Burford

Nº 3
2021

THE BURFORD Quarterly

A REVIEW OF LEGAL FINANCE

OIL & GAS INDUSTRY EXPERTS ROUNDTABLE	TRENDS IN OFFSHORE RECOVERIES	THE NEW WAVE LAW FIRM CFO

THE BURFORD

Quarterly

A quarterly review on quantifying legal risk

CONTENTS

2021 Legal Asset Report: A survey of finance professionals 2

Expert insights: Trends in the oil and gas industry 8

Asset recovery roundtable: Post-pandemic trends in offshore markets 18

London will remain a leading global disputes hub despite Brexit 30

Key developments in insolvency funding in Hong Kong and Singapore 36

Covid business interruption insurance: What do the numbers tell us? 42

The new wave law firm CFO 48

This communication shall not constitute an offer to sell or the solicitation of an offer to buy any ordinary shares or other securities of Burford.

Burford is the leading global finance and asset management firm focused on law. Its businesses include litigation finance and risk management, asset recovery and a wide range of legal finance and advisory activities. Burford is publicly traded on the New York Stock Exchange (NYSE:BUR) and the London Stock Exchange (LSE:BUR), and it works with companies and law firms around the world from its principal offices in New York, London, Chicago, Washington, Singapore, Sydney and Hong Kong. For more information, please visit burfordcapital.com.

© 2021 Burford Capital. All rights reserved. Burford, Burford Capital and the Burford logo design are registered trademarks of Burford Capital.

75%

of CFOs at companies with revenues over $1 billion reported unenforced judgments worth $20 million or more in 2020.

[1] Source: *2021 Legal Asset Report*, Burford Capital, https://www.burfordcapital.com/insights/insights-container/2021-Legal-Asset-Report/.

2021 Legal Asset Report

A survey of finance professionals

CFOs are ever more important corporate leaders—and architects of value creation within their organizations.[1]

An area of opportunity for additional value creation by the CFO lies in the potential to collaborate with the legal department to maximize the value of corporate legal assets. Over Burford's 12-year history, it has been our experience that these often highly valuable legal assets remain surprisingly invisible to the finance suite, and thus stubbornly illiquid for the organization. But as finance professionals increasingly look for new and innovative ways to enhance liquidity and maximize profits for company shareholders, a new approach to their companies' legal assets can be transformative.

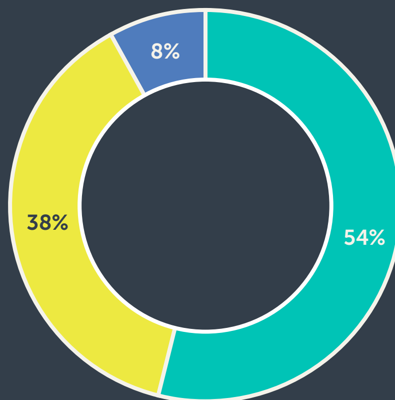
To help finance and legal teams understand this opportunity, Burford commissioned independent research with senior financial officers in the US, the UK and Australia. The full 2021 Legal Asset Report can be downloaded on Burford's website.

Snapshot of key findings

Affirmative recovery and legal cost management programs are extensive—and need to grow

Nearly three quarters of all financial officers (73%) report extremely or very extensive affirmative recovery programs—that is, initiatives focused on pursuing meritorious claims that will return value to the organization. Even more (84%) report extensive cost management programs that are focused on reducing the cost of the legal department. Yet almost half of financial officers see room for improvement in both their affirmative recovery and legal cost management programs. This suggests that financial officers are not entirely aware of the opportunities they have to leverage their legal assets—and working with legal to understand these opportunities could significantly benefit the businesses they lead, helping them reduce risk and enhance liquidity.

Which of the following best describes your view of the legal department's affirmative recovery efforts?



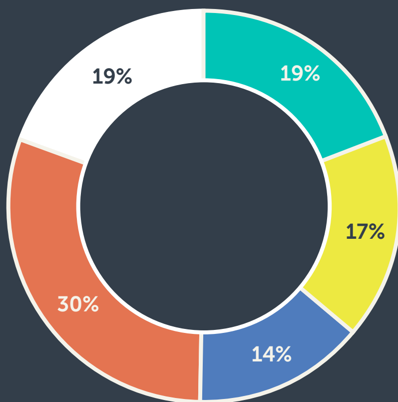
- The legal department's affirmative recovery meets the company's needs
- The legal department's affirmative recovery needs to improve, but steps are in place to do so
- We need to place a greater priority on the legal department's affirmative recovery

Snapshot of key findings

Reducing risk and boosting liquidity by leveraging legal assets

49% of financial officers reported that they chose not to pursue judgments due to cost in 2020, with half of those reporting the amounts at stake totaling $20 million or more. At large companies (those with over $1 billion in revenues), a stunning 75% report unenforced judgments worth $20 million or more. Those with inadequate affirmative recovery programs are 27% more likely to leave money on the table. The impact on business is clear: Enforcing these judgments, and using available tools to pursue claims and awards, can add millions of dollars in value to advance business goals.

What was the total value of judgments in 2020 whose enforcement you did not pursue?



Less than $5 million · $5-$9.9 million · $10-$19.9 million · $20-$49.9 million · $50-$99.9 million

Snapshot of key findings

Quantitative analysis: Financial officers can apply the same financial approach to legal as the rest of the business

The majority of financial officers report a high degree of control over legal budgeting and recovery targets. However, very few (24%) report making decisions about high stakes commercial litigation based on quantitative financial modeling as they do in other areas of the business. Many (59%) report doing so because they do not get enough information from the legal department to model litigation value; and a significant number (39%) say that litigation variables don't lend themselves to quantitative analysis. This suggests that an opportunity for greater use of legal finance: Burford offers not only capital to finance legal assets but also the expertise to identify and value them. Burford undertakes quantitative modeling for every case we fund and stands ready to discuss a company's cases with CFOs and GCs alike.

Which of the below describe why you do not conduct quantitative financial modeling of litigation recovery?

Reason	%
As an organization, we do not conduct enough affirmative litigation to have built expertise in modeling litigation value	26%
As a finance team, we do not get enough information from the legal team to model litigation value	59%
Neither the finance nor the legal team believes that the variables involved in modeling affirmative litigation outcomes lend themselves to quantitative analysis	39%

Time is money, and accounting for it aids the valuation of litigation assets

Although lawyers instinctively consider time to resolution as a key factor in proactive litigation, financial officers are less aware of this consideration: Time is the least likely primary factor to be considered by financial officers when evaluating the impact of litigation. This suggests a need for finance and legal to collaborate more closely, given that the long duration of commercial disputes is one of the key factors in their valuation and modeling. ICSID arbitrations, for example, take on average 46 months to resolve, and another 13.3 months may elapse between the close of a final hearing and payment of an award.[2] Financial officers are significantly more likely to base their minimum recovery target on return on investment (ROI) vs. internal rate of return (IRR), but this could be impacted by greater awareness of the duration risk inherent to commercial disputes.

Snapshot of key findings

A commercial mindset about legal assets reinforces more commercial behaviors—benefiting the business

Financial officers seem poised to bring a more commercial mindset to their companies' legal assets and functions. A majority (56%) believe legal departments should have commercial targets just like other departments and that legal claims are assets because they represent future cash flow (59%). Financial officers who conduct quantitative analysis of litigation are more likely to believe that legal departments should have commercial targets and those whose companies have extensive affirmative recovery programs are more likely to believe that it is possible to control the timing of incoming cash flows from litigation. Companies that have a commercial mindset towards the legal department are better positioned to maximize liquidity and reduce cost and risk—generating more value for shareholders.

Are commercial claims financial assets?

Response	Share
Commercial claims are financial assets because they represent future cash flow	59%
Commercial claims are not financial assets because they don't show up on the balance sheet	41%

[1] "Architect of business value: Leading collaboration," *Accenture CFO Now: Breakthrough speed for breakout value*, https://www.accenture.com/_acnmedia/PDF-145/Accenture-CFO-Now-Research-2021-FullReport.pdf

[2] Jeffery Commission and Rahim Moloo, *Procedural Issues in International Investment Arbitration.* Oxford: Oxford University Press, 2018.

ROUNDTABLE

Expert insights: Trends in the oil and gas industry

In the spring of 2021, Burford Director Jeffery Commission and Vice President Reda Hicks asked a group of trial attorneys, arbitration leads and dispute resolution specialists in the energy sector about major risks and opportunities in the oil and gas industry following the pandemic. Their insights are gathered and excerpted below.

Q.

A year after Covid, what are the major areas of concern and opportunity in the oil and gas sector?

Mark Baker:
While everyone says that "volatility is the new normal," in the oil and gas sector volatility has always been the norm. Covid-19 created larger waves in most economies, with the oil and gas sector hit hard by a seemingly perfect storm: The pandemic, a downturn in demand, steep declines in oil prices followed by sharp rebounds, political instability, trade wars and sanctions. Major areas of opportunity and risk post-pandemic are a dichotomy between those who recognize that the world will need oil and gas to fuel its growth and the increased pressures to move quickly toward the energy transition. Related to that is the increased focus on ESG and Business & Human Rights issues along the energy value chain. Also important are the risks associated with political instability and change including to investment regimes and domestic energy policies.

Joe Buoni:
Just five or ten years ago, many clients in Houston would recoil if you started talking about renewable or alternative sources of energy. Now, clean energy is an area of growth for traditional oil and gas firms—especially the larger ones. Just recently, we saw a multinational oil company propose a $100 billion investment for a facility that would capture carbon emissions on the Gulf Coast. While this is a response to the concern of climate change, it's an area of opportunity to generate revenue and capture public attention.

Another opportunity is in the consolidation of the traditional oil and gas industry. Last year, Chevron made a large acquisition, as did Southwestern Energy and Devon Energy. There was a recent wave of bankruptcies at the onset of the pandemic in March 2020. Usually, banks and lenders are reluctant to take over the assets of their companies in the face of a downturn. What was unusual was that many lenders were willing to take on assets of oil and gas companies this time around and—since it paid dividends—were getting more than their loans back.

> "Dispute risk audits are an important mechanism, particularly for large corporations with a global reach."
>
> —MARK BAKER, GLOBAL CO-HEAD OF INTERNATIONAL ARBITRATION, NORTON ROSE FULBRIGHT

Michelle Gray:
One major area of concern in energy litigation is the uncertainty surrounding many of the lawsuits already on file. More than a year into the pandemic, there is still relatively little precedent from courts on some of the core legal questions posed by the pandemic-driven litigation. While most judges have tried to keep their dockets moving through virtual hearings, the vast majority of courts have not been holding trials and, as a result, it is difficult to predict how courts are going to decide many of these core issues that are percolating in pandemic-driven litigation. The lack of case law is also affecting arbitrations; without clear precedent to follow, arbitrators are often inconsistent in their analyses.

However, with the US seeing reduced numbers of Covid-19 infections, there are opportunities for resolution of pandemic-driven lawsuits outside the courthouse (or an arbitrator's conference room). To the extent possible, now is a good time to reassess ongoing litigation and see if a business solution makes sense. Rather than spending money on litigation, it might make sense to renegotiate deals or try and work out settlements—especially if your disputes are pending in a court backlogged due to the pandemic.

Q.

In many cases, we are beyond the point in the pandemic where force majeure can serve as a basis for handling commercial disputes, yet we are still feeling the ripple effects of Covid. How are you helping clients manage the continuing uncertainty caused by the ripples?

James Brown:
The impact of Covid-19 is still often a key issue for parties. Unlike an event of force majeure having a short duration, the pandemic has continued for well over a year and, with no end in sight, continues to impact projects. I have seen matters where parties are yet to agree on the pandemic's impact to date and who have had a real difficulty in arriving at a deal on its impact on their contractual obligations and rights. The difficulty arises from having to determine the pandemic's current and future impact on their projects. Parties don't want to preclude claiming further extensions of time if circumstances change, especially if they face another lockdown. So, there is that tension, which can make it hard for parties to move forward with a plan on an agreed footing.

Mark Baker:
The best way to manage uncertainty is to "know the enemy and know yourself." Dispute risk audits are an important mechanism, particularly for large corporations with a global

reach. They add measurability and predictability, establishing protocols for how to prepare for and resolve disputes from the outset and after they arise. Likewise, careful assessment of counterparties and asset profiles are important, particularly in light of the increasing potential of facing a non-performing or insolvent counterparty along the supply chain. In the long run, these measures can save significant management time and money—and critically, preserve important counterparty relationships.

Michelle Gray:
As there is still a lot of uncertainty, especially as employees return to offices or navigate a new normal with work-from-home policies, companies will need to continue to be flexible without completely waiving their legal rights—and that balance is difficult. If you are dealing with a business relationship that is governed by a contract, you should know what your legal rights are and ensure that you aren't doing anything that would be considered a waiver of those rights. Read the contract and, if needed, amend agreements. Do not proceed under the prior contract without memorializing what new terms you have agreed to. Similarly, as they deal with employees, companies need to make sure they are explicit about expectations and that any new policies are in writing to avoid headaches down the road.

Q.

The supply chain is a significant source of risk and uncertainty for the oil and gas sector even in the best of times, and the last year's events have further exacerbated that harsh reality. Can you address how you are helping clients navigate the heightened risk and uncertainty in their supply chains? What are the tools when it comes to commercial disputes?

James Brown:
Covid-19 has caused parties and their legal advisors to scrutinize force majeure clauses much more closely than before. Parties in the last 18 months have had to grapple with these clauses and apply them to seek to excuse contractual failures or extend the time that they have for performance. Often, the shortcomings in clauses agreed pre-pandemic became apparent. One way we are addressing the heightened current risks in supply chains is by including liquidated damages clauses in contracts and making sure that such clauses are prepared to be enforceable and as free from the potential for disputes to arise as possible. The pandemic has served as a driver to really focus on sharpening these clauses in new contracts.

Michelle Gray:
Litigation related to supply chain problems can be difficult. Oftentimes,

supply chain contracts will contain provisions waiving or foreclosing consequential damages, and depending on underlying facts, lost profits or significant damages may be considered consequential and thus precluded. When negotiating contracts with vendors or others in your supply chain, it is helpful to be as clear as possible about what damages you want to preserve should issues arise in the future. If you are already in a dispute arising from the stall to your supply chain, read any contracts you have and make sure to understand what legal avenues are available to you.

Mark Baker:
Globalization of markets has led to supply chains which extend across multiple borders. As the pandemic highlighted, the oil and gas sector needs to take a cold, hard look at risks to their supply chain and ensure mechanisms are in place to assess and mitigate disputes risk. Supply chain disputes are as complex as the supply chains themselves, and often require fast cross-border solutions. International arbitration provide a flexible, efficient and effective framework to resolve these disputes.

Joe Buoni:
We make sure clients are aware of counterparty risks and disruptions from not just the pandemic, but also from other forces including weather disruptions and one-off events. In Texas, for instance, there was a huge supply chain disruption following the storm in January 2021—and in just one week, the cost of electricity exploded, which ultimately proved to be a contributing factor to a number of bankruptcies and litigations. Understanding the risks and weaknesses within the industry is key to resolving them. We also want to make sure that companies understand the financial costs associated with litigations and bankruptcies. There are huge costs involved, and many clients face deal fatigue and are less eager to spend money on lawyer fees to deal with unresolved claims post bankruptcies.

Q.

Managing risk in multi-tier oil and gas ventures can be a huge challenge, especially where the work—and even certain vendors and partners—are based in geographies with real potential for economic and political instability. When problems arise, how do you see them playing out in the arbitration space, either in treaty or commercial disputes?

Mark Baker:
I cannot say this enough—dispute risk management is all about data and preparation. Now, sophisticated parties take a close look at the disputes risk profile of a project and structure in bespoke mitigation mechanisms—both contractual and treaty based. This should be done at the very outset of a transaction and during the life cycle of a project.

The nature of oil and gas, indeed energy more generally, is such that disputes risk is generally higher than most other projects. But it is simply a matter of preparation and mitigation. Put yourself in the best position, with the best tools to hand to avoid, resolve or win disputes decisively and efficiently.

Q.

The past year's challenges seem to have "shaken loose" issues that may always have existed in the energy business, but now are much more apparent. What legal and commercial risk topics are on client radars today that were not as apparent before the pandemic?

Michelle Gray:
As lawsuits play out, I anticipate that we will see courts taking very nuanced approaches on a case-by-case basis. The words "force majeure", once obscure, are now in vogue. Plaintiffs seeking to hold defendants accountable will blame non-performance on poor management and other avoidable factors, while defendants will blame it entirely on the pandemic.

Therefore, I suspect causation will become a highly contested issue in force majeure litigation.

Outcomes will depend on the specific language of the force majeure clause and whether the resulting harm was largely attributable to the pandemic or whether causation can be pinned on something else. I also anticipate that transactional attorneys will be revamping force majeure clauses in

their contracts; we can expect to see those clauses more fulsome and fleshed-out in future agreements.

Mark Baker:
It's fair to say that most of the challenges in the energy business have been on everyone's radars pre-pandemic. Supply chain risks have always existed. During the challenges of the past year, however, there was (for good reason) a heightened focus on risk, so perhaps that is why these issues appear to have been shaken loose. The common thread for all these issues is that collectively and individually, these present complex macro and micro level risks to navigate and require a deep understanding of the client, sector, markets, disputes and trends developing in each.

James Brown:
The pandemic has given rise to numerous contentious issues for clients and this has made them really focus on how the resolution of disputes in new contract they are entering may play out. The heightened perceptions of risk and potential that currently exist, combined with an ever-increasing focus on avoiding dispute-related costs, has driven a renewed focus on making sure that dispute resolution provisions work. There is also a focus on the potential to limit litigation and arbitration costs, especially by the inclusion of multi-tier provisions that, for example, provide for internal discussions, carving out of issues for resolution by technical experts and even mediation as a pre-condition to the commencement of any claims.

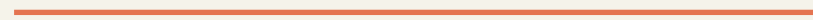
Joe Buoni:
The outlook is better now than it was a year ago. Pricing and production levels have picked up over the past few months. However, the problem of oversupply has plagued the industry over the last decade and there's concern that the current pricing could be artificially high.

> **"Companies will need to continue to be flexible without completely waiving their legal rights—and that balance is difficult."**
>
> —MICHELLE GRAY, FOGLER, BRAR, O'NEIL AND GRAY

Are you seeing any policy trends emerge from the Biden administration that will impact the energy industry? How would you suggest clients be thinking about them?

Mark Baker:
President Biden's day-one executive order mandating the US rejoin the Paris Agreement was a pretty clear statement of intent in his administration's energy priorities. The clear trend is a strong focus on emissions reductions and a push towards a comprehensive energy transition. This will mean a boost to clean energy, renewables, electric vehicles (and by association, mines and commodities), related infrastructure and technologies. For the oil and gas sector, the policy trends are more restrictive with additional hurdles to navigate.

Given the status of federal lands both on and offshore, much can still be done by regulation. This creates real sector opportunities for those holding leases already granted and relatively insulated from rule and regulatory regime changes. We are advising clients to be flexible, nimble and looking to take advantage of the plentiful opportunities in the energy sector that disruption of this scale and speed offers, but also be alive to the risks and how they can be mitigated.



PARTICIPANTS

Mark Baker

Mark Baker is a Global Co-Head of International Arbitration at Norton Rose Fulbright and a member of the Firm's Global Supervisory Board. He practices in the areas of complex commercial arbitration, investment arbitration, business litigation and alternative dispute resolution.

James Brown

James Brown is a partner in the dispute resolution team in the London office of Haynes and Boone. He has more than 19 years of experience as a disputes lawyer, with a primary focus on litigating and arbitrating complex, high-value engineering and construction disputes for international clients operating in the shipping and offshore oil and gas sectors.

Joe Buoni

Joe Buoni is a litigation and bankruptcy partner in Hunton Andrews Kurth's Houston office. He represents clients across many industries, but his practice focuses on the representation of energy companies, financial institutions and private equity funds, including their portfolio companies.

Michelle Gray

Michelle Gray is a trial attorney and founding partner at Fogler, Brar, O'Neil and Gray. She has consistently been named a Texas Rising Star since 2016, and in 2021, Super Lawyers named her to both the Texas "Up and Coming 100" list and the "Up and Coming 50 Women" list. Michelle is on the Board of Child Advocates, a non-profit organization that mobilizes court-appointed volunteers to represent the needs of abused and neglected children.

MODERATORS

Jeffery Commission | +1 202 873 1566 | jcommission@burfordcapital.com

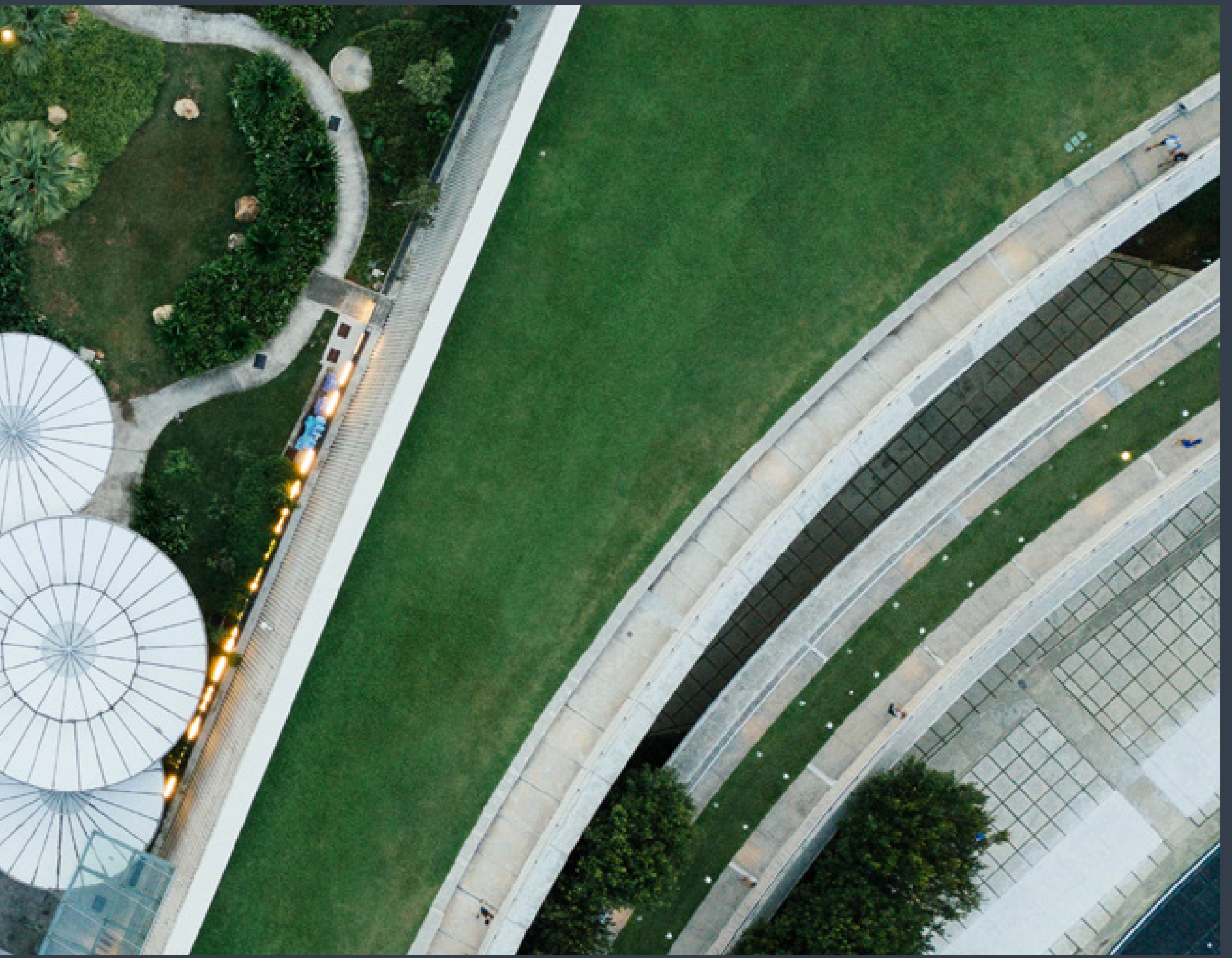
Jeffery Commission is a Director with responsibility for overseeing Burford's underwriting and investment activity in investor-state and international commercial arbitration. Prior to joining Burford, he practiced litigation and arbitration with Shearman & Sterling and Linklaters and was a Senior Associate in international arbitration at Freshfields.

Reda Hicks | +1 346 395 5500 | rhicks@burfordcapital.com

Reda Hicks is a Vice President with responsibility for helping US and Texas-based law firms and companies find legal finance solutions to their business needs. Prior to joining Burford, she was the Senior Counsel for deugro (USA), Inc., a global freight forwarding and project logistics organization, and a Partner at Diamond McCarthy.

ROUNDTABLE

Asset recovery roundtable: Post-pandemic trends in offshore markets



In June 2021, Daniel Hall and Michael Redman, Managing Directors and co-leads of global corporate intelligence at Burford, posed questions on major legal developments in the offshore markets over the past 18 months and economic trends that will play out in the markets post-pandemic to leading litigators, insolvency practitioners and financial professionals in the region.

Q.

A recent act in the Cayman Islands, the Private Funding of Legal Services Act 2020 (PFLSA), which came into force in May 2021, permits third-party funding in a much wider range of proceedings and allows law firms to enter into contingency fee agreements. How do you anticipate this law changing the way law firms interact with their clients and how will it benefit both the claimant and the representing attorney?

John O' Driscoll:
The issue prior to PFLSA was that litigation funding agreements were subject to advance approval by the Grand Court on a heavily restricted basis. They were all but unknown in commercial cases as a result of the continued existence of maintenance and champerty as criminal offenses, and the availability of litigation funding remained scarce. With the increased certainty provided by PFLSA, we anticipate an increase in claims. However, there is likely to be a short delay in uptake initially as the act specifically applies only to causes of action which have accrued since it came into force.

Laura Hatfield:
In reality, litigation funding has been available for over 15 years (particularly in the insolvency space), but PFLSA removes the need to carefully avoid landmines of champerty and maintenance lurking around alternative financing—which often adds a layer of costs in obtaining advice and court confirmation. The law also allows for contingency fee arrangements, either based on value of recoveries or an uplift on normal fee rates as a success fee. Cases that were unable to proceed because of a lack of finance can do so, and claimants will get compensation where otherwise there will have been none.

Christopher Smith:
PFLSA is still in its infancy, but if it achieves its intended purpose, it should allow for a much wider use of litigation finance and flexible fee arrangements between claimants and their attorneys. From a claimant's perspective, the most obvious benefit is that it allows claims to be brought that might otherwise have been difficult to pursue due to a lack of resources. From the attorney's

> “[Because of PFLSA] cases that were unable to proceed because of a lack of finance can do so.”
>
> —LAURA HATFIELD, BEDELL CRISTIN

perspective, the main benefit is commercial given the uplift in fees in the event of a successful claim. It remains to be seen what appetite Cayman Islands' attorneys will have for increased risk versus potential increased recovery in these new contingency fee arrangements.

Matthew Brown & Jonathon Milne:
Nowadays, litigation funding and other alternative fee arrangements are commonly viewed as necessary components of a sophisticated and high-functioning legal system. The Grand Court of the Cayman Islands has expressly recognized the shift in the tide of public interest. The principal objective of the act is to remove any lingering uncertainty in relation to the status of litigation funding in the Cayman Islands. The introduction of clear parameters through bespoke legislation is likely to bring benefits to claimants, funders and their attorneys.

While the Cayman Islands is among the first offshore jurisdictions to implement specific litigation funding legislation, they have the benefit of learning from and following the lead of other sophisticated onshore common law jurisdictions, such as the UK and Australia.

Tim Prudhoe:
The act is welcome and overdue; the tensions inherent in a contingency "onshore" will be no different in Cayman. The main impact will be the improved access to justice.

Q.

Do you believe that the PFLSA may act as a trigger for other jurisdictions in the Caribbean Islands to create their own versions of the law? If so, how do you see this changing the litigation finance and legal landscape?

Matthew Brown & Jonathon Milne:
Cayman Island decisions on third party funding are definitely being seen and emulated in other jurisdictions. For example, courts in the British Virgin Islands (BVI) have expressed support in general terms for third-party litigation funding. In late 2020, In the Matter of Exential Investments, Inc., a third-party litigation funding agreement was approved in the BVI. Citing the Cayman Islands decision of Segal J in A Company v. A Funder (2017), Honorable Justice Jack in the BVI Commercial Court held that a proposed funding arrangement to be entered into between liquidators and a third party funder was "essential to ensure access to justice."

Christopher Smith:
While the recently sanctioned funding agreement between BVI liquidators and third-party funders is relatively new, it is expected to increase the appetite for third party funders to get involved in litigation in the BVI. The increasing prevalence of

litigation funding and flexible fee arrangements in the Caribbean and elsewhere will likely encourage other similar jurisdictions to follow suit, possibly leading to an increase in both the number of funders and the number of claims being pursued.

Tim Prudhoe:
I know that the Cayman legislation is being leveraged elsewhere in the region because I have used it myself.

Laura Hatfield:
Other Caribbean jurisdictions such as Bermuda are also following in the same path as the Cayman Islands where the judiciary is interpreting the existing law to enable access to justice. The existence of the PFLSA will make the discussion on legislative change or clarity a priority in these jurisdictions. Reform may take a few years, however, given that most governments have pandemic recovery uppermost in their minds.

Q.

Are human rights or access to justice issues a basis to open the door to litigation funding, given the tendency of offshore jurisdictions to have written constitutions stating as much, and will this also improve its prospects for becoming available to commercial clients?

Matthew Brown & Jonathon Milne:
Although many jurisdictions in the Caribbean have written constitutions, many also apply the common law, and access to justice is a fundamental principle enshrined in the common law. It was the common law principle that Jack J relied upon in the Exential Investments, Inc. case.

Laura Hatfield:
A written constitution which states that there is a right to access to justice will help make the argument that denying litigation funding is a breach of human rights. However, most judicial work in litigation funding has been done in commercial litigation and insolvency fields without recourse to constitutional arguments.

Tim Prudhoe:
The somewhat “indirect” route of leveraging human rights challenges will likely be the agent of change needed. For example, in the Turks and Caicos Islands, that is precisely the strategy my firm and I have adopted and have two reserved decisions on funding issues. One of those is in the context of insolvency. It is likely that it will take appellate activity to clarify the position under TCI law. It currently looks like the first instance decision will be that primary legislation will be required. We are ready for that.

Q.

The Caribbean islands were deeply affected by the pandemic in 2020, with the economy contracting by 8.6%. A mild recovery of 3.5% was projected for 2021. With that in mind, how has the economy recovered this year and what are some concerns for the region?

Christopher Smith:
The two main pillars of the Cayman Islands economy are financial services and tourism, and tourism has been effectively frozen since March 2020. From the financial services perspective, the Cayman Islands have weathered the storm extremely well. The government was quick to introduce a series of economic stimulus measures to support individuals and businesses, but any recovery this year, particularly tourism, will be reliant on borders re-opening. In terms of potential concerns, there is obviously some uncertainty around what a post-pandemic world will look like and many people may be reluctant to travel when it becomes possible later this year.

Laura Hatfield:
The Cayman Islands economy, despite borders being still largely closed, did better as a whole than projected as the financial service insurance sector, a mainstay of the economy, only contracted by 0.7%. As vaccine roll out reaches critical mass, the Caribbean Islands' economies will benefit as the hospitality sector returns to pre-pandemic levels with some potentially unprecedented demand in winter 2021. Not every pre-pandemic business will survive and there may will be shifts towards less vulnerable commercial activity. There is also an increasing concern of shortages in construction materials and of expat workers which may result in some drag on the recovery.

Matthew Brown & Jonathon Milne:
On an optimistic note, tourists are already returning in droves to many locations throughout the Caribbean. At the risk of stating the obvious, the speed and recovery of the tourism sector will have a major impact on the economic fortunes of the entire region.

> *"Nowadays, litigation funding and other alternative fee arrangements are commonly viewed as necessary components of a sophisticated and high-functioning legal system."*
>
> — MATTHEW BROWN & JONATHON MILNE, CONYERS DILL & PEARMAN

Q.

Chapter 15 filings dramatically increased in 2019 and 2020, including in the Cayman Islands and BVI. For example, Caribbean telecommunications provider Digicel filed in 2020 with $7.4 billion in outstanding debt. Could you talk more generally about bankruptcy and insolvency trends in offshore markets in 2021?

Laura Hatfield:
The overwhelming trend is for restructuring rather than liquidation. To date, any company asking a court for its help to avoid bankruptcy has almost always been given a chance, but increased scrutiny of the genuine desire and the ability to restructure is now being applied to both situations. There is also increased scrutiny by judges on the real need for the proposed multi-jurisdictional applications, which may not achieve much more than an increase in professional fees.

Christopher Smith:
The one thing we've seen towards the end of 2020 and the first half of 2021 is an increase in the use of "light touch" provisional liquidation to facilitate the restructuring of a larger group. The provisional liquidation process provides a moratorium and an automatic stay on proceedings against a company, allowing breathing space for the company to propose an arrangement or compromise. The idea is that the company can exit the provisional liquidation following restructuring and continue as a going concern.

Often these applications involve Cayman entities listed on the Hong Kong stock exchange with operations in mainland China seeking to refinance or deleverage their debt; however, a number of recent decisions by Justice Harris in the Hong Kong Companies Court have caused doubt on the efficacy of this approach. It remains to be seen whether this trend continues during the second half of 2021.

John O'Driscoll:
In general, across both the Cayman and BVI, we are seeing creditors explore their options in terms of enforcement. Many creditors are not yet pulling the trigger on enforcement but have well formulated plans if they decide to go down that route. From a Cayman perspective, following the presentation of a winding up petition against a company without leave of the Grand Court, a secured creditor will be entitled to enforce its security without leave of the Grand Court and without reference to any appointed liquidator.

In terms of the type of companies that we have seen in distress, we have seen activity in the resources, aviation and retail sectors. In terms of regions, we have seen an uptick in resources work out of Africa and the Middle East.

Matthew Brown & Jonathon Milne:
In the Cayman Islands, there are proposed amendments to the Companies Act that would allow Cayman companies to restructure their debts outside of a formal insolvency process under a qualified insolvency practitioner acting in the capacity of a "restructuring officer." This is a welcome development in light of the increasing number of schemes of arrangements being implemented as a means to restructure groups via holding companies domiciled in the Cayman Islands.

The BVI is also expected to see an increase in restructuring and insolvency work in the coming months. Following the decision in Constellation Overseas Ltd. (2018), it is clear that the Commercial Court is able to appoint "soft touch" provisional liquidators. We expect to see this power utilized more frequently in the coming months and into 2022.

Tim Prudhoe:
The continued increases and market for specialist counsel will be buoyant. Modern insolvency legislation is increasingly prevalent in the region, which itself will generate opportunity, subject to funding issues.

"Across both the Cayman and BVI, we are seeing creditors explore their options in terms of enforcement."

—JOHN O'DRISCOLL, WALKERS

Q.

Earlier this year, the BVI amended a Supreme Court Act (Section 24A) to confirm that its court has the authority to grant injunctive relief in support of foreign proceedings. With the BVI arbitral seat increasingly popular, what effects does the amendment have to arbitral proceedings in the region?

Owen Prew:
The Supreme Court Act came about as a result of the decision in *Broad Idea International Limited v Convoy Collateral Limited*, which is still being appealed to the Privy Council. The Arbitration Act 2013 already empowered the BVI court to grant interim relief in foreign arbitration proceedings, and so arbitrations in the BVI were largely unaffected by either the *Broad Idea* decision or the introduction of the Supreme Court Act in 2020. The only advantage now is that the definition of "proceedings" under the Act is broad enough to encompass arbitral proceedings as well. It therefore supplements the existing powers already contained in the Arbitration Act.

John O' Driscoll:
It is true that this is a positive development for the BVI. Section 24A remedies a lacuna in the BVI legislation which did not previously provide for the court to grant interim remedies in support of proceedings on foot outside the BVI.

Q.

With the Charging Orders Act 2020 as an example, do you anticipate further pro-creditor legislation in the BVI? Is the region's shift to becoming less debtor-friendly a positive development for business?

John O' Driscoll:
The Charging Orders Act 2020 is a strong message that the BVI's policy and intention is to ensure that rogue judgment award debtors cannot use asset protection structures to evade enforcement. It is a positive message for the BVI to send at this time.

Matthew Brown & Jonathon Milne:
It is certainly a positive development for business and the jurisdiction as a whole. As the then BVI Attorney General said, during the second reading of the bill that would eventually become the Charging Order Act 2020, "The enactment of this bill will demonstrate that the territory is not a haven for recalcitrant debtors and those who would seek to evade justice."

Owen Prew:
Overall the BVI is a very pro-creditor jurisdiction in terms of the willingness

of the BVI Commercial Court to assist with the enforcement of foreign judgment debts where there are assets located within the jurisdiction. While it is hard to anticipate further legislative changes, the Charging Orders Act 2020 ensured that the jurisdiction remains competitive for internal business going forward.

Tim Prudhoe:
It is a difficult balance to strike. Legislative change in the "big three" (Cayman, BVI and Bermuda) is often driven by competition between them and external pressures will continue the march towards open registers in terms of beneficial ownership.

Christopher Smith:
Notwithstanding this creditor-friendly perception, the BVI Court has previously also shown a willingness to support a more debtor friendly approach in certain circumstances. In the *Constellation, Ltd.* decision, the BVI Commercial Court appointed the first ever soft touch provisional liquidators over a number of BVI companies in connection with a group restructuring taking place in Brazil. While it is unlikely there will be any fundamental shift in the perception of the BVI as a creditor friendly jurisdiction in the short term, it's important to note that there is a balance.

"Modern insolvency legislation is increasingly prevalent in the region, which itself will generate opportunity, subject to funding issues."

— TIM PRUDHOE, ENGLISH BARRISTER

PARTICIPANTS

Matthew Brown

Matthew Brown is Counsel in the Litigation & Restructuring Department of Conyers Dill & Pearman in the BVI and has a broad practice covering all contentious aspects of commercial, trusts and insolvency law. Since joining Conyers in 2017, he has been involved in some of the jurisdiction's leading cases and has appeared in a number of cases in the Commercial Court and Court of Appeal.

Laura Hatfield

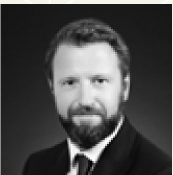
Laura Hatfield is the head of the Litigation and Insolvency & Restructuring groups in the Cayman Islands and Partner at Bedell Cristin. She has advised bankruptcy and restructuring professionals, lenders, investors and professional service providers in the Cayman Islands, UAE and Europe and has been involved in most of the significant Cayman Island cases in the last decade, including Bear Stearns and Weavering.

Jonathon Milne

Jonathon Milne is a Partner in the Litigation department in the Cayman Islands office of Conyers Dill & Pearman and has extensive experience of complex litigation and insolvency matters. He focuses on financial services, litigation and insolvency/restructuring, acting for investment managers, directors, service providers, liquidators and receivers.

John O' Driscoll

John O' Driscoll leads the Insolvency and Dispute Resolution (IDR) team at Walkers in London and practices BVI and Cayman law. He specializes in contentious and non-contentious insolvency work and international disputes, and advises creditors, debtors, private equity and hedge funds and other stakeholders.



Owen Prew

Owen Prew is a Senior Associate at Bedell Cristin. He is an English and BVI qualified solicitor advocate specializing in Commercial and Insolvency litigation. He has substantial offshore experience acting for and advising clients in respect of high-value commercial matters involving shareholder disputes, director's breach of duty claims, enforcement of judgments and all forms of insolvency proceedings and remedies.

Tim Prudhoe

Tim Prudhoe is an English Barrister and practices both across the Caribbean from a Turks and Caicos Islands base as well from 3 Hare Court, London. A former Big Law lawyer, he brings commercial acumen to cross-border litigation strategies. He is often offshore counsel to disputes run from onshore involving litigation funding issues.

Christopher Smith

Christopher Smith is a Director of R&H Restructuring (Cayman) with more than 25 years of experience in corporate restructuring and insolvency. He is a UK qualified and licensed insolvency practitioner and an insolvency practitioner in the Cayman Islands. He has been involved in a wide variety of restructuring and liquidation assignments, from advising stakeholders and investors in distressed situations, to acting as Official Liquidator appointed by the Grand Court of the Cayman Islands.

MODERATORS

Daniel Hall | +44 (0)20 3814-3696 | dhall@burfordcapital.com

Daniel Hall is the Managing Director and co-lead of Burford's global corporate intelligence, asset tracing and enforcement business. He previously spent ten years investigating fraud and financial crime and was a co-founder of Focus Intelligence Ltd, a leading asset recovery advisory boutique acquired by Burford in 2015.

Michael Redman | +44 (0)20 3814 3699 | mredman@burfordcapital.com

Michael Redman is the Managing Director and co-lead of Burford's global corporate intelligence, asset tracing and enforcement business. He has worked in complex asset recovery and enforcement, holding senior positions in both Moscow and London before co-founding Focus Intelligence Ltd.

Despite Brexit, London retains its appeal as a leading global disputes hub

John Lazar

+1 212 235 6820
jlazar@burfordcapital.com

John Lazar is a Managing Director with responsibility for overseeing the growth of Burford's substantial business in the UK and Europe by developing Burford's strategy and opportunity. Prior to joining Burford, he was a litigator at Cravath and at Wollmuth Maher & Deutsch. He has extensive experience in arbitration and complex commercial litigation matters.

London's pre-eminence as a forum for international disputes resolution both in courts and in arbitration is well established. A combination of history, strong rule of law and the city's status as an international financial center—particularly for banking, insurance, shipping and commodities trade—has contributed to London's international reputation as an arbitration hub.

Recent commentary[1] has speculated that Brexit may prove a major threat to London's position as one of the most preferred and widely used seats for international arbitration.

Although it is too early to tell for sure, London's popularity as a leading arbitral seat has not yet been significantly impacted by Brexit. Back in 2018, most respondents (55%) to a Queen Mary survey about the impact of Brexit did not believe it would have a negative impact on London as a seat.[2] As argued in a 2021 Queen Mary and White & Case study: "London's continued presence at the top of the table suggests that, as was predicted by the majority of the respondents in our 2018 survey, its popularity as a seat has not been significantly impacted (at least so far) by the UK's withdrawal from the European Union. London retains its reputation amongst users as a reliable seat of choice."[3]

What do the numbers suggest? In 2020, the London Court of International Arbitration (LCIA) received 444 referrals, including 407 arbitrations pursuant to the LCIA rules—both all-time highs, representing a 10% increase in the total number of referrals and an 18% increase in the number of LCIA arbitrations.[4] There was a slight decrease in the choice of England as a seat (from 89% to 84%). But one cannot make too much of these numbers: Most of the underlying contracts containing the London-seated arbitration clause were likely drafted pre-2016. Thus it is simply too soon to tell whether London's popularity as a seat will decline in the coming years, as Brexit settles in.

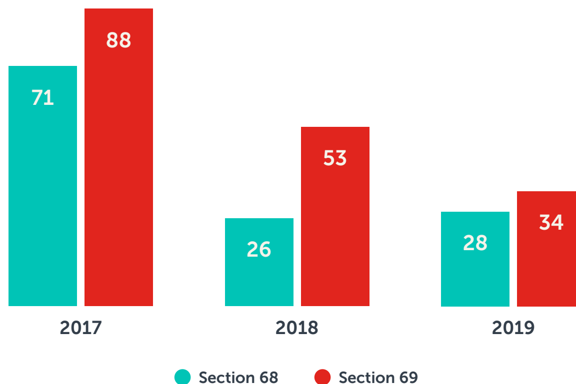
BREXIT DOES NOT CHANGE THE ADVANTAGES OF LONDON AS AN ARBITRAL SEAT

While the jury is still out on whether London as an arbitral seat will be significantly impacted by Brexit, there is no question that it will retain many of the qualities and advantages that have made it a such a prominent global disputes hub in the past. One could even argue that its position may be strengthened as these qualities and advantages become ever more unique in a post-Brexit world—and indeed that potential is among the reasons I relocated to London from New York in March, as part of Burford Capital's pursuit of an expanded market opportunity in the city.

Among those advantages, London is globally recognized for its rigorous legal and disputes resolution system and has a centuries-old developed body of law that is independent of the EU. English law remains the most popular governing law for cross-border contracts and is widely considered the international standard for nomenclature and terminology in contractual documents. In industries such as banking, finance and shipping, English law is undisputedly the most frequently chosen, which often goes hand in hand with the choice of London as arbitral seat.

Additionally, commercial parties looking for certainty will want an arbitral seat that upholds contractual terms with minimal interference. English courts are well known for their non-interventionist approach to arbitral awards: Recently published statistics demonstrate a continuing downward trend in the appetite to bring challenges against arbitral awards under s.68 and s.69 of the Arbitration Act 1996.[5]

Arbitration applications under s.68 (serious irregularity causing substantial injustice) and s.69 (appeal on a point of law)



Minutes of the Commercial Court User Group Meeting that took place at the end of November 2020 show that challenges made under either of those sections have extremely low success rates and the year-on-year decrease in the number of s.68 and s.69 applications being brought before the Commercial Court suggests an increasing acceptance among applicants of the low chances of success associated with the applications. While the English courts continue to intervene where necessary and appropriate, there is a high hurdle for setting aside arbitral awards, allowing legitimate arbitral processes to proceed largely unfettered.

Further, London is a center of gravity for legal expertise from all over the world, with a strong contingent of world-class commercially minded lawyers, arbitrators and expert witnesses. Given that Brexit concluded relatively recently, there remain a vast array of London-based practitioners trained and experienced in both EU law and other legal and technical areas of expertise.

London also boasts a respected, reliable and independent judiciary, conducts proceedings in the English language (the primary language for international business) and has many excellent arbitration facilities, including the new International Arbitration Centre (IAC).

ARGUABLY, LONDON'S POSITION OUTSIDE OF THE EU COULD ENHANCE ITS ATTRACTIVENESS

With no evidence to date of any significant adverse impact on London's position as a preferred seat post-Brexit, some legal commentary has argued the reverse—that Brexit may in the long run bolster London's position as an "offshore" financial services hub.[6]

The reasons include London's location in an island nation separate from the European continent, abundant and well-developed transportation links between the city and the rest of the world and London's location midway between time zones in Europe, Asia and North America, which is convenient both for law and the financial markets.

Its physical separation from the EU may also enhance its perception of neutrality for international disputes from the region in the longer term, just as Singapore is often viewed as an impartial but geographically close venue to bring disputes involving parties from mainland China. To that end, Singapore and Hong Kong both made significant percentage gains as preferred arbitral seats—54% and 50% respectively—in the 2021 Queen Mary survey as compared with previous surveys.

INVESTOR-STATE ARBITRATION AWARDS MAY BE EASIER TO ENFORCE IN LONDON

The Energy Charter Treaty (ECT) is a multilateral treaty that entered into force in 1998 to promote and protect investments in the energy sector through Investor-State Dispute Settlement. ECT awards have become increasingly difficult to enforce in Europe as the European Commission (EC) and the Court of Justice of the European Union (CJEU) have taken an aggressively anti-intra-EU disputes stance.

Prior to Brexit, English courts were formerly bound by CJEU judgments. Following the UK's departure, English courts are now free to enforce arbitral awards which may be against EU public policy. While there is speculation that English judges may still be influenced by EU politics, it is likely that third parties will see English and Welsh law as being more certain and neutral if they are no longer

bound by CJEU decisions, and therefore may adopt "English law, English seat" when drafting dispute resolution provisions.

London is likely to become a particularly attractive destination for European investors looking to enforce arbitral awards without the risk of matters being referred to the European courts, although opposing parties may still file separately to the CJEU if they are a member state.

AN OPPORTUNITY FOR LONDON TO BECOME AN ARBITRAL HUB FOR EUROPEAN DISPUTES

Commercial arbitration is becoming an increasingly popular means of settling disputes. With a perfect storm of uncertainty and change as a result of Covid-19 and disruptions in financial markets, parties will inevitably default on or look for ways to avoid and exit their contractual obligations, leading to an abundance of disputes.

As the EU expands its trading relationships, including through trade deals such as the Comprehensive Economic and Trade Agreement with Canada or its free-trade agreement with Singapore, the volume of commercial disputes involving either transatlantic or Asian parties can also be expected to increase.

London is well-placed to meet this demand, not least because several of the EU's most important trading partners (the US and Commonwealth nations) have stronger affinities with it for reasons of history, legal tradition and language than any other continental seat.

For centuries, English arbitration law and practice have thrived independently of the UK's membership of the EU, not because of it, and commercially savvy parties will be well aware that the significant advantages of arbitrating disputes in London will endure in this post-Brexit world—and may indeed become stronger.

---

[1] Nick Holland, "London's status as a disputes hub is in serious jeopardy despite impending Brexit deal," *Law.com*, December 24, 2020, https://www.law.com/international-edition/2020/12/24/londons-status-as-disputes-hub-in-serious-jeopardy-despite-impending-brexit-deal/.

[2] *2018 International Arbitration Survey: The Evolution of International Arbitration*, Queen Mary University of London, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf.

[3] *2021 International Arbitration Survey: Adapting Arbitration to a Changing World*, Queen Mary University of London, http://www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/.

[4] *2020 Annual Casework Report*, LCIA, https://www.lcia.org/LCIA/reports.aspx.

[5] Louise Bond and Ian Meredith, "2020 Report of the Commercial Court (England & Wales) confirms the deferential approach to arbitral awards continues," *JDSupra*, February 11, 2021, https://www.jdsupra.com/legalnews/2020-report-of-the-commercial-court-6475559/

[6] Leigh Crestohl, "How London could become Europe's arbitration hub," *Law360*, March 16, 2021, https://www.law360.com/articles/1364989/how-london-could-become-europe-s-arbitration-hub

> "London is likely to become a particularly attractive destination for European investors looking to enforce arbitral awards without the risk of matters being referred to the European courts."

Key developments in insolvency funding in Hong Kong and Singapore

Quentin Pak

+ 65 6817 6219
qpak@burfordcapital.com

Quentin Pak is a Director with responsibility for leading Burford's office in Singapore and for expanding Burford's resources to support clients in Asia. He works with corporations, law firms and insolvency practitioners, both in relation to Asia-based legal proceedings and for companies involved in disputes in other jurisdictions.

Emily Tillett

+852 6655 8996
etillett@burfordcapital.com

Emily Tillett is a Vice President at Burford with responsibility for leading its investment activity and operations in Hong Kong. A Hong Kong, Australian and New Zealand qualified lawyer, she has multijurisdictional expertise in complex commercial disputes.

Legal finance has been used in Asia for over a decade in the context of insolvency, but the awareness of its use among the legal community and the appreciation of its value for insolvency practitioners have grown considerably following the introduction of the third-party arbitration funding framework in Singapore and Hong Kong. Courts in both jurisdictions have in recent years clarified and expanded the scope of legal financing arrangements for insolvency practitioners. Given the courts' increased willingness to facilitate external finance, it is essential for practitioners to understand its current status in these two jurisdictions, the practical considerations of financing in the insolvency context and what lies ahead for legal finance in Asia.

Arbitration proceedings have brought renewed momentum to the use of funding in insolvency

Both Singapore and Hong Kong recently passed legislation establishing a framework for legal finance and its various products to be used in association with international arbitration matters. The framework in Singapore was given effect through amendments in 2017 to the Civil Law Act; the Hong Kong funding arrangement introduced by the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 was implemented in February 2019. The introduction of these arbitration frameworks has since led to a renewed interest in the development of the legal finance industry, not only in insolvency in Hong Kong and Singapore, but also more broadly across other Asian jurisdictions.

Further, growing focus in recent years on corporate governance in public companies has acted as a catalyst for the increasing willingness of liquidators and creditors to pursue claims relating to misconduct of former company directors and audit oversights.

The market momentum and growing awareness of legal finance more broadly are helping to facilitate the pursuit of claims

relating to insolvency situations, thereby enhancing the prospects of recovery for creditors. As developments continue to unfold through case law and legislative reform, it's essential for insolvency practitioners to stay up to date on the changing status of external finance in these jurisdictions and understand the practical considerations of insolvency proceedings and legal finance.

Developments in insolvency funding in Hong Kong vs. Singapore

The development of legal finance in Hong Kong and Singapore (outside the context of international arbitration) is progressing at different speeds, with Singapore more willing to make funding available whereas Hong Kong seems to be treading more cautiously.

SINGAPORE

The Courts in Singapore have played an important role in pushing forward the development of legal finance in Singapore, and there have been significant changes in recent years to the law governing legal finance agreements in Singapore. The first came from the landmark 2015 decision *Re Vanguard Energy*, in which the High Court held, for the first time, that the sale of the fruits of a cause of action belonging to a company was within a liquidator's power of sale and was therefore permissible. In *Re Vanguard*, Chua Lee Ming JC (as he then was) gave considerable support to the use of funding, expressing the view that it was "undeniable that litigation funding has an especially useful role to play in insolvency situations," signaling growing support and a more positive attitude towards external finance from the Courts.

The second significant change came in 2017 when the Civil Law Act was amended to abolish the torts of maintenance and champerty, and the use of "third party funding" was recognized by legislation for the first time. It is noteworthy that the amendments to the 2017 Act were forward-looking as funding is made possible for "prescribed dispute resolution proceedings" which, in addition to international arbitration, will in time be expanded to cover other dispute resolution mechanism.

The third and most recent development—the Insolvency, Restructuring and Dissolution Act (IRDA)—came into effect on 30 July 2020 as an omnibus legislation that collated and consolidated Singapore's insolvency regime into a single piece of legislation. The Act expanded and clarified the circumstances in which an insolvency practitioner may use legal finance, consolidating the incremental developments brought by the Courts in this area.

HONG KONG

While maintenance and champerty remain torts and crimes under Hong Kong law, case law has incrementally expanded the permissibility and use of finance in the context of insolvency proceedings—an important exception to the operation of the two doctrines. However, the absence of broader reforms to the legislative framework has slowed this evolution, as there has not been the opportunity to formalize the use of legal finance in the context of insolvency proceedings. Development via case law is naturally a slower process.

Until recently, it has been the practice for liquidators to apply for court sanction and for funders to require such approval as part of the funding agreement. This position recently changed as a result of *Re Patrick Cowley*, which held that liquidators need not obtain court approval before entering into a third-party funding agreement.

Despite the absence of a comprehensive statutory regime for insolvency law, there

is active development in this area. The Hong Kong Courts appear to be proactive in progressing the development of the insolvency law regime and a legislative overhaul has been a topic of much discussion over recent years. We expect the Hong Kong courts will continue to forge ahead in developing the common law in this area, including continuing to expand the permissibility of legal finance, and, in time, there will be a modernization of Hong Kong's insolvency and restructuring framework.

Practical considerations for insolvency practitioners

Given the significant risks and costs associated with insolvency proceedings and challenges often encountered in obtaining a meaningful recovery for the estate, creditor activism is unsurprisingly low. Liquidators are service providers that are generally compensated using a fee-based structure, yet the discharge of their duties often come with personal liability. These features of liquidator appointments often make the pursuit of big ticket litigation a less than compelling proposition. The risk is accentuated where the liquidator faces the possibility of adverse cost orders. With liquidators (and creditors) being understandably hesitant to throw good money after bad, it is often not possible or feasible to undertake inquiries and initial investigations into possible claims due to lack of funding. This means that good claims may ultimately not be pursued and money for creditors is left on the table.

> **"Given the positive recent developments in the law around third-party funding and the growing availability of capital, legal finance is increasingly becoming an essential part of an insolvency practitioner's toolkit."**

Legal finance helps liquidators overcome limited creditor activism

Legal finance can help mitigate some of the issues faced by liquidators of estates with no money by providing capital, after-the-event (ATE) insurance and asset recovery services.

- Portfolio finance—the funding of multiple unrelated claims within the same estate—helps liquidators leverage strong claims with strong recovery prospects as anchor cases, allowing seed capital to be provided for other cases that may otherwise not be sufficiently developed to be considered for funding.
- ATE insurance mitigates adverse costs risk for liquidators, enabling them to pursue strong claims without having to worry about attracting personal liability for these costs. To protect clients from adverse costs risk, Burford can provide insurance for matters we are funding through our wholly owned insurer, Burford Worldwide Insurance Limited (BWIL).
- Burford's in-house asset recovery team can help liquidators trace assets and enforce judgments in many jurisdictions around the world. Burford can provide this service on a contingent basis, reducing or eliminating the risk of non-enforcement.

DEVELOPMENTS IN ASSET RECOVERY IN MAINLAND CHINA

Mainland China has traditionally been a challenging jurisdiction in which to enforce cross-border claims, but a recent cross-border arrangement ("The Cooperation Arrangement") between mainland China and Hong Kong means that courts in Shanghai, Shenzhen and Xiamen could begin to mutually recognize restructuring or liquidation orders from Hong Kong courts that encompass assets in these cities. This pilot program has fairly narrow application—applicants need to demonstrate that the company's "center of main interests" is in Hong Kong—but may well assist both off-shore and on-shore creditors to recover losses by making claims on foreign assets. If this pilot program is successful, it is anticipated that other Mainland courts will be added to the arrangement. While a new and unproven development, this is a positive step for investors seeking recovery in mainland China.

Conclusion

With insolvencies in Asia expected to increase as a result of the economic impact of the pandemic, the demand for legal finance in Hong Kong and Singapore will likely accelerate. We have already seen a sharp increase in insolvency activity in the region as the Chinese economy has slowed[1] (particularly in Hong Kong where businesses are closely connected with the mainland economy). Given the positive recent developments in the law around third-party funding and the growing availability of capital, legal finance is increasingly becoming an essential part of an insolvency practitioner's toolkit for maximizing recoveries for the insolvent estate and securing redress for creditors and wronged parties.

---

[1] Bill Conerly, "China's Economic Miracle is Ending," *Forbes*, May 4, 2021, https://www.forbes.com/sites/billconerly/2021/05/04/chinas-economic-miracle-is-ending/?sh=6a0934d6aa9d.

> "With liquidators (and creditors) being understandably hesitant to throw good money after bad, it is often not possible or feasible to undertake inquiries and initial investigations into possible claims due to lack of funding."

Covid business interruption insurance: What do the numbers tell us?

G. Andrew Lundberg

+1 212 235 6831
alundberg@burfordcapital.com

Andy Lundberg is a Managing Director and member of Burford's Commitment Committee. He practiced for 35 years at Latham & Watkins, where was the Global Chair of the firm's Insurance Coverage Litigation Practice and Chair of its Los Angeles Litigation Department, litigating dozens of coverage actions in state and federal courts and counseled numerous Fortune 500 companies on insurance matters. He is one of Lawdragon's Global 100 Leaders in Litigation Finance.

As predicted, the fallout of the Covid pandemic in the US has included a large wave of insurance coverage litigation, directed primarily at the issue of whether the business interruption coverage included in commercial insurance policies extends to the trillions of dollars in losses flowing from the virus.

What conclusions should, and shouldn't, clients and lawyers draw from the record to date? As discussed below, the raw numbers are a starting point, and may seem to indicate momentum, but they don't provide a sound basis for predicting the final outcome of what is sure to be a long and costly battle.

The headcount

More than 1,900 Covid insurance cases are pending or have already been resolved in the state (about 650) and federal (about 1,300) courts.[1] Trial courts have issued merits rulings on more than 400 of them—roughly 85% of which have favored the insurers. New cases continue to be filed almost daily.

The forum factor

Interestingly, insurers have fared significantly better in dismissing policyholder claims in the federal courts (to which insurers have removed a number of cases originally filed in state court). Whereas the state court dismissal rate is around 57%, roughly 93% of federal cases have been dismissed at the early motion stage. Federal courts thus seem to be appreciably more aggressive in disposing of these cases at the pleading stage.

This trend is a bit surprising, on at least three grounds. First, insurance policy interpretation is, under the Erie doctrine, governed by the contract law of the different states. Second, the coverage issues presented have thus far not been addressed by most

state courts. Third, many federal judges have lived through the great environmental insurance coverage wars that began in the 1980s and continue to the present, and so are well aware that the insurance industry will litigate defenses to coverage claims to the highest court of virtually every jurisdiction. Notably, federal district judges have thus far not shown much eagerness to certify those dispositive questions of state insurance law to those state supreme courts, as the rules of court in nearly all states permit them to do. (At least three federal Courts of Appeals have now done so.)

Why are at least the lower federal courts seemingly reaching out to decide novel questions of state law to dismiss cases at the pleading stage? Possible explanations include:

- Sophisticated policyholder lawyers are being choosier about their cases and the jurisdictions in which they file them, preferring to file them in state court, while lawyers with less insurance experience are filing weaker cases and opting for, or being removed to, federal court.
- Insurers are being selective in targeting their motions to dismiss, focusing on federal cases with relatively obvious pleading vulnerabilities. The statistics speak only to the judicial treatment of claims that insurers choose to attack by motion—not to those of cases they don't.
- The federal courts are tacitly seeking to conserve judicial resources. A dismissal order will, after all, have one of two fates. If it is affirmed, the trial court got it right, and expended no more effort than necessary in doing so. If it is reversed, the trial court on remand will have the benefit of the appellate court's ruling, and/or of the relevant state high court's intervening determination of the dispositive issue(s)—ensuring that the record's further development will be as efficient as possible.

Trends—or are they?

The raw numbers, especially with their federal-court component, seem to bode ill for efforts to recover benefits under business interruption coverage. But do they? There are several reasons to think not.

RESULTS IN WEAK CASES DON'T PREDICT RESULTS IN STRONG CASES

First, the nearly 2,000 Covid coverage actions filed to date are not cookie-cutter cases. Although the majority involve the same threshold issue concerning the coverage "trigger"—the requirement that the loss for which benefits are claimed result from "direct physical loss or damage" to property, which insurers deny is the case with the Covid virus—policies then start to diverge widely. Some contain virtually bulletproof exclusions for losses caused by virus. Others include "contamination" exclusions that do or don't reference viruses. Some exclude "contamination" and yet at the same time extend coverage to loss caused by "communicable disease." And some have no applicable exclusions at all.

Accordingly, gross dismissal numbers say very little about the quality of any given case or group of cases. Cases that fail to plead the actual physical presence of virus on the relevant property are almost all dismissed; policyholders who can plead and prove that the virus was present on the property stand a much better chance of surviving motion practice and reaching trial. Likewise, cases that seek to avoid a very carefully worded virus exclusion are an entirely different proposition from cases where the insurer, amazingly, opted out of using any of the various virus or contamination exclusions

that the industry began to issue following the 2003 SARS and 2009 H1N1 epidemics.

INITIAL RESULTS DON'T PREDICT FINAL OUTCOMES

As the recent presidential election teaches, in any sort of contest, an early lead often gives way to eventual defeat, and vice versa. Again, the history of environmental insurance disputes shows that trial and intermediate appellate rulings on crucial questions of policy interpretation are often overturned by state supreme courts. For example the granddaddy of environmental coverage disputes, the Montrose litigation, produced three watershed California Supreme Court rulings across four decades—all of which reversed the original trial court ruling. So—at least until the high courts of "opinion leader" jurisdictions like California, Washington, New York, Illinois and a few others have spoken—any "trend" apparent from the lower courts' rulings is just that: A currently prevailing wind that may well shift as insureds and their lawyers study the landscape, weed out weak claims and perfect strong ones.

INSURER "SKY IS FALLING" ARGUMENTS IN THE MEDIA DON'T PREDICT RESULTS IN THE COURTS.

While their lawyers have been busy addressing coverage lawsuits under the technical rules of pleading, insurers have also sought to litigate those cases in the court of public opinion, offering op-ed pieces contending that the Covid business interruption risk is an "uninsurable" one that they never meant to cover, and that judicial rulings to the contrary could threaten the viability of the insurance marketplace. There are at least a couple of reasons to cast a skeptical eye at those arguments, and every reason to think they will have no impact in court.

First, property insurers have known for decades that their standard "physical loss or damage" coverage trigger, while serving well in the case of fire, hurricane and other everyday perils, is quite blurry around the edges. The much-publicized Odwalla incident, involving transient E. coli bacteria contamination of a juice processing facility, produced coverage litigation hinging on

> "The history of environmental insurance disputes shows that trial and intermediate appellate rulings on crucial questions of policy interpretation are often overturned by state supreme courts."

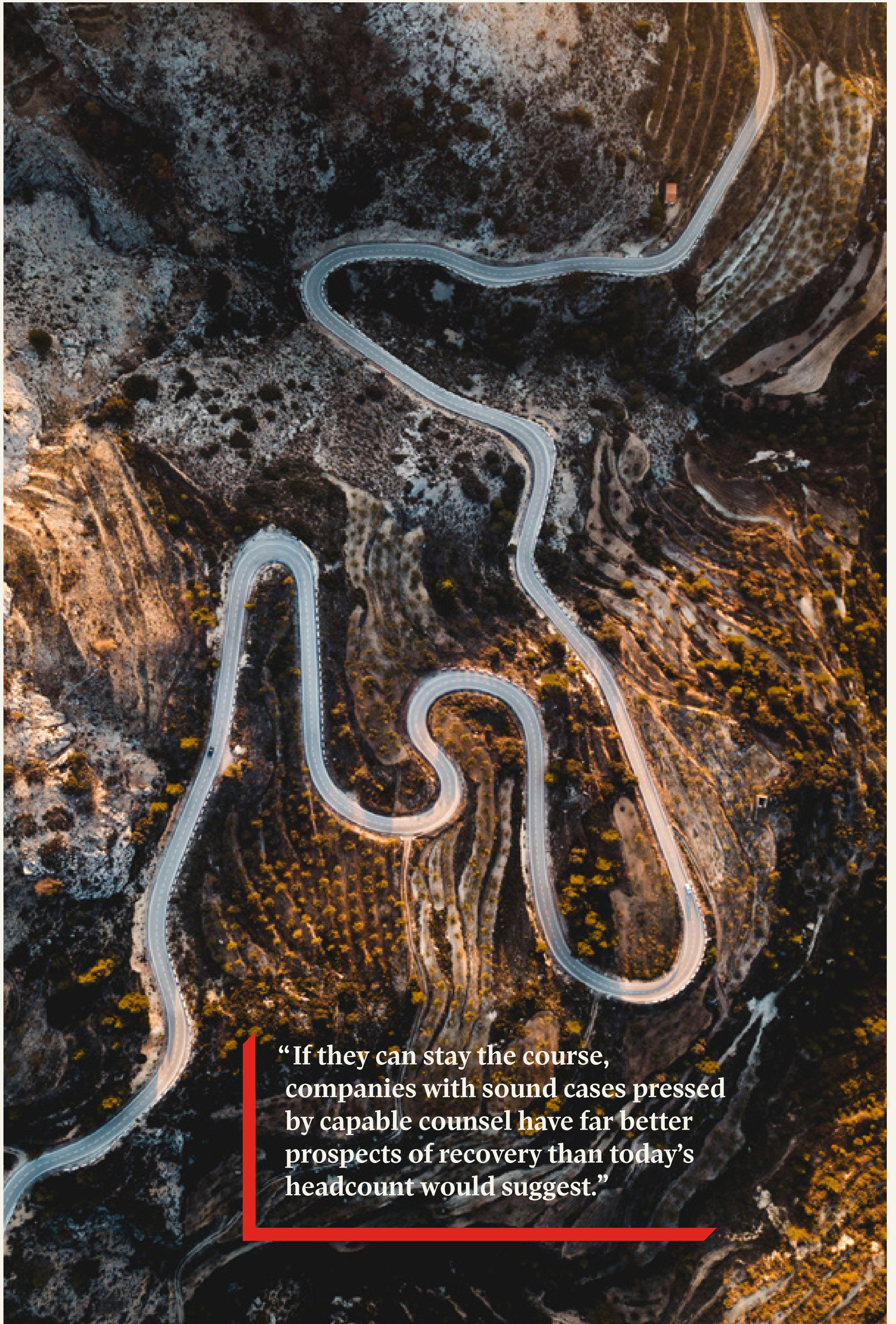
"physical loss or damage" in 1999. (The case settled as the parties awaited a summary judgment ruling on the issue.) Similarly, computer server outages and malware attacks that left no permanent harm to the hardware following a reboot or reloading of memory have been the subject of multiple coverage lawsuits in the past 20-plus years. Insurers lost or settled a number of them. There is no "too big to fail" doctrine of insurability or of common sense that requires excusing insurers from covering a risk that was well known to them by 2019 if their policies did not unambiguously exclude it.

Second, insurers and courts outside the US are recognizing that the Covid business interruption risk is insurable, and is insured. In January 2021, the UK's highest court ruled broadly to that effect. In May, the Paris Commercial Court expressly rejected a major insurer's claim of uninsurability, and held it liable for its insured restaurants' losses from a lockdown order; the insurer vowed to appeal, but then in June offered €300 million to settle the claims of 15,000 insured restaurants. There is no notion of "insurability" or "public policy" unique to the US preventing insurers from being similarly held to account if the courts find that their policies afford coverage by their express terms. If public policy really is on their side, insurers can seek recovery of their losses from public coffers through the legislative process. They shouldn't claim that such a policy requires the courts to disregard their undertakings toward their insureds.

Conclusion

The US courts—few of them will be excepted—will be wrestling with Covid business interruption cases for years to come. If they can stay the course, companies with sound cases pressed by capable counsel have far better prospects of recovery than today's headcount would suggest.

[1] "Covid coverage litigation tracker," Penn Law, https://cclt.law.upenn.edu/cclt-case-list/.


"If they can stay the course, companies with sound cases pressed by capable counsel have far better prospects of recovery than today's headcount would suggest."

The new wave law firm CFO

Christine Azar

+1 212 235 6827
cazar@burfordcapital.com

Christine Azar is a Director with responsibility for building business with US-based law firms and companies. Since joining Burford, she has focused on originating business in large commercial matters including antitrust and securities matters. She is a champion for women in the legal industry and has taken on a significant role in promoting and championing Burford's Equity Project initiative, aimed at closing the gender gap in law.

Over the last decade, law firms have developed a more commercially driven business model to meet growing competition and changing client demands. While this shift has been progressing incrementally for years, the disruption of the last year accelerated progress as firms were quick to reevaluate their technology, operating models and management.

The pandemic-induced economic slowdown also prompted law firms to carefully review their financials and sharpen their focus on pricing, profitability and long-term growth—all of which remain priorities today. Central to this effort is the law firm Chief Financial Officer (CFO). No longer restricted to the traditional number-crunching role, the new law firm CFO has become a strategy-influencer, increasingly integrated into firm management and essential for innovation.

Influencing change within the firm

In an interview, Holland and Knight CFO Mia Stutzman explained the evolution she has experienced in her 10 years with the firm—and captured a larger trend of the CFO's expanding role within law firms. "Law firm CFOs have become more externally focused[…]. I've seen the finance department's role evolve from that of budgeting, processing transactions and maintaining the firm's financial statements to one of data analytics, development of creative pricing arrangements and direct client interactions."[1]

As of 2017, over 71% of all AmLaw 200 firms and more than 85% of the AmLaw 100[2] employed CFOs. As firms continue to adopt more "corporate" best practices, these numbers should continue to climb, with a new wave of collaboration between law firm CFOs and firm management.

Big law firms have hired CFOs because they consciously decided to become more business-minded. Law firm CFOs bring a unique perspective to the executive leadership team. They are integral to innovating firm strategy and are increasingly

client-focused to ensure that the firm remains profitable, innovative fee structures are sustainable and that the firm is well-positioned to drive measurable change.

Balancing increased firm expenses with client demands

Despite having reported record returns in 2020, law firms anticipate experiencing accelerated expense growth as the sharp expense reductions recorded in 2020 create an unsustainable year-over-year expense comparison in 2021—particularly as firms return to the office, resume travel and partner meetings.[3] To manage these increased expenses, firms are prioritizing the security of their cash flow: 93% of CFOs at AmLaw 200 firms identified boosting profitability as their top priority for this year.[4] Their clients, however, are unsurprisingly focused on reducing legal costs. Herein lies the friction between law firm profitability and client satisfaction, both of which are inextricably linked to a law firm's financial strategy—the management of which now falls to the CFO.

Reducing legal costs and risk is not a new priority for law firm clients. Since the 2008 recession, clients have been looking for more predictability, alternative fee structures and flexible pricing. But the liquidity concerns sparked by the pandemic have led clients to develop a heightened interest in learning about managing litigation costs and mitigating risk. Their interest comes with new responsibility for firms, whom clients expect to proactively present financing options.

Both clients and partners therefore benefit from the existence of a law firm CFO. The CFO—being the expert in firm financials—is better equipped to draft, review and negotiate financing products, allowing lawyers to focus on delivering positive outcomes to clients. Clients are more likely to see flexible fee structures and innovative pricing and firms are likely to see higher revenues and margins. In fact, firms who employ a CFO see over a $300,000 increase in profits per equity partner compared to firms without a CFO.[5]

Legal finance helps law firm CFOs deliver novel solutions to partners and clients

Clients want low costs and flexible fee arrangements; law firms want to get paid—and CFOs have become critical to delivering sustainable solutions. With a legal finance partner, CFOs can increase value to their firms by bringing solutions that bridge the gap between client demands and firm expectations. Savvy CFOs are using legal finance help them serve clients without interruption, pursue new business and practice areas and accelerate the payment of post-settlement payments and client receivables. In short, CFOs help their firms boost liquidity and profit while reducing risk.

“

With a legal finance partner, CFOs can increase value to their firms by bringing solutions that bridge the gap between client demands and firm expectations.

”

SERVE CLIENTS WITHOUT INTERRUPTION

Law firms can use legal finance to continue working with clients even when clients' capacity becomes constrained. Particularly useful for hourly billing firms, fees and expense financing (in which the finance provider pays for the cost associated with the commercial litigation or arbitration in exchange for a portion of the ultimate award or settlement) fulfills the needs of companies that can't afford or don't want to pay their lawyers by the hour, or of law firms that wish to offer clients flexible terms but can't or don't want to assume the entire contingent risk of doing so.

PURSUE NEW BUSINESS WITHOUT INCREASING RISK

84% of law firm lawyers cite managing contingent risk as an important challenge.[6] With a portfolio financing arrangement (in which a pool of capital is tied to a pool of existing or future matters) firms can take on more cases without increasing risk to the firm. This product enables firms to continue to grow and avoid turning down good clients.

ACCELERATE POST-SETTLEMENT PAYMENTS AND CLIENT RECEIVABLES

A legal finance provider can purchase a firm's outstanding receivables, allowing the firm to convert its receivables to cash. In hourly fee matters, this generates revenue regardless of when clients ultimately pay bills. In resolved contingent fee matters, it generates revenue even if a court has not yet approved a settlement or payment is delayed for some other reason.

Conclusion

Balancing the needs of the client with the goals of the firm is no small feat, and firms are more successful with the expertise of a CFO. With legal finance, the law firm CFO is better equipped to deliver novel solutions, and in the process, demonstrate value to the firm by reducing risk and enhancing liquidity and profitability.

[1] "A Chat With Holland And Knight CFO Mia Stutzman," *Major Lindsey & Africa*, June 21, 2018, https://www.mlaglobal.com/en/knowledge-library/articles/a-chat-with-holland-and-knight-cfo-mia-stutzman.

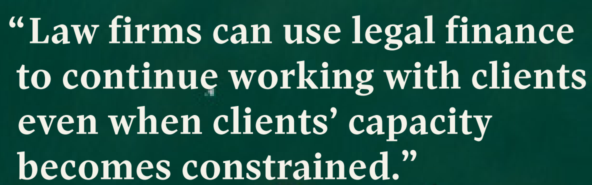
[2] Alatanet, May 16, 2017.

[3] *2021 Citi Hildebrandt Client Advisory,* Hildebrandt Consulting, https://www.privatebank.citibank.com/insights/citi-hildebrandt-client-advisory-report-2021.

[4] "The Year of the CFO," *American Lawyer*, 2021.

[5] "The Law Firm C-Suite Study: The Impact of C-Suite Growth in the AmLaw 2017," *Colliers International*. 16 May 2021, https://www.alanet.org/docs/default-source/whitepapers/c-suite-white-paper-5-16-17.pdf?sfvrsn=30104dab_4

[6] *2020 Legal Finance Report*, Burford Capital. October 19, 2020, https://www.burfordcapital.com/insights/insights-container/2020-legal-finance-report/.



"Law firms can use legal finance to continue working with clients even when clients' capacity becomes constrained."

The gold standard for legal finance.

Since its founding in 2009, Burford has earned a reputation as the leading provider of commercial legal finance in the world.

PROFESSIONALISM AND TRANSPARENCY
Institutional-quality finance partner, process and team

- Trusted by Fortune 100 and FTSE 100 companies
- 94 AmLaw 100 and 90 Global 100 firms have sought our capital

SCALE
Unmatched capacity

- $4.5 billion current investment portfolio
- Multiples larger than our next largest publicly traded competitor*

EXPERTISE
Large, diverse portfolio and long industry tenure

- 136 employees drawn from top firms and corporations, including 68 lawyers
- Band 1 ranked by Chambers in the US and UK for litigation finance and global asset tracing

RESPONSIVENESS
In-house expertise and permanent capital accelerate process

- NYSE and LSE listed, drawing on multiple funding sources to provide market-priced capital
- All diligence conducted in house, with 11+ years of proprietary data about commercial disputes

To learn more about working with Burford, visit burfordcapital.com or email us at info@burfordcapital.com.

New York
350 Madison Avenue
New York, NY 10017
+1 212 235 6820

London
Brettenham House
2-19 Lancaster Place
London WC2E 7EN
+44 20 3530 2000

Chicago
353 N. Clark Street
Suite 2700
Chicago, IL 60654
+1 312 757 6070

Washington
1750 K St. NW
Suite 300
Washington, DC 20006
+1 202 788 0888

Singapore
10 Collyer Quay
Level 40
Ocean Financial Centre
Singapore 049315
+65 6817 6218

Sydney
Level 19
1 O'Connell Street
Sydney NSW 2000
+61 8607 8890

Hong Kong
Level 20, One ifc
1 Harbour View Street
Central
Hong Kong

* Based on public reporting of combined core litigation finance investments, unfunded core litigation finance investments and other investments as of March 22, 2021

Burford

350 Madison Avenue
New York, NY 10017
+1 212 235 6820

www.burfordcapital.com

THE BURFORD
Quarterly
Nº 3 | 2021