AUTUMN 2019 ISSUE

Antitrust roundtable

Lawyers weigh in:
Legal finance in Korea

Claim monetization

One year of
The Equity Project

Burford

BURFORD QUARTERLY

A review of legal finance

CONTENTS

Expert insights: Antitrust roundtable	2
Legal finance in Korea: Lawyers weigh in	10
Claim monetization: A guide to unlocking legal asset value	16
How legal finance providers add value as equity investors	20
Best practices in building an effective recovery program	24
The Equity Project: Continuing the conversation	28
2018 ICSID Awards: Year in review	32

Burford Capital is a leading global finance and investment 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 London Stock Exchange, and it works with law firms and clients around the world from its principal offices in New York, London, Chicago, Washington, Singapore and Sydney.

© 2019 Burford Capital. All rights reserved. Burford, Burford Capital and the Burford logo design are registered trademarks of Burford Capital.

The top factor cited by lawyers as very important in selecting a legal finance provider is “expertise and track record”; the least cited factor is “cost of capital”.

Source: 2019 Legal Finance Report

Antitrust roundtable

Aviva Will & Craig Arnott

Aviva Will is Senior Managing Director with overall responsibility for Burford's global underwriting and investment activities. Before joining Burford in 2010, Aviva was a senior litigation manager and Assistant General Counsel at Time Warner Inc., where she managed a portfolio of significant antitrust, intellectual property and complex commercial litigation.

+1 212 235 6820 / awill@burfordcapital.com

Craig Arnott is a Managing Director with responsibility for leading Burford's underwriting and investment activities in the UK, continental Europe, Asia and Australia. Prior to joining Burford, Craig advised the company while serving as barrister at Sixth Floor Selborne and Wentworth Chambers in Sydney.

+44 (0)20 3530 2010 / carnott@burfordcapital.com

In September of 2019, Burford Senior Managing Director Aviva Will and Managing Director Craig Arnott posed a series of questions about antitrust litigation to a respected group of antitrust litigation experts from the US and the UK. Their answers are excerpted on the following pages.

In just two years, Google was fined a total of €9 billion by the European Commission. How have eye-popping fines like these impacted the number of follow-on matters being brought—and how do you foresee the trend continuing in the years ahead?

AARON PANNER: The pace of follow-on actions in member states remains slow as the appeals of the Commission action continue to work their way through the EU courts. Future litigation will depend on whether the promise of significant collective action recoveries (or, in some cases, significant recoveries by rival businesses) is realized. Private litigation is an intensely rational business: Lawyers representing private plaintiffs are at least as cognizant of the Willie Sutton principle as anyone else. As the risk/reward ratio declines—which is fair to expect, given the Commission's desire to promote private enforcement and the willingness of national courts to leave the way clear—the pace of follow-on litigation will increase, perhaps dramatically. I think the pendulum is early in its swing towards greater private litigation; continued vigorous administrative enforcement will likely provide the impetus.

SCOTT CAMPBELL: The European Commission's fine imposed in the Google Android case was the largest-ever antitrust fine for an individual company and such record-breaking penalties have attracted a great deal of attention. The fine mirrored Google's large revenues but also the far-reaching consequences of the investigated conduct for the markets concerned and the widespread damage it caused the entire online ecosystem. The same applies to the Google Search (Shopping) decision, which the European Commission calls a "precedent" for future cases and which now forms the theoretical basis for further competition complaints against Google, Amazon, Apple and Facebook.

Google appealed all three decisions before the General Court of the European Union, interrupting the limitation period for damages lawsuits. Accordingly, the victims of Google's abuses are in no rush. Nevertheless, several claims of aggrieved comparison-shopping services have already been brought in the UK and in Germany, some even prior to the Google Search (Shopping) decision.

Just like the fines, the quantum in such follow-on actions can reach high figures. Last year, Germany-based company Idealo brought a civil lawsuit against Google, demanding more than €500 million as compensation. Similar sums are at stake for UK-based company Kelkoo. Similar actions are likely to be brought in the near future, despite the fact that in such cases of long-lasting abuses of dominance on multi-sided Internet markets it is relatively burdensome to calculate quantum (as compared to, for example, cartel overcharges).

European Union antitrust enforcement will likely see further decisions involving the dominant platforms Google, Apple, Facebook and Amazon. Numerous investigations are pending, and the number of competition complaints are rising by the week. Closer scrutiny of the competition enforcers is accompanied by several proposals for legislative action, aiming particularly at ensuring a level-playing-field in the digital markets. Thus, competition enforcement in the digital era is not only in the spotlight of enforcers and legislators, but also a future market for damages claims.

JANE WESSEL: There has been a notable increase in the number of follow-on damages actions across Europe in recent years, particularly in the claimant-friendly jurisdictions of the UK, Germany and the Netherlands. Significant European Commission fines, such as the €2.93 billion fine against manufacturers of medium- and

heavy-duty trucks in 2016, have encouraged this trend. Inevitably, large fines against well-known corporates will attract media attention, and in turn the attention of potential claimants. There is little doubt that this trend is set to continue.

More specifically, the fines against Google reflect the European Commission's increased focus on the tech sector in recent years, which has seen Apple being ordered to pay €13 billion in back taxes to the Irish government and the announcement of an investigation into how Amazon uses data from other merchants selling goods on its websites. With Margrethe Vestager appointed for a second term as European Commissioner for Competition, this regulatory push against tech companies appears to be the tip of the iceberg as regulators play catch up with rapidly advancing technologies and the tech giants behind them. As this gap narrows and regulation in the sector becomes more advanced, victims of infringements will have increased opportunities to seek redress in national courts.

GREGORY ASCIOLLA AND JAY HIMES: Despite the heavy fines levied on Google in Europe since 2017 involving Google Shopping, Google AdSense and the Android operating system, and the numerous complaints lodged by competitors with the Commission against Google during the EC's investigations, there has been no stampede in Europe or the United States to file follow-on cases, even though the EC encouraged victims to rely on the 2017 decision to bring damages claims against Google. That said, in April 2019, the first action for damages against Google was filed by a large company in Germany based on the EC's 2017 decision finding Google abused its dominant position in the search engine market relating to price-comparison shopping services. This could lead to similar actions being filed throughout Europe.

Damages in follow-on actions may be hard to prove in Europe, requiring more access to data than typically is available. In the years ahead, as access to data increases, risks of litigation will decline and we can expect case volume will increase.

How do the US, UK and EU differ in their requirements for burden of proof for antitrust/competition matters—and what impact does that have on claimants?

AARON PANNER: On paper, the US regime appears to place greater demands on private plaintiffs both substantively and procedurally than EU and UK regimes. US law has higher thresholds for findings of market dominance; it generally does not recognize "abuse of dominance" claims that are not connected to monopoly maintenance; vertical agreements not involving a monopolist are more likely to be treated as benign; and government enforcement actions—even when successful—often end in consent decrees that entail no admission of liability, and hence no res judicata effect in parallel private litigation.

But for all that, the private enforcement regime in the US has been and remains both active and much more central to the implementation of competition laws than the still-developing private enforcement regime in the EU, with the UK in between. In part, that is simply a function of the long tradition of private enforcement in the US, but it also reflects institutional factors in the US that create a number of advantages for private plaintiffs. To be sure, US courts, especially the Supreme Court, have generally been defendant-friendly over the past two decades, both in tightening substantive standards and in making it more difficult for cases to proceed as class actions. Nevertheless, defendants face serious downside risks and high defense costs when faced with antitrust litigation, and plaintiffs retain incentives to pursue claims.

GREGORY ASCIOLLA AND JAY HIMES: Differences in burden of proof probably isn't so important on its own. Access to proof is. In the US, the discovery mechanism provides plaintiffs access to documents, electronically-stored information and testimony in order to gather evidence to prove their case. The UK provides for limited discovery. Most of continental Europe has none, or very little—at best it's being developed under the EC Damages Directive.

The availability of collective litigation is also a factor. It's developing in the UK and northern European countries—but it's still rudimentary. In addition, procedure in UK collective actions front-loads costs more than in the US.

Cost shifting (also known as "loser pays") in the UK is also a big difference. Third-party funding and after-the-fact insurance are needed to mitigate claimant risk. Lack of contingent fee arrangements, except for UK, is a factor as well.

JANE WESSEL: In the EU and UK, infringement decisions of the European Commission are binding on national courts, and victims can rely on these decisions as the basis for follow-on litigation. This differs from the position in the US, where a government judgment or decree is only prima facie evidence in a private antitrust suit. In addition, DOJ and FTC consent decrees in the context of settlement do not constitute an admission by the defendant that competition law has been infringed. This contrasts with the position in the UK and EU where settlement decisions can be relied upon as the basis for follow-on action. In terms of the UK specifically, this analysis is likely to change as and when the terms of the UK's withdrawal from the EU are finalized.

As things currently stand, claimants in the UK and the EU benefit from the fact that the European Commission's decisions on liability are binding on national courts. This certainty reduces the risks of conflicting decisions which in turn has encouraged a flourishing third-party funding market in the context of follow-on damages claims. It is therefore unsurprising that the number of follow-on damages claims across the EU has soared over the past decade.

SCOTT CAMPBELL: In the English civil law context it is well established that the burden of proving loss occasioned by a breach of competition rules rests with the claimant (subject to the exemption—which was dealt with by the Court of Appeal in the case of Sainsbury's v Mastercard—that the burden of proving loss does not extend to proving that the agreement in breach of the competition rules cannot be exempted).

Where the claimant has established that it has suffered a loss in the form of an "overcharge" arising from the cartel conduct, it is open to the defendant to claim that the claimant passed on the overcharge downstream to its own customers. In those circumstances it is the defendant's burden to prove that the claimant passed on all or part of the overcharge and the defendant may seek disclosure from the claimant or third parties in this regard.

The EU Damages Directive builds on these principles, but it goes further by establishing two rebuttable presumptions that make it easier to prove a damages claim: The first is that cartel infringements cause harm; and second that cartel overcharges are at least partially passed on to indirect purchasers. It is then up to national courts to determine the extent of the overcharge harm and the amounts passed on.

Within this context the burden of proof shifts to the defendant to show that indirect purchaser claimants did not have any overcharge passed on to them. In practice, expert economic evidence is invariably relied on by both parties to establish whether there was in fact upstream pass-on (irrespective of where the burden of proof lies), but the implementation of this presumption can nevertheless only be a positive thing for prospective indirect purchaser claimants. Indirect purchasers will therefore subsequently be able to rely upon the presumption that the overcharges have been passed on to them, with the potentially more challenging onus of disproving the passing-on of overcharges falling to the defendant and its experts.

What impact has the EU Damages Directive had on implementing global strategies for addressing anticompetitive conduct (as opposed to bringing suit in one jurisdiction)?

GREGORY ASCIOLLA AND JAY HIMES: It's too early to tell. While defendants likely take it into account, it still appears to be the case that when they settle, a US-only deal is good enough. Defendants seem willing to risk litigation in Europe, which still is not very plaintiff-friendly nor collective litigation friendly.

JANE WESSEL: The EU Damages Directive was designed to harmonize EU competition litigation, making it easier for victims of anti-competitive conduct to obtain compensation for loss suffered across the EU. While laudable, it was ambitious given the mix of common and civil law systems and the varying attitudes to private enforcement of competition law across the EU. While all Member States have implemented the Directive as national law as of 6 June 2018, it remains too early to assess the lasting impact this will have on jurisdictional strategies. Although the Directive introduces a series of minimum standards, for example in relation to limitation periods, disclosure and pass on, we have already seen wide divergence in the application of these minimum standards which suggests that EU-wide harmonization is some way off.

The approach of the judiciary in each jurisdiction will be key. Although many of the Directive's key

reforms are not retrospective meaning that the previous regime has some time to run, we are already seeing judges in some jurisdictions making decisions with the spirit of the Directive firmly in mind. This in itself has already created a degree of divergence across Member States. Moreover, although the aim was to create a level playing field, the benefits of particular jurisdictions will remain an influential factor. For example, English judges' familiarity with ordering wide ranging disclosure is well documented and will continue to attract claimants notwithstanding the ability to secure disclosure in jurisdictions where this was previously unavailable. Finally, significant differences will remain between jurisdictions given that the Directive does not address other important factors such as the ability to bring collective actions or third-party funding, or the level of detail required to initiate proceedings.

Ultimately, the post Directive landscape will still involve an analysis of the pros and cons of particular jurisdictions. The real difference is that new jurisdictions may now enter the private enforcement space. However, there is a lot of ground for emerging jurisdictions to make up. Jurisdictions such as the UK and the Netherlands in particular have built up significant experience handling large-scale competition damages claims over many years. Claimants in these jurisdictions benefit from the experience of judges and a specialist competition bar, and no doubt such factors will continue to influence litigation strategy. The question is whether emerging jurisdictions can overcome this lack of experience, or whether other court systems suffer from structural impediments that will make this difficult to achieve. For example, there have been reports that the Spanish courts are struggling to cope with the large volume of follow-on claims related to the Trucks cartel.

AARON PANNER: With respect to private enforcement, the EU Damages Directive does not seem to have had any significant impact on enforcement strategy within the US. There are exceptions, but most of the lawyers that bring antitrust cases in the US—particularly on behalf of class plaintiffs—are associated with relatively small firms, with a small number of US offices, that have expertise in US antitrust law and litigation and limited exposure to other countries' antitrust regimes. To be sure, US plaintiffs continue to try to pursue damages based on the impact of domestic conduct outside the US and international conduct within the US, with the scope of US remedies remaining an area of uncertainty and active litigation. Overall, however, the trend seems to be against providing a US forum for claims with a tenuous US connection. That will encourage plaintiffs to explore international options.

Corporate plaintiffs have, for many years, taken advantage of administrative enforcement mechanisms within the EU as part of a global litigation strategy. There are surely opportunities for the small number of plaintiff-friendly firms with international presences to pursue damages actions that encompass the UK, the EU and the US, much as patent litigation has taken on a global cast.

SCOTT CAMPBELL: The implementation of the Directive throughout the EU has produced an identifiable uptick in competition damages claims in jurisdictions that had hitherto seen very few claims coming forward. For example, we have witnessed a dramatic rise in the number of damages claims being brought before the Spanish Courts, particularly arising from the EU Trucks cartel. A similar trend is taking place in Italy, France and elsewhere. We expect this trend to continue in terms of damages claims being brought in places other than the traditional triumvirate of England, the Netherlands and Germany. This is positive and is likely to help claimants pursue claims in the jurisdictions which make most sense in their own case, in terms of where the defendant is domiciled and/or where the loss was suffered. If that is correct, then we are likely to see fewer jurisdictional challenges in the early stages of cases.

While it is unlikely for a single claimant to be pursuing multiple suits in the courts of EU Member States (however one can envisage a conglomerate with multiple business units pursuing several claims in key jurisdictions where a product was purchased), in respect to losses arising from one cartel, defendants now do face the specter of handling multiple claims in several jurisdictions based on one Commission Decision in tandem. The foremost example of this at the moment is the litigation arising from the EU Trucks cartel, with litigation ongoing in multiple Member States' courts.

What are the most significant challenges facing the collective action regime in the UK, and what impact do they have on advising claimants?

SCOTT CAMPBELL: The regime is in its infancy and we are yet to see a case get fully certified by the Tribunal. Clearly the staying of existing cases due to the *Merricks* Supreme Court appeal is an unusual situation, and so it is hoped that the delay can be minimized and certification hearings can take place sooner rather than later. We will therefore have to wait and see how the various tools at the parties' disposal are used once a case has been certified.

However, from the collective cases that have been issued—*Dorothy Gibson, Merricks, UK Trucks Claims* and the *Road Haulage Association*—we have learned a lot about how the Competition Appeal Tribunal will approach the early stages of a collective claim. The CAT has paid particular attention to funding structures and documentation, providing useful guidance for claimants and funders alike.

Overall, there are a good many reasons to be very positive about UK regime and, indeed, there has been no letup in funders' appetite to bring these types of claims, and so we expect to see many more in next couple of years.

GREGORY ASCIOLLA AND JAY HIMES: Right now, the *Mastercard* collective action lawsuit in the UK is on appeal to the UK Supreme Court. That should provide clarity on whether the UK adopts the current Canadian approach (relatively easy to certify)—which was essentially the US approach 20 years ago—or an approach that requires a more rigorous inquiry before permitting certification. Defense attorneys can be expected to keep exporting US approaches into UK cases to see what's accepted and what isn't. The outcome of this case will provide an important roadmap to bringing collective actions in the UK.

Therefore, expect the upfront cost of collective litigation in the UK to keep increasing. Even if the UK Supreme Court affirms the Court of Appeals decision, defense attorneys will find argument-obstacles to test drive before the UK lower courts.

JANE WESSEL: The introduction of the collective action regime via the Consumer Rights Act 2005 was intended to herald a new dawn in group actions in the UK. However, several years on, the UK courts are still grappling with the appropriate test to be applied at the class certification stage, as is well illustrated by the conflicting approaches in *Merricks v Mastercard.* While the CAT refused to certify the claim as suitable for the collective actions regime, the Court of Appeal concluded earlier this year that the bar to certification had been set too high and ordered the CAT to reconsider. *Mastercard* has now obtained permission to appeal the Court of Appeal decision before the Supreme Court and the case is set to be heard on 12-13 May 2020. Given the conflicting approaches to certification thus far, guidance from the Supreme Court on certification will be welcomed, particularly with respect to issues such the correct approach to the level of proof required from each individual claimant and the distribution of an aggregate award when a party is applying for collective proceedings status. Beyond the issue of certification, various other complex questions remain unanswered, including how the Courts will address conflicting claims between class members at different levels of the supply chain. These issues will need to be addressed as the collective action regime develops over time.

Looking ahead, there is little to doubt that the number and size of collective actions brought in the English courts and the CAT are set to increase. Consumer based claims such as *Merricks* are likely to become increasingly common, with claims involving personal data and GDPR set to dominate along with cartel follow-on actions. Recent data breaches by British Airways and Facebook have only served to demonstrate that this is an area ripe for growth in the context of collective actions. The Court of Appeal decision in *Lloyd v Google LLC* illustrates that damages can be awarded to compensate for an individual's loss of control of personal data, without the need to establish financial loss or distress.

AARON PANNER: I'm the opposite of an expert in UK law, so my perspective on the challenges facing the collective action regime in the UK reflects my US-law sensitivities. And from that perspective, the Court of Appeals decision in *Merricks*—assuming it remains undisturbed—may remove a significant obstacle by liberalizing the standards for certifying a collective proceeding. In the US, of course, class certification is a critical inflection point in class-action litigation. A high barrier to certification gives defendants incentives to "hang tough" through certification; denial of certification can end litigation almost as effectively as a merits judgment in a defendant's favor. Once a few collective actions have been certified in the UK and the procedural and substantive standards governing certification have begun to take shape, that will help to provide a roadmap for further actions.

Another question is how UK rules governing attorneys' fees—and claimants' potential liability for fees—may affect the risk profile of collective actions. That's not a risk that US plaintiffs face, and it limits the downside of unsuccessful actions. If fee awards are modest, this may not be a significant factor in the overall calculus regarding whether to bring a collective action, but large fee awards may wind up as a complicating factor in maintaining collective actions in the UK.

Burford's research shows that there is a gap between general awareness of legal finance and real understanding of how it can be used. What do you think accounts for that gap—and what do you think is the biggest benefit to claimants and firms?

AARON PANNER: The lawyers at our firm have worked with Burford, as well as other firms, for many years in a variety of capacities. We appreciate that litigation finance is not one-size-fits-all, but a tool that can be adapted to meet various challenges associated with maintaining litigation, particularly when there is an imbalance in resources and appetite for risk. It is generally recognized that litigation finance makes it easier for plaintiffs and counsel to take on well-funded defendants. More generally, such finance, like all finance, can manage and spread risk to allow litigants to pursue or defend cases in ways that create value.

SCOTT CAMPBELL: Litigation funding has been a key element in the growth of private antitrust litigation over last decade or so. Indeed, clients expect funding to be on the menu of engagement structural options. London has become a very sophisticated market for funded claims with a range of funders, law firms and ATE products. However, whilst use of litigation funding is broadening, some firms—like Hausfeld—have a good deal more experience and knowledge with regard to deploying funding in the most suitable cases, working with third party funders to get the best funding profile in place and understanding how to budget realistically.

Perhaps the main reason for a gap in awareness of legal finance as a tool and how it can be used is that it does not fit traditional law firm business models, at least from a defendant perspective but less so on the claimant side. However, given that corporate claimants expect to see litigation finance on the "menu" there are powerful reasons for awareness to improve.

JANE WESSEL: As the third-party funding market has matured, corporates have become increasingly aware of litigation legal finance as a tool to manage litigation costs. While the general concept is now familiar, there is still a knowledge gap in terms of the sheer variety of ways in which funding arrangements can be structured. As the legal sector itself becomes more attuned to the options available, corporate clients are gaining further awareness of the possibilities. There may also be a lingering conceptual bias that funding is for parties unable to fund litigation themselves as opposed to those who have the means but choose not to do so, preferring to finance the costs of litigation. Corporate claimants watching their competitors enter into bespoke arrangements are likely to have pointed questions for legal advisers who failed to highlight the full range of options.

The key benefits of funding will vary depending on the claimant's profile. The classic scenario is that of a small company seeking funding for a claim against a better resourced opponent. In this scenario, funding tips the balance away from the deeper pockets of the defendant, enabling Davids to take on Goliaths in a less uneven playing field. The situation is different for larger companies. Here, funding arrangements help transform litigation from cash drain to a contingent asset. In-house legal departments can effectively operate as self-standing profit-making units. Significant funds that would have been earmarked for the costs of litigation are free to be reinvested into the business. For these companies, litigation funding just makes good business sense. For law firms, litigation funding enables greater flexibility, particularly with portfolio arrangements becoming increasingly popular. These arrangements allow multiple cases to be funded under a single facility through a streamlined process and on agreed terms, thereby reducing the risk to firms in taking on certain cases and reducing the cost of funding.

GREGORY ASCIOLLA

Gregory Asciolla is Co-Chair of the antitrust and competition litigation practice of Labaton Sucharow, where he represents businesses and public pension funds in complex antitrust and commodities class actions. Currently, Greg represents clients in global antitrust matters involving alleged price-fixing, benchmark and commodities manipulation, pay-for-delay and other anticompetitive practices.

SCOTT CAMPBELL

Scott Campbell is Head of Competition Disputes at Hausfeld, where he represents organizations with disputes arising from breaches of EU and UK competition law. He has more than a decade of experience litigating competition disputes in the English High Court, the Court of Appeal and the Competition Appeal Tribunal.

JAY HIMES

Jay Himes is Co-Chair of Labaton Sucharow's antitrust and competition litigation practice. Jay represents plaintiffs in price-fixing class action cases and protects businesses from anticompetitive activities, and previously served as the Antitrust Bureau Chief in the New York Attorney General's office.

AARON PANNER

Aaron Panner is a Partner at Kellogg Hansen with a practice focused on antitrust law and US Supreme Court and appellate litigation. He has represented leading companies and individuals in high-stakes litigation in district courts and courts of appeals across the county and has argued six cases before the US Supreme Court.

JANE WESSEL

Jane Wessel is a Partner at Arnold & Porter, where her practice focuses on antitrust litigation and international commercial and investor state arbitration. She has extensive experience handling competition damages litigation in the English High Court and the Competition Appeal Tribunal.

Legal finance in Korea: Lawyers weigh in

Quentin Pak

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. Prior to joining Burford, Quentin was most recently the head of the Asia commodities business at Commonwealth Bank of Australia.

+65 6817 6219
qpak@burfordcapital.com

Given growing interest in legal finance in South Korea, Quentin Pak asked a group of international arbitration lawyers from leading law firms to address questions relating to the legal framework regulating funding, common misconceptions, as well as predictions for the future of legal finance in the region. Their answers are gathered below, and we thank them for their perspective.

There is currently no legal framework in South Korea regulating the funding of litigation or arbitration by a third party. Do you foresee the formalization of guidelines for legal finance similar to recent arbitration funding frameworks in Singapore and Hong Kong? What would the likely impact be?

EUN YOUNG PARK: The maintenance and champerty principle does not exist in Korea. Instead, Article 6 of the Trust Act provides "any trust, the main purpose of which is to have the trustee to proceed with litigation, shall be null and void.". This prohibition of trusts aimed at lawsuits differs from the maintenance and champerty principle in that it applies only to the acts of trust where the party delegates his rights in litigation to the trustee. Maintenance and champerty, on the other hand, apply to a broader range of interference by a third party in litigation, including funding or material assistance. Thus, Article 6 of the Trust Act would not be applicable to third-party funding as long as the third party would not be exercising rights of the litigant. As such, to the extent that the terms of third-party funding do not constitute a trust aimed at a lawsuit, there is currently no law or regulation prohibiting third-party funding in lawsuits or arbitration similar to the maintenance and champerty principle in common law.

However, to the extent that a monetary judgment or award granted to the plaintiff in a litigation or arbitration is shared with a third-party funder, such funding can be subject to restrictions set forth in the Attorney-at-Law Act. Article 34(5) of Attorney-at-Law Act stipulates that "no fees and other profits earned through services that may be provided only by attorneys-at-law shall be shared with any person who is not an attorney-at-law". The main legislative purpose of this provision is to restrict non-Korean lawyers from practicing law in Korea, rather than aiming to restrict third-party funding. Despite the lack of any precedents, however, we cannot rule out the possibility of applying the Attorney-at-Law Act to a third-party funding case, depending on the structure of the funding.

We believe that when it comes to the actual implementation of third-party funding, issues such as conflict of interest, ensuring fairness of the process and conflict with domestic law such as Article 34(5) of the Attorney-at-Law Act will need to be addressed. Furthermore, methods of regulating third-party funding such as 1) restriction of interference by the third party on the case, 2) disclosure, 3) qualification requirements and a registration system for the third party, and 4) an obligation of the third party to provide security, are expected to be discussed further.

In this regard, many Korean companies are becoming more interested in the availability of third-party funding, particularly for cross-border disputes. We think that there is a momentum to formalize and implement third-party funding guidelines in the near future, including a potential amendment to the Arbitration Industry Promotion Act and/or adding an exemption clause to Art. 34(5) of the Attorney-at-Law Act. This amendment would certainly clarify potential issues of regulation on the third-party funding by the Attorney-at-Law Act. We would expect that such formalization of the third-party funding framework is likely to result in a substantial ripple effect and create a stable legal finance market in Korea.

JAE MIN JEON, SEUNGMIN LEE AND ARIE EERNISSE: In line with the recent growth of Korea as one of the hubs of international arbitration in East Asia, there is also growing interest in the field

of legal finance among Korea-based arbitration practitioners. However, there is currently no legal jurisprudence directly addressing legal finance issues and no legal framework clearly setting out what is permitted and what is not in relation to third-party funding. Also, at present, there are no third-party funders or funds in Korea that openly provide services in relation to Korean domestic litigation or arbitration matters seated in Korea.

Since at least 2010, arbitration practitioners in Korea have been actively discussing the necessity of adopting a legal framework for third-party funding, but there have not been any noteworthy developments. Notably, the Ministry of Justice recently released its blueprint to promote the arbitration industry for the coming years from 2019 to 2023, but it did not include any discussion of adopting a legal framework for third-party funding.

Nevertheless, arbitration practitioners in Korea are very open to the concept of third-party funding. Many Korean conglomerates are already receiving support from third-party funders in matters involving litigation in the US or UK.

Given this situation, it is difficult at this point to say whether or not Korea will enact formalized guidelines for the use of legal finance that are similar to the arbitration funding framework recently introduced in Singapore and Hong Kong. Arguably, it is only a matter of time before such a legal framework is established to regulate the funding of Korea-related litigation or arbitration by a third party. However, it remains to be seen how attorneys, parties and other stakeholders will be regulated once a framework is in place.

KYONGWHA CHUNG AND BHUSHAN SATISH: Korea's fast-evolving arbitration landscape has proactively kept pace with the latest global thinking on various arbitration-related issues. In 2017, the National Assembly passed the Arbitration Industry Promotion Act, recognizing that the arbitration was an "industry" in its own right, and accordingly putting in place a basic legislative framework for the long-term growth of this industry. Improving the legal framework for arbitration is a critical part of this strategy, and we expect legal finance to be a part of the agenda.

There is considerable uncertainty in the Korean arbitration community regarding the use of legal finance. "Third-party funding" as conventionally understood in international practice is an unfamiliar concept in Korea. While there are no explicit prohibitions under Korean law analogous to common law doctrines of champerty and maintenance, there is also no established legal framework for third party funding, no specific legislation or court judgments in this area and no known instances of its use in litigations or arbitrations based in Korea. Formalizing the use of legal finance will go a long way.

Burford's latest research shows that lawyers are under pressure to remain competitive and provide clients innovative financing solutions. What do you perceive to be the main business challenges faced by lawyers in South Korea?

EUN YOUNG PARK: In Korea, lawyers generally do not offer innovative financing solutions to clients and do not yet see that as a part of lawyer's job. However, there are cases, particularly in large international arbitrations, where the party ultimately decides not to pursue the arbitration due to costs, despite having a legitimate claim. Therefore, if a law firm can propose innovative financial solutions together with its legal proposal, it would gain a significant competitive advantage in the Korean market. However, the clients will expect the lawyers to bear the burden of financing in such circumstances.

JAE MIN JEON, SEUNGMIN LEE AND ARIE EERNISSE: Korea used to be a jurisdiction in which the government strictly limited the number of qualified lawyers. The number of new lawyers admitted each year was limited to 1,000. Because of this, even until recently, there were only approximately 20,000 qualified lawyers in the market, which meant that, on average, there was only one Korean lawyer for every 2,500 Korean people. However, this strict control of the number of lawyers generated market distortions and did not provide society with adequate means of accessing legal services.

In 2007, Korea established a graduate law school system similar to that of the US, and the number of new lawyers admitted each year has now risen to 1,700 lawyers. The increase in the number of lawyers changed the market dynamics drastically, adding competitiveness and many other challenges to the market. One of the noteworthy trends is

a decrease in legal costs, especially for disputes. There are many young lawyers in the market who are willing to represent clients for a nominal amount but tied to a handsome success fee. This trend shows that lawyers are willing to be creative—and, to a certain extent, that they must be creative—in structuring their fee arrangements in the reformed legal market.

Faced with a public that is trying to reduce legal fees and with courts that have taken a stricter stance on types of fee arrangements and amounts of fees, lawyers in the Korean market are more likely to think outside the box and creatively structure their legal fees, while taking into consideration any accompanying risks and limitations. As such, third-party funding is definitely one of the options that practitioners will consider seriously in the coming years.

However, as mentioned above, the main business challenge for lawyers in Korea when it comes to third-party funding is that there is currently no legal framework regulating it. Therefore, there is uncertainty and ambiguity with respect to legal finance governed by Korean law. Although there are no explicit restrictions on legal finance under the current legal system, it is still unclear whether Korean courts can be expected to uphold a third-party funding agreement in the absence of express legislative or regulatory approval. Thus, it is imperative for lawyers in Korea and their clients to determine how the existing laws and regulations would apply to third-party funding and how to avoid any potential pitfalls.

What are the biggest misconceptions lawyers and their clients have about legal finance?

EUN YOUNG PARK: One of the biggest misconceptions about legal finance would be that the control over decision making will be taken away from the client/lawyer. Some even worry of losing their right/claim and the negative influence that legal financing might have on their reputation. There is also the concern regarding the risk of third-party funding as it is still not considered as "an established practice" in Korea.

JAE MIN JEON, SEUNGMIN LEE AND ARIE EERNISSE: The two most commonly discussed (and sometimes not fully understood) issues are (i) whether third-party funding is in violation of the Attorney-at-Law Act or (ii) the Interest Limitation Act in Korea.

First, Article 34(5) of the Attorney-at-Law Act provides that non-lawyers are prohibited from sharing in any fees or other profits earned through services that may be provided only by attorneys. Therefore, unless and until third-party funding is legalized in Korea, third-party funding agreements involving any nexus to Korea should be structured carefully to ensure that they are in compliance with the relevant Korean laws. At the same time, considering the language and the legislative history of Article 34(5), it arguably cannot be interpreted as an outright ban on funding agreements.

Second, under the Interest Limitation Act and the relevant decree, interest rates must not exceed 24 percent. Any violation of these laws may result in criminal charges. However, the Korean courts take a restrictive approach when deciding whether a contract qualifies as a money lending contract (Seoul High Court Case No. 2014Na8532, dated 14 May 2015). Therefore, if the arrangement is on a non-recourse basis, it is unlikely that a third-party funding arrangement will be viewed as money lending.

Our view is that third-party funding would not violate the relevant laws if the arrangements are made carefully. However, interested parties would of course benefit from legislative and regulatory certainty in relation to third-party funding, and it would be ideal if Korean authorities enacted relevant laws to legalize and adopt third-party funding based, for example, on the Singapore or Hong Kong model.

Apart from dealing with legal technicalities, the legal industry may also face a cultural challenge to the wide-scale acceptance of legal finance in Korean society. The prestige traditionally accorded to lawyers in Korea came with the expectation that they would also serve as defenders of public interest, meaning that there was a certain culturally imposed restriction as to how and to what extent lawyers could gain profit. Despite the recent changes in the market, the public's expectation remains the same. For third-party funding to be institutionalized, the public needs to be persuaded that the adoption of third-party funding will provide them with an option to pursue justice even when one party does not have the means to do so, instead

of letting the market be swayed by questionable lenders and forcing people without means to sell out their entitlements to bring lawsuits.

How would the growth of the legal finance market in South Korea potentially impact the use of contingency fee arrangements? Would legal finance expand the types of matters that can be taken on risk, either by the lawyer or a legal finance provider?

JAE MIN JEON, SEUNGMIN LEE AND ARIE EERNISSE: Third-party funding may serve as a flexible financial and risk management tool to benefit a wide range of parties within the Korean market. Firms may utilize third-party funding to meet their regular overhead needs as well as other disbursements in exchange for a share of the contingency or future success fees. Thus, third-party funding is expected to reduce the cost barriers associated with commercial disputes and provide better access to justice. Although the Korean courts have imposed limitations on contingency fees in certain types of cases, we do not believe this will have a negative effect on the viability of legal finance, considering that contingency fee arrangements and third-party funding arrangements have different features.

KYONGWHA CHUNG AND BHUSHAN SATISH: Contingency fee arrangements—typically a retainer deposit plus a success fee—are legal and widely available in Korea, both for litigation and arbitration. We expect that the introduction of legal finance in Korea would have a positive impact on the use of contingency fee arrangements for arbitration matters.

The types of matters taken on risk would be expanded as legal finance is provided to clients in Korea. Given that Korean courts dispense civil justice quickly and cheaply, arbitration is viewed as a costly procedure in Korea especially to clients with little means to fund their case. However, legal finance, if introduced through explicit legislation, would definitely have an impact on expanding the matters that can be taken by lawyers, which otherwise were restricted due to limited funding.

Looking ahead to the next decade, what are your predictions for how legal finance will impact the business of law in South Korea?

EUN YOUNG PARK: We see a positive opportunity to develop the legal finance industry in Korea in the near future. It will be more so if certain policy decisions are made to remove regulatory risks associated with third-party funding. The interest of Korean companies in third-party funding, especially for complex international arbitration cases seated outside of Korea, is increasing and lawyers who can propose innovative financing alternatives to Korean clients would gain a competitive edge. It is possible that such momentum may also carry over to the domestic legal market and help create a platform to establish a solid framework for legal finance market within Korea.

JAE MIN JEON, SEUNGMIN LEE AND ARIE EERNISSE: Having the means to resolve a legal dispute is one key factor in promoting investment and business in a country. We believe that the adoption of a legal framework for the use of third-party funding and other legal finance tools will be essential in this regard. For Korea, the issue remains when and how such tools will become legally sanctioned and commonly accepted by users. Our view is that if users are provided with more flexible options, it will definitely promote business overall and have a positive impact on the business of law in Korea.

KYONGWHA CHUNG AND BHUSHAN SATISH: Arbitration in Korea, as a function of the Korean economy, most of which is outward facing and international, is brimming with potential. The growth of legal finance will give a much-needed impetus to realize this potential and will play a crucial role in the development of arbitration in Korea. Legal finance and its innovations are essential in this growth and the professionalization of this "arbitration industry". Legal finance providers are expected to offer another source of potential instructions for law firms and constitute an additional client base.

Korea could be a promising market for funders. It is, after all, home to giant conglomerates with complex business activities worldwide giving rise to disputes. Many Korean corporates are likely to find legal finance attractive, either because they cannot fund their own claims or because they prefer to use resources for other purposes.

EUN YOUNG PARK

Eun Young Park is Co-Chair of the international arbitration & cross-border litigation practice at Kim & Chang. Mr Park is currently serving as the Vice President of LCIA Court and a member of the SIAC Court of Arbitration. He is also on the board of Korean Council of International Arbitration and is an Executive Member of the Seoul International Dispute Resolution Center.

JAE MIN JEON

Jae Min Jeon is a Partner at Shin & Kim and member of the firm's international dispute resolution practice group. He has represented major corporate clients in international commercial arbitration cases and multi-jurisdictional litigations arising out of cross-border M&A transactions and in-bound and outbound investments.

SEUNGMIN LEE

SeungMin Lee is a Partner in the international dispute resolution practice group at Shin & Kim. She has acted as counsel in international arbitration cases before the ICC, KCAB, SIAC, HKIAC and LCIA as well as in ad-hoc arbitrations under the UNCITRAL rules.

ARIE EERNISSE

Arie Eernisse is a Foreign Attorney in the international dispute resolution practice group at Shin & Kim. He is a Fellow of the Chartered Institute of Arbitrators and an active member of the International Bar Association and the American Chamber of Commerce in Korea.

KYONGWHA CHUNG

Kyongwha Chung is a Partner in international arbitration practice group at Bae, Kim & Lee LLC. She has represented corporate clients in international arbitration cases and is representing the Republic of Korea in its first treaty-based arbitration. Ms Chung also serves as Director of the International Committee of Seoul Bar Association

BHUSHAN SATISH

Bhushan Satish is an associate in international arbitration practice group of Bae, Kim & Lee LLC. He acts as counsel and tribunal secretary in international commercial and investment treaty-based disputes.

Claim monetization: A guide to unlocking legal asset value

Kelly Daley

Kelly Daley is a Vice President with responsibility for assessing and underwriting legal risk as part of Burford's investment team. Prior to joining Burford, Kelly was a senior litigator at Orrick Herrington.

+1 312 778 6182
kdaley@burfordcapital.com

Here's a paradox: even as more lawyers become more aware of legal finance as a tool to offload cost and risk, too many of them remain unfamiliar with one of its most potent uses, the monetization of pending claims.

Lack of awareness of claim monetization is all the more surprising given that it alleviates one of the biggest frustrations faced by companies involved in major commercial disputes: Their inability to control the timing and certainty of cash flows back to the business when they pursue recoveries through litigation. This has relevance in the broader C-suite. According to the *2019 Managing Legal Risk Report,* nine out of ten (91.9%) CFOs say that greater control over timing and the ability to monetize legal assets on their company's schedule is an important benefit of legal finance.

Why then are so many lawyers unaware of claim monetization? Perhaps because so much discussion of legal finance focuses on its most common use, in which a third party pays lawyers' fees and expenses so that claims may proceed. In-house lawyers who only see legal finance as a tool to pay their lawyers may then mistakenly conclude that unless they can't or don't want to pay their lawyers out of pocket, legal finance isn't for them. Far from it: Legal finance enables companies to unlock the asset value of pending claims—including companies that can afford to and do pay their lawyers out of pocket. In doing so, monetization gives companies (and their firms) the ability to control the timing and certainty of cash flows back to the business by accelerating a portion of a pending claim.

Defining monetization

As its name implies, monetization is simply the conversion of a portion of a pending claim into cash, with a legal finance provider essentially advancing capital that would otherwise be captive until the resolution and payment of the claim in question.

Pending claims often represent vast latent value to the organization. Unfortunately, they carry a tremendous amount of uncertainty as to both outcome and timing—and because they are highly illiquid, traditional capital sources historically have been unable to assign asset value to them. Because legal finance providers have experience and expertise in assessing the value of legal assets, however, they can help companies unlock value through monetization.

Monetization accelerates an organization's access to capital. Capital is provided upfront, without the company needing to wait for outstanding claims to resolve—offering immediate liquidity that may be used for virtually any business purpose. Unlike fees and expenses financing, in which money flows from the finance provider to pay lawyers as costs are incrementally incurred, capital provided through a monetization is provided in a lump sum upon investment and can be redirected to fund defensive positions in the legal department—or to build warehouses, hire staff, shore up corporate balance sheets or any other corporate purpose. And because the capital typically is provided on a non-recourse basis, the company is obligated to repay the investment only following the successful resolution of the matter.

Worked example

MaxValue Inc. had for four years been pursuing an antitrust claim against a group of suppliers that had engaged in price-fixing that resulted in $1 billion in overcharges to its business. MaxValue

Inc. had a strong claim and, with ample resources to engage a top litigator at a leading firm, had elected to pursue its claim on an opt out basis. However, even as the claim passed motion to dismiss, MaxValue Inc. faced an indeterminate delay to being made whole through the litigation. Meanwhile, the company CFO, facing a quarterly reporting deadline, wished to access some of the cash from the asset. The GC secured a $100 million monetization on a non-recourse basis in exchange for a portion of the ultimate recovery in the event of a successful outcome. Happily for the CFO, the monetization injected $100 million of immediate cash income into the business; happily for the GC, the cash was used to fund a combination of defense matters and a recovery program that would bring further value to the business.

Matters suited to monetization

Claims suited for monetization tend to be large-scale matters with significant damages, and must meet standard criteria for legal finance, which for Burford include:

- Strong merits
- Type of matter (complex commercial litigation, including antitrust, securities, fraud, contract, patent and intellectual property, trade secret and other business tort matters, as well as international arbitration)
- Experienced litigation counsel with successful track records and a strategic approach
- Jurisdiction (matters filed or expected to be filed in domestic courts in a common law jurisdiction or in an internationally recognized arbitration center)
- Damages supported by solid evidence of loss and large enough to support our investment and returns with the client keeping most of the proceeds if the case goes well

Claims can be monetized at various pre-settlement stages, but as a general matter, more capital can be provided for matters that are more advanced through litigation.

Benefits of monetization

For companies with high-value claims, there are several obvious benefits to monetization:

- **Mitigating risk:** Companies can reduce their exposure to the risk of loss, a reduction of damages or a reversal set aside of a judgment.
- **Controlling timing:** Companies gain access to capital based on their preferred timeline—cash they can then invest in the business without delay.
- **Unlocking better pricing:** Should companies have multiple claims suitable for monetization, financing can be offered through a portfolio-based facility that provides more competitive pricing.

Finding the right legal finance partner

Companies seeking to monetize claims should take care in identifying a reliable legal finance partner with a clear track record and capital sources—respectively the top two most important factors cited by lawyers in choosing a funder, according to the *2019 Legal Finance Report.*

By definition, monetization will require a special quality of finance provider. Many well-capitalized finance firms lack the expertise or the willingness to provide a lump sum investment for a legal claim because they lack the expertise to value that claim; conversely, few specialist legal funders have the capital to monetize significant claims.

It is important for companies to work with a finance provider with sufficient valuation expertise and talent, and with sufficient resources to provide the requisite capital—and when timing is of the essence, working with a provider that has access to its own permanent capital (as Burford does) helps ensure the process moves swiftly and smoothly.

FEES AND EXPENSES FINANCING SOLVES "MONEY OUT" PROBLEMS:

Legal finance shifts the cost and risk of pursuing litigation or arbitration from the company (or its firm) to Burford—enabling the pursuit of meritorious claims while minimizing money put out the door and a corollary hit to profits.

MONETIZATION FINANCING SOLVES "MONEY IN" PROBLEMS:

Legal finance accelerates a portion of a pending claim or of an unenforced judgment or award, bringing money into the business and allowing companies to unlock the value of pending claims and unenforced judgments and awards without waiting for legal processes to resolve.

How legal finance providers add value as equity investors

Emily Hostage

Emily Hostage is a Vice President at Burford. Prior to joining Burford, Emily was Vice President of Strategic Analytics and Policy at RPX Corporation, a leading global provider of patent risk management services, and practiced at Arnold & Porter, where she represented high-tech clients in patent, copyright and trade secret litigation cases.

+1 312 778 8762
ehostage@burfordcapital.com

Litigation finance as an asset class is hailed as "uncorrelated" with traditional debt or equities. This characteristic attracts investors seeking to outperform traditional markets. But sometimes this characterization overlooks an extraordinary opportunity—an accretive equity investment from litigation finance.

Suppose, for instance, that a start-up technology company's chief engineer leaves his company, steals some of its intellectual property, and starts a competing business. Foregoing legal action against him could doom the company; on the other hand, pursuing litigation would drain precious resources with perhaps equally fatal opportunity costs.

Conventional solution

Traditional legal finance offers a simple solution to this problem: Cover the expenses of the company's litigation against the former employee in exchange for a portion of proceeds from any favorable result. For the finance provider, there are basically three possible outcomes:

- A multi-million-dollar loss
- A share of a settlement (likely at a discount to the total value of the claim)
- A share of winnings at trial, priced to return about 4x to 6x the provider's invested capital after a 4- to-5-year timeline to trial

This investment style is expected to generate significant risk-adjusted returns (with an IRR target of 20 to 30 percent), regardless of the underlying performance of the company.

This approach is what makes "uncorrelated" legal finance so attractive. The litigation investor can expect returns at the level of high-performance venture capital or private equity even as it is largely indifferent to the value of the company.

Missed opportunity

That said, litigation quite frequently does influence a company's enterprise value. What if this is a missed opportunity? For instance, what if winning the lawsuit not only generates cash, but also shuts out the competitor and thereby doubles the company's market share?

Value-add solution

With that in mind, suppose instead that the investor not only covers the litigation expenses but also purchases shares of the start-up's equity, e.g., in a traditional venture capital round. The interaction between the two investment components creates value for both the investor and the start-up.

On one hand, litigation success (the competing business shuts down) leads to greater market share, increasing shareholder value and thereby generating incremental upside for the investor. Litigation failure (the competing business survives) should leave shareholders with at least some value, if less than desired. Hence, the equity provides the investor some enhanced returns in the event of a win and some protection in the event of a loss, as compared to the traditional "non-recourse," fees-and-expenses-only financing approach described above.

On the other hand, the legal claim is largely immune to fluctuations in equity value; whatever happens to the company while the litigation is pending, a significant portion of the legal claim

value should survive. If anything, they may be anticorrelated: certain legal remedies like “lost profits” can increase precisely when equity value begins to suffer.

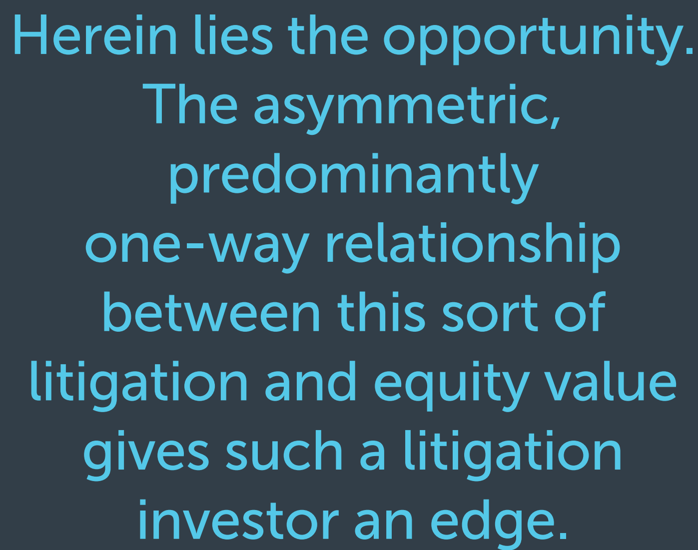
Herein lies the opportunity. The asymmetric, predominantly one-way relationship between litigation and equity value gives the litigation investor an edge. And because of this edge, the investor can offer more attractive capital on a holistic basis than the company might find in the combination of siloed options from traditional litigation finance and venture capital.

Quantitatively, the advantage to the company is straightforward: Holistic valuation of assets almost always equates to more competitive pricing of capital. For instance, a holistic investor with a meaningful share of equity might be satisfied with less than 4 to 6x returns at trial on the litigation capital, given the downside protection the equity provides. And likewise, the liquidity from the litigation can temper the holistic investor’s need for highly dilutive equity. (More pointedly: A venture investor generating up to 2 to 3x returns from a litigation outcome prior to company exit might not press as hard for things like high-multiple participating preferred shares.) Contrast this with a pure equity investor, whose higher uncertainty about the litigation might push him to discount heavily the positive litigation outcomes and instead lean harder on liquidation preferences, redemption rights and the like.

Qualitatively, too, a litigation-savvy equity investor can be an extraordinary value-add to the right company. Who as a director could better advise a company facing the predicament described above? Such an investor by definition understands the risks of litigation and has the stamina to bear them through the arduous path litigation often takes. Along the way, as an adviser, such an investor can help the company prevent, identify and handle similar problems as they inevitably arise.

It’s no accident we chose this particular hypothetical scenario to illustrate the point. Intellectual property theft is a common and often recurring problem in highly competitive markets. And sadly, this scenario is even harder to navigate today than it was ten years ago. The present US legal regime, while resulting from many well intended policy changes, has made intellectual property enforcement far more challenging, not just for so-called “trolls” (non-practicing entities) but also for legitimate operating companies.

An investor with litigation expertise (and just as importantly, risk tolerance) levels this playing field. Competitors of the legal investor’s company will have to succeed or fail on their merits rather than by skirting laws that can be prohibitively expensive to enforce. Litigation-savvy investment thus could pay substantial dividends in company value over time. Indeed, the company’s survival may depend on it.



Herein lies the opportunity. The asymmetric, predominantly one-way relationship between this sort of litigation and equity value gives such a litigation investor an edge.

Best practices in building an effective recovery program

Rufus Caine

Rufus Caine is a Vice President with responsibility for helping companies, in-house legal teams and their law firms optimize the value of their legal assets, including providing financing to maximize recovery proceeds and build high-value affirmative recovery programs. Rufus was a Director at Axiom Law and a litigation associate at Willkie Farr and Gallagher.

+1 202 873 1898 / rcaine@burfordcapital.com

Nearly three-quarters (72.0%) of in-house lawyers surveyed report that their companies have failed to pursue meritorious legal claims for fear of adversely impacting the bottom line, according to the *2019 Legal Finance Report.* In case the implications of this point aren't clear: Companies routinely leave untold millions of dollars in recoveries on the table rather than take on the added cost and risk of litigation.

While an abundance of caution is understandable given the mounting pressure legal departments face to stay on budget and fear of adverse outcomes, a growing number of companies are choosing an alternative path: Pursuing affirmative recovery programs to proactively generate value for the business. Indeed, research suggests that an increasing number of companies have recovery programs; half of the in-house lawyers interviewed for the 2019 Legal Finance Report noted that their companies have recovery programs in some form.

Although in-house lawyers may be familiar with the concept, many remain unsure of how to put a recovery program in place and how legal finance can dramatically support those efforts. Below, we address key considerations for any company that wishes to build an effective recovery program.

Why companies pursue affirmative recovery programs

In recent years, companies have trimmed legal spend and asked in-house lawyers to do more with less—and research suggests the trend of shrinking legal budgets will accelerate in the event of a recession. Recovery programs can be a cash-generating tool by which legal departments can add quantifiable value to their organization and offset other unavoidable legal costs—sometimes dramatically so. One off proactive litigation on its own can have little material impact on the bottom-line of large company—but when pursed programmatically and in the aggregate, it is well positioned to effectively bankroll the legal department given the proceeds that can be recovered.

Affirmative recovery programs at DuPont, The Home Depot, Tyco, Ford and others have generated headlines for over a decade, with the most prominent headline the $2.7 billion in cumulative recoveries won by DuPont between 2004 and 2013.[1] However, the idea is not new: Large pharmaceutical and technology companies have for some time assertively pursued patent claims to protect their intellectual property. The range of claims have since expanded: Companies now pursue recoveries—based on existing meritorious claims—from insurers, suppliers and business partners—effectively transforming the legal department from a cost center to a profit center.

Key considerations for building recovery programs

For legal departments that have never pursued affirmative matters with an eye to cash-generating litigation, a successful recovery program should be based on a few simple premises:

DEVELOP A STRATEGY

Understanding the organization is the first step to building a recovery program: Lawyers must consider which departments and functions within the organization may have meritorious claims, and thus contain recovery opportunities so they can guide colleagues who may not have experience in pursuing proactive litigation. A strong recovery strategy should be built on a clear business plan wherein the company has modeled financial scenarios and set goals. Legal departments should also work with colleagues to ensure that recoveries have no unforeseen impact on key business relationships. Relevant stakeholders in and outside of Legal should weigh the value of potential proactive litigation to the Business against relationships with vendors, partners or suppliers in a thoughtful and objective manner.

SELECT APPROPRIATE CASES

After assessing the organization's opportunities for recoveries, legal teams should prioritize the most high-value matters: Those with significant damages that are likely to resolve relatively quickly and thus cost-efficiently are particularly

[1] "Dupont's Legal Recoveries Initiative," *Presentation to ACC Annual Meeting* (October 17, 2016).

good targets. Common areas for recoveries include: Breach of contract claims, insurance recovery claims, intellectual property claims and antitrust claims.

APPOINT THE RIGHT COUNSEL AND TAKE THE RIGHT PLAINTIFF POSTURE

High-risk, high-reward recoveries often require outside counsel with specialist litigation expertise in the types of matters being pursued. Legal teams should consider counsel with experience in both pursuing and defending these types of matters, as such counsel are best positioned to be effective. In matters where the company can pursue recovery as a member of a class, the legal team should balance the relative ease of this approach with the greater control and often significantly higher return yielded by pursuing recovery on an opt-out basis.

MARSHAL SUPPORT

Recovery programs represent a shift for most legal departments and the companies they serve—so education and communication are key. In-house lawyers should engage internal stakeholders who may have reservations about dedicating additional resources to the legal function in order to pursue affirmative recoveries, or the impact of litigation on business relationships and priorities. Creating internal dialogue with colleagues on how the proactive litigation can both identify potential roadblocks and set forth a path to garner support for the program. The most effective approach leverages objective data to address foundational questions on the anticipated time for resolution, anticipated loss to the Business for the defendant's underlying conduct, and the anticipated amount of recoverable proceeds.

How legal finance jumpstarts recovery programs

Legal finance is an important tool for companies that wish to initiate or improve a recovery program. In essence, a legal finance provider like Burford is an expert in valuing legal risk and has the capital to shift risk from a company's balance sheet to its own. Thus, for a variety of reasons, legal finance can help companies jumpstart their recovery programs:

OFFLOAD THE COST OF A RECOVERY PROGRAM

By working with a legal finance provider, a company can offload the cost and risk of pursuing claims in a recovery program. Typically, capital is provided on a non-recourse basis with the funder paying litigation cost and/or accelerating a guaranteed financial result ahead of the resolution of the case in exchange for a portion of a future recovery. In the event of a loss, the funder is owed nothing as it has no recourse against the company to recoup its initial investment or return. This shifts the upfront costs and downside risk of a recovery program to the funder, creating certainty that the recovery program is positioned to advance budget and value-generation objectives as opposed to undermining them. Burford can offer portfolio-based capital facilities that offset the cost of multiple recovery matters simultaneously; these portfolios can include both affirmative recoveries as well as defense matters.

PRIORITIZE HIGH-VALUE MATTERS

As experts in valuing legal risk, a legal finance provider can help a company with multiple potential recoveries to prioritize the matters that are most likely to yield the most positive results as quickly as possible. Given the need to marshal internal support for a recovery program, this ability to set priorities in a quantitative way—and show results—is key.

WORK WITH COUNSEL OF CHOICE

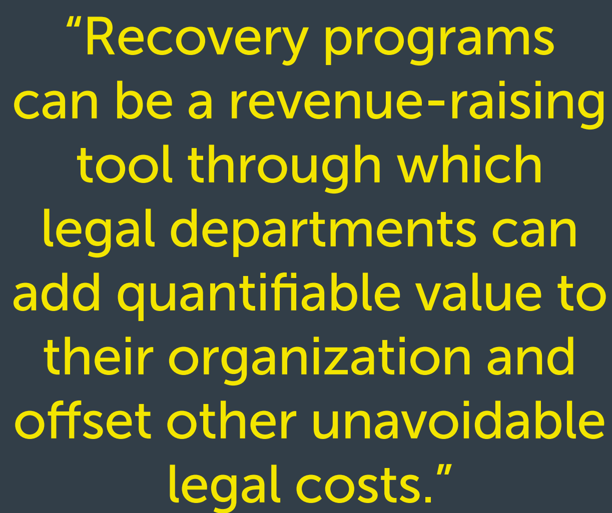
Gaining access to outside capital ensures that companies are able to work with their preferred counsel—meaning they can choose the firm best suited to their particular needs and not risk being forced to make economically-driven decisions.

ADD VALUE BEYOND CAPITAL—WITHOUT CEDING CONTROL

Companies that work with a worldclass legal finance provider like Burford get a long-term partner that can provide practical advice throughout the lifecycle of a case, offering valuable insights to help evaluate the viability of litigation and set priorities pre-investment and maximize value post-investment. However, it is essential to note that working with a legal finance provider has no impact on control of litigation and settlement decisions. Control of these decisions rightfully remains with the client.

Making the business-forward choice

As affirmative recovery programs become increasingly commonplace, savvy legal teams will be prepared to proactively recommend such programs to their organizations. In most cases, programs will start out small and grow as early wins help prove out the concept and convince internal stakeholders of the merits. Legal finance can help legal departments seamlessly transition from cost centers to value generators using recovery programs—without taking on added uncertainty or risk.



> "Recovery programs can be a revenue-raising tool through which legal departments can add quantifiable value to their organization and offset other unavoidable legal costs."

The Equity Project: Continuing the conversation

Christine Azar & Elizabeth Fisher

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. Prior to joining Burford, Christine was the partner in charge of Labaton Sucharow's Wilmington office and has been recognized as a leading litigator by numerous organizations.

+1 212 235 6827 / cazar@burfordcapital.com

Elizabeth Fisher is Senior Vice President with responsibility for developing and expanding Burford's relationships with law firms and companies across the UK and Europe. Prior to joining Burford, Elizabeth served in a number of leadership positions at Axiom, the global leading alternative legal services provider, most recently as Vice President, EMEA Head of the Banking & Regulatory Practice.

+44 (0)20 3814 3685 / efisher@burfordcapital.com

This year marks numerous important milestones for women in law. 2019 is the 150th anniversary of the first female law student in the US and the first woman lawyer in the US (in 1869, Lemma Barkeloo and Phoebe Couzins entered Washington University in St. Louis and Arabella Mansfield was admitted to the Iowa bar). Across the Atlantic, the UK is celebrating the centenary of the Sex Disqualification (Removal) Act of 1919, which paved the way for women to become lawyers.

But even as we celebrate women's progress in law, challenges persist—and the biggest of them is the significant gender-based pay gap that women lawyers face. For example: Women account for only 22.4 percent of partners in major US firms, according to the *2018 NALP Report on Diversity in U.S. Law Firms,* and 18.5 percent of partners in the top 10 UK law firms, according to *PwC's 2018 Law Firms' Survey.*

To address this challenge, in late 2018 Burford launched The Equity Project—a groundbreaking initiative designed to close the gender gap in law by providing an economic incentive for change through a $50 million capital pool earmarked for financing commercial litigation and arbitration matters led by women. To mark our one-year milestone, we address how The Equity Project—and the individual Champions who have committed to helping us promote it—are facilitating this conversation and inciting meaningful change for women in law.

How The Equity Project helps

The Equity Project helps address a number of cultural and historical factors that contribute to the gender gap in law.

EMPOWERING WOMEN LAWYERS TO OFFER ALTERNATIVE FINANCIAL SOLUTIONS

With capital from The Equity Project, women can provide clients an alternative to the hourly billing model—which can be a competitive advantage for lawyers trying to win clients who prefer to work with firms that are willing to share risk or offer different arrangements.

Remunerating lawyers based on the number of hours worked "incentivizes working more rather than working efficiently," as Equity Project Champion Nicole Galli noted in a 2018 roundtable published by Burford. Given their tendency to take on more domestic, childcare and eldercare responsibilities, it can also penalize women who need to be efficient with their hours.

PROVIDING ACCESS TO ORIGINATION CREDIT

Bringing in new business remains key to long-term success at most law firms, but women historically inherit fewer client relationships and opportunities than men. In the worst example of how this can play out, a firm may bestow origination credit on a permanent basis, meaning that even if a female lawyer is a client's main point of contact, credit for cases brought to the law firm are awarded to the male partner who owns the permanent economic rights to that client relationship.

The Equity Project provides a lever for change. By providing capital on the proviso that a woman lawyer is receiving origination credit, serving as client relationship manager, or leading the case, law firms and clients are incentivized to ensure that the lawyers working on their matters are being fairly credited and adequately compensated for bringing in new business.[2]

ENCOURAGING SELF-PROMOTION

Unconscious biases often affect women's resolve to pursue high-profile opportunities and "self-promote." As Equity Project Champion Katherine Forrest noted in a 2018 roundtable published by Burford: "This tendency stems from many places, including the ways in which women (and girls) are socialized to fear being labelled as 'aggressive'."

Encouraging women to actively seek leadership roles in high-profile litigations and arbitrations is at the core of The Equity Project. It equips women to pitch for new business or approach a law firm fee committee with client-friendly financing in place. As Nicole Galli explained in a 2018 roundtable: "The Equity Project can help more women be rainmakers. It also encourages majority-run firms to funnel opportunities to women when they might not otherwise have done so."

MOVING PAST A "CHECK-THE-BOX" APPROACH TO DIVERSITY

Research from Cambridge Judge Business School reveals an unexpected trend among law firms: As female representation at the partner level goes up, recruitment of female junior associates goes down.[3] In an interview published on Burford's blog in 2019, Saadia Bhatty, Counsel at Gide Loyrette Nouel, offered an explanation for this phenomenon: "Law firms were ticking boxes and feeling as though they had hit their quota of female partnerships and therefore not feeling the need to recruit or promote more."

The Equity Project helps arm firms against complacency by providing a tool that women lawyers can use to win new business and advance their careers.

The impact of The Equity Project

By offering a new tool to help change outcomes for women lawyers, The Equity Project is advancing the conversation around the gender gap in law in a way that resonates.

Since launching a year ago, Burford has been joined by 22 Equity Project Champions—distinguished women and men from leading law firms and corporations in six different jurisdictions around the world.[4] Thanks to our Champions' commitment to this initiative, The Equity Project will continue to lead the discussion by featuring our Champions in a series of upcoming workshops and interactive panels aimed at women litigation and arbitration rising stars.

The Equity Project has also been recognized with the inaugural Annual Pledge Award at the 2019 GAR Awards. And our esteemed colleague Aviva Will has been named a Trailblazer and a Distinguished Leader by the New York Law Journal, based in part on her work launching The Equity Project.

Finally, and most importantly, women lawyers and the law firms that are committed to their success have asked for and received funding from Burford through The Equity Project.

Continuing the conversation

In addition to actively funding women-led matters, one of the immediate impacts of The Equity Project is that it "creates awareness and sends a message," as Equity Project Champion Sophie Nappert commented in an interview published on the Burford blog.

It's undeniable that discourse around the gender disparity in law has progressed dramatically in recent years: Initiatives led by Equity Project Champions like The Equal Representation in Arbitration Pledge (of which Burford is a signatory) and organizations like the Diversity Lab are helping promote gender parity. Meanwhile, law firm clients are increasingly using economic incentives to promote equality: In January of 2019, 170 GCs penned an open letter to law firms demanding that they actively improve diversity or risk losing their business.

But because progress remains slow, continuing the conversation around the gender gap in law is crucial—and can only help shed light on both the challenges and the potential solutions. Burford will strive to continue to be at the forefront of driving change.

[2] Kibkabe Araya, "Origination Credit Is Hindering In-House Counsel's Diversity Push," *Delaware Law Weekly*, September 4, 2019.

[3] Q&A: Sophie Nappert and Saadia Bhatty", *Burford Capital blog* (October 23, 2019). Available at: burfordcapital.com/insights/insights-container/qa-sophie-nappert-and-saadia-bhatty-part-i/.

[4] Numbers current as of 31 October 2019.

"It's undeniable that discourse around the gender disparity in law has progressed dramatically in recent years: Initiatives led by Equity Project Champions like the Equal Representation in Arbitration pledge (of which Burford is a signatory) and organizations like the Diversity Lab are helping promote gender parity."

2018 ICSID Awards: Year in review

A REVIEW OF THE 18 ICSID AWARDS RENDERED BY TRIBUNALS IN 2018

Jeffery Commission

Jeffery Commission is a Director of Burford with expertise in international arbitration, and the co-author of Procedural Issues in International Investment Arbitration (Oxford University Press, 2018). He was formerly a Senior Associate in the international arbitration group at Freshfields Bruckhaus Deringer in London, New York and Washington, DC.

+202 788 0888
jcommission@burfordcapital.com

What makes an investor-state arbitration under the ICSID Convention or under the ICSID Additional Facility Rules attractive for funding? In short, it is typically a mix of five key considerations typically makes a claim attractive: jurisdiction, merits, damages, counsel and enforcement.

Of those, the damages and economic analysis of any investment arbitration claim is paramount. In performing that analysis, we necessarily examine whether or not the alleged damages in a particular case are realistic and supported by contemporaneous evidence, including evidence of a company's investment in a project.

What is more, however, we consider that amount of damages claimed against damages awarded historically across all investor-state arbitrations, as well as against the track records of counsel, experts and arbitrators (to the extent such information is available). We then use that data when considering how much capital is required for an ICSID arbitration (in terms of counsel fees, expert fees and arbitration costs), and how long that ICSID arbitration proceeding is likely to take from registration to award.

Here, in this year in review survey we test the 2018 awards rendered by ICSID tribunals against these three data points: damages awarded vs. damages claimed; legal and arbitration costs; and duration.

In 2018, ICSID tribunals rendered 18 final awards. In six of those arbitrations, tribunals either dismissed the case on jurisdictional grounds, or dismissed all claims on the merits. In seven cases, ICSID tribunals rendered awards in favor of investors, including the then-largest ICSID award rendered (at the time), in *Union Fenosa Gas, S.A. v. Arab Republic of Egypt* (approx. US$2 billion). In the remaining five ICSID arbitrations, award details are not yet publicly available.

Damages claimed vs. damages awarded

Looking at the 7 ICSID awards rendered in 2018 resulting in damages awarded to claimants, tribunals awarded claimants 37 percent of the damages claimed, on average, as set out in the chart on the following page.[5]

This figure is consistent with that set out in prior studies of investor-state awards, which typically have reported tribunals awarding between 34 percent to 39 percent of damages claimed.

Turning to 2019, however, there have been 20 ICSID awards rendered in investment arbitrations so far (as of 30 September 2019). In terms of the 2019 ICSID awards, nine resulted in no damages in favor of an investor, and eleven with damages in an investor's favor (although three of those eleven are not publicly available). The eight publicly available awards range in awarded damages from approx. $19.1 million to $8.3 billion, including two of the largest ICSID awards ever rendered *(ConocoPhillips Petrozuata B.V. et al. v. Bolivarian Republic of Venezuela*—approx. $8.3 billion; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*—approx. $5.7 billion). Taking together the eight favorable ICSID awards issued in 2019 that are in the public domain, tribunals awarded 48% of the damages claimed, on average, in those arbitrations.

Legal and arbitration costs

It is no surprise that costs incurred by claimants and respondents in ICSID arbitrations are

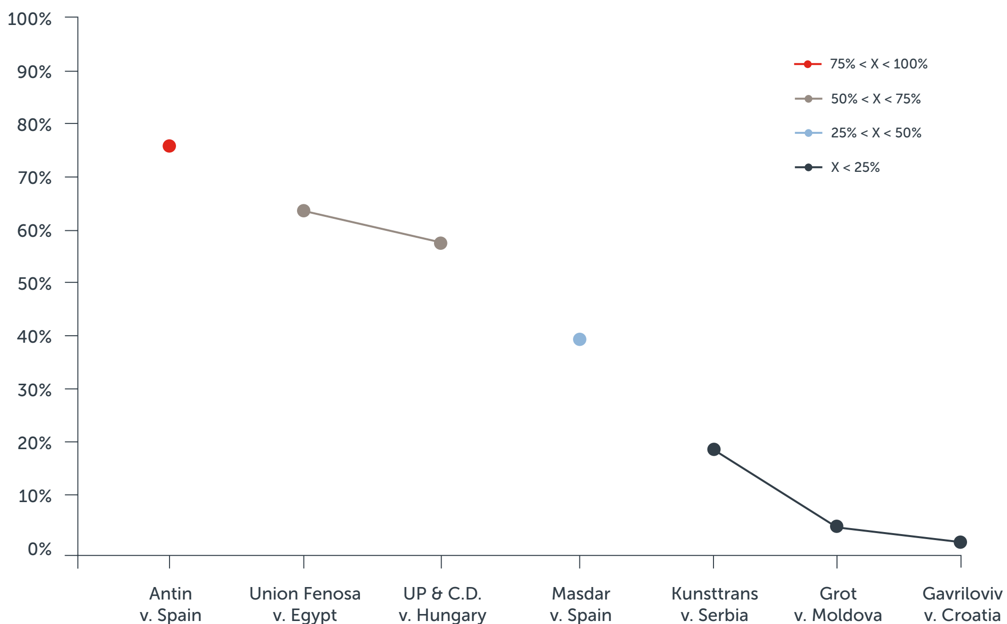
[5] The empirical analysis of 2018 ICSID arbitration awards discussed herein was conducted in consultation with Garrett Rush, Kiran Sequeira, and Matt Shopp, of Versant Partners.

substantial, averaging US$6.1 million for claimants, US$5.2 million for respondents, and US$922k for arbitration costs (tribunal fees and expenses, ICSID administrative fees).[6] Having examined the costs reported in 2018 ICSID awards, claimant legal and other costs were US$7.05 million on average, and US$4.83 million was spent, on average, by respondents on legal and other costs, with US$986k on average for arbitration costs.

Duration

Equally important is the duration of an ICSID arbitration, details of which are now reported by ICSID itself on a regular basis. Historically, the average duration of ICSID proceedings from registration to award has been 3.86 years.[7] Comparing this figure to the duration of the arbitrations resulting in awards in 2018, the average duration is slightly higher, coming in at 3.96 years. Apart from the oral and written procedures inherent in any ICSID arbitration, a significant portion of that 3.96 years is the amount of time it takes for the award to issue (from the close of a final hearing to award). Prior to 2018, the average time between the close of a final hearing and issuance of an award in all concluded ICSID arbitrations was 13.3 months.[8] A review of the 2018 ICSID awards reveals a slightly longer period of time, 15.5 months from final hearing to award.

This is the first of two "year in review" surveys I will offer examining investor-state arbitration awards rendered in 2018. This first survey examined the 18 awards rendered by ICSID tribunals, and the second survey covers the 17 awards rendered in 2018 by non-ICSID tribunals. Extracts from both surveys were first presented on 18 October 2019 in London at BIICL's Thirty Third ITF Public Conference: Valuation of Damages in International Investment Law.



[6] Jeffery Commission & Rahim Moloo, *Procedural issues in international investment arbitration* (Oxford University Press, 2018), at 187-188.
[7] *Id.* at 194.
[8] *Id.* at 193.

Lawyers choose Burford because we have more capital and more capacity to invest quickly and efficiently than any other legal finance provider. Our respected team includes more than 59 lawyers who are experienced, fast and easy to work with.

For more information about Burford, visit burfordcapital.com or contact us at info@burfordcapital.com.

New York
350 Madison Ave
New York, NY 10017

+1 212 235 6820

London
Brettenham House
2-19 Lancaster Pl
London WC2E 7EN

+44 (0) 203 530 2000

Chicago
353 N. Clark Street
Suite 2700
Chicago, IL 60654

+1 312 757 6070

Washington
1750 K Street, 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 2 8607 8891

350 Madison Ave
New York, NY 10017

www.burfordcapital.com