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Litigation Committee response to *Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's proposals*

The City of London Law Society ("CLLS") represents over 14,000 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's professional work is conducted through nineteen specialist committees drawn from the CLLS's membership, who meet regularly to discuss pending legislation, law reform and practice issues in their fields. This response has been prepared by the CLLS Litigation Committee (the "Committee") and addresses issues raised in the Ministry of Justice's consultation paper entitled *Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's proposals* (the "Consultation Paper"). The membership of the Committee is set out in the Schedule to this response.

The Committee is concerned primarily with commercial litigation. Its response below does not therefore address all the issues raised by the Paper but only those that affect the commercial sphere.

Fixed costs in commercial cases

The Committee is wholly unpersuaded by the arguments put forward by Sir Rupert Jackson or in the Consultation Paper to justify the imposition of fixed recoverable costs in commercial litigation. The Committee agrees that a " 'one size fits all' approach does not work for all types of claim" (pages 3-4 of the Consultation Paper). For the reasons set out below, commercial cases raise very different challenges in terms of costs from those raised by personal injury cases, the vast majority of which are funded by no win, no fee conditional fee agreements and are successful. In the Committee's view, there should be no extension of fixed recoverable costs to commercial litigation, certainly not beyond the areas contemplated by the Consultation Paper.

The English legal system (unlike, for example, the US system) has not historically regarded the cost of litigation as simply another cost of doing business that must be borne regardless of the rights and wrongs of the litigation. Commercial litigation does not represent one of a number of possible new business opportunities that a party may choose to pursue or not as it sees fit in order to make a profit. Commercial litigation commonly involves enforcing an agreement or seeking damages caused by the infringement of a party's existing rights. Litigation is seldom optional or undertaken with enthusiasm. The ability of a party to enforce its rights is, however, fundamental to trade and commerce, and should not be undermined.

The rationale behind costs shifting in English litigation is that a litigant, whether a claimant or a defendant, who is compelled to have recourse to the courts to vindicate its rights should not be left out of pocket as a result of being forced into litigation. If a claimant has a good claim that a defendant refuses to acknowledge, the claimant should recover judgment both for the amount of the claim and also for the additional costs that the defendant has forced on the claimant in order to secure judgment. Similarly, if a defendant is not indebted to a claimant, the defendant should be compensated for the costs imposed on it by being taken, wrongly, to court.

As a result, the Committee considers that a strong justification is required in order to depart from the current position, which attempts (albeit in a manner that could be improved) to compensate a successful litigant for the actual costs of the litigation it was forced to conduct. Fixed costs do not seek to do provide recompense for actual costs but, instead, allocate a policy-driven figure for costs that, most likely, will bear little direct relation to a party's actual costs.

The principal justification for fixed recoverable costs put forward in the Consultation Paper is the need to control the costs of litigation and to ensure that they are "proportionate" (eg pages 6 (paragraph 1.3), 10 (paragraph 1.2) and 11 (paragraphs 2.4 and 2.7)). However, in a commercial context fixed recoverable costs will do neither of these things. As the Paper accepts, fixed recoverable costs affect only the costs that a successful party can recover from the unsuccessful party. The actual costs a party must incur in commercial litigation are dictated by the steps required by the CPR to take a case to trial, not by the costs it might expect to recover. Removing the additional costs introduced by costs budgeting, determining in advance the level of recoverable costs or even altering the costs recovery regime in other ways will do nothing to control the costs of litigation. The cost of litigation will only be controlled if the underlying steps required by the CPR are addressed. The fundamental premise behind fixed costs is therefore misplaced.

In this regard, the Committee notes that the Consultation Paper concedes that the German legal system keeps costs down by limiting disclosure and oral evidence, and adds that the German system only allows recoverable costs according to a scale (page 10, footnote 16). However, in commercial cases in Germany, lawyers seldom charge

their clients according to the scale of recoverable costs, leading to a disparity between actual costs and recoverable costs. There is no reason to believe that the position would be any different in England. Further, in limiting the procedural steps required by the parties, the German legal system places significantly greater emphasis on the judge to direct a case. To enable this to happen, Germany has 24 professional judges per 100,000 of population whereas England & Wales only has 3 (Council of Europe, *European judicial systems: Efficiency and quality of justice*, CEPEJ Studies No. 26, page 103). The average number of professional judges per 100,000 of population in the countries covered by the Council of Europe's survey is 22; on this measure, England and Wales ranks 48th and last of the jurisdictions surveyed.

The other justification for fixed recoverable costs offered in the Consultation Paper is predictability, though this largely concerns the unsuccessful party's ability to predict what it will have to pay by way of costs if it loses the case. Predictability may be desirable, but it does not, in the Committee's view, begin to justify fixed recoverable costs. Solicitors are, in the main, able to make a reasonably accurate estimate of what recoverable costs are likely to be in a case. Fixed recoverable costs are not necessary to provide a sufficient level of predictability.

More fundamentally, the primary focus of costs recovery should be on vindicating the rights of the successful party, not of protecting the unsuccessful party. The successful party has been forced by the unsuccessful party (and the requirements of the CPR) to incur costs to secure its rights, and should be compensated for those costs.

Fixed recoverable costs could also have perverse consequences. For example, if a claim of little or no merit will cost £5m (or £100,000) to defeat but fixed recoverable costs will only recoup £1m (or £68,000), the logical step, financially, is for the likely successful party to pay up to £4m (or £32,000) to the other party to settle the claim: the party likely to win will lose that sum come what may, and it will generally be better commercially to buy off the claim at an early stage in order to avoid the need to spend management time dealing with the claim. This could allow litigation to become a form of extortion (except for those rich and principled enough to fight a case regardless of cost). On the other side, a meritorious claim for £5m which, because of the steps required by the CPR, will cost at least that much to run but has fixed recoverable costs of only £1m risks becoming effectively unenforceable.

The Committee also regards the potential to recover actual costs as one of the factors in the international popularity of the English legal system. At a time when the English legal system is facing questions, whether justified or not, as a result of Brexit, the Committee would be highly concerned at any steps, such as fixed recoverable costs, that might reduce the attractiveness of the English legal system and offer encouragement to England's competitors.

Fixed costs could also have the effect of encouraging parties away from the courts and towards arbitration, in which they might expect to recover their actual costs of the dispute.

Lower value cases

If fixed recoverable costs were to be introduced for lower value commercial cases, the Committee considers that the proposals in Chapter 5 of the Paper are too complicated. To allow fixed recoverable costs to provide costs recovery that might at least approximate to actual costs, procedures (including, for example, disclosure) need to be more strictly limited and defined than the Paper proposes. Allocating a case to one of four bands, which could significantly affect the viability of a claim, will inevitably lead to argument and cost, and, as a result, should be avoided. There should be a single band, with prescribed, restricted procedures. This may result in a degree of rough and ready justice, but that is the only way to control costs.

5th June 2019

Schedule

THE CITY OF LONDON LAW SOCIETY
Litigation Committee

Individuals and firms represented on this Committee are as follows:

Simon James (Chairman)	Clifford Chance LLP
Jan-Jaap Baer	Travers Smith LLP
Duncan Black	Fieldfisher LLP
Patrick Boylan	Simmons & Simmons LLP
Jonathan Cotton	Slaughter & May LLP
Andrew Denny	Allen & Overy LLP
Richard Dickman	Pinsent Masons LLP
Angela Dimsdale Gill	Hogan Lovells International LLP
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