

How Have In-House Teams Adapted to the Crisis?

Winston & Strawn partner Ben Bruton has seen a number of trends from general counsel clients.

By Ben Bruton

A crisis like COVID-19 presents a highly unusual set of challenges for global business. Whilst, for any business, ensuring the immediate health and safety of its workforce is paramount, a coordinated and considered crisis response strategy is also essential.

Since the World Health Organisation declared COVID-19 a pandemic on 11 March 2020, its effects have been felt across almost every sector. In many organisations, the in-house legal function has been placed under unprecedented pressure as their businesses have sought guidance on a whole range of legal issues and short to long term risk mitigation strategies.

Based on our discussions with our general counsel clients since governments across the world imposed varying lockdown obligations, and also from the type of activity we are seeing from our perspective as a legal services business, a number of trends are emerging.

From a logistical perspective, in-house teams appear to have adapted to the new way of working extremely well. For many years, in-house functions have been challenged to “do more with less” and, therefore, remote management of teams, video-conferencing and effective communication across jurisdictions have become well entrenched as working practices.

There has also been a real focus on checking in on colleagues and supporting each other, recognising that the individual circumstances of remote working, and the challenges it may bring, will vary significantly and, unless actively inquired

about, many of those challenges may go unnoticed by team leaders.

Many of the general counsel we have spoken to have also guided their businesses through the 2008 financial crisis. Similar to 2008, the pandemic has caused financial instability and market upset which has led to defaults in a variety of contractual and payment obligations and, in some cases, litigation.

However, the 2008 financial crisis was triggered by illiquidity and deficiencies in the global financial system itself and, whilst some of the effects will be similar from a litigation trends perspective, the causes and the nature of the pandemic are so different to the 2008 financial crisis that comparisons have limited utility.

There is also a sense that the volume and nature of litigation and arbitration cases arising from the pandemic will be affected significantly by the approach that the courts in major common law jurisdictions adopt to the claims which develop. In view of the serious humanitarian aspects of the pandemic, in cases where there is scope for judicial discretion, the courts are likely to be particularly intolerant of opportunism on the part of claimants.

Third party litigation funding had become a well-established feature of the dispute resolution landscape well before the pandemic. However, interest in third party funding within the general counsel community has certainly increased since the onset of the pandemic as businesses exercise caution around protecting their balance sheets.

Similarly, the funds available for deployment are now substantial. With interest rates at sustained record low levels, litigation funding has become an attractive investment class, even to conservative institutional investors.

A particularly uplifting trend emerging is the emphasis that businesses have been placing on proactive, constructive engagement with contractual counterparties, sometimes going well beyond the requirements of contractual obligations to protect the integrity of supply chains.

Whilst this approach is often preferable to adversarial litigation, experienced general counsel also tend to be able to identify the disagreements that have the potential to develop into formal disputes and are preparing proactively by taking steps to strengthen their platform from which to subsequently litigate successfully. This is one of the key areas in which we have also been advising recently.

It is clear that in-house teams across all sectors are under significant pressure. However, it is also clear from the insights we receive that the value of the contribution in-house counsel make, as perceived by their businesses, also appears to be at an unprecedented high.



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