Yet another litigation review cannot paper over the cracks

So, yet another review of the civil litigation system. This time it is into costs and it is going to be 'fundamental'. On the face of it, Lord Justice Jackson's brief is wide-ranging. He is to look at all civil litigation from fast track to mega-case, taking into account views on case management, conditional fee arrangements, third-party funding, cost regimes in other jurisdictions, costs shifting rules and more. The review, we are told, is the judiciary's response to the failure of the Woolf reforms to control the cost of civil justice. Do we, or should we, have any realistic hope that by 31 December 2009 Jackson and his colleagues will have happened upon the key to low-cost proportionate civil justice for all?

We keep coming back to a few consistent themes. First, with the best will in the world, complex, high-value litigation is never going to come cheap. You only need to read the recent *Digicel* decision on e-disclosure to appreciate the cost implications for large-scale commercial litigation. Similarly, the availability of witness statements marked up with hypertext links to the electronic bundles makes eminent sense in a lengthy trial – but at a cost. Second, how come, despite varied attempts to change the rules and behaviour of the parties and judiciary, not that much seems to have changed? We still have unmeritorious cases that run on for too long and cases that are unnecessarily and disproportionably expensive. Third, does it make sense to come up with the same solutions for all civil litigation such that perhaps the answer is to abolish the English Costs Rule? Finally, how can we maintain the reputation of the English courts as an attractive forum for dispute resolution?

Courtesy of Lord Woolf, we have a wide range of rules and judicial discretion built into the existing civil litigation system such that the judiciary can stop disproportionate behaviour and expense. Backed by the Court of Appeal, particularly on summary applications, there is no reason why unmeritorious claims should be allowed to grind on with the attendant disproportionate costs and waste of resources. We are waiting to see what impact the pilot of the Long Trials Working Party in the Commercial Court has on case management going forward, but it is clear that with greater judicial involvement from the beginning of proceedings, a tighter control of the conduct of even complex cases is possible within the current system. We do not need radical reform to police litigation. We do need more judicial resources and a cultural shift in our courts.

Relevant to this is the example of the German courts. Jackson will be looking at the costs rules in other jurisdictions, of which Germany is an interesting example. As the Forum of Insurance Lawyers has explained in its briefing paper addressing Jackson's review, the approach of the German system is heavily reliant on fixed costs, and the cost of litigation is much lower than in England and Wales. There are a number of differences in the systems overall – for example, in Germany there is no pre-trial disclosure. Most notably, it is believed that there are 10 times more judges per capita in Germany than in England and Wales. In general, German lawyers spend less time and German judges more time on cases in the court system. The key to the German system seems, therefore, to be greater commitment to central funding of the system. Wouldn't we expect to see radical changes in behaviour and cost in our system if we had 10 times more judges per capita than we currently have? Isn't this far more likely to impact the system helpfully than, say, abolishing the English Costs Rule or encouraging an expansion of third-party funding?

'We do not need radical reform to police litigation. We do need more judicial resources and a cultural shift in our courts'

As practitioners, how can we help maintain the reputation of the English Courts as an attractive forum for disputes resolution? We start with an advantage: our courts are recognised as providing reasoned, reliable adjudication of commercial disputes without the uncertainties surrounding jury trials. While this may come at an increased cost, I have yet to come across a client who, provided with a realistic view of the merits of their position and a transparent estimate of costs, didn't see the advantage of our system. As ever, bad practice can lead to bad reform.

Clare Canning is a partner in the litigation group at Mayer Brown.

Editor's blog

legalweek.com/community

Private equity – everything's all right, honest

Having taken a decade to fall head-over-heels in love with private equity (PE), at least no-one could accuse City law firms of dumping their beloved at the first sign of trouble. Just as well as there's no shortage of strife in private equity land currently, with Candover's listed owner this week delivering results so dire that questions have been raised about its survival. That one of the UK's top PE brands should find itself in such a position would have until recently been wildly improbable – credit crunch or not. But after a week in which a string of investments were heavily written down and Candover Investments announced redundancies and the possible closure of its Asian and Eastern European operations, the odds have swung in the direction of the unlikely.

To be fair, the industry view is that Candover is very unlikely to pursue run-off, though – worryingly for key advisers like Clifford Chance (CC) – some believe it is set to refocus as a smaller operation.

But the reasons for such pressure on the industry is obvious. With cheap debt evaporating, the ability to make investments has been crippled, while options for exits in a depressed market are equally scarce. This is compounded by hard-to-manage debt on portfolio companies and investors, not getting their expected returns, that have in some cases struggled to live up to funding commitments.

'The refrain that the industry does its best deals in bad markets is misleading'

Likewise, many believe the PE universe has been swelled beyond sustainability by a decade of easy credit, with research by Boston Consulting Group suggesting the industry is set to contract substantially. Nevertheless, City law firms maintain that this is still a good sector, understandably given their heavy investment of recent years. After all, some activity is guaranteed as portfolio companies are restructured, investors targeting distressed debt enter the market and depressed share prices allow buyout firms to start buying.

There is much to be said for this view. The industry has grown too large, too sophisticated and too influential to wilt away. And with banks set to become more regulated and risk-averse in future, there will be a place for PE. There has already been evidence of such renewed activity in recent weeks, such as the restructuring of the debt of Ferretti, 3i's acquisition of its 3i Quoted PE fund and Oaktree's investment in Countrywide.

Yet the mood of forced optimism among PE lawyers isn't entirely convincing. For a start, the much-repeated refrain from buyout houses that the industry has typically done its best deals in bad markets is true but misleading. Recessions aren't typically accompanied by chronic credit shortages. Until there is substantive improvement of credit availability for new deals, such acquirers will be forced to sit on the sidelines – a fact underlined by recent news that Allen & Overy is downsizing its leveraged finance team as part of its partnership restructuring.

And if the buyout industry is set to go through a clear-out before the hardier players re-establish themselves, it seems just as likely some law firms that rushed to get a piece of the buyout market will go through a similar weeding-out process. Even some of the stronger advisers in PE like CC could find themselves over-manned. Legal advisers are right to keep the faith with PE but the industry was never for every law firm. And those that remain committed will have to be realistic regarding the challenges ahead.

Posted by Alex Novarese