Challenges of a Multi-Jurisdictional Legal Team

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Organization of a Multi-Jurisdictional Legal Function

- Multi-national groups **organize** their in-house **legal teams** with a view both towards their **overall strategic organization** and level of centralization and also to the **specific functions** that the in-house team provides.

- For example, the largest U.S. multinational General Electric Company, has among its main activities a financial arm which include regulated banks, a large medical devices division, a large material science division and a large power generation division. These businesses require very different legal skills.
Organization of a Multi-Jurisdictional Legal Function

- A different approach organizes the legal functions along geographic lines. This can be more efficient in matching in-house legal skills, usually limited to a single jurisdiction, with the problems of the business unit.
- Advantages are better match of legal skills to local law, less travel expense, closer to local business teams.
- The main Disadvantage is lack of specialization to products and legal problems of a business unit (e.g. FIDIC, ISDA, Cloud Computing).

Organization of a Multi-Jurisdictional Legal Function

- The reporting line of in-house lawyers normally follows this organization. In a decentralized department, in-house lawyers in a division will usually report to division management with a so-called “dotted-line” reporting to the Group General Counsel. This is true whether the divisions are along product or geographic lines or both. This approach assumes that the division management is best able to set the priorities of lawyers working for it and best able to judge their performance.
Organization of a Multi-Jurisdictional Legal Function

- Putting aside the case of U.S. public companies, in which the Sarbanes Oxley Act determines to a certain degree one type of reporting (whistle-blowing) and gives specific functions to the so-called Chief Legal Officer, the decentralized approach can perform poorly in implementing Group compliance objectives.

- Reason: in the absence of a big bounty, whistleblowing on local managers would be career-limiting.

Organization of a Multi-Jurisdictional Legal Function

- Companies also face tradeoffs in selecting a multijurisdictional legal team with the right qualifications. Companies have to choose between the coherency and internal functionality of a team on the one hand and a broad knowledge base well-suited to solve the company’s legal problems on the other hand. Some U.S. companies put the emphasis on coherency and employ many U.S. expatriates as in-house counsel.
Organization of a Multi-Jurisdictional Legal Function

- Ubiquitous use of expatriates facilitates internal communication.
- Costs result from poor foreign language skills, resisting formal training in foreign law, and imposing U.S. legal structures on what amount to purely domestic legal projects in the country they are working. Surveys show corporate legal spending in the U.S. as a percentage of revenue as three times higher than in Continental Europe.

Organization of a Multi-Jurisdictional Legal Function

- Finally, in-house lawyers are not immune from the human tendency to “do what you know” rather than “do what the job demands.” All things being equal, you will probably find in a Dutch company with a Dutch legal team in charge of all of Europe, that the team spends more of its time on Dutch projects than warranted by the underlying business and less on projects for which it feels less qualified.
Legal, Business and Cultural Differences within a Legal Team

Legal Differences

- Let us look however, at how differences in law may directly impact on the in-house legal function. In most countries in Continental Europe, an in-house legal function is not a regulated profession and is indeed inconsistent to a greater or lesser degree with admission as a lawyer and do not under European law enjoy a legal privilege in dealings for their employers, even if they are admitted as lawyers[1].

Legal Differences

- In some European countries, notably Germany and Switzerland, in-house counsel can only be admitted as an attorney if they have a law practice apart from working for an employer. Such lawyers, including myself, are in fact prohibited from appearing in court for their employer. This is a completely different position than under ABA Model Rule of Professional Conduct 1.13, which treats in-house counsel largely like outside lawyers and Rule 5.5 which requires in-house counsel to be admitted in a U.S. jurisdiction (not necessarily the jurisdiction in which the in-house lawyer practices).

Legal Differences

- In comparable industries with only few exceptions, less in-house and more outside resources are dedicated to litigation in Continental Europe than in the United States. Continental Europe, Asia and South America, are also – at least in most sectors[1] - far less litigious than the United States, the UK or Australia. This combination means that in general a European (or Asian) in-house legal team will have principally transactional (or in some cases regulatory) work as opposed to spending most of its efforts and time on litigation, which it to a large extent has to give to outside counsel in any case.

[1] There are clearly exceptions to this rule, e.g. employment law in all of Europe, travel-related disputes in Germany, or collection cases in (Southern) Italy or Brazil.
External Advisors

Make-or-Buy Decision as to Legal Services

- Except for the legal regulation, e.g. representing the company in litigation may be not be permitted for in-house counsel in large court cases in countries like Germany or Switzerland, the question of when and how to employ legal advisors is really not very different from the make-or-buy decision for any other advisors. In an article that many years later won him the Nobel Prize[1], Ronald Coase analyzed the reasons why goods and services are either procured internally by companies or across market.

Make-or-Buy Decision as to Legal Services

- Key to the make-or-buy decision is not just the price and quality of the services which could be bought but also the transaction costs that a firm needs to expend to select, negotiate with and police the quality of outside vendors and protect company trade secrets.
- In terms of cost, a general rule of thumb is that to the extent an in-house lawyer is fully-occupied and replacing equivalent work as to which the in-house lawyer is equally skilled, doing the work in-house saves 200% of the in-house lawyer’s base salary.

Make-or-Buy Decision as to Legal Services

- These assumptions may or may not hold in a particular case. For very specialized work, e.g. outsourcing contracts for specialized IT functions, the core competence concerning the company's business model learned on the job can make the in-house lawyer more efficient than an outside advisor.
Make-or-Buy Decision as to Legal Services

- On the other hand, the legal environment itself is becoming more and more complicated and specialized and in specific areas, the amount of training in-house lawyers would need to do the job themselves – and in light of why many people take subordinate in-house positions, many in-house lawyers do not seek more training no matter how high the return to the company – it is absolutely necessary to use outside consultants in such cases.

Moreover, using outside consultants for peak work avoids an overstuffed (and de-motivated) department if the workflow in a department ebbs. Finally, there is a type of legal department which views its main function as giving instructions to outside advisors.
Selecting Outside Advisors

- At a high level of abstraction, there are two general approaches to selecting legal advisors. One approach is to select the best qualified and cheapest advisor for each particular job. Depending on the size of the project, this can be done in bilateral discussions with the advisors or in a more formal process that is often known as a “beauty contest”.
- The other is to appoint one or more solicitors firms (a so-called panel), with which the company regularly does business.

Selecting Outside Advisors

- Companies have advance agreements as to terms, including discounts and billing practices (e.g. timing of billing, disbursements, reporting) with panel firms and often further relationships, such as training or secondments.
- In general, the panel approach helps reduce the conflict of interest of an external advisor, who profits in the short run by taking decisions that have the effect of running up a large bill in a particular case. To the extent the outside advisor has and is expecting repeated business, such a strategy could backfire. The panel status puts constraints on the advisor.
Selecting Outside Advisors

- On the other side, an opportune approach allows the company not just to select the best advisor for a particular project, who may not happen to practice with a panel firm, but also hold beauty contests, in which different firms compete with each other on price. As in most areas, price competition tends to bring down the costs of legal services. However, in-house departments need to be careful with the fine print, since law firms try to use escape clauses – claiming the project was more complicated or difficult than expected, to charge more than the quoted rate.

Selecting Outside Advisors

- There is another moral hazard to bidding out work opportunistically or fixed-fee billing. In a non-panel firm, law firms can place a “B” team – a less qualified team than their best team on a project, and if they are working on a fixed fee basis, they have an incentive to do so (and to put the “A” team on projects for clients for which they are panel firms. Moreover, although there are ethical constraints, clients sometimes believe that lawyers working on such a basis may have a subtle tendency to choose the path of least resistance and may be less effective advocates than if they were not so constrained.
Selecting Outside Advisors

- Accordingly, there are a number of techniques – consulting with the client once a threshold is reached, collars as opposed to fixed fees, or bonus arrangements, which can be used to strike a balance between the different economic incentives that a client wants the advisers to have.

Selecting Outside Advisors

- Finally, although they have a different legal status than employees, it is important to emphasize the importance of non-economic incentives to motivate and manage advisers.