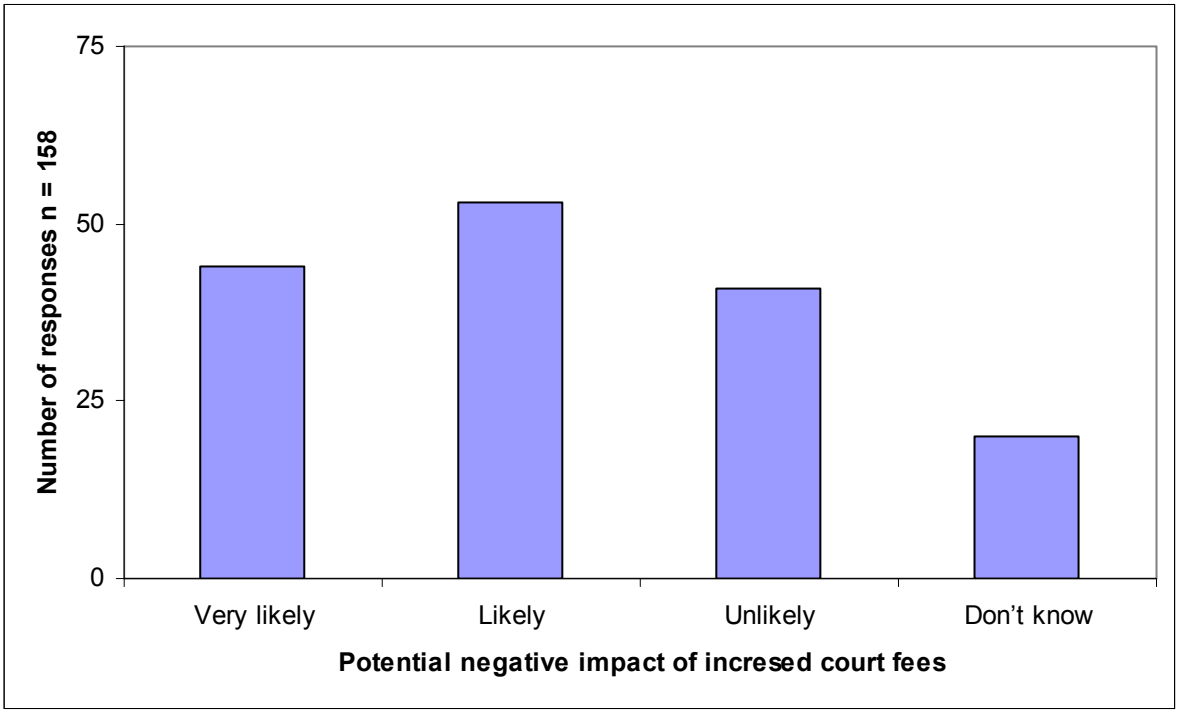
Some respondents suggested that higher court fees presuppose better court services: a proportionate increase of fees could therefore only be justified if services were improved (in particular, but not limited to, information technology).[53]

A number of comments were made regarding specific types of claims, such as non-money claims, declaratory judgments, injunctions or claims with an unspecified amount, with a few respondents foreseeing a risk that, to avoid paying higher court fees, parties could claim declaratory statements instead of bringing a money claim. Declaratory statements of liability may attract a lower court fee than money claims and therefore a party may be inclined to use this route instead.

Potential impact of court fee rises on the competitiveness of English courts

Potential consequences of increased court fees on the competitiveness of the English courts were raised in the interviews and open field comments in the questionnaire.

Figure 4.4: Potential for negative impact of increased court fees on the competitiveness of the English courts[54]



Just over one quarter (26 %) of the 158 respondents who responded felt that increased fees would be unlikely to have a negative effect on the litigation market. This opinion was supported with references to the high quality of legal services/judgments and/or explained by the high value of claims litigated in England, in light of which higher court fees were expected to remain a non-factor. In light of the high overall litigation costs, these respondents felt that the suggested fee changes would not affect the decision to litigate in England. This group of respondents typically litigates claims worth tens or hundreds of millions of pounds. As respondent put it, "in the type of cases [we] are involved in, court fees do not play any role". While being confident that high value claims would still be litigated in England, many respondents thought there was a risk that some competing jurisdictions might benefit from fees increases (see below).

Twenty respondents (approximately 13% of the 158 who responded) said they did not know if increased fees would have an adverse effect on the English commercial litigation market.

In contrast, a total of 97 respondents (61%) thought increased fees were either very likely (44 respondents, 28 %) or likely (53 respondents, 34 %) to have an adverse effect on the English commercial litigation market. These respondents suggested the proposed court fee rises would make English courts less attractive for international commercial disputes - the following key themes emerged from their views and are discussed in detail below:

- potential to generate a negative perception of the English courts;

- a change in the balance between court-based litigation in England and alternatives;
- potential for impact on the wider economy;
- potential for a change in standing and reputation of the English courts and law; and a
- need for a precautionary approach.

Negative Perception

The perception that enhanced court fees would act as a negative "catalyst" was repeatedly stressed by respondents. They felt England might be perceived as no longer being a welcoming place by litigants and many anticipated that any negative perceptions of the English courts could be exacerbated by negative headlines and marketing from competing jurisdictions. They expected competing jurisdictions to present themselves as a cheaper, but high-quality, alternative. For example, one respondent stated that "a significant increase in fees will make the level of court fees a subject that lawyers will feel they should discuss with international clients, will not encourage parties to litigate in England and will offer a marketing opportunity to England's competitors." It was also mentioned by some respondents in this context that litigants might develop a negative impression of English courts if they had to pay fees beyond the cost recovery margin without benefitting from any improved court services.

Alternatives to litigation in England

Respondents expressing concerns as to the impact of the suggested fee rises felt that these could upset a delicate balance in favour of litigation in the English courts. They feared that parties might opt for other jurisdictions if this were sensible from a geographical viewpoint, as competing litigation centres make every effort to improve the quality, ease and speed of their proceedings and offer litigation under English law. Litigation was perceived to be an increasingly competitive market which follows the "basic economic rule: if prices go up, demand drops". In the view of many respondents, the proposed fee rises risked negatively affecting choice of court agreements in favour of the English courts. Parties might be more likely to prefer an alternative jurisdiction or might more frequently include non-exclusive or hybrid clauses into their contracts to guarantee flexibility (as these allow opting for other fora or arbitration) in case of further fee increases in the future. Parties might also consider arbitration more seriously as an alternative from the outset, which might not necessarily be London based. For example: "…at present levels, [court fees] are not determinative of whether or not to bring proceedings before the English courts. They may, however, become so for parties that have the choice whether to arbitrate or litigate and where to do so, if the increases in fees are implemented."

Equally, where parties do not choose a competent court in their contract but have different fora available once a dispute arises, they might take an *ad hoc* decision in favour of an alternative forum. As discussed, respondents perceived a particular risk that parties could opt for alternative jurisdictions (or arbitration) to avoid high upfront fees where settlement may be an option or where it is uncertain whether the other party has any assets. One factor influencing litigants' decisions was the chance of recovery of the debt; substantially increased court fees would increase the debt and may render a recovery less likely.

Even respondents who were not opposed to higher court fees *per se* saw a risk that cases would be brought in competing jurisdictions with lower fees.

> "Increased court fees are unlikely to affect the UK's competitiveness in relation to the very high value commercial disputes on which we advise because the perceived benefits of litigating before the English courts (particularly given the sums at stake) would in our view outweigh the disadvantage of increased court fees. For the same reason, in our view the increase in court fees is unlikely on its own to encourage parties to opt for arbitration in high value disputes. Having said that, where the sums at stake in a dispute are lower, our view is that a significant increase in the fees could be a disincentive for the parties. Further, we agree […] that increasing fees to a level far in excess of the costs involved in order to subsidise unrelated parts of the justice system does not send a message that the courts of England and Wales welcome international business and that loading additional costs on to businesses in order to meet social costs unrelated to those businesses cannot be justified."

Potential impact on the economy

A frequently expressed concern was that the potential profit from court fee rises could not be considered "on the micro level of costs alone" but needed to be seen in relation to the overall contribution of the legal market to the UK economy. If high value cases were no longer brought in England, this loss was expected by respondents to outweigh any benefits that fee rises might generate. Respondents highlighted that it was not only the litigation work at risk if parties are less inclined to litigate in England, but also the transactional work which constitutes a vast amount of Legal London's business, and the related support services: if parties litigated abroad, it was suggested they might also be less likely to choose English law. Taken together, any impact to the market of an increase in fees was considered to represent a risk of significant losses, which could outweigh the additional income expected through enhanced fees.

Potential impact on the standing of English courts and English law

Respondents flagged that a decrease in international cases risks negatively affecting the present standing of the English courts as fewer cases may also lead to a less developed

body of English law. Respondents felt that England needed to remain the “motherplace” of litigation as the current quality and reputation of English commercial law could only be maintained if there was sufficient litigation to guarantee that case law was kept up-to-date.

Respondents indicated that the negative impact of court fee rises they anticipated may not immediately be felt. If parties chose to litigate elsewhere in their contracts, and if organisations changed standard forms in favour of litigation elsewhere or used arbitration, it would likely take a few years before a dispute arose/court proceedings began. By then, any change in the choices of court/law of the litigants may have triggered long-lasting adverse effects on litigation and transactional work in England.

A precautionary approach

During the interviews, supplemented comments in the questionnaire and at the event, it was generally considered that it would be unfortunate for the government to take any action that could have an adverse effect on the English litigation market and it was suggested that a precautionary approach should be taken; “In a highly competitive legal market place, perception is very important, so a prudential approach of the Ministry of Justice would be much better.” From this it can be concluded that respondents either preferred no changes or only minor / justified changes to the current fees structure.

4.5 Competing jurisdictions

While London is considered by respondents as a natural forum for international commercial cases (especially for litigants from common law and Commonwealth States, Russia, and Asia), international litigation is increasingly perceived as a competitive market where litigation centres promote themselves through intensive marketing and improved quality and speed of their court services.

Respondents were asked to reflect on whether they would – currently – consider bringing a case under English law to another jurisdiction. Excluding “not applicable” answers, fewer than a third of the respondents who expressed a view (130 respondents) considered it likely (28 respondents) or very likely (8 respondents) that they would.[55] By contrast, almost three-quarters 72 % of the respondents thought it not very likely or unlikely that they would – currently – bring English law-governed cases to foreign jurisdictions, although they highlighted that this decision would depend on; geographical considerations; strategic advantages of other jurisdictions in the concrete case; the location of assets; and enforceability. However, respondents also expressed a view that, in future, there might be a shift towards more litigation abroad, given the concerns of many that the proposed court fees

rises might be likely or very likely to have a negative effect on the attractiveness of English courts.

Respondents who reported they currently would consider bringing a case under English law to another jurisdiction were asked which other jurisdictions they would consider using. The picture is relatively varied, but with some preferences for certain litigation centres, as shown in Table 4, (respondents were able to provide multiple responses). Some respondents reflected that these jurisdictions might become future competitors to the English courts.

Table 4.2: Competing Jurisdictions[56]

Jurisdiction	Number of responses
New York	61
Singapore	61
Other EU Member State	55
Hong Kong	41
Other	28
Dubai	25
Australia	20
Other US Jurisdiction	14
Delaware	11
India	8

Key Competitors

Other EU Member States

Respondents generally thought it cheaper to litigate in continental Europe than in the UK. Other perceived advantages were the use of inquisitorial systems, better cost control, and quicker results. When confronted, however, with a choice between litigation in the courts of another EU Member State and the English courts (e.g. where the claimant has an option to litigate in courts of two different Member States under Art. 2 and 5(1) Brussels I Regulation[57]), more respondents (most based in the UK) would currently "always" or "often" litigate in the English courts and only occasionally in EU Member State courts, if this was appropriate in the circumstances of the case.[58] Some respondents raised doubts as to whether these jurisdictions currently were serious competitors to England for contracts not involving any parties from continental Europe. However, if court fees rose in England as proposed, they expressed a concern that this picture could change in favour of other EU Member States.

The most seriously competing European jurisdictions were said to be Germany and the Netherlands, and it was noted that both have improved their marketing.[59] Respondents further remarked that in Germany lawyers' fees were more predictable, cheaper and the average duration of trials shorter.[60] They also pointed to recent initiatives to introduce English as an alternative trial language in international commercial cases. Some German courts have already initiated pilot projects allowing hearings to be held in English (although the initiative remains to date rather constrained in scope). The Dutch courts were perceived by respondents as efficient in hearing complex high value claims and as providing for convenient collective settlement mechanisms. Sweden was also mentioned as an alternative to England as a court venue. In Europe, but outside the EU, Switzerland was also a jurisdiction favoured by several respondents.

New York and other US jurisdictions

Respondents perceived New York as a major competitor to the English courts. This is especially true for cases involving Latin American parties, parties from the Pacific area, or cases with assets located in the US. Beyond that, respondents highlighted a general advantage of litigating in New York: it is cheaper.[61] In the event that English court fees rise, New York might, in the respondents' view, become a strategic forum if cases were likely to settle, in order to circumvent high upfront fees.

New York was also considered to have good case management and it has increased its marketing to attract more London-based litigation work, especially in the financial sector.[62] Respondents also highlighted the creation of a special arbitration court, which simplifies proceedings supporting arbitration. This might attract more arbitration work and related court proceedings to New York, to the disadvantage of London. Among the downsides of litigating in New York, respondents mentioned jury trials (the case is resolved by a jury of people selected from the public which is perceived as presenting an increased uncertainty for litigants), onerous pre-trial discovery and the possibility to award punitive damages.

Several respondents also considered Delaware or other US jurisdictions as competitors, depending on the location of the parties and the type of claim at stake.

Singapore

Respondents identified Singapore as a very ambitious litigation centre. It was said that Singapore has observed the developments of the London litigation market closely in an attempt to attract London's litigation business. It markets itself intensively and is likely to continue to do so. The location of Singapore was considered to be favourable for cases involving parties from India, Indonesia and Australia. There was a feeling that cases from these jurisdictions might go to Singapore rather than London if court fees rise.

There were mixed views as to the quality of the Singaporean court system. Some respondents had concerns as to its neutrality and the expertise of the judges, while in contrast others highlighted that Singapore was already now regarded as “good enough” by parties located in Asia.

Respondents felt the interest in litigating in Singapore may increase in the near future as Singapore plans to establish a specialised Commercial Court, a project that is well supported and promoted by its government and its Lord Chief Justice. Respondents reported that the ambition of the Commercial Court Project is to replicate the high quality of English courts and lawyers by employing former English judges and by granting extended rights of representation to qualified foreign barristers in cases involving foreign parties. Provided that the services of the Commercial Court in Singapore does achieve the high quality promised, respondents considered that Singapore could indeed be a serious alternative to England, at least for parties with links to Asia, and especially India or Indonesia. Singapore has already shown its capability as an arbitration centre. It evolved as a serious global competitor within 3-5 years due to good facilities and the quality of its arbitrators. While clients might at first be reluctant to act as “testers of new jurisdictions”, many respondents felt strongly that, over time, similar trust and competence could also be built up in the area of litigation. Another factor potentially advocating in favour of Singapore is support provided by the new Singaporean Commercial Court for arbitration proceedings in the Singapore International Arbitration Centre (SIAC). Direct competition between the English and Singaporean Commercial Court depends on Singapore being able to deliver the same quality of law, lawyers, judges and judgments as London, but for a lower price, and if the Singaporean Commercial Court judgments were enforceable in the country in which enforcement is sought, respondents see a risk that parties will move away from litigation in London.

Dubai

Several respondents mentioned Dubai as an alternative venue following considerable government investment in the litigation market. The Dubai International Financial Centre works with judges from common law jurisdictions and aims to replicate the quality of English courts and lawyers. Dubai is geographically well located for businesses in the Middle East, in particular those in the UAE. Respondents and event participants suggested that Dubai might become increasingly competitive in the future, particularly for financial claims and maritime cases. However many stated that as a litigation centre, Dubai’s growth had not been as rapid as expected.

Hong Kong

Some respondents saw Hong Kong as a competitor. It is perceived as a quite active, albeit small litigation centre. Although in principle free of political influence, a few respondents raised concerns due to its link with China.

Other competing fora

Several respondents considered Qatar as a competing jurisdiction. Qatar has engaged high quality English judges to deal with cases under English law and is seeking to replicate the quality of UK courts and lawyers.

Australia and, to a lesser extent, India were also identified as competing jurisdictions by several respondents.

4.6 Impact on arbitration

Comments on the choice of arbitration at present

Respondents were asked which dispute resolution mechanisms they preferred, for which reasons and to what extent they agreed to, or recommended, arbitration.

Frequency of arbitration

When asked about the frequency of arbitration, more than 80% (once the 'not applicable' category was excluded) of respondents had agreed to or recommended arbitration. Of these, most (88 respondents) recommended it on a case-by-case basis, rather than it being dependent on a specific business sector (9 respondents), or for overall business (10 respondents).[63] Half of those who had agreed to or recommended arbitration gave estimates of frequency. About half opted for arbitration in 0-30% of their cases about one-third chose arbitration in 30-60% of their cases, and the remainder used arbitration in 60% or more of their cases.[64]

Factors influencing the choice of arbitration or litigation

The choice between litigation and arbitration was felt to depend on various factors. Two major factors, closely related, were the enforceability of a decision and the location of the defendant. In many cases involving emerging markets, the enforceability of judgments was not guaranteed while arbitral awards were enforceable under the New York Convention.[65] The choice was, as reported by respondents, also "matter"-specific. If a dispute was very technical, it might not be suitable for arbitration. Likewise, in shareholder disputes, only courts might be able to apply efficient remedies. Furthermore, the choice of arbitration or litigation was said to often be "sector"-specific. In terms of sector, court litigation reportedly prevails in banking and is also frequently used in the shipping business, depending on the parties and types of contracts in dispute. In cases involving natural resources (e.g. oil and gas) or energy, arbitration is more common.

Besides such structural/technical reasons, respondents listed further factors advocating in favour of arbitration: less extensive disclosure; the informality and flexibility of arbitration; confidentiality; better control over the arbitration process; the possibility of choosing the arbitrators; the perceived finality of awards (as appeals are rare due to the 1996 Arbitration Act, as opposed to court litigation); and the fact that arbitration was completely "mobile".

Despite the cited advantages of arbitration many respondents pointed out that the prevalence of either litigation or arbitration could change in phases. According to some respondents, an increase in arbitration was triggered by better marketing of the LCIA as well as the International Chamber of Commerce (ICC) or other arbitration centres such as the Singapore International Arbitration Centre (SIAC).

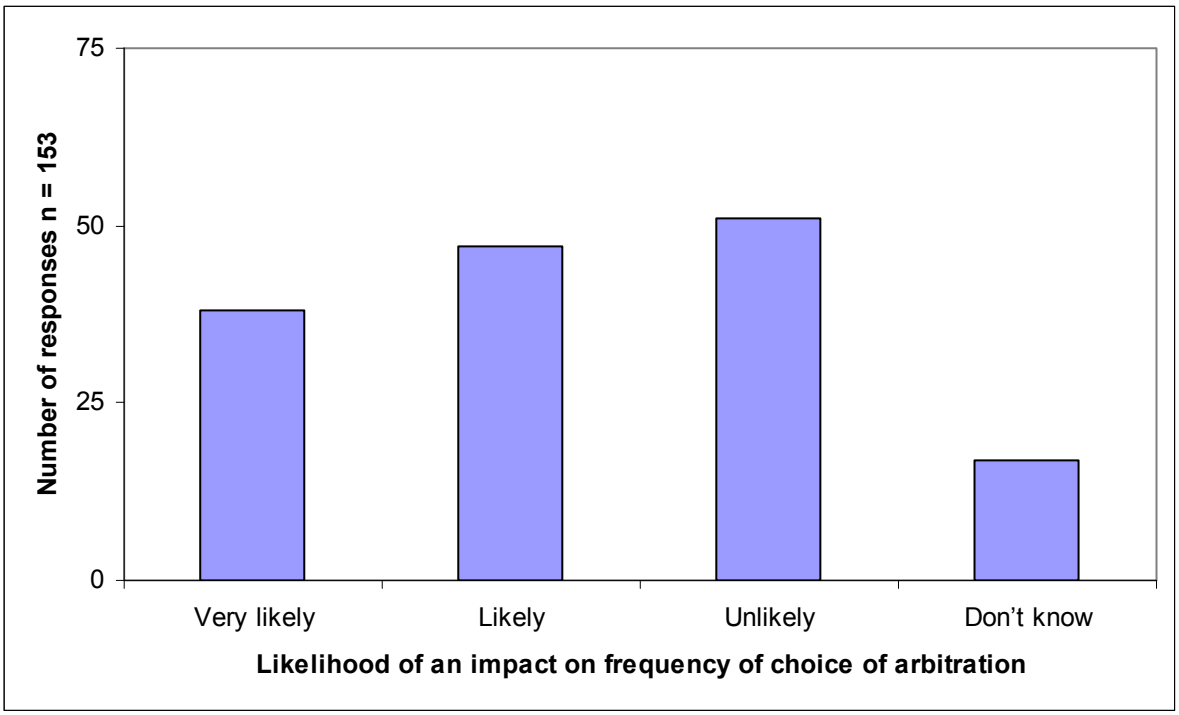
Respondents noted a current trend towards litigation, at least in certain sectors. This was thought to be driven by a disillusion with quality and costs of arbitration and problems of lengthy procedures due to the unavailability of arbitrators. Parties can get a highly specialised judge within a short timeframe but might have to wait a long time for a highly qualified arbitrator. The total costs for arbitration were high, unless a mere notice of arbitration would suffice to settle the case.

It was also noted that there is not only competition between litigation and arbitration but also competition between arbitration centres, notably the LCIA and those based in Geneva, Paris, Stockholm and Singapore. Several respondents also thought that new arbitration bodies for specific sectors (e.g. P.R.I.M.E. Finance arbitration in The Hague) might come to be favoured over both court litigation and LCIA arbitration in future.

Potential impact of court fee rises for the parties' choice of arbitration

Respondents were asked to reflect on the consequences that court fee increases might have on the balance of choice between litigation and arbitration. Despite the costs of arbitration, just over half of those who responded considered it likely or very likely that parties would opt more frequently for arbitration if court fees rose.[66]

Figure 4.5: Likelihood of increased court fees encouraging parties to opt for arbitration more frequently



Several reasons were given for these estimates. Where litigation is initiated to encourage the other party to fulfil their obligations and where cases are likely to settle, respondents thought that arbitration might become a cheaper way to achieve this effect. In lower value claims, where the proposed fees increases may be considered disproportionately high, arbitration was also expected to become more popular.

The flexibility offered by arbitration was considered to rise to the fore in the face of increased court fees: "if court fees rise significantly, more parties will opt for arbitration where they have greater freedom in the choice of decision maker and procedure and greater confidentiality, thereby reducing income to the court system." Moreover "the fact that English courts currently charge relatively reasonable amounts is an important selling factor as against arbitration. This differentiator would be lost if fees were increased to this level and if daily hearing fees were introduced."

A further argument made that increased arbitration may have a negative impact on the development of English law was that important cases would be decided "confidentially" and would not be in the public domain for the benefit of the legal community. The international commercial importance of a case was, in the view of respondents, not dictated by the value of the claim but by the legal issues involved. Claims often contain important legal questions that could increasingly be decided out of court and respondents felt that if they were no longer litigated, the development of English law could be restricted, thus potentially threatening one of its key competitive strengths.

More than one-third of the respondents expressed doubts as to the likelihood of a pro-arbitration effect of enhanced court fees. In their view, a rise in court fees alone was not a reason to opt for arbitration. They stated that arbitration was costly and that "in the decision to litigate/arbitrate the question of court fees plays a very minor role". Parties would take "many factors into account when deciding whether to litigate in England or elsewhere or to arbitrate their disputes. If fees are increased significantly, this may be a factor which parties consider, particularly for lower value disputes, but it will be part of a wider balancing of the relative merits of proceeding in different fora".

In a subsequent question, respondents were asked if court fee rises might affect the role that English courts play as a forum supporting arbitration.[67] Of those who expressed a view just under half of the respondents thought such a result likely (41 respondents) or very likely (19 respondents) while the remaining respondents considered it to be unlikely or did not know.

4.7 Services offered by the Rolls Building

Respondents were asked to consider whether, and in what ways, the services provided by the Rolls Building Courts (the Chancery Division, the Admiralty and Commercial Court, and the Technology and Construction Court) could be improved. Whilst there was general satisfaction with court services, about two-fifths of the respondents (excluding those that have not used the building) believed that there was room for improvement in various areas.[68]

'E-justice' and Information Technology

A majority of the comments suggested improvements relating to information technology. Respondents strongly encouraged the introduction of a system of 'e-justice', to include electronic filing, easier electronic forms, electronic databases, an electronic timetable etc. The need for a safe way to make payments online was also mentioned.

Other comments concerned limited mobile 'phone reception in the Rolls Building, as well as a limited internet connection and videoconferencing facilities.

Effective administration and case management

Comments about administration and case management included suggestions to improve lead times to disputes, to increase the availability of judges, to make the allocation of hearing dates and rooms quicker and easier and to improve communication with court officers.

Several respondents indicated that the management of cases needed to become more efficient through streamlined procedures, rigorous case management and timetables set up in advance for the whole trial, to ensure that cases do not exceed one year. On the other hand, some more flexibility was requested as to timetables and deadlines.

Many suggested rethinking the current system of disclosure, arguing that the scope of disclosure was vast, disproportionate, time-consuming and too costly. Full disclosure generates vast amounts of documents, many of which are not decisive for the trial. Event participants also raised concerns about the benefits of full disclosure. It was suggested that a more flexible approach be adopted to give parties either the option of full disclosure or permit them to identify the key issues of the case first and limit disclosure to those.

It was also stated that during trial, consecutive translation should be preferred over simultaneous translation.

Court structure and the Rolls Building

A few respondents described the current court structure as “anachronistic”. It was said that it was not sensible or comprehensible for foreign parties that commercial cases could be started in the Commercial Court or the Chancery Division or the Queen’s Bench Division.

It has also been suggested to change the name from “Rolls Building” to “Commercial Court” as the current name would confuse international litigants.

Some participants complained that the courtrooms in the Rolls Building are too small and better air conditioning is needed.

Support for arbitration

It was suggested by some respondents that a specialised court chamber for arbitration cases should be established and the interaction of English judges with the arbitration community should be further strengthened. In their view both could be a strong future selling point for Legal London.

5. Key Findings

The following key findings are based on the views of 54 interviewees, 161 respondents to the questionnaire and 60 event participants. All participants had relevant expertise and experience.

- London was considered to be a popular jurisdiction for the litigation of high value cross-border disputes. English courts were perceived as a 'natural forum' for the litigation of international commercial disputes. The popularity of English courts mostly draws on the reputation and experience of judges, and the combination of choice of court clauses with choice of law clauses in favour of English law, which is the prevalent choice of applicable law in international commercial transactions due to its quality, certainty and efficiency in commercial disputes.
- Most respondents sensed increasing competition on the international dispute resolution market with other jurisdictions heavily marketing themselves to attract disputes traditionally adjudicated in London.
- The current English court fee levels were viewed by most respondents as rather insignificant, generally and in light of the overall litigation costs and the value of the claims. They are mainly considered to be a "non-factor" for decisions about where to litigate, with many respondents unaware of the precise fee levels.
- While 20 (13 %) of the 158 respondents who commented on this point did not know whether increased court fees would impact on the decision to litigate in England, just over a quarter (41) of the respondents did not expect any change to the current attractiveness of the English courts if court fees were increased. They considered the level of fees to be of minor significance in light of the value of commercial claims litigated in England and to be outweighed by the advantages of London as a litigation centre, notably the high quality of legal services/ judgments. English courts were perceived as one of the most popular fora for the litigation of international disputes and respondents felt that they would remain as popular.
- In contrast, 97 (61%) of the 158 respondents who commented on this point had a different view and suggested that an increase in court fees (as proposed by the Ministry of Justice in its consultation "Court Fees: Proposals for Reform") could have a detrimental impact on the English litigation market. Of these respondents, 53 believed it was likely that the proposed increases in court fees may affect the attractiveness of English courts for the litigation of cross-border commercial

disputes. A further 44 felt it was highly likely that they would do so. Concerns were expressed among these respondents that the proposed increase might lead to foreign litigants switching their preferences to foreign courts and arbitration, potentially based abroad.

- Those who held the view that an increase in fees could adversely affect the current situation, gave a number of reasons for their view:
  - Respondents were concerned that the proposed fee levels were too high and unrealistic in light of the current market climate.
  - According to them, litigants might perceive fees rises beyond the cost-covering margin as a “tax-like” payment, which could not be justified.
  - England might no longer be considered a welcoming place for international commercial litigation. Respondents were concerned that this could be beneficial for competing jurisdictions, which have started to increase marketing to attract more litigants.
  - Respondents considered that high upfront court fees could be a disincentive in cases of lower value claims and might be inappropriate considering the frequency of settlements.
  - Enhanced fees may also not easily be reconcilable with the general principle that justice is a fundamental obligation of the State, necessary for a stable society.
  - Respondents also felt that the justice system should not be a profit-making enterprise.
- The potential consequences anticipated from increasing court fees included:
  - A decrease in litigation work in England.
  - Possible wider consequences for the economy. Respondents highlighted that if foreign litigants did turn away from litigation in the English courts, it would not only be litigation work that would decrease. The decision to litigate in foreign jurisdictions could also mean that English law is selected on a less frequent basis with an associated switching among litigants to law firms based in other jurisdictions rather than the UK. As a result there was concern that, local transactional work could decrease, also affecting related support services.
  - A detrimental effect on the incremental development and updating of English commercial law.

- In light of the risk implicit in the increase of court fees, the general perception among respondents was that a precautionary approach should be adopted to protect the legal market and either no changes or only minor/ justified changes should be made to the current court fee structure.
- As to the type of court fee structure to be adopted, a widespread suggestion made by respondents was to keep upfront court fees low so as not to discourage strategic commercial litigation and to simplify settlements. A combination of a fixed issue fee with variable hearing fees was a favoured option.
- Jurisdictions that were considered by the respondents to be major competitors to the English courts were New York, Singapore and other EU Member States.
  - Respondents highlighted that New York provided cheaper court services and it might become a strategic venue for cases that were likely to settle, avoiding high future upfront fees in London.
  - Respondents felt that Singapore may become an increasingly successful litigation centre. The successful establishment of the Commercial Court in Singapore, and the employment of former English judges, could transform Singapore into a serious competitor in the near future.
  - According to the respondents' views, the most serious competitors to London in Europe would be Germany and the Netherlands. Advantages given by respondents for litigating on the European continent included more cost-efficient litigation; the inquisitorial systems of EU Member States jurisdictions; and quicker results.
- In respect of arbitration, just over half of the respondents thought that litigants could more frequently switch to arbitration if English court fees rose significantly, although fees were not presently a key factor in the decision-making process. These respondents expect parties to not necessarily opt for London-based arbitration, possibly preferring arbitration based abroad. The remaining respondents however, either did not know whether increased court fees have a pro-arbitration effect, or did not expect litigants to choose arbitration more frequently as decisions in favour of arbitration depend on factors other than costs.
- The respondents who used the Rolls Building were generally satisfied with its services, although some felt there was room for improvement, in particular regarding IT.

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Annex A – Consultation proposals for changes to commercial court fees (Court Fees: a proposal for reform, December 2013 – Annex B)

Claim value	Fees as of December 2013 + fixed hearing fee £1,090	Proposed fee (cost recovery uplift - April 2014) + fixed £1,090 hearing fee	Proposed £10,000 maximum fee + variable hearing fee	Proposed £15,000 maximum fee + fixed hearing fee £1,090	Proposed£20,000 maximum fee + fixed hearing fee £1,090
Up to £300	£35	£35	£35	£35	£35
Greater than £300 but no more than £500	£50	£50	£50	£50	£50
Greater than £500 but no more than £1,000	£70	£70	£70	£70	£70
Greater than £1,000 but no more than £1,500	£80	£80	£80	£80	£80
Greater than £1,500 but no more than £3,000	£95	£110	£110	£110	£110
Greater than £3,000 but no more than £5,000	£120	£200	£200	£200	£200
Greater than £5,000 but no more than £15,000	£245	£445	N/A	N/A	N/A
Greater than £5,000 but no more than £10,000	N/A	N/A	£445	£445	£445
Greater than £10,000 but no more than £15,000	N/A	N/A	5% of the value of the claim	5% of the value of the claim	5% of the value of the claim
Greater than £15,000 but no more than £50,000	£395	£595			
Greater than £50,000 but no more than £100,000	£685	£885			
Greater than £100,000 but no more than £150,000	£885	£1,085			
Greater than £150,000 but no more than £200,000	£1,80	£1,280			
Greater than £200,000 but no more than £250,000	£1,275	£1,475	£10,000		
Greater than £250,000 but no more than £300,000	£1,475	£1,675	£10,000		
Greater than £300,000 but no more than £400,000	£1,670	£1,870	£10,000	£15,000	
Greater than £400,000	£1,670	£1,870	£10,000	£15,000	£20,000

Examples of comparative fees for commercial proceedings assuming claim of greater than £400,000

		One Day Trial	Five Day Trial	Ten Day Trial
Fee as of December 2013 + fixed hearing fee (position at time of research)	Issue fee	£1,670	£1,670	£1,670
	Hearing fee	£1,090	£1,090	£1,090
	Total	£2,860	£2,860	£2,860
Consultation proposed fee (cost recovery - April 2014) + fixed hearing fee	Issue fee	£1,870	£1,870	£1,870
	Hearing fee	£1,090	£1,090	£1,090
	Total	£2,960	£2,960	£2,960
Proposed £10,000 maximum fee + variable hearing fee	Issue fee	£10,000	£10,000	£10,000
	Hearing fee	£1,000	£5,000	£10,000
	Total	£11,000	£15,000	£20,000
Proposed £15,000 maximum fee + fixed hearing fee	Issue fee	£15,000	£15,000	£15,000
	Hearing fee	£1,090	£1,090	£1,090
	Total	£16,090	£16,090	£16,090
Proposed £20,000 maximum fee + fixed hearing fee	Issue fee	£20,000	£20,000	£20,000
	Hearing fee	£1,090	£1,090	£1,090
	Total	£21,090	£21,090	£21,090

Annex B - Methodology

Interviews

The primary method was to conduct interviews with individuals active in the field of international commercial litigation in the London based courts and elsewhere. 54 interviews were conducted between early February and mid-April 2014, both face-to-face and by telephone with legal practitioners, companies and representatives of organisations in the UK and abroad. Interviewees included judges, barristers, solicitors and in-house counsel with substantial experience in international commercial litigation and arbitration. The interviews were designed and structured similarly to the questionnaire to enable questionnaire and interview findings to be brought together and analysed collectively for this report. Interviews ran for between 20 and 80 minutes.

In the interviews, a particular focus was placed on exploring in detail the participants' views on:

- the reasons for and against the choice of English courts and the application of English law in international commercial cases; and
- the potential risks created by enhanced court fees, especially in light of competition from other litigation centres challenging London's position in the international commercial litigation market.

Where interviewees had also completed a survey based on their personal experience, the questionnaire response was reviewed and supplemented by the comments made during the interview. The response was then counted as an interview only, to avoid duplication. However, where respondents replied to the online survey on behalf of a department or firm but gave their personal view during the interview, then these responses were viewed separately, the former being counted as a questionnaire response and the latter as an interview.

Questionnaire

Secondly, a web-based survey was conducted. The questionnaire was established online through the programme *Surveymonkey*.[69] It contained multiple choice questions and offered the opportunity for comments where appropriate. The questionnaire was divided into three parts.

Part one of the survey collected general information about the survey participants:

- type of business;
- geographical location;
- business sector;

- experience with commercial claims brought in London;
- information about the value and cross-border character of these claims;
- types of dispute resolution mechanisms used; and
- preferences as to choice of jurisdiction and choice of law.

Part two explored the drivers behind choice of court and choice of law agreements:

- factors advocating in favour and against the use of English courts and English law;
- competing jurisdictions; and
- factors advocating in favour of arbitration as opposed to litigation.

Part three addressed court fees:

- awareness of current fee levels;
- significance of fees for the decision to litigate in England;
- comments on the suggested fee rises;
- preferred fee structures; and
- an evaluation of the risk that enhanced court fees might present for the litigation market in England.

The questionnaire concluded with a request for comments on the current services offered in the Rolls Building (being the courts where most international commercial litigation is conducted in England) and suggestions for improvement.

Event

Thirdly, individuals with relevant expertise and experience were brought together to debate their views at a forum entitled “Litigating Commercial Claims in the UK – Why or Why Not?” run by BIICL on 31 March 2014 and attended by around 60 people with substantial experience in the field. The event supplemented and tested the findings from the questionnaires and interviews.[70]

Issues of interest were raised and discussed over three hours in two plenary sessions. Six speakers with long experience in international commercial litigation and arbitration presented different perspectives on the advantages and disadvantages of litigation in England and elsewhere and, in particular, the potential impact of enhanced court fees. The delegates participated in an open debate moderated by a member of the research team, with contributions and questions also being sought from the audience. The event was run under

the Chatham House Rule with no attribution of comments to any participant. The comments from the event have confirmed the analysis of the questionnaire and interview data, and are also explicitly referred to at times in this report.

Contact groups

Invitations to complete the questionnaire online using *Surveymonkey* were distributed widely. To capture legal practitioners with the most relevant expertise and experience, the survey was sent through a combination of emailing to the BIICL database and distribution through legal subscription databases held by other organisations. The targeted contacts were legal practitioners, companies and organisations involved in international litigation and arbitration, based in the UK and abroad, and academics with expertise in international litigation.

- BIICL contacts active in the area of international litigation and arbitration both in the UK and abroad (amongst approximately 1,700 contacts, via automatically generated emails and personal emails);
- 85 Law Associations around the world, inviting them to participate in the project and asking them to circulate the invitation to their members active in the area of commercial litigation; and
- subscribers to Kluwer Arbitration and OGEMID – Transnational Dispute Management (in total approx. 5000 subscribers).
- The link to the questionnaire was also publicised through the BIICL website.

In late January 2014, the invitation to participate was sent to the contact groups. A reminder was sent in late February 2014. The questionnaire was also made available at the project event held at BIICL. 161 respondents participated in the survey, excluding blank questionnaires and questionnaires followed by a personal interview (see above “interviews”).

Interviewees were contacted via personal emails to approximately 200 law firms, chambers, the judiciary and companies in various EU countries (in particular the UK, Germany, France and Spain), in the Americas and Asia selected on the basis of their experience and expertise in international litigation and arbitration in the UK and elsewhere. One hundred and sixty-one respondents participated in the survey, excluding blank questionnaires and duplicates.

Event participants were invited from amongst BIICL contacts active in the area of international litigation and arbitration both in the UK and abroad (approximately 1,700 contacts, invited via automatically generated emails and personal emails).

Annex C - Questionnaire & Cross-Analysis (Questionnaire and Interview Data)

Please note:

The Annex contains the combined answers of all 215 respondents (interviews and questionnaire). The original questionnaire, which was designed by BIICL and electronically evaluated via Surveymonkey, has been reproduced by the Ministry of Justice in reformatted version below without any figures and graphs.

Introduction and Guidance Notes

This Questionnaire has been prepared by the British Institute of International and Comparative Law (BIICL) for circulation to representatives of businesses and the legal profession concerning their expectations, experiences and outcome in bringing a commercial claim before English Courts.

BIICL has been appointed by the Ministry of Justice to conduct a study into the factors which influence litigants to bring a commercial dispute to the London based courts. The outcome of the questionnaire will be used to assess both the drivers behind decisions where to seek redress and the international competitiveness of the UK legal services.

The questionnaire should not take longer than 10 minutes to complete. You can answer on behalf of your organisation, on behalf of a department within your organisation or share your individual professional experience. But please make sure that ALL answers given to the questionnaire coherently relate to either the organisation as a whole, to the department or to your own professional experience. If you answer on behalf of an organisation which is active in more than one business sector which adopts different policies for each sector, please provide the answers in respect of your most extensive business sector. If you are a member of the judiciary or an academic, please answer the questions as far as possible.

PART 1. YOUR BUSINESS/INSTITUTION

Q1 What type of organisation do you work in?

Answer choices	Number of responses
Law firm	97
Chambers	52
Judiciary	7
Civil service	3
Company	14
Academia	41
Other	9
Total	*223 (214 respondents)*
No response provided	*1*

Q2 In which region are you based?

Answer choices	Number of responses
UK	126
Other EU Member state	56
Non EU Member State	34
No response provided	*3*

Q3 In which sector(s) are you active?

Answer choices	Number of responses
Legal services	185
Finance	9
Retail	5
Manufacturing	5
Energy	6
Telecom	6
Engineering	4
Other (please specify)	27
No response provided	*4*

Q4 What is your position within the organisation?

Answer choices	Number of responses
Solicitor/Attorney (Law firm)	96
Solicitor/Attorney (In House counsel)	11
Barrister	57
Member of the judiciary	8
Civil Servant	1
Academic	41
Non Lawyer	3
Other (please specify)	16
No response provided	*3*

Q5 Are you answering this survey?

Answer choices	Number of responses
On behalf of your organisation	19
On behalf of a department within your organisation	8
Based on your individual professional experience	184
No response provided	*4*

Q6 Have you/has your department/your organisation been involved in one or more commercial claims brought to the UK in the last five years?

Answer choices	Number of responses
Yes, one	12
Yes, 2-5	27
Yes, 5-10	6
Yes, over 10	12
Yes, regularly	96
No	55
No response provided	*7*

Q7 In which capacity or capacities have you been involved in commercial claims) (choose all that apply)?

Answer choices	Number of responses
As a party (claimant)	24
As a party (defendant)	17
As a solicitor/attorney	88
As a barrister	53
As a judge/decision maker	15
No response provided	*56*

Q8 What was the value of the claim(s) you have been involved in in the last five years (choose all that apply)?

Answer choices	0 - 30%	30 - 60%	60 - 90%	90 - 100%	Total responses
Did not exceed £50,00	24	9	4	4	38
Exceeded £50,00 but not £100,000	23	9	2	3	37
Exceeded £100,00 but not £300,000	28	9	9	5	50
Exceeded £300,00 but not £1,000,000	22	16	6	6	50
Exceeded £1,000,000	20	15	24	87	145
No response provided					*40*

Q9 What was the approximate percentage of transactions involving a cross-border element in your institution/department in the last five years?

Answer choices	Number of responses
0% - 30%	36
30% - 60%	34
60% - 90%	47
90% - 100%	54
No response provided	*44*

Q10 What percentage of these transactions have give rise to a dispute?

Answer choices	Number of responses
0% - 30%	70
30% - 60%	13
60% - 90%	11
90% - 100%	42
No response provided	*79*

Q11 What dispute resolution mechanism have been used?

Answer choices	Rarely	Occasionally	Often	Very Often	Total responses
Out of court settlement	11	45	52	31	139
Court litigation/settlement	14	35	57	31	136
Court litigation/decision	19	33	62	34	148
Arbitration	18	35	47	47	146
No response provided					*41*

Q12 In the last five years, have you agreed upon/recommended a choice of court agreement in favour of English courts? (Please note: questions about choice of law clauses will follow)

Answer choices	Number of responses
Not applicable	58
No for overall business	25
Yes for overall business	14
Yes on a case-by-case basis	82
Yes for a specific business sector	19
No response provided	*26*

Q13 if yes, in which approximate percentage?

Answer choices	Number of responses
0% - 30%	36
30% - 60%	18
60% - 90%	24
90% - 100%	17
No response provided	*120*

Q14 If you are a member of the judiciary, how many commercial cases in the last five years involved a choice of court agreement in Favour of English courts? (Note a few respondents who answered this question are arbitrators or barristers sitting as a deputy judge)

Answer choices	Number of responses
0% - 30%	9
30% - 60%	2
60% - 90%	1
90% - 100%	0
Don’t know	6
No response provided	*197*

Q15 In the last five years, have you agreed upon /recommended a choice of law clause in favour of English law?

Answer choices	Number of responses
Not applicable	53
No for overall business	16
Yes for overall business	26
Yes on a case-by-case basis	81
Yes for a specific business sector	16
No response provided	*32*

Q16 If yes, in which approximate percentage?

Answer choices	Number of responses
0% - 30%	33
30% - 60%	12
60% - 90%	33
90% - 100%	18
No response provided	*119*

Q17 If you are a member of the judiciary, how many commercial cases in the last five years involved a choice of law clause in favour of English Law? (Note a few respondents who answered this question are arbitrators or barristers sitting as a deputy judge)

Answer choices	Number of responses
0% - 30%	9
30% - 60%	0
60% - 90%	2
90% - 100%	0
Don’t know	6
No response provided	*198*

Q18 Have you agreed to/recommended arbitration in the UK?

Answer choices	Number of responses
Not applicable	50
No for overall business	25
Yes for overall business	10
Yes on a case-by-case basis	88
Yes for a specific business sector	9
No response provided	*33*

Q19 If yes, in which approximate percentage?

Answer choices	Number of responses
0% - 30%	46
30% - 60%	28
60% - 90%	11
90% - 100%	8
No response provided	*122*

Q20 Have you engaged UK-based legal representatives to prepare/bring a claim?

Answer choices	Number of responses
Yes	48
No	36
Not applicable	57
No response provided	*74*

PART II. CHOICE OF COURT AGREEMENTS AND CHOICE OF LAW CLAUSES

Q21 Who encouraged a choice of court agreement in favour of English courts?

Answer choices	Number of responses
Party based in the UK	60
Party based outside the UK	42
Lawyers	87
Used standard form agreement which provided for jurisdiction of English courts	37
Don't know	4
Not applicable	32
Other	3
No response provided	*59*

Q22 Which factors have driven the choice of court agreement in favour of English courts?

Answer choices	Not relevant at all	Little relevant	Relevant	Very relevant	Decisive	Number of responses
Reputation/experience of judges	5	5	25	53	55	143
Combination with choice of English law	4	10	28	49	39	130
Neutrality of the forum	7	12	32	39	43	133
Efficient remedies including interim relief	6	10	27	49	20	112
Procedural effectiveness	3	14	27	49	16	109
Effective UK-based legal counsel/legal services	5	14	39	39	26	123
Market practice including standard form agreements	9	14	28	40	17	108
Language	5	15	39	41	13	113
Speed	8	14	47	29	12	110
Enforceability in foreign countries	11	14	40	23	17	105
Chance to shift the legal costs through insurance and 'loser' pays principle	11	34	38	12	2	97
Overall costs of litigation	16	37	30	10	8	101
Court fees	36	41	19	10	2	108
Other	11	2	3	2	7	25
No response provided	*61*					

Q23 When making a decision as to a choice of court agreement in favour of English courts/an English court, at what time did you become aware of the court fees?

Answer choices	Number of responses
Before agreeing on the clause	52
After agreeing on the clause	8
When the claim was brought before the court	17
Never	13
Cannot recall	16
Other	9
No response provided	*100*

Q24 Who encouraged a choice of law clause in favour of English law?

Answer choices	Number of responses
Party based in the UK	62
Party based outside the UK	40
Lawyers	87
Used standard form agreement which provided for choice of English law	40
Don’t know	7
Not applicable	19
Other	4
No response provided	*73*

Q25 Which factors have driven your decision to agree on a choice of English law?

Answer choices	Not relevant at all	Little relevant	Relevant	Very relevant	Decisive	Number of responses
Language	7	11	50	28	14	110
Quality/certainty of the law	4	7	19	47	57	134
Efficiency of English law in commercial disputes	4	7	23	48	43	125
Market practice including standard form agreements	8	9	31	45	14	107
Effective UK-based legal counsel/legal services	8	17	27	41	16	109
Combination with choice of court	7	9	34	42	30	122
Other	9	4	0	3	5	21
No response provided						*68*

Q26 if, e.g. by virtue of art. 2 and 5 Regulation 44/2001, you can decide whether to bring a claim before UK courts or the courts of another EU member State would you choose?

Answer choices	Always	Often	Occasionally	Never	Total respondents
UK Courts	46	54	27	2	127
Courts of another EU Member state	6	23	65	15	108
No response provided					*75*

Q27 Would you consider bringing a case under English law to another jurisdiction?

Answer choices	Number of responses
Very likely	8
Likely	28
Not very likely	48
Unlikely	46
Not applicable	13
No response provided	*72*

Q28 If yes, to which jurisdiction?

Answer choices	Number of responses
Other EU Member state	55
New York	61
Delaware	11
Other US Jurisdiction	14
India	8
Singapore	61
Australia	20
Hong Kong	41
Dubai	25
Other	28
No response provided	*93*

Q29 If you would consider bringing a claim under English law to another jurisdiction, what are the reasons?

Answer choices	Not relevant at all	Little relevant	Relevant	Very relevant	Decisive	Total
Enforceability in foreign countries	4	5	17	27	23	76
Reputation/experience of judges	8	8	18	23	16	73
Neutrality of the forum	7	8	21	23	13	72
Overall costs of litigation	7	9	31	21	16	84
Procedural effectiveness	6	4	3	2	11	26
Efficient remedies including interim relief	8	6	21	28	7	70
Market practice including standard form agreements	7	6	24	29	6	72
Efficient local legal counsel	8	11	22	22	6	69
Language	8	16	19	23	8	74
Speed	11	12	20	18	11	72
Court fees	11	11	22	19	7	70
Other	9	17	28	10	9	73
No response provided						*115*

PART III. COURT FEES

Q30 Are you aware of the UK court fee levels in commercial matters?

Answer choices	Number of responses
Yes	73
No	82
No response provided	*60*

Q31 When a dispute arises, have court fees affected the decision whether or not to bring proceedings before the English courts?

Answer choices	Number of responses
Yes, very much	8
Yes, they were a factor to take into account	37
Not at all	65
Not applicable	31
No response provided	*74*

Q32 When you have entered into a choice of court agreement in favour of English courts, were you aware of the fees charged by English courts?

Answer choices	Number of responses
Yes	59
No	39
Not applicable	34
No response provided	*83*

Q33 What court fees structure is preferred for commercial cases?

Answer choices	Number of responses
Fixed issue fee only	40
Fixed issue fee plus fixed hearing fee	32
Fixed issue fee plus variable hearing fee	49
Other	15
No response provided	*79*

Q34 Are you aware of the proposed fee rises in commercial litigation in the English courts (increased issue fee up to a maximum of £10,000 with variable hearing fee or up to a maximum of £15,000 or £20,000 with fixed hearing fee: for further information see: https://consult.justice.gov.uk/digital-communications/court-fees-propsals-for -reform)?

Answer choices	Number of responses
Yes	39
Yes, but not in detail	44
No	57
No response provided	*75*

Q35 Which of the fees options proposed by the Ministry of Justice in its consultation (see 34 above) is preferable to you?

Answer choices	Number of responses
Maximum of £10,000 with variable hearing fee	56
Maximum of £15,000 with constant hearing fee	22
Maximum of £20,000 with constant hearing fee	18
Other	35
No response provided	*85*

Q36 Do you think that increased court fees (see question 34 above) will negatively affect the UK's competitiveness in commercial disputes?

Answer choices	Number of responses
Very likely	44
Likely	53
Unlikely	41
Don't know	20
No response provided	*57*

Q37 Do you think increased court fees (see question 34 above) will encourage parties to opt for arbitration more frequently?

Answer choices	Number of responses
Very likely	38
Likely	47
Not very likely	51
Don't know	17
No response provided	*62*

Q38 Do you think that increased court fees will affect the role of UK courts as a forum supporting arbitration?

Answer choices	Number of responses
Very likely	19
Likely	41
Unlikely	56
Don't know	19
No response provided	*80*

Q39 Are there any aspects of the service provided by the Rolls Building (the Chancery Division, the Admiralty and Commercial Court and the Technology and Construction Court) which could be improved?

Answer choices	Number of responses
Yes	32
No	14
Don't know	37
Have not used the Rolls Building	27
No response provided	*105*

Q40 If you would like to (not obligatory), you can provide us with the name of your organisation/your name.

Q41 Would you be willing to participate in a research interview conducted by BIICL at a time and place convenient to you (or via telephone)? This will allow you to express your views in more depth and us to better understand the user perspective. Your views will remain anonymous. If you agree to be contacted, please indicate your contact details below.

End Notes

[1] C Hodges et al., The Costs and Funding of Civil Litigation, Hart (2009), pp. 57, 134-156, 172-175.

[2] The report also refers to the "English" courts. Effectively, however, international commercial claims are litigated in London.

[3] Ministry of Justice, *Court Fees: Proposals for Reform* [Cm 8751/2013]; https://consult.justice.gov.uk/digital-communications/court-fees-proposals-for-reform.

[4] There have been a number of earlier public consultations which set out the principle of full-cost recovery through fees: 'Civil Court Fees 2008' [CP31/08]; 'Civil and Family Court Fee Increases' [CP(L)24/05]; 'Civil Court Fees' [CP5/07]; 'Public Law Family Fees Consultation Paper' [CP32/07]; 'Civil Court Fees' [CP10/04] and 'Fees in the High Court and Court of Appeal Civil Division' [CP15/2011] (superseded by the proposals set out in *Court Fees: Proposals for Reform*).

[5] Above, note 3, p. 6, n. 3.

[6] Above, note 3, p. 6, n. 5.

[7] Ministry of Justice Analytical Services Insight Paper, *Potential impact of changes to court fees on volume of cases brought to the civil and family courts*, (2013) .

[8] R Franklyn, *Analytical Summary: Public Attitudes to Civil and Family Court Fees*, MoJ, Dec 2013.

[9] I Pereira, P Harvey, W. Dawes, H. Greevy, *The role of court fees in affecting users' decisions to bring cases to the civil and family courts: a qualitative study of claimants and applicants,* MoJ, 2014.

[10] Centre for Commercial Law Studies School of International Arbitration, Queen Mary, University of London, *Competitiveness of fees charged for Commercial Court Services: An overview of selected jurisdictions*. The MoJ earlier reviewed evidence on how decisions are made on whether to pursue commercial legal disputes, and where to do so from surveys of corporations (*"Corporate Choices in International Arbitration: Industry Perspectives"*, 2013, and "*2010 International Arbitration Survey: Choices in International Arbitration*", both Queen Mary University School of International Arbitration).

[11] *Court Fees. Cost Recovery: Impact Assessment*, IA No MoJ221, Ministry of Justice, 2 December 2013.

[12] *Enhanced Court Fees: Impact Assessment* IA No MoJ222, Ministry of Justice, 2 December 2013,. Also see the critical remarks of the Regulatory Policy Committee on this Impact Assessment, 'Opinion: Impact Assessment – Enhanced Court Fees', RPC reference PRC-13-MOJ-1958..

[13] S Vogenauer, "Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law. A Business Survey – Final Results", 2008, pp. 26-27.

[14] C Hodges et al., The Costs and Funding of Civil Litigation, Hart (2009), pp. 57, 172-175.

[15] Ibid., p. 58.

[16] Ibid., p.70.

[17] The data in section 2.1 relates to questionnaire respondents only and excludes data relating to interviewees, which is contained in section 2.2. Please also note that the tables and figures in this section are not reproduced in the Annex, which contains combined data of all 215 project participants.

[18] This number excludes (a) "blank" questionnaires:BIICL received 15 replies by respondents who submitted the questionnaire without providing any answers to it, i.e. they have clicked through the questionnaire without participating in the study; and (b) questionnaires filled in by respondents in their personal capacity, where these were also participating in an interview, based on their personal experience. These responses were counted as an interview only.

[19] Multiple answers were possible.

[20] Data in section 2.2 refers to interviewees only and excludes data relating to questionnaire respondents, which is contained in 2.1. The tables and figures in this section are not reproduced in the Annex, which contains combined data of all 215 project participants.

[21] Where respondents filled in the questionnaire and have subsequently been interviewed, it was ensured that their responses were identified, supplemented by the comments made during the interview and counted as an interview only, except where respondents replied to the online survey on behalf of a department or firm but gave their personal view during the interview.

[22] For details see http://www.biicl.org/events/view/-/id/828/.

[23] Statistical data was provided on 10 February 2014 and is on file with the authors. Data is incomplete because, for example, parties are not always required to specify the value of a claim, different definitions may be used in different courts, and where information is not provided by parties there will be unknowns or sometimes default values will be recorded.

[24] 'Foreign' in the statistics means outside England & Wales and thus includes Scotland and Northern Ireland, Admiralty and Commercial Courts – Country of Origin Statistics (on file with the authors). There is some information about what countries litigants were from but it is not sufficiently comprehensive to be useful here.

[25] Records of cases with exclusively foreign parties have only been available for 2012 onwards.

[26] See question 8, Annex C.

[27] See question 9, Annex C.

[28] See question 10, Annex C.

[29] See question 20, Annex C. It was mostly lawyers (who are not "engaging" representatives but "engaged as" such) and academics that answered "no" or "not applicable" to this question.

[30] Panel of Recognised International Market Experts in Finance.

[31] See also below, 3.6.

[32] The frequency of a choice of English law was analysed in a variety of studies by academics and practitioners. These include: S Vogenauer, "Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law. A Business Survey – Final Results", 2008. For that study, a multinational sample of businesses was recruited from eight focal Member States of the EU (France, Germany, Italy, Netherlands, Poland, Spain, UK and Belgium) and from a minority of businesses from other European countries; English law was chosen in 21% of the cases). An earlier study by S Vogenauer & S Weatherill ("The Harmonisation of European Contract Law", Oxford 2006, p. 123) found that the law most often used for cross-border transaction is English law (26%). That survey included eight countries (France, Germany, Hungary, Italy, The Netherlands, Poland, Spain, UK). According to the White & Case "2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process" (http:// arbitration practices. whitecase.com/news/newsdetail. aspx?news=3786), 25% of parties prefer English law. The Clifford Chance Survey of 2005 "Does Business Want an EU contract law?" (http://www.mondaq.com/x/32445/ Inward+Foreign+Investment /Does+Business+Want+an+EU+contract+law+The+Clifford+Chance+Survey), concluded that English law is chosen in 26% of cases. See also Gilles Cuniberti, "The International Market for Contracts: The Most Attractive Contract Laws", University of Luxembourg Law Working Paper Series 2014-02, 15-16, who states that between 2007-2012, an average 11% of contracts contained a choice of law agreement in favour of English law; the highest yearly average of 15.43% was reached in 2012.

[33] See question 15, Annex C.

[34] See question 16, Annex C.

[35] See question 24, Annex C.

[36] See question 25, Annex C.

[37] See also S Vogenauer, Civil Justice Systems in Europe (n 27), The study confirms the popularity of choice of court clauses in international commercial cases in favour of the English courts.

[38] See question 12, Annex C.

[39] See question 13, Annex C.

[40] See question 21, Annex C.

[41] See question 22, Annex C.

[42] For a detailed comparison of litigation costs see C Hodges et al., The Costs and Funding of Civil Litigation, Hart (2009).

[43] The 'adverse costs rule' refers to the procedural rule whereby the party that loses has to pay the legal costs of the successful party.

[44] The recent Jackson reform to costs of litigation (in force from 1 April 2013) seeks to temper the increased costs of litigation in the English courts. The reform has introduced a costs management scheme which will apply to all cases on the multi-track, with the exception of Commercial and Admiralty cases. Nonetheless, the courts have the discretion of applying the costs management scheme to commercial cases. Among other things, the reform imposes the obligation of providing a costs budget to the court. The rationale being that the costs budget will act as a limitation upon the level of costs of litigation. See also R Jackson, Review of Civil Litigation Costs: Final Report, 2010,

[45] See question 23 and 30, Annex. See also C Hodges et al., The Costs and Funding of Civil Litigation, Hart (2009) on the relevance of litigation costs from a comparative perspective.

[46] The question has also been assessed in S Vogenauer, Civil Justice Systems in Europe (n 27).

[47] See question 31, Annex C.

[48] See question 34, Annex C.

[49] See question 33, Annex C.

[50] See also question 33, Annex C. Half of the non-respondents to this question were based outside the UK.

[51] See also question 35, Annex C. Half of the non-respondents to this question were based outside the UK.

[52] See also below, 3.4.5 and 3.6.

[53] See also below, 3.7.

[54] See also question 36, Annex C. Half of the non-respondents to this question were based outside the UK.

[55] See Annex C, question 27.

[56] Respondents who did not answer question 27 or considered the question not applicable to them, did equally not reply to question 28. Respondents were able to select multiple jurisdictions See, as a comparison, also S Vogenauer, "Civil Justice Systems in Europe" (n 27).

[57] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[58] See question 26, Annex C.

[59] See e.g. the report *Law Made in Germany*, edited by Bundesnotarkammer (BNotK), Bundesrechtsanwaltskammer (BRAK), Deutscher Anwaltverein (DAV), Deutscher Notarverein (DNotV), Deutscher Richterbund (DRB), which is specifically tailored to litigants who would consider litigating in England.

[60] Ibid.

[61] See also the study “Competitiveness of fees charged for Commercial Court Services: An overview of selected jurisdictions”, Queen Mary, University of London.

[62] See e.g. the International Swap and Derivatives Association (ISDA) master agreements allowing for litigation in either London or New York.

[63] See question 18, Annex C.

[64] See question 19, Annex C.

[65] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 (New York Convention).

[66] See also question 37, Annex C. Half of the non-respondents to this question were based outside the UK

[67] See question 38, Annex C.

[68] See question 39, Annex C.

[69] See https://www.surveymonkey.com.

[70] Event and speaker details are available at http://www.biicl.org/events/view/-/id/828/.

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