THE OPTION OF LITIGATING IN EUROPE

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Chapter 11

FINANCING LEGAL SERVICES:
A COMPARATIVE PERSPECTIVE

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I. INTRODUCTION

In a civil dispute with international dimensions the appropriate forum will often be determined by the rules of the Civil Jurisdiction Convention. In those cases where the jurisdictional rules leave room for choice there may be a difference in mode of factual inquiry which will resolve the issue. In the remaining cases the crucial determinants of the forum will include costs and methods of funding.\(^2\) In relation to the former, most jurisdictions now apply the rule that the unsuccessful party should meet the costs of the successful party.\(^3\) However, there the uniformity ends. In some countries the full costs of the action are recoverable, in others a court official assesses what it is reasonable for the loser to pay. In some jurisdictions the amount recoverable will depend on the extent of success by the winner. Thus in Germany the plaintiff who is awarded only 50\% of the amount sued for will only be entitled to 50\% of the costs of the action. Yet in the United Kingdom unless there is a tender or payment into court, if the plaintiff recovers only 25\% of the sum sued for, they will still receive their full costs. In some countries the Court dues are high\(^4\) (e.g. Germany) while in most they will be token. In some the lawyers’ fees will be fixed in advance by a tariff (e.g. Germany) in others there will be an hourly rate (e.g. the United States) but in others still piecework rates prevail. Relative costs will also vary with the number and experience of court lawyers required to take an action into court.

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2. Other important factors include: types of remedy available, level of damages awards, linguistic barriers and the logistical problems associated with litigating in a foreign country.

3. The most notable exception is the United States. Even there the rule is not uniform since in recent years a growing number of statutory exceptions to the ‘American rule’ have been created—particularly in federal cases.

4. Nowhere, however, are the court dues a realistic contribution to the overheads of the court.
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Given such a diverse background it is perhaps inevitable that methods of funding should prove equally diverse and it is these that will form the main focus of this paper. First, legal aid programmes vary considerably in relation to scope, cover and level of contribution. Such variations could be important in selecting the forum for the case. So too could the variations in cover provided by legal expenses insurance policies throughout Europe. Finally, the existence of contingent or speculative fees and contingent legal aid funds might be a determining factor.

II. LEGAL AID MODELS

There are four principal legal aid models: 'charitable', 'judicare', 'salaried' and 'mixed'.

A. The Charitable Model

Under this approach, meeting the legal needs of the impecunious is considered to be a professional obligation - and usually a gratuitous one. Historically its hallmarks have included:

a. poor funding and inadequate coverage;

b. services provided by 'volunteer' members of the professions, almost invariably (especially in the case of counsel) the youngest and least experienced practitioners, on a part-time basis;

c. services provided on a gratuitous basis with no court dues or expenses being exigible.

Even today there are numerous examples of the charitable model operating both within and outwith the United Kingdom. The former range from the advice clinics staffed by volunteer solicitors to the free initial interview offered by solicitors under the ALAS scheme and from 24 hour freephone advice lines to representing clients on a speculative basis.


In the United States, though not in the United Kingdom, there has been a longstanding voluntary commitment to 'pro bono' work by the really large firms. In the past decade we have seen the emergence of a ‘mandatory pro bono’ movement in the USA. With the decline in Federal funding for legal aid it is increasingly being suggested that attorneys should undertake on a voluntary or a compulsory basis one or two cases a year or give up 40 hours or so a year to assist in the provision of legal services to the poor. As yet no State has adopted this on a compulsory basis but ten or so smaller jurisdictions have, covering more than twelve thousand lawyers. For lawyers who are unwilling to undertake the obligation or whose specialisms are irrelevant to the poor there is provision for the contribution to take the form of a set financial donation to the programme.

Although the objections to such programmes can be overcome, it must be doubted whether in the present climate mandatory pro bono will make the transition to the United Kingdom. In particular solicitors are likely to argue that the fact that legal aid work pays at less than 70% of the private client fee rates, is evidence of a substantial existing pro bono contribution. Certainly, the National Legal Aid Advisory Committee of Australia used this argument (legal aid pays at 80% of private client rates there) in concluding that it would be neither desirable nor practicable that pro bono work should play a significant part in any future strategy for supplying legal services to the poor in Australia. Moreover it is difficult to see how pro bono work would have other than a symbolic role to play in meeting the legal needs of the poor in the United Kingdom. The presence of the charitable model in a jurisdiction is unlikely to predispose litigants to choose to raise their actions there. It might however, predispose them not to do so.

B. The Legal Aid/Judicare Model

The second model of legal aid is usually referred to under its American title, namely, the 'Judicare Model' in order to distinguish it from other legal aid models. Under this approach the state funds the private profession to provide

8. The willingness of one or two London firms to sponsor law centres in recent times may signify the emergence of a similar commitment here. Cynics in North America have pointed out that public interest litigation apart, much of the work done free of charge for clients by American firms turns out to be for clients who could afford to pay in any event or for charities, e.g., the local symphony orchestra or cancer trust with whom it is good to be associated in public relations terms. In today's competitive times such a verdict may be a little harsh. Why should not the 'new professionalism' encompass links between public service and public relations?


13. NLAAC Legal Aid for the Australian Community, 1990, p.92.
legal services to individuals. This model exists in most of the leading industrial countries in the Western world. In some (for example, the United Kingdom, the Netherlands, Germany, Norway, Sweden, most Canadian provinces, Australia, New Zealand and Hong Kong), it is the dominant mode of providing legal services. In most western countries it took over from the first model in the second half of the twentieth century but in a few, for example, Belgium, Italy and Spain, the first model still prevails *de facto* if not also *de jure*.14

1. **Primary Characteristics**

The primary characteristics of the judicare model owe much to the version of it which developed in the United Kingdom, where the model was first introduced on a large scale (in 1950). Its features include the fact that judicare is:

1. **State Funded:** providing access to justice is seen as a State obligation rather than a charitable duty of the profession;15
2. **Independent:** responsibility for the administration and award of legal aid is placed in the hands of an independent body, board or court;
3. **Demand-led:** expenditure is open-ended although it is subject to constraints and monitoring before, during and after the provision of the service;
4. **Broad in scope:** much wider than under the charitable model. Nevertheless some restrictions on coverage exist in that certain types of action may be excluded, e.g. defamation, simplified divorces and small claims. In the UK it is not available in tribunals and in most countries it is designed to support individual rather than collective actions;
5. **Subject to multiple eligibility criteria:** including means and merits testing and an expectation that funding from other sources e.g. a trade union are not available to the applicant;
6. **Contributory:** assisted persons are often required to contribute towards the cost of their cases, depending on their means.16 Until the eligibility cuts in April 1993, only between 10% and 20% of assisted parties in the UK had an initial contribution.17

One of the significant features of the United Kingdom model (as opposed to the position in many other European

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14. It is noticeable that the industrialised countries where legal aid is least developed tend to be Catholic countries where until recently divorce has not been permitted. See Abel, ‘Law Without Politics’ (1985) 32 U.C.L.A. Law Review 474. Certainly, the catalyst for the introduction of the judicare model in the United Kingdom was the provision of state-subsidised legal representation for service personnel seeking divorces during World War II and Abel’s data (p.589) suggests that in most countries family matters represent the single largest category in legal aid programmes.

15. Lawyers in the UK and even more so in the Netherlands, might well argue that the growing disparity between legal aid pay rates and private practice rates represents a substantial indirect contribution by the profession to the cost of legal services. In Ontario, however, a direct levy of £83 per lawyer brings in £2 million per annum for legal aid work. Smith, ‘Canadian Approaches’ 1991 Legal Action 8 (August).

16. Such contributions are less common in criminal cases.

17. See Legal Aid Annual Reports in the past decade. It appears that a significant proportion of those offered legal aid or advice and assistance with a sizeable contribution refuse to take up the offer.
jurisdictions) is that the Legal Aid Fund is expected to bear the bulk of the risk of loss if assisted parties are unsuccessful in their actions. However, for successful assisted parties legal aid is a loan, not a grant and should they be unable to recover the cost of their lawyer from the other side it will be deducted from their contributions and any winnings through the mechanism of the statutory charge;

7. Provided by Private Practitioners: the overwhelming majority of legal aid and advice and assistance is provided by private practitioners. In Scotland there are only three law centres which operate legal aid and nearly a thousand private firms that do so. Nor is advice and assistance used by advice agencies. In England there are no figures available as to the amount of legal aid cases undertaken by the 60 or so law centres there, but the Legal Aid Board Annual Report for 1990/91 indicates that less than a third of 1% of net expenditure under the scheme went to law centres. Research also suggests that advice agencies and law centres account for less than 2% advice and assistance work. A similar picture pertains in the rest of Europe, although 15% of Dutch expenditure on legal aid goes to the salaried lawyers in Buros. In New South Wales by contrast the corresponding figure is 42% and in Quebec it is a surprising 71%.

8. Open panel: hitherto assisted parties have had a very wide choice of lawyer to act for them in legal aid cases. This is a major advantage over the charitable model, in that assisted parties can be represented by some of the best and most experienced court lawyers in the jurisdiction.

Commentators have tended to see most of the features outlined above as strengths, stressing particularly the importance of state funding; independence; breadth of coverage; risk protection and choice. Nonetheless, viewed from the standpoint of the profession, consumers and the government there are also a number of weaknesses in the model.

(a) The profession’s perspective: The principal complaints of the UK profession are that:

1. the coverage of the UK scheme is deficient, for example, in not extending to tribunals or defamation actions and that it is being reduced in small ways by recent and ongoing reforms;

18. Baldwin & Hill op. cit. p. 56. The extent to which legal aid work in the U.K. is delegated to less qualified fee-earners or para-legals is unclear. Baldwin & Hill’s research, op. cit. p.50 suggests that law centre solicitors delegate more readily than private firms but there appear to be few equivalents here to the American style legal clinics staffed by para-legals.


2. bureaucratic hurdles are increasing, necessitating delays, abandonment or the option of doing work for nothing;\(^{21}\)
3. there is no payment mechanism which supplies the necessary working capital to support firms through cash-flow problems;\(^{22}\)
4. the level of remuneration for legal aid work is inadequate. Legal aid rates (in the UK and the Netherlands) are now significantly below the private rates set by the profession and the court. This, however, does not prove that the rates are inadequate. The policy question is what profit margin should be built into legal aid rates.\(^{23}\)

Those drawbacks are said to be causing an increasing number of specialist or sizeable firms to give up doing legal aid, although there are no reliable figures on the issue.\(^{24}\) Equally disturbing for the public is the argument that the workload of these firms is tending to devolve to junior and less experienced fee-earners in smaller practices thus recreating one of the major weaknesses of the charitable model.\(^{25}\)

\((b)\) The consumer’s perspective: A reduction in the quality of service or the availability of legal aid lawyers would be obvious drawbacks from the consumers’ perspective. In fact it has already been established that access problems exist.\(^{26}\) Thus it is clear that there are considerable shortages of practitioners in the UK who are experts in the fields of housing, welfare, consumer, immigration, employment and child law. Moreover the figures suggest that individuals with problems in these areas are much more likely to consult advice or law centres than private practitioners offering legal aid in the shape of Advice and Assistance. Paradoxically, therefore, although the per capita expenditure on Advice and Assistance in the UK far outstrips that in Germany, the Netherlands or Canada,\(^{27}\) repeated Annual Reports of the Law Societies and the Legal Aid Boards in the UK (and a recent research study)\(^{28}\) have confirmed that contrary to original hopes, Advice and Assistance continues to be used primarily in the traditional areas of family and criminal work (about 65% of Scots cases and 75% of English cases).\(^{29}\)

\(^{21}\) Baldwin and Hill op.cit. p.53.
\(^{22}\) In the Netherlands, by contrast, lawyers can receive lump sum payments in advance (up to twice a year) which reflect the level of legal aid work undertaken by them in the previous year.
\(^{23}\) Here much depends on whether legal aid is seen as a \textit{pro bono} activity for the majority of the profession or a specialism to be pursued by a minority of firms.
\(^{25}\) Research currently being conducted at Warwick University on criminal legal aid appears to bear this argument out. See The Lawyer 1.7.92, p.1.
\(^{27}\) See Blankenburg, ‘Comparing Legal Aid Schemes in Europe’ (1992) 11 Civil Justice Quarterly 106.
\(^{28}\) Baldwin & Hill op. cit.
\(^{29}\) The same is true for legal aid. See Smith, ‘Financing litigation for the public’ unpublished paper delivered to the Hart Workshop, July 1992 at p.3.
Apart from the eligibility criteria, the level of contributions and the statutory clawback - points which we will return to in the Eligibility Criteria section - the other principal concerns of consumers in relation to legal aid relate to its scope. The recommendations of both the Royal Commissions on Legal Services that legal aid should be extended to tribunal representation have been strongly reinforced by the Genn report which graphically demonstrates the advantage secured by those who are represented at tribunals. A further deficiency that has been highlighted recently is the individualised nature of legal aid. As the Opren affair revealed, legal aid does not lend itself to collective actions, for example, disaster cases where many victims are suing the same defender in respect of the same alleged wrong. Provision to deal with this problem was contained in the Legal Aid Act 1988 and in 1992 the Legal Aid Board introduced a system of contractual tendering for firms wishing to undertake multi-party actions funded through legal aid.

(c) The State's perspective: Inevitably western governments are concerned at the increasing cost of providing legal aid through the private profession, particularly since the rise in cost seems often to be running ahead both of inflation and productivity in terms of numbers of cases handled. As we shall see, different solutions to this problem have appealed to different governments. Some have tried the tactic of placing a greater proportion of the funds available into salaried lawyers for cost-efficiency reasons. Others have greatly eroded the fee rates for legal aid work while others still have followed the UK model of reducing eligibility levels and focusing on improving efficiency and quality controls e.g. through the Franchising experiment.

One factor which has hampered rational planning by most western governments is that despite the open-panel character of judicare, legal aid work is not evenly distributed throughout the profession. In the Netherlands up to a third of the advocates undertake significant amounts of legal aid work but in the UK less than 10% of the firms do 40% of all legal aid work (a third earn less than £5,000 per annum in legal aid fees). In Quebec, less than 20% of the private profession undertake any legal aid at all. Such fluctuations make it difficult to fix on an appropriate level for legal aid remuneration (legal aid work done in small amounts is never likely to be cost-effective). On the other hand no researcher has yet demonstrated that doing legal aid work in volume leads to necessary economies of scale. A related problem is whether governments should be encouraging the concentration of legal aid providers. Many legal aid solicitors are already specialising and specialist panels of legal aid lawyers

34. See infra. One of the major aims of the Franchising project is to try to measure the quality of service provided by legal aid practitioners - a task that is not without difficulties. See Paterson, Professional Competence in Legal Services, 1990.
currently exist in England in the fields of mental health and child care law. However, specialist expertise has a tendency to encourage arguments for exclusivity or higher fees. Either development leads to a loss of access to justice.

A final area of concern to the UK government is the inefficiency in administrative terms of the differing rates of remuneration for various forms of legal aid work and indeed of a piecework based payment scheme. The UK government has been pursuing an acrimonious debate with the legal profession in England and Wales over the introduction of more block or standard fees. By contrast in the Netherlands and Germany most payments are in the form of lump sums.

2. Variations on the main theme

As noted above the judicare model exists in most western industrialised countries. In few are there significant variations on the United Kingdom version of the model, except that few share its scope. The Netherlands is a partial exception. Although legal aid is provided there by private practitioners, mostly in the same traditional areas of law as in the United Kingdom, there is evidence (as we have seen) that a greater proportion of the profession depends significantly on legal aid than is the case in the United Kingdom. Curiously, the award of legal aid certificates is made by state salaried lawyers working in legal aid offices (Buros) who, having provided initial advice, frequently then refer applicants (if they do not have a lawyer) to private lawyers on their lists on a rota basis. However, in recent times a lively debate has sprung up as to whether buros should go further and provide representation, perhaps even in competition with the Order of Advocates. Equally interesting is the fact that the Dutch Ministry of Justice provides the option to legal aid lawyers of remuneration in advance. When the work is done, the lawyer sends the account to the Ministry, together with the certificate (from the Buro) and it is paid after deduction of any advance.

Germany has a fairly traditional judicare model in civil matters although its provision for advice and assistance is modest compared with the Netherlands and the UK, despite the more rigorous monopoly on the giving of legal advice which prevails there. The German system, however, is interesting in that legal aid

35. See Blankenburg, op.cit. p.113.
37. Legal aid practitioners can ask to be paid lump sums every six months based on their turnover of legal aid cases in the previous year, up to a fixed ceiling. Under the current Legal Aid Bill the advance payment system would become compulsory.
is administered by the courts (whether for advice or representation). One factor which might attract a foreign national to sue in Germany is that legal aid is not restricted to natural persons. Thus legal corporations can be eligible provided neither the corporation nor the 'persons economically interested in it' can reasonably be expected to afford the legal fees. However, legal aid will only be granted to foreign corporations in Germany if there is reciprocity - which would rule out UK companies.

One factor which has inhibited the development of legal aid in Germany is the long-standing penetration of legal expenses insurance there (at least 50% of households have some form of legal expenses insurance policy). Sweden, on the other hand, until recently, had one of the most comprehensive legal aid programmes in the world. It provided up to one hour's worth of legal advice to all citizens irrespective of means. General legal aid is provided to individuals who in the eyes of local legal aid board (consisting of a judge, lawyers and lay persons) meet relatively generous means and merits tests. There are few areas of legal work which are excluded, the principal ones being the preparation of tax returns and the economic activities of business persons. Interestingly, general legal aid can be provided by private or public lawyers who are in open competition with each other for such work. However, even in Sweden legal expenses insurance is widespread - in part because their legal aid scheme (like most on the continent - including that in the Netherlands and Germany) does not protect assisted parties from paying the other side's expenses should they lose.

This deficiency, perhaps the biggest single difference between the UK model and judicare in other Western European countries is one which must make any litigant from the UK who is eligible for legal aid, cautious of litigating in Europe. Equally, it is a feature which may attract foreign, legally aidable clients with a choice of fora, to litigate in the UK.

3. Eligibility criteria

Another factor which might influence potential litigants is the variations in eligibility for legal aid between different countries. The lack of up to date information in English makes it difficult to produce an informed comparison between the financial eligibility tests of western industrialised countries. Some countries e.g. the United Kingdom, the Netherlands, France, Germany, Sweden and Australia use detailed financial limits. Others e.g. Austria, Spain, Italy and

40. For legal advice applicants are required to provide details of their cases as well as their financial situations to a judicial administrator at the district court. If possible the official will provide the relevant advice, otherwise they will issue a certificate which entitles applicants to ask for advice from any lawyer of their own choosing. Legal aid for representation is handled by the court with jurisdiction to hear the case. See Zemans (1983) op.cit. p.404, and Blankenburg & Schultz, 'German Advocates' in Abel & Lewis (eds.) (1988) op.cit. p.124.
43. Up to 80% of Swedish households are thought to have a legal expenses insurance policy.
Finland use flexible criteria whereby those who cannot afford to go to law without causing 'hardship to the applicant or his family' are eligible for legal aid.\textsuperscript{44} Often there is little to choose between the two approaches. Nevertheless, it would be wrong to say that in practical terms about the same proportion of the population is eligible for judicare in most western countries. Even from the limited information available, it is clear that some countries (notably, the Netherlands, Sweden and the United Kingdom) established their programmes to include not just the poor but also part of the middle classes while others - in part because of the extensive penetration of legal expenses insurance in Europe - focus primarily on the poor.\textsuperscript{45} However, rising costs have led the former countries to re-examine coverage and there are signs that some are opting for a transfer of resources to salaried lawyers (on cost-effectiveness grounds) while others, such as the United Kingdom, have been cutting eligibility limits or, failing to uprate them in line with inflation.\textsuperscript{46} In addition applicants are increasingly being expected to make direct or indirect contributions (e.g. the statutory charge) towards the cost of the legal services they receive.\textsuperscript{47}

As in the United Kingdom, it is normal for there to be a merits test in the judicare schemes in other jurisdictions. In some, as in the United Kingdom, the legal merits of the action test is separated from the 'reasonableness in the circumstances' requirement, in others the two requirements are integrated.

In the Netherlands legal aid is not granted 'if the application is wholly unfounded'\textsuperscript{48} or if the matter in question does not justify the cost of providing legal aid.' German judges have to assess whether, on the basis that everything


\textsuperscript{45} In the Netherlands 70% of the population is eligible for civil legal aid, in the UK the figure is nearer to 50% but this is a higher proportion than in Canada or Australia and a much higher proportion than in Norway where only 10% of the population is eligible. See LAG, \textit{A Strategy for Justice}, op. cit. and Johnsen, 'Developments in Legal Aid in Norway' unpublished paper delivered at the Aix conference on Legal Aid, June 1992.

\textsuperscript{46} It seems clear that eligibility for legal aid on income grounds in the United Kingdom had fallen from 70% of the population in 1980 to below 50% in 1989. See NCC, (1988) op. cit, Glasser, 'Legal Aid Eligibility' (1988) 85 Law Society's Gazette 9 March at p.11 and Murphy, 'Civil Legal Aid Eligibility 1989 Legal Action October p.7. The Lord Chancellor's Department disagreed with these analyses but appeared to concede much of the argument by introducing a package of measures which they claimed would increase the proportion of the population who qualified for civil legal aid from 56% to 74%. Michael Murphy's research in 1992 suggested that the decline in eligibility is continuing. See LAG, \textit{A Strategy for Justice} op.cit. Appendix. Murphy's research for the Law Society in 1993 asserted that the Lord Chancellor's eligibility cuts would effect 14 million. The assertion provoked an outraged denial from the Lord Chancellor's Department.

\textsuperscript{47} This, of course, was the major element in the Lord Chancellor's 1993 cuts. Both Germany and the Netherlands now require a contribution from even the most needy clients seeking legal advice and assistance. In the former it is DM 20 (subject to remission by the lawyer), in the latter it is a minimum of 25 Guilders. Blankenburg, op. cit. and T. Goriely, op.cit.

\textsuperscript{48} This is a considerably more generous test than the probable cause test.
said by the applicant is true, he/she would be entitled to judgment\textsuperscript{49} and in Norway the applicant must demonstrate a 'reasonable probability for success'. In France the case must not be 'manifestly inadmissible or devoid of foundation', while Swedish applicants are deemed ineligible if they have no justifiable reason for pursuing a matter.\textsuperscript{50} In most Australian states, however, the merit test is simply whether it is reasonable in the circumstances that the applicant should be granted legal aid, although this criterion is usually amplified with legislative guidelines, one of which is often the English 'reasonableness' yardstick of the 'hypothetical paying client' test.\textsuperscript{51}

4. Legal Aid for foreign matters

It is rare for the judicare scheme in one jurisdiction to provide funding for suits in a foreign jurisdiction. Thus the Advice and Assistance schemes in the UK do not permit advice to be given under them on matters of foreign law. On the other hand most of the advanced judicare schemes permit non-resident foreign nationals to raise an action in the host country (though this entitlement is sometimes subject to additional restrictions). In choosing between competing fora it may therefore be important to consider the availability of legal aid to foreign nationals in each jurisdiction. Unfortunately this is not an easy task. There is no reliable single source of up-to-date information on even the legal aid programmes in the member states of the EEC. In 1977 a Council of Europe Agreement was reached on the Transmission of Applications for Legal Aid between signatory nations.\textsuperscript{52} The effect of the Agreement is to enable citizens of one contracting state to complete a legal aid application in their own country on a domestic application form. This is then sent to their own legal aid authorities who are responsible for any necessary translation and forwarding the application to the other contracting state. This is a useful start, but it does not solve all the linguistic or logistic problems and can involve considerable delays. In practice, the procedure has been little used, partly because it has been little publicised and partly because of the information barriers which remain about the scope, limits and coverage of other judicare systems. Thus litigants wishing to sue in a foreign jurisdiction using their judicare system still have many obstacles to overcome.

5. Reform

(a) Eligibility review.\textsuperscript{53} Ostensibly this review was designed to look at the problem of the increasing proportion of the population in the UK who were ineligible for legal aid. In reality the review primarily addressed the Treasury

\textsuperscript{49} Sometimes described as "having a good chance of being successful". In essence the test seems akin to a Scottish plea to the relevancy. See Hirts op. cit. p.113.

\textsuperscript{50} Blankenburg & Cooper, (1982) op. cit. p.287.

\textsuperscript{51} See OLAA, (1987) op. cit.

\textsuperscript{52} To date it has been ratified by Austria, Finland, Norway, Sweden, Turkey and all the Member States of the European Community except the Netherlands and Germany.

\textsuperscript{53} The review commenced with two consultation papers. The first, published by the Lord Chancellor's Department in 1991 'Eligibility for Civil Legal Aid' was followed by a parallel paper from the Scottish Office Home and Health Department in July 1991 entitled 'Review of Financial Conditions for Legal Aid: Eligibility for Civil Legal Aid in Scotland'.
problem of an uncapped budget which they considered to be spiralling out of control.\footnote{54} Not the least curious feature of the review was that in its initial phase it was not directed at either of the areas which involve the greatest expenditure by the Legal Aid Boards (criminal and matrimonial cases). Ironically its focus on civil non-matrimonial cases targeted an area where legal aid is arguably at its most cost-effective. In brief the review proposed that contributions should be increased and made to last throughout a case while assessment of means should be made less expensive by adopting a more broad brush, not to say crude, approach. In a purported attempt to tackle the problems of those outwith the legal eligibility limits it was suggested that a safety-net should be introduced. Under this system the applicant would spend up to £2,500 of his or her own money (the spending limit) before becoming eligible for legal aid. While this proposal offered assistance to some better off litigants, the paper hinted that the scheme might also be applied to poorer applicants currently eligible for legal aid but with a contribution (i.e. those above the free legal aid threshold). For them the safety net would be more akin to a tripwire.\footnote{55} The Government claimed that the proposal would encourage responsible litigation and settlements. In reality, however, there is no evidence of assisted parties behaving irresponsibly by pursuing their actions. Even those who fall below the free legal aid limit have an interest to be prudent in litigating because of the mechanism of the statutory charge. To suggest that the spending limit would encourage litigants to exercise greater control over their lawyers overlooks the fact that it is very difficult for lay clients to assess the quality of the work being done for them by their lawyer. A more straightforward solution would have been to raise the upper financial limit and increase contributions in line with this.

The near universal hostility that the safety net proposal attracted seemed initially to have reduced enthusiasm for its introduction in government circles. However, in April 1993 the Treasury, alarmed by the ever-increasing rise in legal aid expenditure, drove through a series of savage cuts in eligibility for civil legal aid and advice and assistance. In addition the level of contributions required from assisted parties was greatly increased and extended. The safety net proposal was not included in the package.

\(b\) \textit{Value for money:} Whatever the merits of the eligibility review it is clear that the UK, like many other jurisdictions with the most developed cover, is determined to improve the cost-effectiveness and quality of the service provided under legal aid. In these countries e.g. the United Kingdom, Australia, Norway, and the Netherlands very similar proposals are being considered:

\footnote{54} As in the Netherlands and Germany in recent years expenditure on legal aid in the UK has been running well ahead of inflation. See National Audit Office, \textit{The Administration of Legal Aid in England and Wales}, HMSO, 1992.

\footnote{55} The likely effect of the proposal would have been to transfer resources from a large number of relatively small actions to smaller numbers of large ones. See Smith, \textit{Financing litigation for the public op.cit}, p.5.
1. Standard, fixed or block fees - Germany and the Netherlands already use these and they have been proposed in Norway. In England and Wales proposals that they be used on a widespread basis have provoked mixed responses. The NCC consider that this would be more efficient and more understandable for consumers. The Law Society and the solicitors' profession reacted with extreme hostility to the Lord Chancellor's suggestion that fixed fees be introduced for cases in the Magistrates' Court, concluding that they would encourage shoddy work or delegation to less qualified practitioners. In Australia most of the legal aid commissions have experimented with such fees in a minor way. While they are thought to enhance the efficiency of legal aid programmes, no research has been conducted to test the argument.

2. Vouchers - This involves an eligible applicant for legal aid being supplied with a voucher providing legal aid which could be cashed in with either salaried or private practitioners. However, the private practitioner may treat the voucher as only representing part payment for his or her services and request an additional contribution. The NLAAC concluded by a majority that vouchers should not be introduced in Australia. While the private profession supported vouchers because they permit a choice of lawyer, the salaried sector were strongly opposed to them on accountability and practicability grounds. The NLAAC were persuaded that not only might vouchers lead to inequities because for many applicants the degree of choice would prove illusory but also that the market mechanism would not work as check on quality and value for money. Certainly the suggestion that the choices of one-shot clients will provide effective quality controls on private practitioners seems more than a little far-fetched. The limited experiments with vouchers in the United States have proved similarly controversial and inconclusive.

3. Contracts - In Norway, there have been several false starts in relation to legal aid reform in the past three years. However, one of the features which has been common to each of the proposed programmes has been the suggestion that there should be experiments in contracting out aspects of legal aid work to private lawyers. These contracts would be aimed at lawyers who want to specialise in a certain field of legal aid work or are willing to handle a substantial amount of legal aid work as part of their practice. Contract lawyers would have a wide discretion to self-certify eligibility for legal aid. In general such contracts would only be offered to lawyers operating or willing to set up in areas where access to private practitioners is problematic.

56. Luban, op. cit. 275.
57. Johnsen, op. cit. Instead of being paid on the present hourly basis the 1991 proposal is that a standard fee of 6 hours should be paid for all cases between 2 and 6 hours. In criminal custody cases a standard fee of 3 hours is proposed and for simplified trials, 5 hours.
58. NCC (1989) op. cit.
60. NLAAC 1990: 153.
Establishment support for practices being set up in areas of scarcity might be made available in the form of a loan repayable from legal aid work.62

Contracting out legal aid work to private practitioners and to salaried offices (Buros) is a proposal which was under active consideration in the Netherlands over the last three years. Originally it was proposed that contracts would offer the opportunity of specialising in legal aid work whilst improving quality and reducing costs. The contracts might vary e.g. sometimes covering all legal aid work in a community, sometimes for a set number of clients, sometimes for units of work with price discounts for volume or sometimes for particular types of legal work. The proposals contained disquieting features for the profession e.g. the suggestion that firms should do 10% of their cases without payment or that they should have to pass on clients to other firms if their quota had been fulfilled. In the event, the resistance of the profession to these proposals has been such that the Ministry of Justice has more or less decided to abandon proposals along these lines. Contracting out legal aid work has actually been tried in parts of Australia - mainly in relation to duty lawyer schemes - with some success, although some have objected that they reduce the clients' ability to select the lawyer of their choice.

The United States has the most experience with contracting out legal work to the private profession. In the main the contracts have related to indigent criminal work63. Despite the substantial body of research findings indicating the serious quality deficiencies of contracting out in the criminal sphere,64 the Legal Services Corporation decided in the late 1980s that the contract system should be introduced in the civil sphere also, with the work going to the lowest bidder. The research on the pilot projects designed to bring this about has proved to be highly controversial with most commentators concluding that contracting out is proving as problematic in the civil sphere as it has been in the criminal.65

The Legal Aid Act 1988 contains provision for contracting out legal aid work in England and Wales. The Legal Aid Board's first foray in this area was an attempt (in 1990) to contract out the duty solicitor work in St Albans, Welwyn Garden City and Hatfield but this eventually came to nothing and the proposal has not been repeated. The Board next considered them in relation to the advice and assistance scheme. However, after consultation they came out against contracts in this area because while potentially offering quality control, cheapness and administrative simplicity they would reduce

62. Letter from Professor Johnsen at Oslo University to the author dated 22 2.91 and Johnsen, 'Developments in Legal Aid in Norway' op.cit.
64. See e.g. McConville & Minsky, 'Criminal Defense of the Poor in New York City' (1987) XV Review of Law and Social Change 381 and the studies cited therein.
consumer choice, cause problems in conflict of interest situations and create major access difficulties in poor urban or rural areas. Nevertheless, a number of these contractual elements have re-emerged in the Board's plans for Franchising and also in their new provisions for tendering to undertake legal aid work in multi-party 'disaster' litigation. More ominously, the Lord Chancellor has indicated his desire that franchises should in future be awarded after compulsory competitive tendering.

4. Franchising - Amongst the most advanced plans for ensuring value for money from legal aid suppliers is the English Legal Aid Board's supplier development strategy which has evolved from the Franchising project. The project was confined to firms and advice agencies in parts of Birmingham who were prepared to implement certain quality systems. In return for putting these systems in place and operating them franchise firms receive certain advantages from the Legal Aid Board. Originally it was proposed that all decisions on advice and assistance, ABWOR and emergency applications would be delegated to the franchisees and that in addition firms would receive monthly payments in advance representing a twelfth of the firm's earnings from all types of legal aid over the past twelve months. After last minute negotiations with the Law Society it was agreed that the firms would get four new early payment systems: up to £250 on account for each self-granted emergency certificate, up to £150 on account of each self-certified ABWOR case, the right to be paid at least two hours' worth of costs each time an advice and assistance extension is granted in-house and 75% on account of costs incurred once a civil legal aid certificate has run for nine months.

The concept of franchising was chosen in preference to tendering or contracting-out since it offered more access to the public with a better guarantee of quality. Originally the Board wanted to pursue economies of scale and suggested that franchise firms should have a turnover of £40,000 a year in legal aid fees and employ supervisors who would not be permitted to supervise more than three categories of work or seven people doing that work. After extensive discussions with the profession and the consumer bodies these requirements were dropped for the purposes of the experiment. However it is probable that both the Board and the Lord Chancellor's Department presently envisage that the supplier development strategy which is emerging from the franchising experiment will hinge around firms prepared to specialise in and to undertake substantial amounts of legal aid work ('preferred suppliers'). If this line is pursued, possibly in the direction of exclusivity, as the Lord Chancellor has hinted, it may produce considerable problems of access, particularly in the rural areas.

66. See Curle, op.cit.
67. Since Scottish firms already receive some of the advantages provided to franchise firms, if franchising is to be implemented there additional benefits will have to be offered to firms to encourage them to participate in the scheme.
Largely for these reasons the Scottish Legal Aid Board is less convinced as to the merits of franchising than their southern counterparts. It may be therefore that the current proposals of the Ministry of Justice in the Netherlands\textsuperscript{68} on this issue will prove more attractive. These include the registration of legal aid practitioners. Registration would be subject to a number of conditions:

- a minimum (about 10) and a maximum number of cases that a lawyer can accept during one year;
- specialisation, restricting registration to a limited number of legal areas;
- good office procedures with adequate back-up cover;
- annual reports to the legal aid authorities.

Exceptionally, where there is good reason clients will be permitted to instruct private practitioners who are not registered. Registration will be refused if the conditions cannot be met, if the lawyer is over 70 or if the lawyer works much less efficiently than other members of the profession (judged by a series of performance indicators).

C. The salaried model

There are relatively few jurisdictions in the western world (the United States of America and Quebec being the most prominent) in which the third or 'salaried' model of legal aid provision predominates. Nevertheless the model is to be found in a number of other western countries (including the United Kingdom, the Netherlands, Canada, Australia, New Zealand, Sweden and Finland). The essential difference from the judicare model is that the services are provided by publicly salaried lawyers. The latter are usually restricted in the range of services which they can provide. Thus the staff of the Buros in the Netherlands are generally restricted to providing initial advice to clients before referring them to advocates in private practice. In Australia and the United Kingdom the limits are enshrined in formal agreements, elsewhere the programmes' own priorities ensure that rarely (except in Sweden) are they in competition with the private profession. In the United States of America the Legal Services Corporation salaried programmes are also banned from taking cases to do with school desegregation, abortion, or engaging in political activities such as picketing, striking, lobbying or working for political campaigns.\textsuperscript{69} It follows that the utility of salaried lawyer programmes to foreign applicants will be limited—particularly in damages or divorce cases which are typically left as the preserve of private practitioners. However in those instances where a foreign applicant's case can be dealt with by a law centre there is the added bonus that the service is provided free of charge.

\textsuperscript{68} Information derived from correspondence with the Netherlands Ministry of Justice.
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D. The mixed model

Even though the experts are divided over the relative cost-effectiveness of the judicare and salaried models of legal aid[^70] there is a remarkable measure of agreement between them that the ideal way forward for western countries is a model that involves a mixture of judicare and salaried elements.[^71] In that most of the jurisdictions with salaried programmes also have judicare programmes it might seem that the mixed model exists widely throughout the world. However, in most countries the two types of programme have developed independently in an ad hoc fashion. Genuinely planned and integrated examples of the mixed model, combining the best features of both models with respect to specialist expertise, work styles, client appeal etc., are few and far between.

In Sweden, Quebec and the Netherlands the theoretical integration of the two models (the salaried offices assess all legal aid applications and allocate cases to private practitioners) has not worked in practice, partly because they are to an extent in competition with each other. This, in turn, leads to overlaps in coverage and the costly duplication of expertise. Instead, it is in the United Kingdom, Australia and Ontario that a division of labour has sprung up which emphasises the complementary nature of the two models - particularly where the strategic version of the salaried model is in evidence. But even in these jurisdictions developments have been largely unplanned.^[72]

III. ALTERNATIVES TO LEGAL AID

Given the ever increasing cost of resorting to law, spiralling legal aid bills and government attempts to curb or rationalise legal aid expenditure it is hardly surprising to learn that there is increasing interest in alternative methods of funding litigation. One of the most enduring of these is the contingent fee.

A. Contingent fees

Contingent fees are a mechanism which transfers a share in the risks of litigation from the litigant to the lawyer in exchange for an enhanced reward. Typically they involve contracts for the provision of legal services in which the amount of the lawyer’s fee is contingent in whole or in part upon the successful outcome of the case, either through settlement or litigation. Usually the lawyers are rewarded with higher fees than they would normally receive if they win, in return

[^72]: An interesting example of a planned mixed model can be seen in some of the better organised and funded public defender programmes introduced in the United States in the last decade. In such programmes salaried and judicare components integrate satisfactorily with work contracted out to private practitioners in the rural areas or in conflict of interest situations. This approach appears to have commended itself to the Australian Government in a recent discussion paper on legal aid, namely, NLAAC, Funding, Providing and Supplying Legal Aid Services, Australian Government Publishing Service, 1989.
for running the risk of going without a fee if the case is lost. The availability of such fees can help to protect claimants from financial ruin. As such, their existence in a jurisdiction might encourage foreign litigants to raise their actions in the jurisdiction.  

Prohibitions on contingent fees are common throughout the world, though there are partial exceptions in Denmark, Japan, the Netherlands, and Spain. Contingent fees are generally permitted in Canada but most widely used in the United States. In Scotland, contingent fees are prohibited at common law, though speculative fees (where the legal representatives act for their normal fee if they win and nothing should the case be lost) are acceptable even with an uplift. Similarly, in England and Wales the common law prohibition has been partially repealed by the Courts and Legal Services Act 1990 which permits the use of conditional fees. 

In the United States of America, contingent fees are most frequently used in personal injury actions but not confined to such cases. In certain areas of law, however, the courts and ethical codes prohibit the use of contingent fees on public policy grounds. These are criminal cases, family cases and in some states, legislative lobbying. Contingent fees may be calculated as a percentage rate, as a fixed fee, or on an hourly basis. In practice, percentage rates are the most common: a typical contingent fee agreement in the United States of America may provide that the lawyer’s reward will be 25% of any settlement prior to a writ being issued, a third of any settlement or award made after the writ is issued, and 40% or more if either side appeals. For this, the expenses of the case are usually advanced by the lawyer. 

The merits of introducing contingent fees have been keenly debated in the UK on several occasions in the last decade and another inquiry was set up by the Law Society in August 1992. Proponents of contingent fees argue that they permit poor clients to bring their cases to court by transferring the risk of loss wholly or partly to the lawyer. Contingent fees can thus be viewed as ‘productivity bonuses’ or as an unusual form of venture capitalism. 

On the other hand, contingent fees are frequently blamed for excessive awards and unnecessary litigiousness. Neither accusation has been conclusively proved. A more telling argument against contingent fees is that they create conflicts of interest between the lawyer and the client (although most feeling

73. This is undoubtedly a factor behind the attempts of pursuers in mass disaster cases to bring their actions in the USA. There, the availability of contingent fees and the absence of a 'costs with the event rule' combined with the possibility of high damages awards makes litigation a more palatable prospect than in many other jurisdictions.
75. S.36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 provides that solicitors and advocates can not only charge speculative fees but a % increase in the fee to a limit laid down by the court. This measure is designed to compensate lawyers for cases in which no recovery is made.
76. S.58 provides for the creation of conditional fees which will involve a % uplift on the normal fee if the suit is successful and nothing if the case is lost.
systems are open to the same critique). Finally it is alleged that not only do contingent fees lead to excessive fees since lawyers have superior knowledge of the risks and costs involved but also that they encourage lawyers to adopt unethical tactics. 79

In fact, the evidence suggests that the arguments against contingent fees are not insurmountable provided certain safeguards are introduced, such as statutory limits to the percentage fee that can be recovered and how this may be calculated. Despite this, the existence of the 'costs with the event rule' on this side of the Atlantic reduces the attractiveness of such fees to potential litigants since they will still have to pay the other side's costs should they lose. Nevertheless contingent fees do not require start up costs and are not prone to adverse selection and if money cannot be found for a Contingent Legal Aid Fund (see below) there is an argument for introducing contingent fees in Europe, with appropriate safeguards, on an experimental basis.

B. Contingent legal aid fund

The fact that contingent fees may be worth experimenting with under certain conditions does not make them necessarily the best alternative to legal aid. There are better contenders for that accolade. One is the Contingent Legal Aid Fund. In 1966 (and again in 1978 and 1992) Justice put forward a proposal, which has since attracted considerable support, that a Contingency Legal Aid Fund (CLAF) be set up to underwrite the litigation costs of persons who fall outwith the ambit of the legal aid schemes. This proposal was floated by the Lord Chancellor's Department and the Scottish Office Home and Health in their consultation papers on eligibility for civil legal aid. 80 The CLAF would initially be funded from a government grant, but subsequently from a proportion of the winnings of claimants whose cases had been supported by CLAF. Where claimants were unsuccessful, their costs and those of their opponents would be met by the Fund. The administrative costs of the Fund would be met from a non-returnable registration fee. This scheme, it is argued, would overcome the main disadvantages of contingent fees without losing many of their advantages. (Because the claimants' lawyers would be paid a normal fee, win or lose, there would be no conflict of interest and no possibility of excessive fees.)

Successful claimants would also pay less than under a normal contingent fee arrangement (20% was Justice's suggested figure, however the LCD suggested that 25-30% of a damages award would be needed for the Fund to be self-financing). While claimants would not be subject to a means test (though large corporations would be excluded) they would have to show (as in legal aid cases) that their claims had a reasonable prospect of success. Justice thought that the scheme should not be available to defendants nor would it apply where a reasonable sum of money was not at issue (the figure proposed was £500) since otherwise the returns to the Fund would be inadequate. However the LCD considered

that a combination of high non-returnable fixed fees and subsidisation from reparation actions would enable the CLAF to be used even where damages were not in issue. The attraction of such a scheme to governments is that it is, in effect, an insurance which spreads the risk of loss to other litigants rather than the legal aid fund. The attraction to clients would be that it would cover areas, as well as people, presently excluded from legal aid.

To date only one jurisdiction has any substantial experience of a CLAF – Hong Kong. In 1984 Hong Kong introduced such a scheme as an adjunct to their legal aid scheme for those whose means were just outwith the legal aid limits but who were nonetheless unable to afford the services of private practitioners. The Supplementary Legal Aid Scheme (SLAS) is restricted to substantial (over $60,000) claims for death or personal injury. The scheme is administered by the Legal Aid Department, the usual merits test is applied and a more generous means test. Instead of legal aid contributions the applicants are required to pay fees of $1000 (about £80) which are returnable if they are successful. They must also agree to a deduction of between 10% and 12% of any damages recovered (though the deductions can be reduced by up to 50% if the claim is settled at an early stage). Up to November 1990 there had been 297 successful applications to the scheme, representing 67% of all decided applications. It was three or four years before income under the scheme consistently exceeded expenditure. In Hong Kong the start-up costs were met by an interest free loan of up to $1,000,000 from the State Lotteries Fund. This has now been repaid.

Similar proposals in Western Australia (also backed by the Lotteries Commission) led to the setting up of a 'Litigation Assistance Fund' in 1991. New South Wales and South Australia are also considering such Funds. The English Law Society is optimistic that taking advantage of the lessons to be learned from the Hong Kong experience it will be possible for a CLAF to become self-financing in a shorter period in the United Kingdom. One way to achieve this would be to make speedier cases eligible. The National Consumer Council is also supportive of such a development especially in class actions or test cases.

Nevertheless, the critics remain unconvinced. Carey Miller argues that a CLAF scheme involves unnecessary bureaucratic controls and administrative costs. The Benson Commission in a critique subsequently endorsed by the Legal Action Group argued that a CLAF scheme would be inequitable because poor successful claimants might be subsidising unsuccessful individuals or even companies. Furthermore, those who have suffered most in personal injury cases - and therefore have the largest claims, would have to pay the most, despite the fact that such claimants tend to be undercompensated as it is. The critics have also claimed that a CLAF would be vulnerable to adverse selection. Thus the success of the scheme would depend on a reasonable take-up. Yet claimants with good chances of success, it is said, would be reluctant to take part in the scheme and those who would be attracted to the scheme would have the weaker cases. Since litigants are rarely so claims-conscious as to know the strength of their own cases, and risk-averse claimants would be attracted by the immunity from paying
costs offered by a CLAF, it is likely that this argument is overstated. Nevertheless, as we have seen, most personal injury pursuers/plaintiffs obtain an award of some sort and frequently solicitors will advise clients with strong cases to bypass legal aid in order to avoid delays. If CLAFs are to be set up in different parts of the world, lawyers will be torn between advising clients with strong cases to proceed without cover from the CLAF or legal aid on the one hand or suggesting that they apply to the CLAF because they know that the success of the scheme depends on a reasonable take-up by claimants.

C. Legal Expenses Insurance

In many parts of the world the best established alternative to legal aid is Legal Expenses Insurance (LEI). For subscribers who pay an annual premium or membership fee, LEI provides protection in the shape of meeting the costs of legal advice or representation during the year. It takes two main forms: group legal services and individual policies. While the former are particularly prevalent in the USA and the UK, the latter are more prevalent on the continent of Europe. It is undoubtedly conceivable that the decision to litigate in one country rather than another, might be influenced by the coverage of any LEI policy held by the litigants.

1. Group Legal Services

(a) The general picture: Group legal services provide routine and non-routine legal services at reduced or subsidised rates to the members of groups. The exponential growth of such schemes in the U.S. since the 1970s is partly attributable to tax concessions which make them attractive fringe benefits to employees, partly to their appeal to certain sectors of the profession because they provide a constant supply of legal work, and partly because they are seen as an adjunct of the legal services movement there. Group plans in the U.S. have frequently been aimed at poorer clients who are ineligible for legal aid. As such they provide not only easy access to specialist lawyers but also education on legal matters.

The services offered under these schemes vary quite considerably, but the majority place a stress on preventive law. Consultations to cover routine legal services, are comparatively inexpensive and efficient uses of legal expertise, and as such are strongly favoured by the schemes. Representation in court on the other hand is highly expensive and accordingly less freely available. Typically, the group member and his or her family will be entitled to a stipulated number of hours of advice or representation work from a lawyer, either free or at a

81. The Eligibility Review highlights this point, repeatedly stressing that such a scheme would make litigation almost entirely risk free. In their eyes this is undesirable because it might encourage reckless litigation and an unwillingness to settle. In reality litigation is already a lottery with many unpleasant side-effects, without the need to insist that the risk of ruin should be retained in the interests of prudent litigation.

reduced rate of charge. Claims which are considered by the lawyer to be frivolous, spiteful or very unlikely to be successful will usually be excluded.

The schemes may be 'open' or 'closed' or somewhere in between. 'Open' schemes are those where the member may select any lawyer they choose to provide the legal services offered in the scheme. 'Closed' schemes are those where the claimant is given little or no choice in the selection of the lawyer who will provide the services. Most group schemes are of the closed variety because by insisting that the legal services be provided by staff lawyers or by a restricted panel of private lawyers, the scheme organisers can take advantage of economies of scale enabling greater specialisation and expertise to be built up among the lawyers and improved research facilities and machinery to be provided, while at the same time enabling fees to be kept down and the quality of the work monitored. On the other hand, closed schemes largely remove the clients' freedom to choose their own lawyers and are liable to provoke accusations of unfair attraction of business from lawyers excluded from the schemes. Nor are they of assistance where the client's dispute is against the organisers of the scheme.

Group plans can also be divided between those in which the insurance is automatically conferred on all members of the group and those where only the group members who voluntarily enrol for the scheme are covered. Not surprisingly, schemes of the former variety have proved more cost-effective in the U.S. than the latter. This is because voluntary enrolment plans have higher marketing costs and present a greater risk of adverse selection.

(b) The UK experience: In the United Kingdom group legal services are also a well-established, although little discussed, phenomenon. Principally it is trade unions who have developed such schemes on a large scale. Trade unions view legal services for their members as an important service and (as in Italy) it is one of the strong 'selling' points of union membership. Unlike legal aid, the pursuer has no contribution to pay and if the case is lost the union pays all the expenses.

Indeed, there is some evidence that in an attempt to boost the attractions of union membership, certain unions apply only a minimal merits test and will fund litigation which would have very little chance of success in court and which would be refused legal aid for lack of probabilis causa. It is clear that a considerable proportion of personal injuries cases in the United Kingdom is funded by trade unions and the structure of the legal aid schemes contributes to this, for applicants can be refused legal aid if they have access to other facilities or sources of financial assistance. The most common alternative sources of such assistance are trade unions. Although most group schemes in the United Kingdom are closed ones, both the Law Societies have declared that such schemes do not involve any unfair attraction of business and have granted them waivers of the practice rules against arrangements. However, clients who resent the curtailment of their freedom of choice of lawyer under such schemes have to convince the legal aid authorities that their objection is a reasonable one if they wish to avail themselves of the greater freedom of choice afforded by our legal aid schemes.
Unlike the USA, most group schemes in the UK (and in other parts of Europe), restrict the legal services offered to areas relevant to the activities of the group and the emphasis is put on meeting the clients’ non-routine and more serious legal needs, for example, for representation in court. Nevertheless, a few schemes are now offering a 24 hour telephone advice line to group members, on any point of law. In 1990 the Law Society and the TUC launched a new scheme entitled UNIONLAW which encourages union members to consult solicitors on non-work related matters. Participating solicitors provide a free diagnostic interview on any legal problem, a written estimate of further costs, and a fixed price for conveyances or wills.

The value of group legal services in civil cases with an international dimension are limited in two ways. First by the narrow scope of most schemes and secondly because it is unusual for them to provide funding for litigation in foreign countries. Occasionally access to a group legal service may be purchased with an eye to the cost of potential litigation abroad e.g. joining the AA before going on a foreign holiday. Even here, however the group legal service is usually being topped up by an individual policy of limited duration.84

2. Individual policies

(a) The European picture: Legal Expenses Insurance policies for individuals first appeared in mainland Europe in the 1920s but their significance in the legal services market dates from the 1960s. It is the dominant form of LEI in Europe (although in Sweden and in Italy trade unions are important providers of legal aid). It is estimated that at least 50% of all households in Germany have some kind of LEI85 and 80% in Sweden, though the figure is lower in other European countries. Predictably, the available evidence suggests that higher income individuals are disproportionately likely to take out LEI.86 In contrast to the evolution of group legal services in the USA, individual LEI in Europe has developed along commercial lines. Its aim, like other forms of insurance is to spread the risk of loss consequent on the happening of an uncertain event. As a result the typical coverage of individual policies in Europe is restricted in a variety of ways - not least in excluding many of the routine legal expenses which are the primary focus of group legal services. Thus in Germany the drafting of wills and other documents, negotiations, representation in divorce and succession actions are usually excluded. Similar exceptions exist in Sweden.87 In fact, in most European countries the coverage of individual policies is closely aligned to more general areas of insurance. There is, however, little evidence available as to types of claims experienced by LEI companies. One of the few studies in

this area was conducted in Germany and found that 39% of claims related to traffic violations, another 30% to other car related matters, and 31% to other areas (principally, consumer, labour law, and landlord and tenant cases).

(b) The United Kingdom: In the United Kingdom individual LEI policies, whether free standing or ‘add-ons’ to car or home contents insurance policies, have only been available since 1974. Most policies provide a free legal advice telephone line, a free choice of lawyer and, most important in this context, they usually offer European-wide coverage. For individuals or firms ineligible for legal aid LEI clearly has much to offer, but there are a number of drawbacks. The policies tend to be expensive for the cover offered and the cover offered is limited - most have a financial ceiling on cover and most exclude matrimonial disputes, defamation, tax matters, building disputes and defence of criminal prosecutions involving violence. However, the importance of LEI as a factor for UK based litigants deciding to litigate abroad is most severely limited by its very restricted penetration of the market. Most people in the UK simply do not have an LEI policy. (A recent survey by the Consumers’ Association and the Law Society suggested that only 7% of respondents had any form of LEI). Moreover, its relatively low penetration makes it at risk of ‘adverse selection’, particularly in the case of stand-alone policies, thus undermining the viability of the market. For these reasons even the Eligibility Review felt unable to recommend it as a replacement for legal aid in the UK - at least for the time being.

IV. CONCLUSIONS

(FIRST) At a time when the welfare state is under pressure throughout Europe spending curbs on legal aid may well become the order of the day. Certainly, the pursuit of value for money and quality assurance in publicly funded legal services is likely to become more commonplace. Whichever route is taken, the English ‘preferred supplier’ strategy or the Dutch ‘registered practitioner’ approach, the emphasis on accreditation will be beneficial to international litigators since it will enable them to identify legal aid specialists more easily from abroad. It may, however, entail problems of access in rural jurisdictions and the erosion of the free choice of lawyer principle reiterated as recently as the LEI Directive on Legal Expenses Insurance (87/344). These potential problems reinforce the case for a planned mixed model for the delivery of legal services.

(Secondly) While the policy of relying on the legal aid system of the chosen jurisdiction rather than one’s own to pay the costs of foreign litigation is probably a sound one, it does have certain drawbacks. There is a need for better infor-
mation systems concerning the scope and availability of legal aid in different countries. Moreover the variations in the scope of legal aid between countries makes it very difficult for rational actors to select a legal expenses insurance policy to cover the gaps. Equally, greater predictability of legal costs (as in Germany) would help rational planning both by potential insureds and by insurers endeavouring to set a realistic premium for worldwide cover.

(Thirdly) Contingent and speculative fees - possibly even a Contingent Legal Aid Fund - properly regulated could have a residual role to play for those ineligible for legal aid or sufficiently prescient to foresee that they are likely to be involved in an international litigation. However, unless CLAFs become more widespread there will still be the problem of paying for the other sides’ legal costs.

(Finally) It should be reiterated that any discussion of the comparative financing of civil legal actions must be viewed in the larger context of the differing remedies and juridical procedures (including fact-finding procedures) available in different countries. For example, an examination of legal aid coverage in Sweden should bear in mind that in that country (1) legal expenses insurance is compulsory for certain matters (2) trade unions provide a significant measure of cover through group legal services, (3) consumer disputes are usually handled by special tribunals without the benefit of lawyers, (4) courts handle claims for small sums with a simplified procedure again without legal representation being thought necessary and (5) administrative disputes are often handled by ombudsmen.92 It follows that a further complication for the rational litigator of the future will be the success of differing governments in simplifying procedures or in their pursuit of Alternative Dispute Resolution.

92. See Olauson, op.cit.