

Here the risk on the horizontal axis is the measured 1 in 200 worst case, ie how much capital does the firm need – the further to the left the better. On the vertical axis is the average underwriting result of the company – the higher the better.

So ideally we would want to be at the top left of this chart. The sad truth is that we can't get there. It is generally true in life and business that the more risk we take, the more money we are likely to make. The more we eliminate risk, the more it costs us. The "gross" option (in insurance speak with no risk hedging) gives us the highest average result but also the highest risk as measured by the 1 in 200 year worst case event. Option 1 by contrast reduces

the risk by some 85% but sees average profit halve. The company may decide that the gross option is too risky but they can survive losing £2.5m every 200 years. In that case, the gross option and Option 3 are too risky and can be rejected. But which of Options 1 and 2 should they pick? In this case there is no right answer. It is perhaps probable that they would go with Option 2, the risk is still well within their acceptable tolerance and little worse than Option 1 but the average result is 15% higher.

The decision has been rationalised, the choice can be defended, debated and challenged. In reality things can be more complicated, there may be more than one risk measure (eg protecting capital but also

minimising earnings volatility), but this framework has revolutionised decision making in insurance risk hedging (reinsurance) over the last 15 years. Yes the issues we debated earlier, uncertainty around our estimates must be considered (eg the bars in the chart), but the process of modelling, forcing a transparency of assumption and a robustness of decision making has been undeniably beneficial.

Can these techniques be used more widely in other areas of decision making? I certainly can see no reason why not. Even the less numerate in the insurance industry (the insurance market remains predominantly a people business though now an increasingly technical one) have

now grasped and embraced these concepts and we are certainly beginning to understand best practice around its use. The Willis Research Network has recently been expanded to provide a forum to debate these issues, the WRN Economic Capital Forum.

Serious investment decisions demand proper modelling of the reduction of risk compared to the cost of investment. Without a proper understanding of risk, how can sensible decisions be made?

# WHAT IS SECOND TIER PROTECTION (STP)?



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**In layman's parlance, Second Tier Protection (STP) is a lesser form of Intellectual Property (IP) that is intended for the protection of devices, apparatus and the like where the technical advance is not as high as it might be for obtaining the Grant of a full Patent; nevertheless, STP in its many guises is established in some 77 countries worldwide and finds extensive usage in some European countries but especially in China, Japan and South Korea.**

Presently, STP is called: Utility Model in China; Innovation Patent in Australia; Utility Model in Japan, Italy; Germany (Gebrauchsmuster); France (Certificat d'Utilité) and Spain; Short Term Patent in Holland and Ireland and Short Patent in Belgium.

In some countries the STP is registered without examination

although such a procedure has to be undertaken if an infringement action is contemplated. The various forms of STP have different terms depending upon IP Law of the territory; thus, in Belgium a Short Patent has a term of 6 years while a Utility Model in Japan can be for 10 to 15 years.

Over the last two decades

there have been several proposals for the implementation in the United Kingdom (and Europe) of STP in the form of a 'Utility Model'. The proposals were from, inter alia, CIPA in 1992 and the Max Planck Institute in 1993; thus, on 6th-8th July 1994, a Symposium was held at Bocket Hall to review the Proposal for a European Utility Model as

proposed by the Max Planck Institute. The outcome of the Symposium was somewhat negative with doubts being expressed in relation to the form of the STP, the languages that it should be published in and the vexed question of whether the Applications for STP should be examined or not. Consequently, the issue was left on the table and has not really been addressed since.

In recent times it has been suggested that a European Utility Model would serve the interests of lone inventors and SMEs to be of benefit to UK PLC insofar that it is recognised that the SMEs are the driving force that will lead the country on the path to economic recovery, financial stability and prosperity.

The proposal that STP could be a step in the right direction was included in some of the responses made in the call for evidence that was considered in the Review by Professor Hargreaves; however, the topic never made it to the final report stage.

## HOW WOULD STP BENEFIT SMES et al?

Amongst the main disadvantages that have to be overcome by lone inventors and SMEs is the uncertainty that Intellectual Property Rights (IPRs) can be protected at a cost they can afford. The cost of a full patent in the United Kingdom can be as little as £280 if the Applicant has the ability to draft a Specification and Claims that will pass muster not only before the Patent Office Examiner but also before a Court if the Inventor's monopoly is attacked in an infringement action. On the other hand, if the services of a Patent Attorney are used, the initial costs of filing a Patent Application may be not less than £3000 with attendant additional monies becoming

due if and when an Examiners Report raises objections that have to be responded to by reasoned argument. The financial burden on the lone inventor and/or an SME could be alleviated if STP was available at a lower cost for a short term whether or not the STP was subjected to an examination procedure.

In China, according to Tony Mak, there were 315,000 Utility Models granted in 2010, see the article printed at page 231 et seq of the CIPA Journal for April 2011. He also noted that 99.96% of the patentees were Chinese entities. It is not suggested that there would be a similar proportion of applicants for STP in the United Kingdom if a Utility Model law was to be promulgated; however, without such a Law we can only postulate the effect it might have on the economic development of the country.

Unfortunately, the likelihood of a United Kingdom and/or a European Utility Model is something of a pipe dream and, even if there was to be an accord between the various countries of Europe, it would be many years before a law for STP would be promulgated. In the mean time, there is no reason why lone inventors, SMEs and even larger entities could not take advantage of the STP that is available in any of the 77 countries where such provision is established. This can be most advantageous in places like China, South Korea and Japan so that dealing with manufacturers in those countries, for products to be sold in Europe and elsewhere, would give added safeguard against copying by the manufacturer for his own disposal.

One way of ensuring that the appointed manufacturer is not

tempted to manufacture products and to market them in territories where the inventor has no patent and/or design protection is to offer the manufacturer a licence deal at an equitable royalty rate that allows him to legitimately make the products for the inventor while being able to exploit markets where the inventor has no interest.

It is considered that any Applicant for patent protection in any territory where STP is available should seek their Patent Attorney's advice in relation to the usefulness of adding Applications for STP to their portfolio, especially where the protection being sought is for high value goods, apparatus and machinery. Having an STP, albeit for a short term may ensure that possible infringement of one's IPRs is prevented or at least reduced.

An interesting article appeared in *The Mail on Sunday* 8th May 2011, which article reported that manufacturers from the lighting and sound industry where calling on the Government to introduce an intermediate Intellectual Property (IP) system in order to enable them to compete worldwide. Obviously, STP in the United Kingdom would not protect any overseas markets for an invention, which would have to be the subject of an STP or full Patent wherever the invention was going to be marketed.

## INDIA – UTILITY MODELS – ONGOING DIALOGUE

A most comprehensive Discussion Paper on Utility Models, from the Indian 'Department of Industrial Property and Promotion', has been received with positive acclaim. This is especially so by the Government of India

Department of Micro, Small and Medium Enterprises (MSME). However, as with the negative response to the proposals for a UK and/or Europe wide provisions for Utility Models in the 1990s, there have also been some very negative opinions that may result in the topic remaining on the table with only a passing lip service being paid to the advantages that might accrue from the promulgation of Utility Model Law in India.

It has been suggested that the economic fortunes of India could benefit from the introduction of Utility Models, particularly as such protection at a reasonable cost would help to launch products on the home market and encourage MSME enterprises to enter the export market thereby bringing benefits to the larger Indian economy.

The dissenters, as with the voices against a UK and/or European Utility Models, have raised the issues of unexamined rights and uncertainty when faced with possible infringement of third party rights. One comment on Google even noted that at least two European countries have repealed their Utility Model law because of the lack of certainty.

Perhaps we may see Utility Model Law introduced in India, but not for some time. We shall just have to wait and see!

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