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— GUEST EDITORIAL —

GCS THINK RIGHT ABOUT THE PRICE

by JEFFREY FORBES

The economic downturn has made GC in Europe more price-sensitive than ever. This is not necessarily a new trend. But what is new this time is how the pricing debate has opened a Pandora's box of management issues related to fixed-price billing that are affecting both in-house counsel and their external law firms.

Typically in a downturn, discounts on hourly fees become more common, as departments with reduced budgets try to accomplish more with less, or law firms with excess capacity become more flexible so they can keep people busy. But now when GCs talk of the price they want to pay for external legal services, they actually mean the total cost.

In some jurisdictions in Europe, the market has done what the ACC Value Challenge could only dream of. For example, I recently surveyed GC at global companies in

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European General Counsel hold urgent conferences to address the pricing crisis



The debate over new forms of pricing between general counsel and law firms shows no signs of abating as the New Year 2010 gets underway. Two conferences dedicated to the subject in London and Brussels are due to take place over the next few months with several hundred general counsel expected to attend.

The first, in London February 22-23rd, is entitled 'Legal Spend Management' and features one of the world's best known in-house lawyers, Tom Sagar, general counsel of DuPont and pioneer of the convergence movement known as the Dupont Wheel.

The second, driven by pioneering General Counsel focusing on legal-to-business alignment, is entitled Corporate Counsel Exchange and takes place in Brussels April 18-20th. An advance survey of delegates has already shown that 87% wish to reduce their legal spending budgets this year. Both conferences reinforce the move, driven by in-house lawyers in the USA, to move from the billable hour method of charging to fixed fees and other more certain payment structures.

LEGAL SPEND MANAGEMENT, LONDON, FEBRUARY 22-23RD

Chaired by Eversheds International partner Paul Smith, the London conference plans two days of talks around budgets and related issues. Mr. Sagar's intervention will be eagerly awaited given that the recent economic conditions have forced many in house legal teams to reassess their approach to legal spending. Indeed, many are having to completely rethink their approach to budgeting, reporting and resource deployment.

"The current climate has validated our long held belief that law departments

and their suppliers who embrace strategic partnering relationships are best positioned to navigate these troubling economic times, he told *European GC*.

"Sacrifice for the common good by both parties and investing for the future are the hallmarks of these trusted partner relationships and our network of external providers. Increased reliance upon creative staffing and alternative fee arrangements are critical tools and approaches that will enable us to succeed."

Furthermore he expects the new regime to continue for some time yet. Mr. Sagar explained: "The fees charged for many (not

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About the editor: Patrick Wilkins

Patrick Wilkins is the founder, editor and publisher of the award-winning the European Lawyer magazine from its launch in 2000 until 2009 when the publication passed into new hands. A former British national newspaper journalist, he began to specialise in the reporting

of law and legal issues in 1994, becoming in 1999 executive editor of Commercial Lawyer. The European Lawyer won the prestigious Queen's Award for Export in Great Britain in 2006.

patrickwilkins@europeangc.com

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all) services rendered cannot possibly be sustainable at the rate of increase we have experienced over the recent past. Unfortunately, cost is one of those few metrics that a legal department is measured against by the CEO. We all need to articulate better our value proposition so that we collectively (both in-house and outside lawyers) are not singularly viewed by the client. That is, we bring more to the table than simply settling cases and spending money in defence of our respective Companies. Becoming better bottom-line lawyers and helping our businesses capture growth opportunities is where we should focus our efforts more intently. I expect Europe will not differ dramatically from the US in this respect."

Another speaker, Trevor Faure, general counsel of auditing firm PwC, will be presenting his recent book, *The Smarter Legal Model*, a practical "toolbox" of complementary methodologies which have been applied on a multi-million dollar scale and proven to increase legal coverage by maximising individual potential, reduce legal costs, improve both compliance and client satisfaction at the same time, and replace the traditional law firm-client tension with a mutually-profitable partnership.

"The legal profession is under fundamental examination as result of the unprecedented impacts of globalisation: financial pressures, trans-territorial laws and instantaneous global communications amongst others. The imperatives to perform as both commercial and compliance leaders have never been higher," Mr. Faure said.

The Smarter Legal Model applies world-class business and behavioural principles such as six sigma, return on invested capital, zero-sum game theory and neuro-linguistic programming to the practice of law for the first

time with tangible results. Recently reported benefits of the Model include a 27% reduction in legal fees, a 60% reduction in litigation volume and demonstrable improvements in client satisfaction.

"We all need to bring more to the table than simply settling cases and spending money in defence of our respective companies. Becoming better bottom-line lawyers and helping our businesses capture growth opportunities is where we should focus our efforts... Europe will not differ dramatically from the US in this respect."

The book's message will be of interest to other general counsel since is now being taught at Harvard Law School as part of its Program on the Legal Profession, which in addition formed the core of two Harvard Law School case studies in 2009.

CORPORATE COUNSEL EXCHANGE, BRUSSELS APRIL 18-20TH

Following on from its success in The Hague, Netherlands, last October – which united more than 150 general counsel, law firm partners, and solution providers to the profession – Corporate Counsel Exchange has not even waited a full year before resurfacing to take a second bite at the 'pricing' cherry. Such was the success, organisers IQPC Exchange immediately decided on a twice-yearly format.

Delegates who spent two days in The Hague examining the relationship crisis, budget cuts and streamlining of in-house teams, are already registering for the Brussels Conference in April to hear speakers including Dr Thomas Werlen, of pharmaceutical giant Novartis. Dr. Werlen will be discussing cost cutting initiatives and new ways for GC's to demonstrate value, improve productivity and maintain a good quality of service on restricted and diminishing budgets. Through a

panel discussion and three case studies, the session will give practical advice on spend management methods and effective implementation. Enhanced EU regulations that have arisen due to the economy also present financial challenges. Mark Elliott, Global General Counsel, Bank of America-Merrill Lynch Global Commodities will be presenting on this topic and will discuss how to internalise upcoming regulations in the legal department. Malcolm Wood, General Counsel, Standard Life Insurance, will be presenting on legal-to-business alignment, a strategy that will be instrumental

to the future of the legal department. Delegates will also hear from Robin Saphra, General Counsel and Commercial and Regulatory Director, Colt Telecom Group and Dominique Golsong, Chief Legal Officer EMEA, Goodyear Dunlop.

The key differentiators of the Corporate Counsel Exchange are its one-on-one meetings between delegates and solution providers, the exclusively senior delegation, and special sessions entitled 'BrainWeave' which focus on in-depth knowledge absorption in 50 minute periods between the main presentations and debates. They are performed 'in the round' style and encourage audience participation.

At the first conference in The Hague most delegates reported highly-favourable reactions, particularly as so much was learned in a short period of time. Many of the sessions were particularly animated with debate often originating from the floor. And as always, networking opportunities were frequent given that delegates were housed in the same hotel.

For information on Corporate Counsel Exchange 2010, please contact Kate Bentley +44 (0) 207 368 9340. exchangeinfo@iqpc.com

When costs count, joining parties in arbitration makes sound financial sense...

IN
SIGHT™

By Jon Tweedale

One of the leading disadvantages of international arbitration is the perceived inability to join to arbitration proceedings to an individual, or entity, which is not party to the relevant arbitration agreement. It follows from the very nature of arbitration that as a general rule a third party cannot be compelled to participate. Consent is in practice unlikely to be forthcoming; human nature being what it is: Once a dispute has arisen parties often refuse to agree on anything, almost as a matter of principle.

A different but closely related difficulty, also arising from the contractual basis of arbitration, is the potential inability to consolidate into one set of arbitration proceedings disputes arising under two different contracts (between slightly different parties), even where they both contain arbitration clauses and relate to the same commercial transaction, so that the same or similar issues of fact and law arise.

The inability to join third parties to arbitration proceedings or consolidate proceedings is most likely to arise where there is a chain of contracts (for example, between manufacturer, distributor and customer) or a web of contracts relating to the same underlying commercial matter (for example in a major construction project or project financing). The parties to the related contracts will generally be slightly different, but all will be engaged in the same venture, giving rise to potential cross-claims between the different parties if there are disputes.

The potential disadvantages of not being able to join a third party to proceedings or consolidate them so that there are multiple proceedings rather than a single set are self-evident

- It will cost more – both in legal fees and management time. Evidence relating to the same or similar issues might have to be presented to two different tribunals to which

the same background facts must be explained. Witnesses will give evidence twice and the disclosure process will be duplicated. If separate arbitration proceedings are pursued because consolidation cannot be achieved, the fees of two tribunals (possibly each composed of different members) must be paid and two advances on costs will have to be paid to the institution(s) administering the arbitration (such as the ICC or LCIA). When a party's own legal fees and disbursements can, in a complex dispute, quickly rise to more than €1 million (before taking into account the potential liability for the costs of the opposition in the event that it loses), the cost of commencing separate proceedings can be prohibitive to all but those with the greatest resources.

- There is a risk of conflicting awards. Consider, for example, a scenario in which A enters into a contract with B to design factory machinery and a separate contract with 'C' to manufacture the machinery. The machinery fails after 6 months causing 'A' substantial losses. B claims the failure resulted from a manufacturing defect. C claims that the failure was the result of a design defect. If the contract with B contains an arbitration clause but the contract with C does not, A may generally only join C to any arbitration proceedings brought against B if C consents. Similarly, even if the contracts with B and C both contain arbitration clauses, unless those clauses expressly provide for consolidation, claims against B and C might have to be pursued in separate sets of arbitration proceedings. There is then the possibility that A pursues claims against B, culminating in an arbitration award concluding that the equipment failure was the result of a manufacturing defect, only to subsequently (or simultaneously) commence separate court or arbitration proceedings against C which result in a finding that the failure was caused by a design defect. Arbitration awards do not, as a rule, create binding precedents.

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SOLUTION 1: PREVENTION

To address potential difficulties relating to joinder or consolidation, the best approach is prevention rather than cure.

The best way of ensuring that an individual or entity can be joined to any future arbitration proceedings, or that future proceedings can be consolidated, is to incorporate appropriate consolidation/joinder clauses into related commercial contracts when drafting them. There are a number of ways of achieving this. When related agreements are being drafted at the same time (for example, in the context of a project financing),

the arbitration clauses in each contract can be drafted to provide that each party consents to being joined to proceedings arising from a dispute under the related contracts and/or to the consolidation of any arbitration arising under the contract with proceedings arising under the related contracts. Alternatively, a free-standing 'umbrella' arbitration agreement can be drafted and signed by all parties. This may be suitable where, for example, related contracts come into existence at a later date, possibly as a result of a restructuring of the commercial venture.

Given the obvious and significant

potential merits and benefits of joinder and consolidation, parties are far more likely to consent at the outset of a commercial relationship before any dispute has arisen (and each may be either claimant or respondent in any future proceedings). Advice should be sought from an arbitration specialist when drafting such clauses to avoid potential pitfalls. For example, it will generally be sensible to provide that a tribunal has a discretion whether or not to allow consolidation; it may not be appropriate in every case (for example, where few or no similar issues of fact or law arise).

SOLUTION 2: CURE

If a dispute has already arisen and the contracts do not contain joinder or consolidation clauses, what a party seeking joinder/consolidation may do will always depend on the facts and, in particular, the relevant laws (the law of the arbitration agreement, the law of the seat of arbitration, the substantive law of the contract and the law of the State(s) in which any award would likely be enforced may all have relevance, depending upon the context).

The following suggestions are offered:

- Try to persuade the third party to consent to joinder. There is nothing to prevent parties entering into an arbitration agreement after a dispute has arisen. Identify the potential benefits to the third party of being joined. These may include some or all of the reasons why parties agree to arbitrate. In the above scenario, C might be persuaded to consent to being joined as a co-respondent with B if both contracts contain an arbitration clause because it will be able to share the administrative costs of the arbitration (and the cost of the arbitrators' fees) with two other parties (i.e. A and B) rather than only one other party (A) which would be the case if separate arbitrations were pursued.

- Seek legal advice on the substantive laws of the contract/arbitration agreement (and the law of the seat of the arbitration, if different) to discover if they include legislation and legal doctrines which might be used to join a party or consolidate proceedings. These differ from jurisdiction to jurisdiction. For example, in the Netherlands the court sometimes has power to order consolidation even if that is against the wishes of one of the parties (although no such power exists in most other jurisdictions).

In relation to joinder, French law recognises a 'group of companies' doctrine under which it is possible in certain circumstances to join a company to an arbitration if it is a member of a group of companies, one of which is a signatory to the arbitration agreement. There is no equivalent doctrine under US or English law. Under English law, potential doctrines for joining a non-signatory are largely confined to circumstances in which a party is effectively claiming through a signatory, for example, where the relevant agreement containing the arbitration agreement was assigned to the non-signatory the assignee is bound by the arbitration agreement if it wishes to enforce its rights under the agreement. In certain jurisdictions, including the US, there is a doctrine entitling a party to join a non-signatory to an arbitration where the non-signatory controls a signatory which is in substance an alter ego of the non-signatory and to distinguish between the two would allow a fraud or injustice. In such cases the party is said to be entitled to pierce the veil of incorporation to pursue the individual/entity controlling the signatory. In a similar vein, under US law a non-signatory may be joined to arbitral proceedings on the basis of the doctrine of agency (where the signatory entered into the relevant agreement containing

the arbitration agreement on behalf of its principal, even if the principal was undisclosed).

A common theme underlying many of the doctrines is that the non-signatory is treated as expressly or impliedly having agreed to honour the arbitration agreement in circumstances where it has in some way reaped the benefit of rights under the contract containing the agreement. There consequently tends to be a very close connection or relationship between the non-signatory and a signatory (as under the group of companies, agency and alter ego doctrines). It will be in rare circumstances that any theory assists joinder where there is no close connection between the third party and a signatory. The doctrines are therefore of fairly limited application and in many cases represent a 'grey' area of law so that it is difficult to be certain how they would be applied to a particular set of facts. Even where a doctrine may be called upon in an arbitration seated in one jurisdiction, resulting in an award against a party which was a non-signatory (for example, under the group of companies doctrine), it may then not be possible to enforce the award in a jurisdiction that does not recognise it. (It is a requirement of the New York Convention, under which most awards are enforced, that consent to arbitration be in writing.) It would therefore in most cases be a mistake to rely upon any of these doctrines as an alternative to incorporating joinder/consolidation provisions into an arbitration agreement at the time contracts are entered into. They are best regarded as a last resort.

- Take practical steps to mitigate the potential consequences of separate proceedings. For example, if there will be two separate arbitration proceedings and a three arbitrator tribunal in each, a claimant might nominate the same arbitrator in both sets of proceedings (and seek to procure the nomination of the same Chairman in each). In this scenario, it would also be sensible for a claimant to instruct the same law firm to maximise the opportunities to avoid duplication. A request could be made in each arbitral reference to allow the same evidence to be admissible in both arbitrations, including arrangements for witnesses to be cross-examined at the same time (if necessary before both tribunals), but if this request is declined, as a minimum it should be possible to 'cut-and-paste' large sections from the claimant's witness statements and submissions in one arbitration into the equivalent documents in the other.

Arbitration... *(continued)***OVERRIDING CONSIDERATIONS**

Unless potential joinder and consolidation difficulties are identified before a dispute has arisen (ideally at the contract stage), it is likely to be difficult to resolve either. This may mean added cost, management time and frustration, but that must be balanced against the potential benefits of opting for arbitration in the first place. Joinder and consolidation must be considered alongside the advantages and disadvantages of selecting alternative dispute resolution fora, which generally comprise local courts or foreign courts.

In the scenario described above, for example, whilst it might be superficially attractive to give exclusive jurisdiction to the courts of the State in which A is domiciled to avoid joinder/consolidation

issues, if the assets of both B and C were located in another State which did not recognise or enforce judgments rendered by the courts of A's local courts, when it came to enforcement any judgment against B or C would have as much legal significance as a bus timetable. If the State in which the assets were located was party to the New York Convention, however, no such difficulty would arise in enforcing any arbitration award. Obtaining specialist advice at the time the dispute resolution clause is drafted is therefore a worthwhile and valuable investment.

Jon Tweedale is a partner at Addleshaw Goddard LLP
jon.tweedale@addleshawgoddard.com

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Russia, and their number one priority for reducing external legal costs was not to negotiate a discount on rates or cap fees, but to negotiate fixed fees so they could stay within budget.

Of course most GC have always thought about price in terms of total cost they have to pay. It's just that now many are forced to make law firms think along similar lines by getting them to offer a fixed price for their services. But many law firms in Europe still do not fully comprehend how this will change their business – and profession – because they are still budgeting hours to arrive at an estimate of their cost in order to calculate a fixed price.

When it comes to measuring the internal productivity and efficiency of a law firm, evangelists who adopt fixed fees or alternative billing, will argue that keeping track of time is irrelevant for knowledge workers. This is because they believe the work that such professionals do is nonlinear and cannot be measured like an assembly line worker.

Instead, they see wealth being created from the intellectual capital derived from their knowledge workers. They also believe the most important traits of a knowledge worker, such as interpersonal skills, knowledge, creativity, motivation, innovation, desire, risk taking, or passion, don't show up on a traditional cost accounting financial statement.

So instead of measuring productivity by monitoring hours billed, they use a more fuzzy process known as judgment. This is something that all lawyers think they are good at when it comes to giving legal advice to their clients. But many have trouble discerning these knowledge worker traits with members of their own firm.

Law firms that are trying to wean themselves from a billable hour pricing model should not focus on activities, efforts or inputs. Instead they should shift their firm's culture toward things that clients are more concerned with such as results, output and value.

Partners should ask themselves: "Do our clients buy hours and costs or do they buy results and value?" Better still, they should ask their clients this simple question. And if their answer is the latter, then the firm should begin to transition from a cost-plus pricing model to a price-led costing model, and these are two different things.

Of course this is the theory. Putting it into practice is obviously very difficult for many firms. But there are documented cases of

hundreds, perhaps thousands of such firms globally that use this model. Although admittedly you see this more in smaller firms as the bigger ones have been very slow to adopt this, perhaps because they have been able to get away with using a simpler system for so long that was more to their advantage. But now clients are forcing their advisors to assume some of the risk too.

It would seem then that independent firms are better placed to adopt fixed-price billing because they have a smaller ship to turn around. Due to their size, independent firms tend to be less well-established in their operational efficiency and financial reporting systems. However, the international firms have built their infrastructure based on the billable hour which is a historical accounting method and not client-focused.

The challenge then, is for all firms, big or small, independent or global, to change the culture of their firm to focus more on what the client values. This is essentially a marketing issue of the most strategic kind. And here I do not see the international firms in Europe as being that much more advanced than independent firms.

The reason for this is that many international firms have grown in their markets due to more basic forms of marketing such as capacity and bench strength (size), distribution (network of clients and offices) and communications (events and publicity) which only helped to guide the work that was already out there to them.

For the most part they have been very poor at adopting more sophisticated marketing best practices such as implementing client satisfaction surveys, or training, coaching or mentoring associates on how to properly plan and develop business.

Prior to the economic downturn, in some legal jurisdictions in Europe, it was more of a seller's market for legal services.

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KIMBERLEY CLARK'S MARK MAURICE-JONES CUTS THROUGH THE PRICING CRISIS

As 2009 drew to a close it was patently clear that the biggest issue of the economically catastrophic year for companies and banks was that budgets for legal advice would be cut dramatically. At several conferences, notably the Corporate Counsel Exchange in The Hague, Netherlands, general counsel willingly took to the podium to explain to colleagues in the In Crowd how they were facing up to the problems of getting more legal advice for less: sometimes considerably less.

Among them was Mark Maurice-Jones, chief counsel (EMEA) of Kimberley Clark (Europe), the global paper products corporation, manufacturing and selling everything from tissues to infant napkins. He talked to European GC, and his experiences will undoubtedly be useful to others as they find the instruction to act similarly in 2010.

You've been one of the many companies around the world making significant cuts both on the inside and the outside of the company in terms of legal cover and advice. How has this been executed?

We started on the inside after quite a long period of analysis about what we actually do as a legal department and tried to come up with exactly what value we were adding to the corporation. We broke it down into various functions, and for instance, in a piece of litigation we were able to say comfortably that the legal team added a lot of value. But then on a standard supply contract we were arguably adding less value. At the time, in our UK headquarters in Reigate, Surrey, (UK) we had four lawyers, three paralegals, a patent attorney, and I heard people – particularly in the Hague conference – that you would simply end up outsourcing more if you cut inside your own department. I don't particularly agree with that: we all have a tendency I think to over intellectualise about things and when you do that nothing is ever clear. You have to make a decision what to do and then make the change. So that's what we did once we had been through the objective exercise about what we actually do and the value we added. Obviously we weren't sure about all the ramifications but unless you make the change you're never going to find out.

We spend a lot of time liaising with the business that employed us, making sure that they understood the risk we were taking in cutting within, and we spent three or four months coming up with a detailed action plan that spelled out what we could get rid of as an in-house service. For me perhaps the most important part of this process was to involve the team to avoid negativity. Right from the beginning everyone knew that we would reduce the headcount and therefore there were no surprises when we eventually arrived at who would stay and who would go.

Was it a shock when you were told that you had to reduce your costs?

Well yes, but not a surprise. Kimberley Clark operates in a very competitive environment and we were, I like to put it, challenged by the European business to spend less money, as was going on in all other departments. They didn't exactly specify by what amount, but as things worked out, we eventually reduced our costs by just under 30%.

But reducing by a couple of people wouldn't achieve that surely? The greatest savings would have to come via external counsel which you, like every other multinational corporation, have to resort to frequently?

Well no. But by way of explanation we have never outsourced work unless we simply didn't have the expertise inside. In M & A, litigation, and so on we would go to external counsel and that would be right across Europe, the Middle East and Africa. And I guess the problem

was, and why we had to then start looking here to cut, was that with external counsel you always get surprised by the costs, particularly, in litigation matters. When you have that it is difficult to control what you are spending so we have had to get much tougher with law firms.

Just so everyone understands how you fit in with buyers, what are outside counsel costing you approximately?

Globally we spend huge amounts on external counsel. In Europe in any year we are spending up to \$2million, but we have years where we spend significantly more than that. That excludes patent work which is now managed out of the United States.

When you say you have got a lot tougher on external counsel what do you mean by that exactly?

Firstly what we've done is ask for discounts from our regular suppliers. We've achieved somewhere in the region of 20% or so on anything charged on the billable hour. We occasionally go into fixed fees and I have to say, even though sometimes it's a bit of a battle, we are looking more and more into this method of pricing. Secondly what we have done is worked with our purchasing/procurement department to put certain jobs out to tender. When we've had a significant piece of work we will use this procurement function. It'll go out to three, four, or five firms inviting offers. Personally I think this is something we are going to hear a lot more of. We have been very satisfied with the results so far of work going out to tender. I have been amazed at how law firms can offer so much variation on how they see the value of a job since they all get the same job specification on the Request for Proposal that I compose with our purchasing people. I've seen responses where one firm will quote almost double that of another. So for me we have something for the future in this method of buying in legal advice.

Indeed: which would make your views on where exactly we are going on these pricing and relationship issues now that the recession appears to be abating. Do you see things going back to normal, or are we, as the Association of Corporate Counsel in the United States is suggesting, at a watershed?

From my point of view we will definitely be taking a different approach to law firms from now on with costs. We have to go the way of the business we represent. Kimberley Clark will continue to operate in a very tough environment, so we in the legal department have to also because, like every other department, we will be judged on costs. These pressures are not going to go away so I have to do the best I can to keep them under control. I really doubt if things will return to normal where legal spend happened to be what it cost, no questions asked. Because from where I sit as an in-house lawyer I just don't see, however hard I try, how many partners in law firms can justify the huge profits they take from their firms along with the generous salaries they take monthly. You've got partners in some firms earning over the year close to £1m. This is more than some chief executives in many sizeable companies. It is simply not justifiable. They bear no relation to what other people in parts of industry earn and are not justifiable. Therefore I think there is room for us, buying these legal services, to make them more competitive and push for further discounts. Obviously in some of the more esoteric areas such as securitizations there are only a few lawyers who do it, so they will always be able to command big fees. But a lot of what we do in Europe is fairly routine in nature and my guess is that there will be a whole range of law firms who can do it. Therefore they are going to have to look very closely indeed at the way they price this. We just can't go on judging the value of legal advice on the time people spend doing it. This doesn't make sense: everyone knows from their schooldays onwards that some work quicker than others and still arrive at the same result. It's just nonsense to base everything on the time spent doing it.

LITIGATION: A THIRD WAY?

Litigation is almost always costly and time-consuming. But there are alternatives: Why not get a third party to assume all or some of the risk? NINA HALL, Director of London-based Global Arbitration Litigation Services explains

In this new area of litigation management and financing, I often get asked to explain in basic terms what is third party litigation funding and why should in-house counsel consider it? The answer to the first part of the question – what is it – is simple. It is any situation where someone other than the claimant is funding the claimant's costs.

Most reading this short introduction into this topic will already have identified situations within past experience where a third party funded a claim. The three most common are a) where a holding company funds the claim(s) of a subsidiary or b) creditors through insolvency provide the necessary funds for legal action to be taken and/or c) of course the lawyers themselves providing “time equity”. In all cases the third party is “re-paid” their investment from the outcome.

Third party funding is not immune from regulation or controversy. Over the past 2-3 years it has also attracted the interest of the money markets as

a form of high net worth investment. Understanding the financial parameters and attendant regulation is key to the understanding of in-house counsel where for whatever reason “outsourcing” of legal costs or costs risk is being considered.

Take first the example of a holding company funding a subsidiary. This form of third party funding is common but generally unregulated as the holding company is treated as funding business risk rather than providing the funds as part of its business activities. The situation would be different where the holding company funds to receive a “cut” of the outcome. Rather than as a non-recourse loan (or indeed inter-company loan), if the holding company aims to “gain” on the outcome then both tax and regulation will have to be considered.

The main regulatory aspect considered is the application of doctrines that exist in one form or another throughout the world, namely that traditionally the courts of the

developed world have forbidden those funding or prosecuting a claim to have an interest (financial or otherwise) in the outcome of the claim. The bar on such activity is driven by public policy desires to keep matters before the courts immune from behind-the-scenes factors that may influence the behaviour of the claimant before them (or its representation).

In the case of insolvency, there has been a pragmatic exception. Insolvency practitioners have been able to borrow to fund recoveries that in many circumstances should benefit the insolvent company's creditors (unpaid invoices, for example may have driven the company into insolvency in the first place).

Lawyers and contingency fees is the third example, and this area is rife with professional and statutory regulation. Any counsel reviewing this as a possibility to transfer some or all of the costs risk ought, in my view, also seek independent advice on the suggested retainer agreement such is

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INFORMATION REQUIRED FOR ANY APPLICATION FOR THIRD PARTY FUNDING & POINTS TO NOTE

TYPE	INFORMATION	NOTES
THE CLAIM	Is there an opinion on the case from outside counsel on all three key elements of the claim, namely the nature of the legal obligations governing a) liability b) causation and c) loss? Also any advice on risk of counterclaims or set-off?	The issue of “did the breach cause the loss?” is often overlooked. Do not underestimate the importance of being able to prove loss/damage and have legal advice to back that up. Absorbed opinions on liability risk should be a focus but by no means the main focus of any case assessment by in-house counsel prior to any out-sourcing of litigation risk.
THE QUANTUM	Quantum must be examined very precisely. What is recoverable as a matter of law and fact may differ depending on the legal matrix governing this area. Factual support in the form of expert opinion is always required.	The fact based support eg accountants reports / forensic support may often be available to in-house counsel “in-house” and this option for compilation and assessment of information to support the quantum figures put forward should be explored by in-house counsel.
THE DEFENDANT	All investors will want to know as much as possible about the Defendant and the likelihood of recovery.	It is important for in-house counsel to collect as much information on the defendant as possible and/or undertake a review of defendant assets.
THE CLAIMANT	Similarly an investor will want to know about the claimant and the commercial relationship with the defendant. Any case with high prospects of settlement is more interesting to an investor.	Before approaching an investor, in-house counsel should seek instructions on whether the claim should be assigned / sold to the investor and/or what commercial relationship, if any, needs preserving with the defendant.
THE COMMERCIAL TERMS	The terms will vary depending on the nature of the deal. It is best to go into the negotiation with an open mind and a realistic attitude to what risks are being off-loaded. Claimants should not underestimate the value of having a third party who was less “involved” in the commercial relationship with the defendant taking on some if not all of the management burden.	At all times in-house counsel and/or Claimant's owners must be aware of the risks involved in litigation. There is very rarely a guarantee of winning at trial in any jurisdiction.

EUROPEAN GC

EDITOR
Patrick Wilkins

SUB EDITOR
Richard Dinnick

CONTACT
www.europeangc.com
patrickwilkins@europeangc.com

DESIGN AND LAYOUT
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LITIGATION... (continued)

the minefield of regulation (and of course costs risks where matters do go astray due to professional negligence or other factors in this risky business). In all three examples, the theme of regulation and public policy consideration will occur.

So turn now to the "new market" of third party funding as a financial investment. The regulatory and public policy "audit" that any in-house counsel should insist upon related to the jurisdiction of the claim under consideration for funding remains. However, in addition "market terms" have begun to appear. The expectation of the hedge funds now involved in this area is high risk high return. Cases of 20/80% split of outcome are not unusual. Funding of claims below \$5m in perceived quantum value is rare and the "up-front" cost to both the claimant company and the interested fund are high. The case will be thoroughly reviewed and quantum and recoverability analysed in depth. No claim of course will be reviewed at the expense of the broker/fund/ company of course unless the legal assessment of liability is as definitive as it can be. The example of the unpaid



Nina Hall
Director,
Global Arbitration
Litigation Services
hall@globalarbitration
litigationservices.com

invoices for goods delivered is a useful one. Immediately interesting to the market but a high quantum is still a threshold test and high returns are still demanded where the mere risk of a bizarre counterclaim (it can happen), or difficult recovery remains. The area can be a minefield for in-house counsel charged with the review of a possible funding mandate. The commercial decision to out-source cost or cost-risk has of course being taken but finding a co-venturer funder of a type permitted by regulation that is prepared to enter into negotiations where all fairly understand the value of litigation risk(s) is not easy. That said the financial markets are interested. It is an area where terms still can be fluidly negotiated on a bespoke basis and at the end of the day, in theory, all benefit. The company gets some money back rather than none and the funder can go on and provide the service to others in a similar situation.

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