Written evidence from TheCityUK

Executive summary
1. TheCityUK submission to the House of Commons Justice Committee inquiry on courts and tribunals fees and charges sets out our members’ views on the court fees regime and its effect on the international competitiveness of the legal services market in England and Wales. These focus on the following points, discussed in more detail in the submission, which the Committee may wish to consider:
   - there needs to a clear recognition that the attractiveness of English law and English courts can be affected by a range of factors. The recently introduced enhanced fees and new proposals for further fees increases have the potential to impact significantly on international parties’ view of both
   - high value commercial dispute resolution is a competitive legal service offered by a number of jurisdictions which also have well-established systems of law and well-respected judiciaries
   - commercial parties have a choice of where to litigate. If they begin to move away from a choice of English jurisdiction, they may also choose a different law to govern their contracts doubly impacting on the long-term competitiveness of the sector. Once that trend is established, it may be difficult to reverse.

Introduction
2. TheCityUK represents the UK-based financial and related professional services industry, including the legal sector. We work on its behalf, producing evidence of its importance to the wider national economy. In the UK, the EU and internationally, we seek to influence policies that drive competitiveness, create jobs and deliver lasting economic growth.

3. As part of that work, TheCityUK liaises with member firms, HM Government and a range of professional bodies to ensure that the UK is best positioned as a leading global centre for the provision of legal services. We have been a key proponent of major initiatives including the “Unlocking Disputes” campaign, the launch of “UK Legal Services Plan for Growth” and the renewed legal services action plan launched in March 2013, “UK Legal Services on the International Stage: Underpinning Growth and Stability”, as well as the Global Law Summit which took place in February 2015.

4. We seek to respond to respond to relevant UK, EU and international developments which have the potential to impact on the international competitiveness – in terms of both opportunities and threats - of the UK legal services sector, including recent Ministry of Justice consultations and this inquiry.

Context
5. Legal services play an important role in the global success of British business and help to offset the UK’s trade in goods deficit. The sector’s trade surplus nearly doubled over the past decade to £3.1bn in 2013. Legal services’ contribution to the economy also increased steadily over the past decade to £22.6bn in 2013, or 1.6% of UK GDP and the sector directly employs over 316,00 people, two thirds of whom are located outside London (source: TheCityUK).

6. London’s success as a centre for commercial disputes is based on a whole series of factors including judicial specialisation in commercial disputes, neutrality and appropriateness of English law for commercial contracts, as well as the costs involved in bringing commercial disputes to the London courts. It is the world’s leading centre for all forms of dispute resolution, whether
litigation, arbitration or mediation, underlined by the fact that 40% of governing law in all global corporate arbitrations is English law and that London is viewed as the leading preferred centre of arbitration (source: Queen Mary University of London).

7. A number of other jurisdictions including Singapore, the US (New York and Delaware), Australia (New South Wales and Victoria) and Dubai are competing with London as commercial dispute centres. This means that particular care needs to be taken when considering proposals that may erode the UK’s international competitiveness.

TheCityUK’s past representation on court fees

8. TheCityUK responded to the Ministry of Justice consultation covering court fees and proposals for reform in January 2014. Our submission stressed that the UK is operating in a competitive landscape. Members expressed concerns related to the potential impact the proposals could have in terms of strengthening the position of competitor jurisdictions and the resultant impact on the UK’s international competitiveness and on the UK’s leading global role as a centre for dispute resolution and legal services.

9. The Government’s response in January 2015 outlined its plans to introduce a set of enhanced fees. In discussing the impact on international competitiveness, it noted respondents’ concern about the potentially damaging impact it may have on high value international litigation. The Ministry of Justice research on “Factors Influencing International Litigants’ Decisions to Bring Commercial Claims to the London Based Courts” was published alongside the Government’s response. It considered a range of factors that impact on the decisions related to how and why parties choose to litigate in London stating, “English law is the prevalent choice of law in commercial transactions because of its quality, certainty and efficiency” as well as “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.”

10. Following the Government’s response to the consultation, the Ministry of Justice introduced a set of enhanced fees which came into effect in March 2015. To illustrate the cost implication of this, TheCityUK has examined the percentage increase in fees for money claim cases with a value of £190,000 and £250,000: these are 622% and 481% respectively.

11. TheCityUK also responded to the Ministry of Justice consultation on further fees proposals in September 2015 which set out proposals to further increase court fees for some claims. We did not agree with the proposal to raise the maximum fee for starting proceedings for the recovery of money from £10,000 to at least £20,000 or to a higher amount and highlighted concerns regarding the further potential impact the new proposal could have on the UK’s international competitiveness.

12. The consultation was published the day after the House of Commons Justice Committee announced its inquiry on courts and tribunals fees and charges and we asked the Government to consider the results of the inquiry in conjunction with submissions to the consultation before making public its response on the further fees proposals.

House of Commons Justice Committee inquiry

13. TheCityUK response to the House of Commons Justice Committee inquiry on courts and tribunals fees and charges includes our views on the specific question posed in relation to the competitiveness of the legal services market in England and Wales in an international context.

14. The set of enhanced fees introduced in March 2015 has already resulted in substantial increases in court fees for some money claims as noted above. We note that the volume of cases,
particularly high value money claims and those issued in the Commercial Court, will be monitored alongside the Ministry of Justice consultation on further fees proposals and the Government will provide an update on its findings when issuing its response.

15. In order to monitor the potential impact of the enhanced fees on case volumes effectively, there must be a concomitant drive to improve the efficacy of existing data-gathering at the Commercial Court. Users of the Commercial Court report low completion of the claim information sheets which seek to gather a range of information including the value of the claim, the country of residence or incorporation of the parties involved and the nature of the dispute, as well as the basis for the Court’s jurisdiction.

16. High value commercial contracts are concerned with a variety of transactions which may take many years to complete. It follows that it may take many years for disputes to arise. If parties begin to insert other governing law clauses in contracts, the impact may not be known for several years. We therefore feel that monitoring the possible impact of enhanced fees from March 2015 to, for example, December 2015 is insufficient.

Courts fees and international competitiveness
17. It is too early to build a robust evidence base on which to assess the potential impact the enhanced fees regime has had on the competitiveness of the legal services market in England and Wales. However, when assessing the potential impact of the court fees regime on the competitiveness of the legal services market in England and Wales, particularly in an international context, the Committee may wish to consider the following points.

18. The Government’s rationale for reform in the Ministry of Justice consultation on further fees proposals notes that many higher value claims will “involve large multi-national organisations or wealthy individuals” and references that these are parties who have a choice of jurisdiction in terms of where to handle disputes.

19. Research from the Ministry of Justice cited earlier found that 61% of respondents to the online survey who commented on the impact of court fees on the decision to litigate in England suggested the proposed increase in court fees, which were subsequently introduced in March 2015, could have a detrimental impact on the English litigation market. Concerns were expressed that the proposed increase might lead to foreign litigants choosing alternative jurisdictions in which to litigate. The Ministry of Justice consultation on further fees proposals sought to dispel these fears stating “these views were based on perceptions and no evidence could be produced to support them.”

20. The same Ministry of Justice research noted that 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. 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 or recommend English law in less than a third of their transactions. We would also draw attention to the fact that 62% of respondents to the research who had agreed upon or recommended a choice of English law had done so on a case-by-case basis.

21. There is therefore no room for complacency when considering the attractiveness of English law given the use of English law is already exposed to a range of competing governing laws in a significant number of cases. The research also found that those who would less frequently recommend or agree on a choice of English law were parties based outside the UK. If parties begin to move away from a choice of English law to govern their contracts, they may also choose
a different jurisdiction to resolve disputes. This has potential long term significance for revenues generated by the Commercial Court when, according to Ministry of Justice data, 81% of Commercial Court claims involved at least one foreign party in 2012-2013.

22. A move away from English law could also have a detrimental impact on the revenues of UK-based legal firms, who experienced their strongest rate of growth in six years during 2013, increasing turnover by 8.4% in 2013 to a record £30.6bn (source: TheCityUK). This is further evidenced by the PwC 2013 International Arbitration Survey which found that selecting the location of counsel in the same jurisdiction as the governing law of the contract is cited ‘very important/somewhat important’ by 75% of respondents. With English law as the governing law of choice in 40% of global corporate arbitrations (source: Queen Mary University of London), the value of the courts in underpinning arbitration from an enforcement perspective is clear and a further important factor to consider.

23. An increase to a maximum fee of at least £20,000 as proposed in the Ministry of Justice consultation on further fees proposals would result in fee increases of over 100% for some money claims since March 2015 and in fees in England and Wales being significantly more expensive than a number of key competitor jurisdictions. The Ministry of Justice commissioned study “Competitiveness of fees charged for Commercial Court Services: An overview of selected jurisdictions” compared fees across a number of jurisdictions including England and Wales. Assuming a maximum fee of £20,000 in England and Wales, the table below illustrates the percentage increase in fees borne by parties when making a money claim of over £500,000 in England and Wales compared to the jurisdictions listed in the study.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Cost (£)</th>
<th>Percentage increase (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Singapore</td>
<td>5,500</td>
<td>264</td>
</tr>
<tr>
<td>New York Federal Court</td>
<td>248</td>
<td>7965</td>
</tr>
<tr>
<td>New York State Court</td>
<td>208</td>
<td>9515</td>
</tr>
<tr>
<td>Delaware Superior Court</td>
<td>207</td>
<td>9562</td>
</tr>
<tr>
<td>Delaware Court of Chancery</td>
<td>223</td>
<td>8869</td>
</tr>
<tr>
<td>Australia Federal Court</td>
<td>8,776</td>
<td>128</td>
</tr>
<tr>
<td>Australia Supreme Court (New South Wales)</td>
<td>7,631</td>
<td>162</td>
</tr>
<tr>
<td>Dubai Ordinary Courts</td>
<td>5,054</td>
<td>296</td>
</tr>
<tr>
<td>Dubai International Financial Centre</td>
<td>14,845</td>
<td>35</td>
</tr>
</tbody>
</table>

24. This is further evidence that an increase to at least £20,000 would significantly impact on parties’ view of England and Wales in terms of value for money to which we have already referred. It should also be noted that in England and Wales fees are payable upfront in all claims. This includes those that do not proceed to a trial, which represented 95% of claims made in the Commercial Court in 2012. Furthermore, the existing and proposed fees increases do not include any scheme that allows remissions or rebates if a case is settled quickly therefore making limited use of the Court’s facilities which again erodes parties’ perception of value for money.

25. We believe the proposal within the Ministry of Justice consultation on further fees proposals that there be no maximum fee for commencing a money claim could see fees amount to millions of pounds. This is likely to be a significant deterrent to making a claim in an English law court as it impacts on an important component of certainty relating to cost. The consultation document itself states “we recognise that the removal of a maximum fee could lead to very high fees in a small number of very high value claims.”
26. The set of enhanced fees introduced in March 2015 has already contributed to a level of fee income above full cost recovery across the civil courts. Fees raised from the further fees proposals outlined in the consultation are earmarked for other functions of Her Majesty’s Courts and Tribunals Service (HMCTS), including the criminal courts and tribunals.

27. In the event that the Government implements these new proposals, we are concerned that competing jurisdictions will use this to articulate the message that foreign parties litigating in London will be exposed to punitive fees which do not contribute to the ongoing development of the courts predominantly used by those parties. There is a recognised principle in international trade that governments should not inhibit trade by levying charges for services exceeding the cost of the service (see, for example, Article VIII of the General Agreement on Tariffs and Trade – GATT, 1994). The UK is departing from this principle through the enhanced court fees already being levied: it should not threaten the standing of UK international legal services by going further.

28. Any proposed increase in fees could also serve to undermine ongoing efforts to maintain and enhance the UK’s leading global role as a centre for dispute resolution as evidenced, for example, by the opening the Rolls Building and creating a specialist Financial List. We strongly support these developments. It could also, over time, negatively impact on the findings in the World Bank Group’s annual “Doing Business” report, where the UK currently ranks 36th in terms of the cost, time and procedures involved in enforcing a commercial contract in the courts.

Conclusion
29. We therefore believe the current and future proposed courts fees regime has the potential to significantly impact on the competitiveness of the legal services market in England and Wales, particularly in an international context. This impact could begin to undermine both the wider UK’s legal services market, including the courts and legal services firms across the UK, and its positive contribution to the balance of trade. Once that trend is established, it may be difficult to reverse.

30 September 2015