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Litigation Committee response to the Consultation Paper on the Shorter and Earlier Trial Procedures Initiative

The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients, from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to consultations on issues of importance to its members through its 19 specialist committees. This response has been prepared by the CLLS Litigation Committee (the "Committee") and addresses the Consultation Paper entitled *The Shorter and Earlier Trial Procedures Initiative* (the "Consultation Paper").

The Committee supports the Shorter and Earlier Trials Initiative. The English courts face ever increasing competition from courts and other dispute resolution institutions across the world. It is important for the English courts to improve, and be seen to improve, the service they provide to international litigants rather than merely to rest on the courts' historic laurels. The proposals in draft Practice Direction perhaps contain little, if anything, that could not already carried out under the existing Civil Procedure Rules, but the establishment of a pilot under its own rules should encourage parties, lawyers and judges to think more carefully about whether abbreviated procedures are appropriate for a particular case and also demonstrate internationally the cost-effective dispute resolution that can be achieved through the English courts.

The Committee has the following more detailed comments on the draft Practice Direction.

Paragraph 2(1)(c)(2): It would be useful to clarify that "extensive witness evidence" includes expert evidence.

Paragraph 2(4)(b): Urgency is not the only reason for not sending a pre-action protocol letter. A common reason is fear that the Defendant will launch an "Italian torpedo" by starting proceedings in another EU court, a tactic that the Brussels I

Regulation (recast) has not wholly nullified. More flexibility as to whether pre-action steps are required before the issue of proceedings would, therefore, be appropriate.

Paragraph 2(4)(e)(1): It is not entirely clear from the drafting whether Particulars of Claim must include only the matters covered in paragraphs (a) to (c) or whether they must meet the normal requirements for Particulars and, in addition, include the matters covered in paragraphs (a) to (c). The Committee assumes the latter is the intention, but clarity would be helpful.

The Committee also notes that the draft Practice Direction does not refer to the inter-relation, if any, of the shorter trials initiative and alternative dispute resolution.

Paragraph 2(4)(e)(2): Since the Commercial Court's general limit for pleadings is 25 pages, reducing this to 20 pages may not be significant. It may be that a more restrictive limit should be imposed or that consideration should be given to a reduction in the light of experience gained during the pilot (similarly, consideration could be given to what form pleadings should take and what they should contain).

Paragraph 2(4)(e)(3): The Committee is sceptical whether the Claimant should be required to attach documents on which the Defendants are likely to rely. In cases involving few documents, it might be obvious to the Claimant what documents the Defendant will rely on, and attaching them to the Particulars may save time. In general, however, since the Defendants must also attach documents to their pleadings, it is more appropriate, and less costly, to leave it for the Defendants to decide what documents they rely on rather than for the Claimant to speculate about this.

Paragraph 2(4)(f): It is not clear what sanction the court can usefully impose for a failure by the Claimant to issue and serve the Claim Form within 14 days of Defendant's response. If the case is suitable for the Shorter Trials procedure, the failure of the Claimant to act with this haste should not generally be a sufficient reason on its own to remove the case from the procedure.

However, the court must also ensure that the procedure is not used by Claimants to impose an unrealistic and unfair timetable on Defendants. Claimants will in practice have as long as they wish to prepare for the proceedings (whether prior to sending a pre-action protocol letter or after receiving the Defendants' response), and should not be able to impose a timetable that does not give Defendants an equal opportunity to explore the issues.

Paragraph 2(4)(s)(1): Since CPR 31.5(2) is expressly excluded, it would clarify matters if CPR 31.7 was also expressly excluded rather than leaving it to implication from paragraph 2(4)(s)(3)(b)(iii).

Paragraph 2(4)(s)(3)(b)(iii): This requires a party to disclose documents that are disadvantageous to it if the party happens to be aware of them and their contents. This will either encourage a party not to look for documents that might turn out to be

disadvantageous or potentially handicap a party who is more thorough. It is also difficult to administer (eg if the "party" for these purposes is the person with conduct of the litigation, he or she has an incentive to ask colleagues to supply helpful documents only). In the Committee's view, the better (and cheaper) approach is to omit this paragraph and, instead, to adopt the normal approach in arbitrations of, initially at least, requiring the parties to disclose only the documents upon which they rely. If a party wants more documents, it can apply for specific disclosure. (It might also be useful to re-consider the paragraph numbering scheme in the Practice Direction with a view to avoiding over-cumbersome referencing.)

Paragraph 2(4)(s)(3)(c): For the reasons given above, the Committee is sceptical as to whether this is appropriate. Since there is no requirement to search for documents, reciting the searches that have been undertaken is unnecessary.

Paragraph 2(4)(t): The Committee wonders whether a limit on the length of witness statements, or on the aggregate length of all witness statements, might be appropriate, given that the procedure is not intended for cases with extensive factual disputes. This may be a measure that could be considered when the pilot is reviewed.

Paragraph 2(4)(v)(2): This requires the court to deal with all applications without a hearing unless, under paragraph (e), the court considers it necessary to hold a hearing. It may be better if it is merely the general rule is that applications should be made in writing and dealt with without a hearing. It may also be useful to include express provision for telephone hearings, which can be easier and cheaper to organize than hearings in person or paper applications, and may be more practical for short applications.

Paragraph 2(4)(z)(3): A period of six weeks from the end of a four day trial represents a generous allowance for the judge to prepare his or her judgment.

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THE CITY OF LONDON LAW SOCIETY
Litigation Committee

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