

SOUNDINGS

Alternative billing arrangements – certainty, value and transparency

In previous publications the importance of accurate estimating of costs has been highlighted. In order to provide increased certainty for Members and the Club, the Board is requiring the Managers to change the way in which suppliers bill for the services they provide.

The traditional approach of solicitors simply billing by the hour and periodically presenting fee notes is being challenged by a requirement for new approaches. This reflects the increasing demand for certainty, value and greater transparency in the provision of legal and other services. More progressive law firms have demonstrated a willingness to think creatively about alternative fee structures, at the outset of a dispute and at key stages throughout its life, and this is welcomed by the Board, the Managers and Members alike.

Effective alternative billing arrangements provide certainty without compromising the quality of services. They enable accurate estimates of future expenditure to be put in place as litigation moves forward. The results deliver good value for all concerned and provide comfort that there will be no unpleasant surprises when bills arrive.

The Managers have agreed with the Club's major legal service providers that alternative billing arrangements should be agreed whenever possible. The approach now being taken is that the default billing arrangement should be alternative billing rather than hourly rate, although disputes continue to be dealt with on a case by case basis. Over time this will be extended beyond legal service providers to include technical experts and consultants. Members should of course ensure that alternative billing proposals are discussed with the Managers in advance of them being agreed.

What are alternative billing arrangements?

Alternative billing arrangements can take many forms, some simple and others more complex. The following are some of the methods used by the Managers in order to achieve certainty, value and transparency.

continued overleaf



Capped fees

The death of the hourly rate may not be here just yet, but billing discipline can still be agreed by the use of capped fees. With these arrangements a lawyer will propose a maximum fee that will be charged for a specific task – if the agreed cap is exceeded, nothing further is payable beyond the agreed capped fee.

This mechanism is particularly useful in connection with the LMAA's Small and Intermediate Claims Procedures, and the FALCA regime. The Small Claims Procedure the extent of legal costs that can be recovered by a successful party, and the instructed lawyers can be requested to limit the costs charged for their handling of the litigation to that amount. This avoids disproportionate costs.

Fixed Fees

Fixed fees are increasingly common and are often agreed for the performance of a specific task or set of tasks – perhaps initial advice, investigations, pleadings, disclosure, or attending meetings or hearings. This requires a lawyer to give some advance thought to the resources that will be required, and should ensure that there are no surprises due to an overrun in the time spent.

This type of arrangement is unlikely to be applied to the handling of an entire case. It is best suited to circumstances where it can be anticipated that tasks will last for a certain number of days, for example taking witness statements.

It can also be suitable for specific applications to a court or tribunal, such as applications for injunctions or seeking an order for security for costs. Fixed fees can also be supplemented with a bonus, payable if resolution is agreed within defined parameters – perhaps within a short time frame, or with a clearly defined outcome.

Reduced rates with success bonus

This option includes possible reduced hourly rates, but with an uplift in the event of success. It is important that there is a clear agreement as to what constitutes success sufficient to trigger the uplift. Of course this needs to be defined and agreed in advance by the lawyer, the Member and the Managers. This arrangement can be especially useful when seeking a recovery against an elusive opponent or in a difficult jurisdiction. If the lawyers are successful in achieving such a recovery within agreed bands then they might receive a percentage thereof, or a pre-agreed percentage uplift in their fees.

Collar arrangements

This option commonly relies on a mutually agreed target band for fees for a specific task. If the law firm's recorded time comes within the agreed target band then the firm will invoice for that recorded time. If the fee comes below the target band there would be an agreed uplift. However, if the target band is breached then there would be a reduction in those fees recorded above the target band. This approach requires careful consideration to ensure that the anticipated fee is reasonably expected to fall within an appropriate target band.

Conditional fee agreements

Where a conditional fee agreement has been agreed, a lawyer's remuneration is linked to the outcome of the proceedings. For example, this may result in the payment of fees based upon a percentage of a recovery actually achieved on behalf of a Member, or on the basis of minimising a liability. However, some care must be taken with these arrangements. The nature of the "success" that will trigger the bonus payment must be carefully defined. Furthermore, the bonus payment for success in the claim may not be recoverable from the opponent, while some jurisdictions impose regulations and restrictions upon schemes of this type.

Direct instructions to counsel

The Managers handle a significant volume of cases without reference to external legal advisers. Nonetheless, straightforward arbitrations that can be heard on documents alone can be efficiently handled by instructing junior counsel directly. In the Managers' experience, as self-employed service providers, junior counsel represent an important pool of talent that is willing and able to agree fixed or capped fees with their clients.

The Future

The Board and the Managers committed to adopting innovative approaches to billing of fees. This is aimed at achieving increased certainty, value and transparency. This is best achieved through active discussion and cooperation with legal services providers. Going forward, willingness to participate in this process will be a prerequisite of any relationship between the Club and a service provider.

The UK Defence Club

Thomas Miller Defence Ltd, 90 Fenchurch Street, London, EC3M 4ST
 tel: +44 207 283 4646 fax: +44 207 204 2131
 email: tmdefence@thomasmiller.com web: www.ukdefence.com

