Burford

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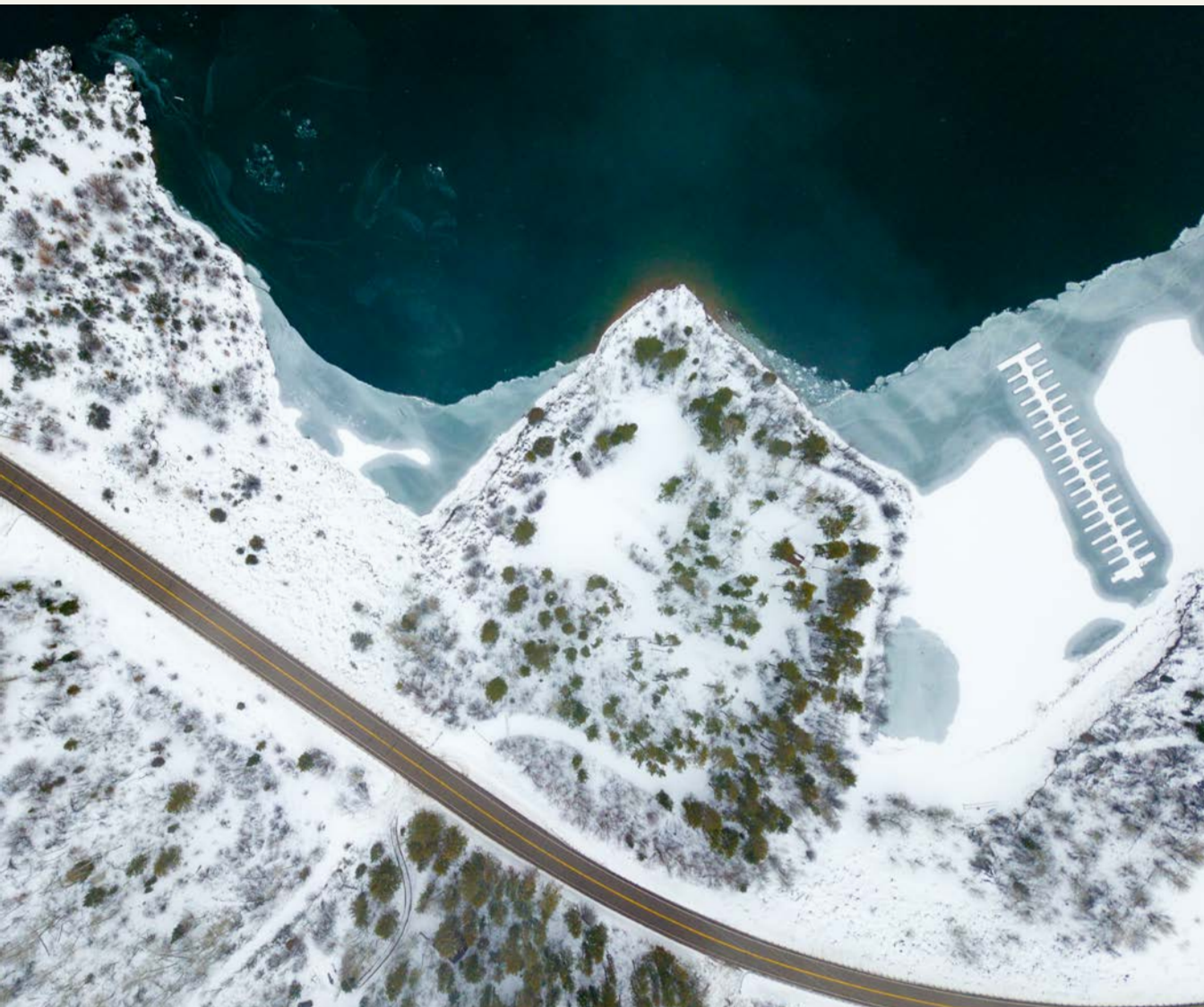
2022

# THE BURFORD Quarterly

A REVIEW OF LEGAL FINANCE





THE BURFORD

# Quarterly

A REVIEW OF LEGAL FINANCE

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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.

# 2 *out of* 3

senior in-house lawyers say their companies have affirmative recovery programs. Nearly half say their affirmative recovery programs need improvement.

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The forthcoming *2022 Affirmative Recovery Programs Report* draws on extensive one-on-one interviews with 52 general counsel, heads of litigation and other senior legal leaders at major corporations around the world.

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# Bridging the legal/finance knowledge gap: Essentials to building an effective affirmative recovery program


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Reda Hicks is a Vice President who works with companies and law firms, with a special focus on Texas-based organizations. Prior to joining Burford, she was Senior Counsel for deugro (USA), Inc. as well as DSV Panalpina, Inc., and was a partner at Diamond McCarthy.

## The inner workings of every business organization can be broken down into two categories activities: Support functions and core functions.



The support functions—things like legal, finance, and human resources—keep the proverbial house in order, while the core functions—things like operations and sales—generate revenue for the business. Although core and support functions are equally important, they are almost always in tension with one another for the simplest of reasons: Core functions make more money than they cost, while support functions typically cost more money than they make. In terms of legal services, however, this need not be the case.

Corporate legal departments perform the critical role of protecting the enterprise from harm. Historically, this role has been viewed as a predominately defensive one, in which legal departments represent "money out". In legal departments, cost management has translated into lean teams that work to avoid litigation as much as possible. However, there is only so much that cost management can do to help the bottom line, and forward-looking legal departments are thinking strategically about how they can proactively support their companies' businesses. In some cases, that means in-house teams are working more closely with suppliers to avoid contract disputes altogether; in other instances, legal departments are developing internal processes or programs to pursue the company's own claims in a coordinated way so that instead of being a cost center, the legal department becomes a contributor to the bottom line.

Increasingly, savvy companies are thinking about affirmative litigation as a revenue-generating activity with significant potential to increase financial recoveries and generate value. Yet many face challenges in implementing a strategic program to pursue affirmative recoveries:

- **Internal roadblocks:** Internal stakeholders outside the legal department remain unfamiliar with litigation as a corporate asset and may focus more on cost and other concerns.
- **Reputational risk:** Companies rely on a huge network of clients and vendors to generate profits, and must weigh the potential impact litigation can have on reputation and business relationships.
- **Gaps in expertise:** In-house lawyers are often recruited for their deep expertise in contract and M&A law to conduct the transactional work that businesses require—exceptional in-house lawyers may not have the litigation background necessary to assess the potential value of significant claims or judgments. And even in-house litigators are frequently recruited from defense-oriented practices and thus will not have experience representing plaintiffs, experience that is critical to a recovery program.



Starting an affirmative recovery program can feel like a big, unwieldy goal with many potential pitfalls. However, just as legal teams develop strategies for processing and reviewing 150-page contracts, or for defending the corporation in large litigations, they can likewise standardize the process of evaluating affirmative legal claims, and put in place an affirmative recovery program that will earn the support of the finance team and the C-suite.

Below, we discuss four steps in-house lawyers can take to bridge the knowledge gap and develop a programmatic approach to assessing litigation and building effective affirmative recovery programs.

### 1. Ensure stakeholders understand the latent asset value of litigation

Unlocking the potentially significant value that affirmative recovery programs represent hinges on collaboration between the legal and finance teams, though many finance professionals remain unfamiliar with the concept. In the forthcoming *2022 Affirmative Recovery Programs Report*, the senior legal counsel at a publicly traded reinsurance company acknowledges that the onus is on in-house lawyers to help educate their colleagues in the finance department: "Legal needs to do a better job of communicating value-add to the business generally."[1] The GC of a privately held property management company reiterates the imperative: "You are not doing your job as a legal department if you're not working hand in hand with the finance department."

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> **[Legal teams can] standardize the process of evaluating legal claims—and thus put in place a working affirmative recovery program with buy-in from the C-suite and finance team.**
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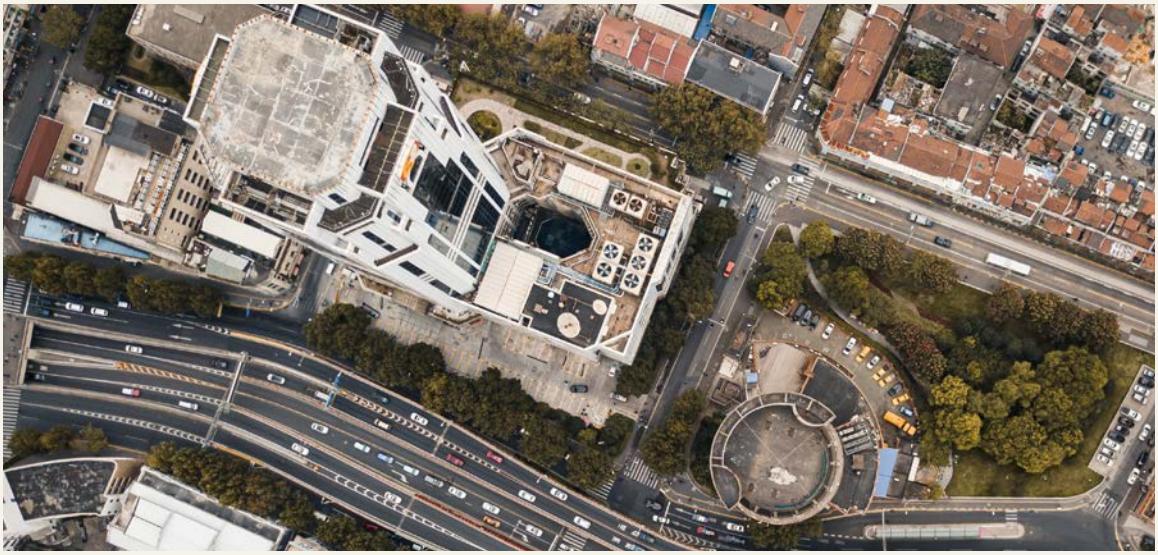

In-house lawyers should be prepared to discuss the key concepts and benefits of an affirmative recovery program with non-legal stakeholders in mind. Fundamentally, pursuing meritorious claims in a coordinated way helps ensure that—when harmed—the company has a plan to be made whole. Often, this starts with helping finance colleagues understand how to think about affirmative claims as one more corporate asset class.

### 2. Agree on an assessment framework for evaluating affirmative litigation

When developing an affirmative recovery program, legal and finance teams should collaborate to consider a variety of factors:

- What claim types make sense for the business?
- What is the minimum claim value the business can support—and does it make more sense to pursue many smaller, related claims or fewer larger "unicorns"?
- Are there jurisdictions that are more or less favorable?
- Has the legal team identified the best possible outside counsel for various claim types?
- What potential reputational issues or other impact on business relationships (e.g., supplier or customer issues) may arise as a result of pursuing claims? Is outside funding potentially available?

As the litigation counsel, of a multinational investment bank notes: "If [meritorious claims] arise with any frequency, [legal teams] should implement some type of program to identify those claims and evaluate whether they are worth pursuing, particularly if the environment is one where those claims could be missed, resulting in a missed revenue opportunity. If there is a particular business with repeat claims, why wouldn't you put in place a system to evaluate these cases and your probability of success balanced against reputational risk, the likelihood of success, and value? Simply requiring the business to ask a standard set of questions will allow the company to benefit from affirmative litigation." Creating an assessment framework upfront helps streamline the process of identifying and assessing claims and ensures that the legal team can create a complete and compelling package for the finance team's evaluation.

### 3. Leverage outside resources to value claims and remove cost and risk

Leveraging knowledgeable external partners can be a tremendous asset to companies in building a successful affirmative recovery program. They can lend expertise and insight to companies in developing a claims evaluation process, and in considering individual claims. A funding partner can also balance the risk associated with pursuing valuable claims and awards by offering capital resources that increase certainty around costs and capital flows. Burford partners with companies by supplying capital in one of two formats: Traditional fees and expenses litigation finance (in which Burford covers the ongoing costs associated with pursuing litigation) or monetization (in which Burford provides capital in a lump sum upfront that the company can use for virtually any business purpose—accelerating the company's access to a portion of the claim's expected outcome). In both cases, Burford's capital is generally provided on a non-recourse basis—our investment is repaid only upon the successful resolution of the matter(s). Working with Burford gives companies access to the tools, and the capital, they need to be made whole without risk.



In addition, Burford can help companies overcome the expertise gap many legal teams face when pursuing affirmative claims. With well over a decade of experience in financing affirmative recovery, Burford has reviewed more than 10,000 legal claims in jurisdictions all over the world and worked with hundreds of lawyers in the process. Companies frequently partner with Burford to identify matters with the most potential, build litigation budgets, develop damages theories, and even identify top litigation counsel. And capital arrangements can be structured so companies can avoid the unfavorable impact litigation can have on business relationships or reputation.

Leveraging an external partner like Burford can also address the tension that exists in many legal departments between the goal of pursuing affirmative claims, and the mandate to reduce costs. Fifty-six percent of senior finance professionals agree that legal departments should have commercial targets just like other departments, but many (46%) report a need for improvement in cost management programs.[2] The ability to leverage outside resources to pursue claims means that legal departments can do more for the company's bottom line with less internal expense.

### 4. Socialize affirmative recovery program as a win-win for the business

Finding ways to identify and pursue recoveries can only benefit the business. After all, as an associate GC of an insurance company notes: "When we receive a recovery, it goes directly to the corporate treasury." However, because companies have historically treated their legal departments as a cost center, many have an internal culture in which core functions tend to avoid legal if they can. Building a successful affirmative recovery program means reframing this narrative internally, and helping stakeholders across the business to view claims as potential assets.

Fifty-six percent of senior finance professionals agree that legal departments should have commercial targets just like other departments, but nearly half of them (46%) report a need for improvement in cost management programs.[3] An affirmative recovery program that builds in collaboration with the finance department can position the legal department as a savvy contributor

to the business—enabling in-house lawyers to demonstrate their ability to protect the company while contributing to positive financial outcomes. One deputy at a financial services company acknowledges the importance of self-advocacy among legal departments: "[We are] getting the word out that we are here for affirmative litigation as well as defensive litigation. If you have an issue, let us know and let us look at it. Over the past few years, we have been better about this. We need to make sure that business leaders have a place to go in those situations."

The next strategic step taken by companies with successful affirmative recovery programs is to enlist leadership across the core functions to educate their own teams. Business units that are customer-facing are often the first ones to identify potential issues with contracts and other hiccups in a company's relationships. When they understand a company's affirmative recovery strategy and how it helps the business, the business units serve as a proverbial front line for identifying potential claims worth pursuing and engaging legal to assess them.

## Prepping for success

For companies to have effective, efficient recovery programs, legal and finance teams need to be aligned both on goals and the process for evaluating and pursuing potential claims and they need to work together to help other parts of the business understand the value, and the role they play. Lawyers can help streamline the process internally—and make the program easier to sell to stakeholders outside the legal department—by standardizing their approach to evaluating potential claims and packaging the business case for approval. And external partners can be valuable for expertise and resources, to legal departments to take their affirmative recovery programs to the next level.



[1] Unless otherwise noted, the quotes in this article are pulled from the *2022 Affirmative Recovery Programs Report*.

[2] *2021 Legal Asset Report: A Survey of Finance Professionals on Unlocking Legal Assets to Enhance Working Capital and Reduce Risk*, available at https://www.burfordcapital.com/insights/insights-container/2021-legal-asset-report/.

[3] *2021 Legal Asset Report: A Survey of Finance Professionals on Unlocking Legal Assets to Enhance Working Capital and Reduce Risk*, available at https://www.burfordcapital.com/insights/insights-container/2021-legal-asset-report/.

EQUITY PROJECT Q&A

# Diversity, equity & inclusion: Examining the path forward for companies and law firms

*In October of 2021, Burford launched the second phase of its award-winning Equity Project, which has as its centerpiece a $100 million pool of legal finance capital to back commercial litigation and arbitration led by female and racially diverse lawyers as well as a commitment to share a portion of profits with charities focused on the advancement of historically underrepresented lawyers upon the successful resolution of Equity Project-backed matters.*

*In January 2022, two of the legal and business leaders who support The Equity Project as Champions shared their perspectives on how legal departments and law firms can continue to promote diversity, equity and inclusion. Their answers appear in edited form below.*

## Q.

**There's clearly a near universal desire for more diversity in law, but progress hasn't kept pace with intentions. What myths persist attempting to explain this lack of progress? What can law firms and in-house legal departments do to actively address and dispel these myths?**



**Maria Eugenia Ramirez:**
Some of these myths include the belief that diversity and inclusion is simply about morality and ethics, that diversity and inclusion is only about gender and race (and nothing else), and that acquiring more diversity in law will just result in the exclusion of white people/white men. Diversity today means so much more than the myths described above. Diversity excludes no one, and it requires everyone's participation in order to truly "make it happen". Law firms need to set a consistent strategy to promote diversity as a true firm policy and keep track of its implementation. Law firms should also educate their people by offering diversity and inclusion trainings, conferences and lectures, and participate in certifications such as the Mansfield Rule.

**Daniel Winterfeldt:**
We need to break down the myth that what we are currently doing in the legal sector around diversity, equity and inclusion is even close to the mark. Over time there has been an emergence of more and more diversity, equity and inclusion activities such as sponsorships, pro bono projects, corporate social responsibility programs, awards, lists, et cetera. We need to remind ourselves that our core diversity, equity and inclusion activities should focus on the recruitment, retention and promotion of diverse talent.

## Q.

**Which do you see as the bigger challenge: Retaining diverse talent or recruiting diverse talent?**

**Maria Eugenia Ramirez:**
Retaining diverse talent is a much bigger challenge. Law firms in the US are typically able to recruit diverse talent, but as the years go by and the attorneys become more senior, it is harder to retain them. There is no one single reason as to why this happens; it is a result of a combination of factors. For example, some of these individuals may become disenchanted about a career in law, they may perceive that there is a lack of diverse role models in the firm's management or they may believe they were initially employed as "token diversity hires", but see no future or continued growth within the firm.

**Daniel Winterfeldt:**
The largest challenge is to retain diverse talent. Many have spent time and made significant progress on recruiting diverse talent, but without accompanying this with cultural change to create inclusive organizations where diverse talent can thrive, these efforts will not yield long-term change in the profession.



## Q.

**In-house lawyers haven't always felt comfortable asking their panel law firms for their diversity data. Do you see that changing with so many companies prioritizing diversity, equity and inclusion efforts, and if so, how should they use this data?**

**Daniel Winterfeldt:**
We are working hard at the InterLaw Diversity Forum to transform this in the UK through launching the UK Model Diversity Survey (based off the ABA's Model Diversity Survey, which now in its fourth year) with support of the Solicitors Regulation Authority (SRA), Microsoft and others. This initiative is a supplier diversity program where client signatories ask for law firm participants to fill out an annual, intersectional and multi-strand diversity, equity and inclusion survey into a system that produces reports using a Microsoft reporting tool. We now have over 30 client signatories and over 50 law firm participants onboarded or in the process of onboarding. We believe a focus on clear and transparent data will create better collaboration between clients and law firms in this space, as well as re-focus diversity, equity and inclusion efforts to unlock meaningful, long-term change in this space.

**Maria Eugenia Ramirez:**
Over the past few years, law firms have seen a growing trend in which clients specifically ask firms for diversity data. Many clients are also mandating that their legal teams be composed of a certain number of diverse lawyers, refusing to work with firms that merely include diverse attorneys to win a pitch, but not to actually work on the matter. Asking law firms for their diversity data is important and necessary, not only because it brings awareness, but because it increases accountability in the workplace.

## Q.

**What are law firms and companies doing that shows real innovation in tackling the diversity problem in law?**

**Daniel Winterfeldt:**
The UK Model Diversity Survey is the single most important project we have been working on for diversity, equity and inclusion in the UK, alongside our recently published research report, *Career Progression in the UK Legal Sector 2021*, sponsored by the SRA, covering diversity, equity and inclusion and social mobility, with data from over 1,100 lawyers in 2020 and over 1,400 lawyers in 2018.

**Maria Eugenia Ramirez:**
In this day and age, law firms that fail to recognize and prioritize diversity and inclusion will be left behind. As a result, many law firms have set certain goals with respect to how much diverse talent they need to have in their ranks or in strategic positions of management within the firm. Others have set diversity mentoring programs in which junior lawyers are paired with senior diverse lawyers who have moved through the ranks within the firm, while other law firms have chosen total transparency with respect to discussing (internally or externally) the diversity challenges that they encounter on a day-to-day basis.



**“Many clients are also mandating that their legal teams be composed of a certain number of diverse lawyers, refusing to work with firms that merely include diverse attorneys to win a pitch, but not to actually work on the matter.”**

—MARIA EUGENIA RAMIREZ, PARTNER, HOGAN LOVELLS

## PARTICIPANTS

### Maria Eugenia Ramirez

Maria Eugenia Ramirez is a partner at Hogan Lovells with a practice focused on international arbitration. She has represented clients in contract, construction and telecommunications disputes. She is among Latin American's Top 100 Female Lawyers by Latinvex and has been ranked in *Chambers Global*, Dispute Resolution and Litigation. She received the *Daily Business Review*'s Most Effective Lawyers—Pro Bono Award in 2007.

### Daniel Winterfeldt MBE QC (Hon)

Daniel Winterfeldt MBE QC (Hon) is a Managing Director and the General Counsel for EMEA and Asia at Jefferies, and has over 22 years of experience as a corporate and securities lawyer in London and New York. In 2008, he founded the InterLaw Diversity Forum to promote meritocracy and inclusion for all diverse and socially disadvantaged groups in the legal sector. It has 8,500 members from 300 law firms and chambers and 500 corporates and financial institutions.

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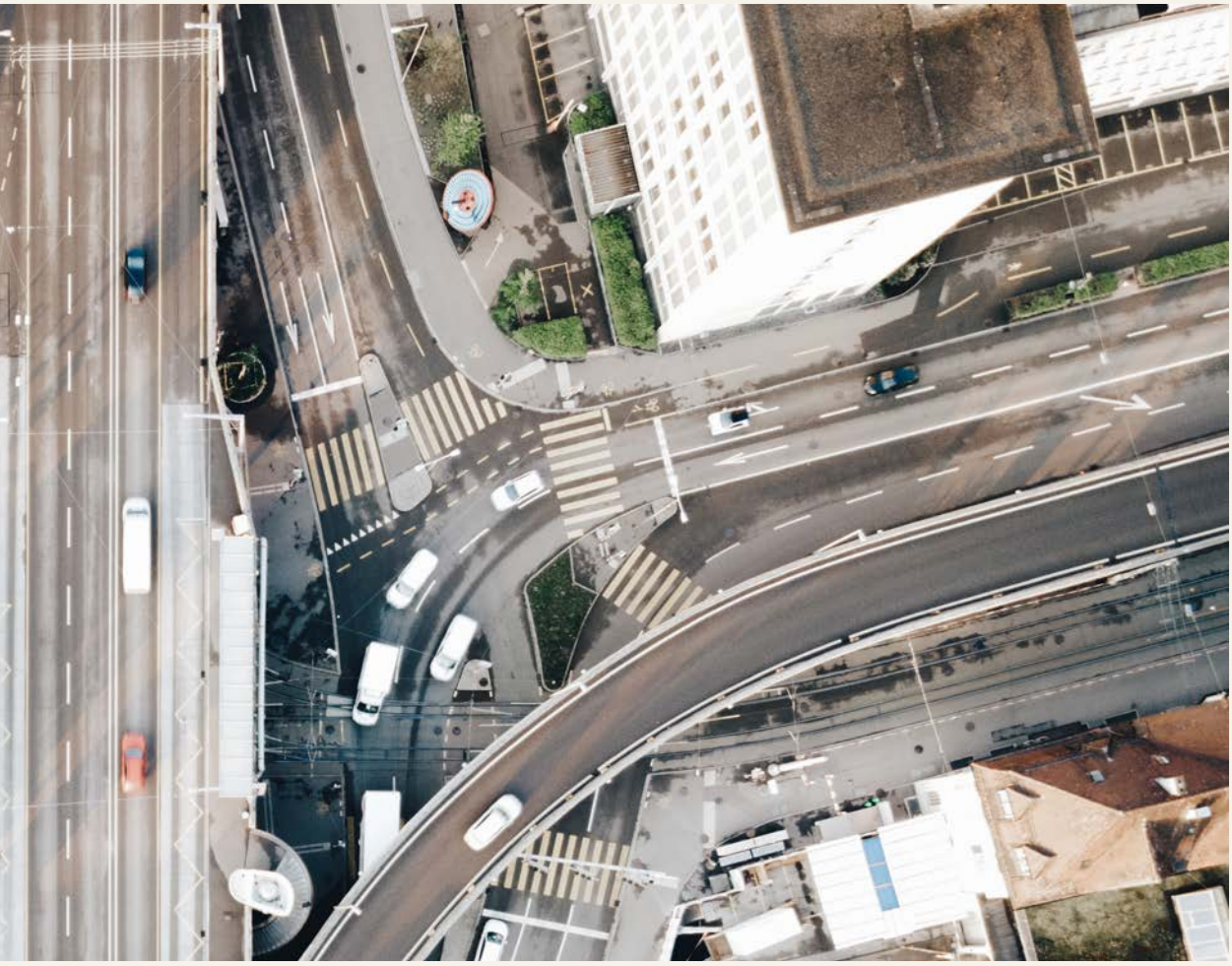
Alyx Pattison is a Vice President who works with US-based law firms and companies. Prior to joining Burford, she was the founder and President of a political consulting business with a focus on providing legal and compliance advice to congressional campaigns, and for more than a decade was a litigator at AmLaw 100 law firms.

ROUNDTABLE

# Expert insights: Global opportunities in antitrust & competition



*In January 2022, Kelly Daley and John Lazar directed questions concerning global trends in antitrust and competition to a respected group of law firm leaders whose perspectives are gathered and excerpted below.*

# Q.

**What notable 2021 event or trend has impacted how companies approach their antitrust and competition litigation recovery efforts in 2022?**

**Philip Iovieno:**
The main trend in 2021 was the growing escalation of individual opt-out lawsuits filed by companies affected by antitrust violations. An escalating trend for years now, it has increased substantially in the last few years. Going back to the early 2000s and the Vitamins case, there were several companies that opted out, and then from 2008 to 2015 there were a number of price-fixing cases in the electronics industry (*LCD*, *CRT*, *Batteries*, *Capacitors*, etc.), in which more companies opted out but the total number of opt-out suits was still in the low dozens or fewer. Since then, opt-outs have significantly expanded, and the Broiler Chicken antitrust case is a prime example. The first Broiler Chicken opt-out case was filed in 2018, followed by a flood of new cases filed in 2021 by major companies such as McDonald's, Costco, Burger King, Wendy's, Chick-Fil-A and others. To date, there are over 180 individual opt-out plaintiffs, representing well over 50% of the entire direct purchaser market. History has shown time and again that companies with large antitrust claims recover significantly more by opting out than they do remaining an absentee member of the class. Companies are increasingly aware of this reality and are seeking to maximize their recoveries when they've been the victims of established antitrust violations. Major corporations' growing awareness and willingness to pursue individual opt-out cases when they are victims of antitrust conspiracies has led to a significant expansion in antitrust litigation generally and is a trend I see as further escalating in the years to come.

**Kate Vernon:**
2021 was a year in which we saw the grant of collective proceedings orders (CPOs) by the Competition Appeal Tribunal (CAT), more and more standalone business-to-business claims were filed in the High Court and CAT, and many settled there, too. These factors continued the trend of competition damages litigation being something that is a real option for those businesses that have been harmed by anti-competitive conduct, or for those that advocate on behalf of consumers harmed by anti-competitive conduct. Funders' continued willingness to fund meritorious claims of this nature is key, and there is now a significant established practice that gives comfort and reassurance for the commencement and litigation of claims.

# Q.

**Given the changing regulatory environment and stronger focus on cross-border merger enforcement, how should clients prepare?**

**Philip Iovieno:**
Right now, we're dealing with a lot of regulatory uncertainty, particularly in the US, and clients need to get comfortable with that uncertainty and prepare for it. We are no longer in a world where parties can agree to merge and work out the details later—merging parties need to think hard about possible challenges, outcomes and contingencies long before they get to the regulators. Regulators are not only questioning the traditional business and economic impact of mergers, but also issues like labor, social and governance considerations and the environment. The US Federal Trade Commission (FTC) in particular has expressed frustration about mergers cleared in the past and has recently reinstated its so-called "Prior Approval Policy". This policy, dormant for the past 25 years, seeks to deter merging parties from pursing anticompetitive deals by requiring that any settlement by consent order include a prohibition on further acquisitions in an affected market (and sometimes even broader markets) for at least ten years. The FTC recently challenged DaVita Inc.'s acquisition of certain of the University of Utah's dialysis services. To get the deal through, DaVita had to agree with the FTC not only to divest certain dialysis clinics (a traditional remedy to allegations of an anticompetitive merger), but it also had to agree on restrictions related to physician non-compete clauses and non-solicitation practices for a period of two years—and of course to the terms of the Prior Approval Policy, meaning DaVita cannot seek future acquisitions or mergers regarding dialysis in Utah without prior approval of the FTC for ten years. Companies have been dealing with cross-border transactions and enforcement long enough that I think most are already aware of the risk and can prepare for the possibility of inconsistent merger enforcement decisions, although the uncertainty in the US makes it harder to predict



"We're dealing with a lot of regulatory uncertainty, particularly in the US, and clients need to get comfortable with that uncertainty and prepare for it."

the actual inconsistencies and to craft common remedies. What's less obvious is the coordination that occurs among regulators, which has been increasing, and depending on the jurisdiction may not be disclosed to the merging parties.

**Kate Vernon:**
The best preparation is early assessment of where and how the competition authorities may be expected to be involved; and to recognize that the authorities talk to each other about their investigations and conclusions. Coordination on strategy, remedy potential and substantive analysis is critical across the different jurisdictions. It is also important to know the endgame and plan for it—so if a prohibition or divestment order is something the parties want to challenge in the courts, then from the outset it is important to position arguments with future litigation in mind.

## Q.

**With the EU aggressively bringing suits against US tech companies for anticompetitive behavior, do you expect the US to respond with increased regulation of its digital economy?**



**Karma Giulianelli:**
Yes, we definitely see more awareness from regulators worldwide of the impact of consolidated power, particularly in the digital economy. Recent US administrations have focused on a handful of companies that have power in markets that impact much of our daily activity. The focus on Facebook and Google from federal and state competition authorities in the courts is a precursor to increased regulation, particularly if the current antitrust laws prove inadequate to address some of the issues we face in the digital economy.

**Kate Vernon:**
I think there is a general global trend towards an increased regulatory focus on the digital economy. It is inevitable that competition law will form a core part of the global analysis of the challenges and opportunities of the digital economy and we will see many different kinds of action across all major jurisdictions.

**Philip Iovieno:**
There is little debate in the US that there should be increased regulation of the digital economy—it might be the only major issue with bipartisan support out there right now, and the antitrust leadership in both the prior Trump administration and the current Biden administration have made regulation of digital markets a priority. The question being debated is whether, at the end of the day, the antitrust laws or potential new laws are the most effective means to that end. And if it is to be the antitrust laws, do they need to be reformed

to do the job? That said, US federal regulators have been directed by an Executive Order from the Biden White House to make enforcement of the tech sector a priority. They also have been joining with the attorney generals of various states to bring lawsuits against tech giants like Google and Facebook. I would not characterize any of this as a "response" to the fact that the EU has brought suits against big US tech companies, so much as the fact that those companies have an outsized impact and are an enormous part of the US economy and compel close scrutiny. US regulators have been active in regulating fintech for quite a while and this, too, is an important part of regulating the digital economy.

One reason we've seen the large actions against US tech companies in Europe is that European antitrust laws are written to prevent all monopolies, while US laws recognize that some monopolies may be beneficial. On the flip side, the US allows for private enforcement of the antitrust laws as a means of regulation in the form of class actions and individual lawsuits, and there are dozens of major lawsuits against the tech giants (Google, Facebook, Amazon and Apple) in this posture. The antitrust regulators in the G7 countries recently had a summit in the UK to discuss and compare notes on regulating digital markets, and I expect we will see continued efforts in that direction as well.



## Q.

**We routinely encounter clients who aren't aware of valuable existing claims they could pursue on an opt out basis, often due to the resources needed to stay on top of the complex universe of claims based on anticompetitive behavior. Is that also your experience? What do you see as the best roles for law firms and legal finance providers in educating clients about these potential affirmative recoveries?**

**Kate Vernon:**

This is a really important issue as we see many opportunities arising from lawyers and/or funders educating themselves first about the potential claims that may exist and then talking to their clients about these. I think the best role for law firms and for funders to work together to provide clients with worked up opportunities and to make it as easy as possible for a claim to be assessed from a business perspective by clients. Law is fundamentally a people business, and, as human beings who are busy, we all need to have clear and fulsome information to be able to make decisions, especially if speed is of the essence. The investment of time in really thinking through opportunities and how they could work is so important in order to be able to prepare clear and full analysis.

**Philip Iovieno:**
I have certainly found it to be the case that often companies are not aware of potential, very valuable recovery opportunities. More recently, however, I have found it more common for companies to be aware that these claims exist but unsure whether and how to pursue them. It is in this space where I see an important place for a law firm or litigation funder to assist. A substantial part of my practice involves analyzing potential claims for companies and advising them on the different strategic alternatives for pursuing that claim, ranging from doing nothing and staying in the class to opting out, with many other strategies in between. While opting out often makes sense for large purchasers, there is no simple formula for determining what to do, and I believe the best value I can provide to these companies is to help them align their business interests with the ultimate strategy they choose to pursue for these claims.

No one size fits all—these are complicated cases with a lot of moving parts and different companies can have different strategies and goals. Indeed, it is not uncommon for me to spend a year or more in this process assisting a company to determine what's best for it, even before we discuss a fee arrangement should they decide to pursue the case. I believe that this process in and of itself provides considerable value for a company, as it shows that they are vigilantly fulfilling their fiduciary obligations by considering their options. In my experience, should a company decide to opt out, it is most common they will pursue the claim on a full contingency fee basis, but there are many different kinds of alternative fee arrangements, such as tiered contingency fees, for a company to consider. I also see more and more companies utilizing an RFP process to select counsel with the proper experience who can provide the type of representation they are familiar

and comfortable with and who best aligns with that company's particular business goals for the litigation. As such, doing the diligence ahead of time to determine the company's objectives and identify the best strategies is time well spent.

**Karma Giulianelli:**
While large companies with significant claims are becoming more sophisticated about their affirmative recovery programs, we find that pursuing these claims often is not the focus of a legal department or the business. Pursuing affirmative claims typically doesn't take on the urgency that defending against significant downside exposure does. Obtaining internal funding and resources to pursue such claims can be a challenge, particularly where the business is facing other more pressing issues. Still, companies often leave significant money on the table by failing to monitor and explore these claims. Some law firms provide routine counseling for potential opt outs, but in-house legal departments can also designate a lawyer to monitor a handful of potentially relevant MDLs to determine whether they merit an opt-out discussion. Litigation funders can aid in this discussion by providing the resources to obtain outside counsel to dig into potential claims and damages ranges before making the decision to opt out one way or another. Sometimes this involves months of work to determine the best course.



## Q.

**What are you watching for in antitrust and competition in 2022?**

**Philip Iovieno:**
We've been in a period of market uncertainty, starting with the Trump administration's trade wars and continuing today in the form of supply chain disruptions, but also not much scrutiny in terms of cartel enforcement. I work frequently with experts who study cartels and business behavior and one thing I've learned is that anticompetitive conduct such as price-fixing and allocation of markets is often linked to or has its origins in times of industry disruptions and uncertainty. Supply and demand shocks in particular create incentives for competitors to talk to each other, which can lead to anticompetitive outcomes under certain circumstances. Separately, one development I've been watching is the growth of private enforcement of competition laws in the UK and Europe, including collective actions. We've seen more US-style approaches, including litigation funding, taking hold there. It will be interesting to see how these European actions develop and what kind of opportunities they present.

**Karma Giulianelli:**
There are a few potential significant developments on the horizon, including how courts will deal with the question of market definition in the high-tech world where products are not physical, but rather defined by sets of code and how market power will be assessed in these markets. The Google cases pending in the Northern District of California and Washington, DC, will provide some insight into how to look at relevant markets and power in a world defined by a handful of high-tech companies. We will also continue to keep an eye on class certification standards, and how the Ninth Circuit assesses those standards in the context of cases where statistical evidence is used to show class-wide damages. We will keep an eye out for the outcome in *Olean Wholesale Grocery Cooperative, Inc. v Bumble Bee Foods LLC* for more insight into the standards for class certification.

**Kate Vernon:**
The progression of the opt-out regime past the grant of the recent CPOs by the CAT is a key focus. We have lived through six years of observing how the pre-CPO/grant of CPO phase works out and now we are moving on to see how these cases progress and ultimately go to trial or settle. This will be a fascinating year for the class actions regime in the UK.

I am also very interested to see how the Competition and Markets Authority (CMA) develops its investigations mandate now that we are fully post the transition period after Brexit and how this shakes out in the UK courts in terms of follow-on actions. There is still a long tail of EU follow-on potential, but the CMA's new investigations will also gather pace and provide new and exciting developments in the law and procedure.

## PARTICIPANTS

### Karma Giulianelli

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### Philip Iovieno

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# Trends in asset recovery

Daniel Hall
& Michael Redman

## Covid-19 continued to play a central role in debt and judgment enforcement last year as courts across the world grappled with both the backlog of cases and an increase in litigation and arbitration.



While law firms saw a sizable jump in revenue as legal demand hit record-breaking levels in 2021, many businesses struggled to regain footing amid changing restrictions, supply chain shortages and loss of revenue.[1] The asset recovery business continued to meet the evolving demands of creditors seeking to enforce judgments acquired prior to or during the pandemic.

In 2022, creditors with unpaid judgments may continue to face severe resource constraints as well as obstacles in recovering monies owed to them, as recalcitrant debtors continue to evade enforcement. As courts reopen and countries adopt new regulations, asset recovery expertise will play a key role in creditors' enforcement strategies.

### Navigating sovereign immunity will prove to be a major challenge for creditors

The pandemic drove a detrimental accumulation of debt across the globe. In 2020, global debt rose by 30 percentage points of GDP, the largest single-year increase since 1970.[2] This increase stretched across most countries and included both private and sovereign debt, the latter being much more difficult to resolve. With private debt, creditors may expect the process of recovering debts from individuals and companies—though costly and time-consuming—to be achievable. However, creditors seeking to enforce judgments against sovereign debtors face a seemingly unsurmountable barrier: Sovereign immunity.


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By definition, sovereign immunity, a legal doctrine that grants sovereigns and states immunity from civil suits or criminal prosecution, represents the greatest challenge for claimants in their enforcement efforts against sovereign debtors. Covid-19 and the ensuing downturn has further exacerbated enforcement by creating significant economic concerns for many countries, impacting their ability to pay their debts voluntarily at the same levels as pre-pandemic; leading to a greater desire for these states to litigate using defensive doctrines like sovereign immunity to increase enforcement risk for claimants; thereby driving down any eventual settlement.



Several cases have been brought to address immunity principles. Most recently, in *In re Venoco, LLC*, the Third Circuit of the US Court of Appeals rejected the State of California's motion to dismiss based on sovereign immunity.[3] While it is uncertain what effect, if any, the decision will have on the overall limitations of sovereign immunity, one thing remains certain: Sovereign debtors continue to use immunity as a defensive measure, and claimants face increasingly complex routes to translate judgment debts into tangible capital.

### Global regulations are evolving the asset recovery landscape

In an attempt to make the recovery process more transparent and easier to navigate, several countries have adopted more creditor-friendly regulations, increasing claimants' scope and accessibility to recover capital from recalcitrant debtors regardless

> "As courts reopen and countries adopt new regulations, asset recovery will play a key role in creditors' enforcement strategies."

of where assets have been hidden across the globe. In 2021, mutual enforcement of arbitration awards in both China and the Hong Kong Special Administrative Region (HKSAR) came into effect, allowing parties to commence enforcement proceedings in both jurisdictions simultaneously.[4] The UAE similarly declared a bilateral treaty, allowing for the faster enforcement of UAE court judgments in India and vice versa.[5] The country also clarified the scope of payment order claims, a mechanism for immediate *ex parte* judgments, signaling the importance of expedited judgment procedures in the region.[6]

Evolving global regulations will create more avenues for creditors to extract hidden legal assets, provided that they are able to navigate the complex procedures, rules and regulations of local courts.

## Law firms are recognizing the necessity of asset recovery

As multijurisdictional concealed-asset recovery becomes more complicated, clients looking to be made whole will increasingly turn to asset recovery expertise. While conserving resources and maintaining stability were understandably the main goals for many businesses early in the pandemic, collecting on unenforced judgments and awards now can provide a greater pool of capital to businesses facing economic constraints. The award value can greatly affect a business's chance of thriving post-pandemic. Indeed, a majority of companies in 2020 had unenforced awards valued at $20 million or higher.[7]

The global asset recovery business has also grown to meet evolving client demands; what used to be a smaller function or niche offering has now developed into a discrete line of business. In 2021, many new players entered the market, and several law firms


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formed in-house asset recovery teams to help clients begin the post-judgment enforcement process.

Legal finance providers that have dedicated asset recovery teams play a crucial role in judgment enforcement in two ways. First, external providers fill in the gap for law firms with in-house asset recovery departments by monetizing claims (advancing a portion of the claim upfront) on contingent interest. Second, asset recovery specialists can provide information that can help ensure a successful recovery, including tracing assets, investigating and procuring evidence and removing obstacles. In a perfect partnership, the external specialists can combine years of experience in the field with a law firm's knowledge of the case to collaborate and produce a successful outcome.



## Conclusion

With the pandemic continuing, creditors can expect continued impediments to judgment and award enforcement; many may face delays as courts in various countries reopen at their own pace. Creditors can also anticipate obstacles to locating assets overseas, as debtors conceal them in progressively creative ways. However, as the asset recovery business continues to expand, claimants will be able to take advantage of new tools and solutions to include in debt enforcement strategies.

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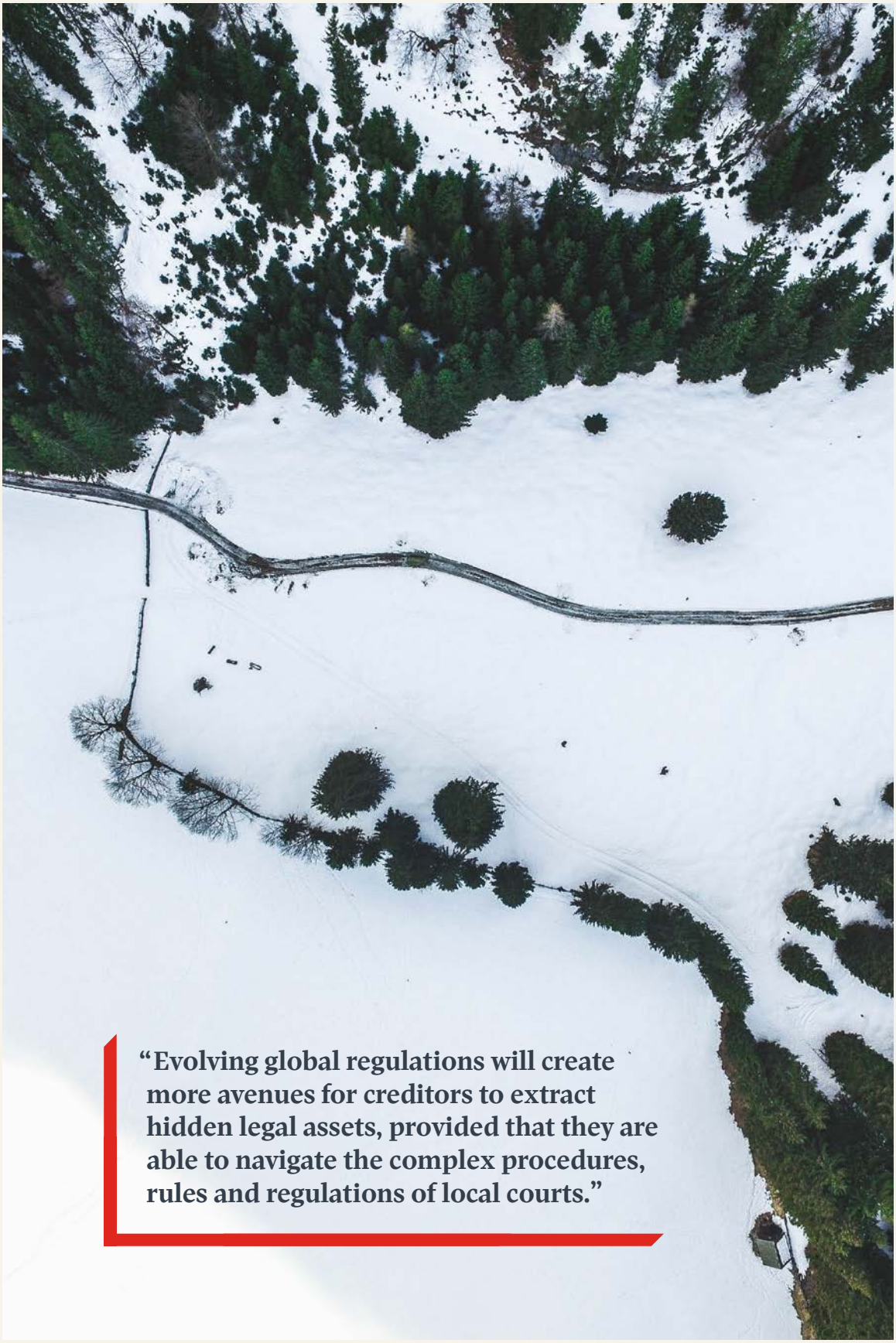


**"Evolving global regulations will create more avenues for creditors to extract hidden legal assets, provided that they are able to navigate the complex procedures, rules and regulations of local courts."**

# Trends in international arbitration

Jeffery Commission
& Christiane Deniger

International arbitration continues to be the most popular mechanism for cross-border dispute resolution, growing in popularity over the past two years given Covid-19's disruption to businesses and courts across the world.

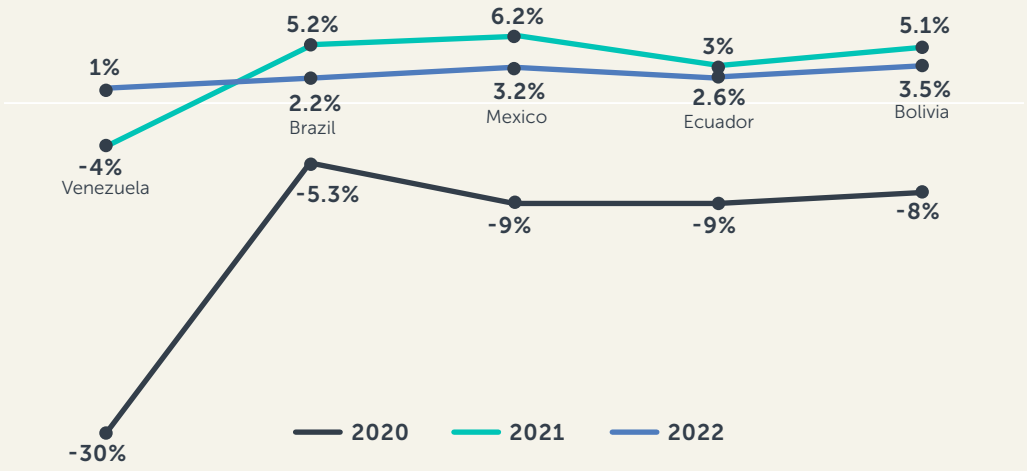


It comes as no surprise that 90% of respondents in White & Case's *2021 International Arbitration Survey* prefer arbitration—either standalone or in conjunction with alternative dispute resolution methods—to litigation, especially as businesses emphasize conserving capital and resources during economic uncertainty.[1]

As arbitration caseloads continue to rise, arbitral institutions are increasingly accepting funding alternatives as part and parcel of the process and many have adopted arbitration financing rules in their international frameworks. Most recently, ACICA included a provision on third-party funding that created very limited disclosure obligations on parties utilizing financing.[2] The ICC—consistently the most popular arbitral institution worldwide—also adopted reasonable disclosure rules for third-party funding in recognition of the value and popularity of the practice.[3]

This year, we expect a new wave of arbitration cases in Latin American countries and related development of Latin American arbitral institutions and seats. As we enter the third year of a global pandemic we expect construction disputes to grow as the industry remains disproportionately affected by Covid-19. We also anticipate several arbitral tribunals will follow in the footsteps of major 2021 decisions (most recently in *Tenke Fungurume Mining S.A. v Katanga Contracting Services*[4]) and increasingly allow parties to recover legal finance costs.

## Growth projections for Latin American economies




### Latin America will take center stage in 2022

Latin America has endured years of socioeconomic and political turbulence, and more recently, the pandemic devastated many countries. While the Economic Commission for Latin America and Caribbean (ECLAC) reported 5.2% as its average growth estimate for the entire region in 2021, that number is expected to drop to 2.9% in 2022.[5] Latin America's political and civil instability, combined with ongoing economic problems, contribute to international arbitration's popularity there. Given these factors, we anticipate a growing number of treaty and contractual arbitration cases in 2022.

As the region holds a fifth of the world's oil reserves, the extractive industry will likely experience the most disputes.[6] Countries whose economies are particularly dependent on oil and gas—Venezuela, Ecuador and Bolivia, to name a few—could be involved in a significant percentage of these disputes.[7] Furthermore, these disputes will be increasingly complex and involve foreign investors, many of whom will turn to international arbitration.

The construction industry will see a similar growth in disputes, which is seen in the increase in activity around Latin American arbitral seats; São Paulo was the fourth most popular seat for construction disputes according to Jus Mundi's most recent Construction Industry Insights report, indicating arbitration's rise in the region.[8] Miami—a hub for international companies that have a presence in Latin America—also gained popularity in response to increasing numbers of cross-border construction disputes. It's important to note that many upcoming disputes may also involve state and governmental entities. In a more recent example, the Mexican government requested bids for legal counsel in two upcoming investor-state cases in which the country is a defendant.[9] Brazil, as another example, allows state entities to use arbitration, which explains why São Paulo frequently appears in transport system construction disputes.

The positive outcomes of Latin America's period of upheaval may be the increased popularity and strengthening of Latin American arbitral seats, specifically those

in Mexico City, Chile and São Paulo.[10] Overall usage of arbitration in the region has significantly grown in the past two decades— between 2005 and 2015, the number of Latin American parties in ICC arbitrations alone rose by 131%, and the number of ICC arbitrators grew by 164%.[11]

## Construction disputes to surge in MENA region

As global supply chains experienced severe disruptions in the past year, shortages in construction materials affected major international infrastructure projects everywhere and led to an increase in construction disputes. This was especially seen in the Middle East and North Africa (MENA) due to major multibillion-dollar construction projects in the regions. The pandemic's effect on workforce restrictions, force majeure claims and project suspensions further strained an industry prone to uncertain cash-flows. *WCT Holdings Berhad and Arabtec Construction LLC v Maydan Group LLC* is one of the more recent examples of the size and scale of construction disputes in the region.[12] Maydan Group reached a settlement agreement with WCT Bhd under which Maydan paid AED 726.5 million ($197.7 million) to resolve the contract dispute between both parties. Other major infrastructure disputes in recent years included *DIPCO v. Damietta Port Authority*;[13] which involved $494 million in contractual fines, and *DP World v Djibouti*;[14] in which Emirati port operator DP World was awarded $533 million in a breach-of-contract dispute; and an arbitral tribunal of the London Court of International Arbitration has awarded over $200 million in interim damages to DP World and joint venture company Doraleh Container Terminal covering the period from February 18, 2018 to 31 December 2020.[15] As foreign parties struggle to navigate local courts, international arbitration continues to serve as the best method to resolve cross-border disputes. In 2019, 18% of the 2,490 parties involved in ICC disputes came from the MENA region.[16] In North Africa alone, the number of parties involved in ICC disputes has increased fourfold over the past two decades.[17]

While arbitration financing has historically been uncommon in the MENA region, changing global attitudes toward funding



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alternatives and an unprecedented need to mitigate cost and risk have increased financing usage over the past few years. Cost continues to be the primary factor when deciding on pursuing construction arbitrations, according to the most recent Queen Mary report, "International Arbitration in Construction".[18] As the average duration of an arbitration can span over four years (based on 2020 awards) and cost millions of dollars ($7.49 million on average in 2020), we expect arbitration financing to be particularly valuable to parties in construction disputes.

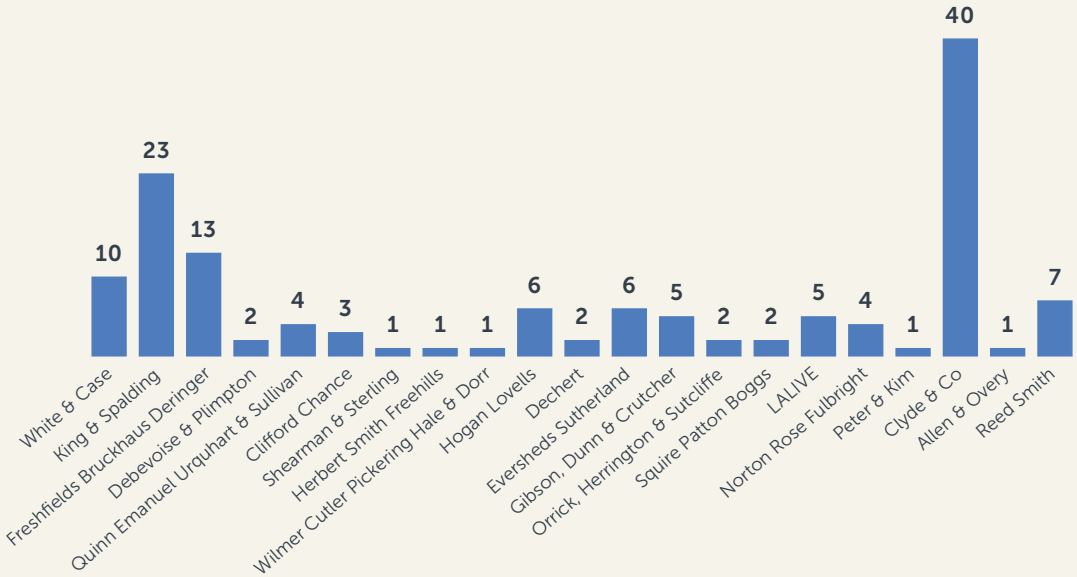
### Financing is a vital component to international arbitration

As arbitral rules, under ACICA and ICC's recent revisions, expressly contemplate the award of funding costs to claimants, we can expect more instances in which parties are able to recover arbitration financing costs under "other" and "legal costs". This was seen most recently in the 2021 *Tenke Fungurume Mining S.A. v. Katanga Contracting Services* decision, in which an ICC tribunal issued a final award against Tenke Fungurume that included $1.7 million in funding costs for financing that Katanga Contracting had obtained to offset the arbitration costs. While this is just the second publicly known instance of awarded funding costs in an ICC arbitration, several leading arbitral institutions outside of ACICA and ICC have adopted provisions in their international framework that make recovering funding costs possible.

While awarding of funding costs is more likely to be seen in commercial arbitrations in which funding costs are much lower than in treaty arbitrations, this is a huge development for parties in ongoing funded arbitrations. Nevertheless, it is more evident than ever that arbitration financing is now the norm—there were 249 funded arbitrations reported by law firms in the latest GAR 100 survey, a 66% increase from 150 funded arbitrations in 2019. Furthermore, the number of law firms using arbitration financing has also increased; 71 firms in the GAR 100 survey used financing, compared to 60 in 2020 and 53 in 2019. GAR 30 firms accounted for



**Number of funded cases reported by GAR 30 law firms (2021)**

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majority of funded cases (55.8%), indicating the importance of financing in large-scale, complex arbitrations.

## Conclusion

2022 may be a defining year for the global arbitration landscape as more arbitration cases develop in new regions. We may see further instances of third-party funding provisions being part of the discussion in upcoming disputes, especially as it is adopted into the frameworks of more arbitral institutions around the world.



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# Trends in IP & patent litigation

Christopher Freeman
& Katharine Wolanyk

***Intellectual property and patents shape corporate growth, credibility and profitability, but the litigation associated with IP and patents is known for its high cost, complexity and duration.***



In 2021, IP and patent litigation stakes were heightened by disputes related to Covid vaccine development and a spate of nine-figure mega-verdicts across industries.

While it's not news that patent litigation can result in very sizeable monetary damages, the uptick in activity nonetheless drew headlines. Going into 2022, patent holders from small to large entities are increasingly aware of this development and are becoming more sophisticated in evaluating and asserting patent portfolio value. Below, we explore the key patent litigation trends that companies can expect in 2022.

### Patent holders will turn to divestitures to indirectly monetize corporate patent portfolios

Often, operating companies and universities with patent portfolios have business conflicts or reputational concerns that prevent them from pursuing affirmative litigation as named plaintiffs. While not exclusively, many such patent holders are electing to sell or divest patents to special purpose vehicles (SPVs) to monetize value without assuming reputational risk or damaging client relationships.

Still, many companies remain uncertain as to how best to capitalize on patent value and evaluate the risk/reward of pursuing infringement clams. Even those companies with large patent portfolios and established affirmative recovery programs may not know whether their portfolios are litigation-grade—particularly if the patents weren't prosecuted with affirmative licensing in mind.

Whether such companies capitalize on their patents through divestitures or not, all have invested significant amounts of time and money into developing patents and intellectual property and are wise to explore their portfolios' true value. By working with a legal finance provider, patent holders benefit from otherwise unavailable third-party data, gain access to experts in evaluating litigation assets and receive guidance on how to best capitalize on their patent portfolio and improve or implement an affirmative recovery program.



### Complex medical device technology will drive patent activity

Burford's IP team is fortunate to get an early look at opportunities involving cutting-edge technologies, among them augmented reality (AR), electric engine technology and wearable medical monitoring device technology. We're often asked about the litigation activity related to these new technologies, but in reality, the commercial market for such technologies has yet to fully develop, meaning there are often not enough related sales or other market data to support high-stakes patent litigation activity.

Burford's IP and patent legal financing focuses instead on complex, high-volume technology that has well-established commercial success. This has historically included semiconductors, 5G technology, LED lighting, robotics, energy, alternative fuels and medical devices. These technologies have been in the market long enough, and have the necessary level of market activity, to result in meritorious disputes.

**“By working with a legal finance provider, patent holders benefit from otherwise unavailable third-party data, access experts in evaluating litigation assets and receive guidance on how to best capitalize on their patent portfolio and improve or implement an affirmative recovery program.”**

In 2022, we expect these technologies to drive market activity and are keeping a particularly close eye on health sciences-related technology. The increased pandemic related attention and pressure on the medical and healthcare industries over the past two years have precipitated an intensified effort by those industries to innovate.

Intellectual property and patents are essential to protecting and advancing medical innovation, and with the uptick in R&D, we expect patent litigation and patent transactions to become more closely intertwined with medical device technology. As medical device companies build their patent portfolios and evaluate potential infringement, they should consider working with a legal finance team whose day-to-day focus is on identifying and evaluating the litigation value and risk of patents and IP.

## Mega-verdict damages awards will be under close watch

In continuation of a trend in 2021, patent mega-verdict activity comes in waves, and at the current peak these eye-popping damage awards continue to make headlines.[1] What's often left out of the coverage is the fact that the announcement of a damage award is just the beginning; there is a long and costly road of appeals ahead and patent owners must be well-resourced to see a case through to completion. Nonetheless, the very real potential upside has grabbed the attention of patent holders, sophisticated investors and large insurance companies.

The ability to protect a portion of the verdict is extremely attractive—to patent owners as well as their counsel and investors—and the insurance industry recognizes the opportunity. We hear that a few recent large trial awards now have a portion of the verdict insured, but the extent to which insurance providers are entering the patent space remains unknown.

When both the insurance coverage and the case are strong, there's an opportunity for a sophisticated legal finance provider to provide capital to cover the costs of the insurance. For example, if a client were to obtain insurance for a large verdict (which thus guarantees a portion of the award), could finance the premium as well as perhaps advance capital against the verdict. Approaching insurance and monetization in parallel ultimately benefits the client, because the insurers can work with Burford and increase confidence in the underwriting for both parties.

Though it is too soon to say how insurance will complement mega-verdicts, with more money in the market we expect the mega-verdict wave to continue into 2022. Legal finance providers will be keeping an eye on the judgment insurance and the patent litigation space.

## Patent cases will become more accessible to the public

Presided over by Judge Thomas Zilly of the Western District of Washington, the first-ever Zoom patent jury trial—*Ironburg Inventions Ltd. v. Valve Corporation*—kicked off in January 2021 with virtual jury selection.



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While not the first Zoom trial ever, the case marked a turning point for patent litigation. In response to pandemic-inflicted court closures, many patent hearings occurred via Zoom. The shift to virtual made available litigation insights that were previously difficult to obtain without traveling to the courthouse. This new visibility will allow litigators, investors and other interested parties to better understand the nuances of cases as well as of presiding judges. At the proceeding's outset, Judge Zilly noted that the virtual trial would be "a very educational and worthwhile experience", and we could not agree more.[2]



On top of the educational benefit, there is also the clear cost savings benefit. Virtual hearings lower costs for all parties, and clients who would otherwise have incurred travel expenses can now more easily engage with the case. While courts have since reopened, we expect that the increased accessibility and transparency of the entire IP/patent ecosystem are here to stay—a silver lining in challenging times.

## | Conclusion

With robust patent litigation activity continuing in 2022, patent holders will benefit from robust affirmative recovery programs to which legal finance can be an effective complement. By providing patent holders with risk-sharing solutions, offsetting legal costs and managing resources throughout the appeals process, legal finance can help companies and their law firms recognize the true value of their patent portfolios.

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"The announcement of a [significant] damage award is just the beginning; there is a long and costly road of appeals ahead and patent owners must be well resourced to see a case through to completion."

# Trends in bankruptcy & insolvency

Salina Brindle, Matt Lee, Peter McLaughlin, Quentin Pak & Emily Tillett

**Experts and non-experts alike predicted a wave of bankruptcies and insolvencies following the business disruption caused by Covid-19 in 2021. However, new filings globally were much lower than expected following historic levels of government support and easy access to cheap liquidity in the capital markets. Despite this, we expect new commercial filings to pick back up as government support around the world abates.**



## Bankruptcies and insolvencies will rebound in 2022

### US

With the release of easily accessible vaccines, 2021 promised to be the year that everything turned around for industries that were hit hardest by Covid. But the Omicron variant has shown us that Covid is probably not going away anytime soon. And if Covid continues on its current path, we expect the hospitality, travel, tourism, commercial real estate, and in-person retail and event industries to experience a second wave of bankruptcy filings in 2022. While lenders showed great flexibility by doing whatever they could to avoid foreclosures and declarations of default in 2021, this flexibility cannot last forever, and the cold reality is that we are unlikely to see things return to "normal" any time soon.

US inflation reached its highest level in nearly four decades in the fourth quarter of 2021. While the Federal Reserve was initially quick to declare inflationary pressure "transitory", there's good reason to think that a more forceful monetary response is forthcoming. In December, a majority of Federal Reserve's Open Market Committee projected at least three-quarter percentage point rate increases in 2022. While easy access to cheap liquidity has been a defining feature of the capital markets for years now, as interest rates rise, defaults will inevitably increase as businesses struggle to borrow and refinance. The pandemic's duration means those companies that managed to extend liquidity runways at its onset may encounter new maturity walls or other liquidity shortfalls. Given the inflationary environment and the Federal Reserve's aggressive posture, it's likely that such companies will encounter less forgiving credit markets this time around.

## ENGLAND & WALES

Despite the UK experiencing the worst financial crisis in the last 300 years, restructuring and insolvency activity was notably restrained in 2020 and 2021. While there were some notable insolvencies in the high street retail and food sectors (Debenhams, Carluccios, The Hummingbird Bakery, Bonmarché, Arcadia and the UK arm of Victoria's Secret among these) insolvencies were down overall compared with month on month statistics published by the Insolvency Service in previous years. In fact, formal company insolvencies in 2020 were at 12,557—their lowest annual level since 1989, with compulsory liquidations at their lowest since 1973. Similar figures are expected to be reported for 2021.

The reduction in corporate insolvencies was due to a number of factors: Unprecedented government support, access to abundant liquidity from the corporate debt market (in part due to central bank stimulus), government-backed loan schemes, courts operating at reduced capacity, landlord credit to non-paying commercial tenants and overall reduced creditor action.



The most significant of the government-led support measures for businesses came via the Corporate Insolvency and Governance Bill (CIGA 2020). This introduced a whole suite of temporary support measures, including furlough schemes, bounce back loans, a moratorium on statutory demands and the suspension of wrongful trading provisions. These provided a welcome—albeit in some instances, unsustainable—lifeline to many.

Recent figures suggest the economy is faltering and that recovery is trailing behind those of other major economies.[1] Supply constraints remain a heavy burden.

Combined with a restricted labor market, high energy costs and the negative impact of Brexit on UK trade, the outlook for 2022 is that of another challenging year for many sectors.

In terms of insolvencies, we might expect to see an increase in formal restructurings. The new Restructuring Plan introduced last year, has the potential to help address how companies deal with liabilities now that support measures have ceased and we work in a reduced-growth, high-cost environment. Companies struggling financially that became so-called "zombie companies"—earning just enough money to continue operating and to service debt but lacking excess capital to spur growth—are likely to fold now that government measures are mainly at an end. It is perhaps indicative that the Q3 2021 insolvency statistics largely comprised of director-led insolvencies such as Creditors' Voluntary Liquidations (CVLs).[2]

While the predicted tsunami of insolvencies may not transpire, we can expect an overall increase in insolvencies in 2022: Even if this is merely a correction on the unexpected statistics of the last two years.

## CHINA

Given the dearth of domestic commercial bankruptcy filings in 2021, the US restructuring community has turned its attention to China. Several real estate developers have defaulted in recent months following the introduction of regulations intended to decrease excessive levels of leverage. These defaults could be especially significant given the massive scale of the sector; by some estimates, the real estate sector makes up nearly 30% of Chinese GDP, nearly double the sector's relative size in the US and most other developed economies. The distress of such a large sector, and particularly one as deeply interwoven with the financial system as real estate, poses a significant risk to the broader Chinese economy.

Given China's key role in the already stressed global supply chain, a downturn in China would likely generate ripple effects globally, particularly at a time when the US commercial real estate sector can ill afford additional disruption. In 2021, the sector felt the effects of 2020's retail bankruptcies, with several retail landlords following their tenants into Chapter 11. Meanwhile, the recent Omicron surge has put a pause on many return to office plans, further threatening the industry's short-term outlook. As such, we will be closely monitoring the situation in China and any other catalysts that could trigger an uptick in commercial real estate bankruptcy filings in 2022.

## HONG KONG

According to data published by the Hong Kong Government's Official Receiver's Office, Hong Kong's filings for compulsory winding-up petitions reached 461 at the end of 2021, up 2.6% from 449 in 2020. We anticipate this upward trajectory will continue in 2022, which is set to be another challenging year with the continuation of the pandemic and Hong Kong's pursuit of a "zero-Covid" strategy. As the economic impact of the pandemic continues, businesses will remain



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under pressure—with small and medium enterprises likely feeling the pinch the most, notwithstanding the implementation by the Hong Kong government of various financial relief measures focused on supporting them.

## AUSTRALIA

Much like in other jurisdictions, the number of insolvency filings has been well below historic figures, by some reports representing as much as 40% from pre-Covid levels. Despite this dip in insolvency filings, insolvency practitioners in Australia point to three factors to predict a ripe environment for an increase in filings over the next 18 months. First, the federal government is no longer providing support to Australian businesses and safe harbor relief for Australian directors, yet restrictions on both borders and many businesses continue even though most of Australia has pivoted to a public policy position of living with Covid. Second, rising inflation raises concerns about how long historically cheap liquidity will continue and whether large amounts of asset-based lending create greater exposure for Australian businesses should asset prices fall. Third, the Australian Tax Office has resumed its enforcement efforts, and Australian banks are likely to follow suit with their own enforcement campaigns. These factors have led many to question how long zombie companies can hold on.



> **Legislative and regulatory developments in Asia will have an impact on global insolvency regimes**

## SINGAPORE

The city-state has long been an entrepot whose economy depends on international trade and domestic hospitality-related industries, and the pandemic has taken a heavy toll on the economy. While the temporary Covid relief measures implemented in April 2020 have helped soften the economic impact of the pandemic, it will be the new insolvency framework that will be put to test in the coming years.

The Insolvency, Restructuring and Dissolution Act 2018 (IRDA), which combined Singapore's personal and corporate insolvency and debt restructuring laws into a single piece of omnibus legislation, came into force on July 30, 2020. The timely arrival of the new legislation provides a number of legal mechanisms that could help companies stay in business. The IRDA introduced or codified important corporate rehabilitation tools such as super-priority rescue funding (or debtor-in-possession funding), cross-class cramdowns in schemes of arrangement and prepackaged restructuring plans. The legislation introduced significant reforms designed to simplify and modernize Singapore's insolvency framework.

The new legislation's practical importance cannot be overstated. The IRDA provides a toolkit for companies to confront the challenges resulting from the pandemic and avoid liquidation. Given the economy's reopening and an improving outlook, the new framework will play a critical role in allowing companies to restructure their debts and liabilities and stay afloat until operating conditions improve—rather than finding themselves simply placed in liquidation. A restructuring that postpones repayment of debt to creditors or compromises investor returns on a transitory basis would arguably be a better alternative to liquidation.

The IRDA also clarifies the ability of insolvency practitioners to enter into legal financing arrangements. For companies in liquidation or under judicial management, these arrangements could be an effective

way of unlocking assets for the benefit of the estate.

> *"While admirable, these government measures were not a panacea and ultimately only served as a temporary lifeboat to companies struggling financially."*

## HONG KONG

The position in Hong Kong stands in marked contrast to the developments in Singapore. The current lack of a statutory corporate rescue procedure in Hong Kong means that there are limited options available to distressed companies to pursue restructuring efforts compared with other common law jurisdictions. The Court noted in the recent case of Re China Oil Gangran Energy Group Holdings Ltd, [2020] HKCFI 825 that legislative provisions for corporate debt restructuring and rehabilitation were desirable, and the issues arising from the lack of such provisions have been brought into greater focus during the pandemic. In March 2020, the Hong Kong government announced that it would re-introduce a long-awaited Companies (Corporate Rescue) Bill at the Legislative Council in early 2021, which would bring Hong Kong more in line with international practice in other common law jurisdictions, including the UK. There will be a great deal of focus on the bill in 2022, which may be put to the Legislative Council soon, although the provisions will likely take some time to come into force. In the meantime, we expect Hong Kong courts will continue their proactive and practical approach with respect to cross-border and domestic insolvencies.

One such approach includes the Hong Kong courts recognizing offshore provisional liquidators appointed on a "soft-touch" basis, in which a company remains under the day-to-day control of the directors but is protected against actions by individual creditors. The purpose of such cooperation

is to give the group the opportunity to restructure its debts, or otherwise achieve a better outcome for creditors that would be achieved by liquidation (*Re Constellation Overseas Ltd BVIHC (Com)* 2018/0206, 0207, 0208, 0210 and 0212). However, 2021 saw the first Hong Kong decision refusing to assist offshore soft-touch provisional liquidators (in *Re China Bozza Development Holdings Ltd* [2021] HKCFI 1235) because the Court had concerns about the protection of creditors' interests. Mr. Justice Harris noted that many cases coming before the Hong Kong companies court involved company owners and boards of directors who were more interested in avoiding liquidation and where the creditors were not involved in or driving the process. He suggested that the Hong Kong Court should closely police the use of soft-touch provisional liquidation to avoid it being abused and to ensure that creditors are protected. Although each case turns on its own facts, an increase in insolvencies of such companies may result, as the Hong Kong Court ensures that the recognition of offshore soft-touch provisional liquidation is consistent with general insolvency law and principles in Hong Kong.



2021 also saw a major development in cross-border insolvency co-operation between Hong Kong and mainland China with the jurisdictions' entry into an arrangement for mutual recognition of and assistance to insolvency proceedings between their respective courts. The arrangement, which is essentially a framework for cooperation, applies where the debtor's center of main interest lies in Hong Kong and has principal assets, a place of business or representative office in Shanghai, Xiamen or Shenzhen (given the close trade ties of these cities with Hong Kong). Shortly after, Mr. Justice Harris allowed the first application for a letter of request to be issued by the High Court of Hong Kong to the Bankruptcy Court

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of the Shenzhen Intermediate People's Court (in *Re Samson Paper Company Limited* (in Creditors' Voluntary Liquidation) [2021] HKCFI 2151) and in mid-December 2021, the Shenzhen Intermediate People's Court handed down the first ruling by a mainland court under the arrangement, granting the application by the liquidators. This is a significant step forward in developing a cooperative insolvency process between Hong Kong and mainland China and addresses the need to provide practical assistance to Hong Kong liquidators in their administration of assets and affairs in the mainland. We are aware of several corporate insolvencies where liquidators are seeking to use the arrangement and will monitor with interest how Hong Kong and mainland courts develop this framework going forward.

### We expect to see an increase in fraudulent insolvencies in the near-term

Where there is an increase in distressed debt, there is inevitably a greater potential for fraud. Business uncertainty may lead to an increase in fraudulent behavior as, under increasing pressure to hit earnings targets, directors resort to improper means to replace lost revenue. Therefore, we should expect to see more director fraud uncovered, including Ponzi schemes, investments in non-existent assets and false representations to creditors. For example, in England, the insolvency industry already reports fraudulent claims on the back of the bounce-back loans that companies applied for during the pandemic, reportedly costing the government over $20 billion in either fraud or creditor losses.[3]

To recover value for defrauded creditors, various antecedent provisions within the insolvency legislation allow a look back to previous transactions and behavior that might give rise to claims against third parties—potentially with deep pockets—including recipients of assets at undervalue or preferences. But hunting down and acquiring these assets is not a straightforward process.

### Legal finance and asset recovery expertise will become increasingly important

Meritorious high value claims can be among an insolvent company's most valuable assets. However, these claims often require significant financial resources to investigate and pursue, resources which a liquidator or judicial manager often does not have,



resulting in the abandonment of potential claim. Legal finance from Burford allows stakeholders to pursue valuable claims that otherwise might be abandoned or settled—thus maximizing recoveries for debtors and for creditors.

We frequently receive case inquiries before insolvency events, from entities that are looking to use legal finance to avoid large legal fees, legal risk and/or potential liquidation that could accompany pursuing their large claims. In a number of jurisdictions, a common theme is that companies—particularly those in the mining, energy, and oil and gas sectors—with overseas or multijurisdictional projects face legal disputes with large counterparties that involve very large legal fees and disbursements. In those instances, legal finance can help companies during pre- or mid-insolvency processes, not just by providing a needed source of finance, but also by providing an additional source of expertise to assist the client throughout the life of a case.

When seeking assets from a company in insolvency—particularly where there is an element of fraud—creditors, insolvency lawyers and professionals may need to investigate company directors' and officers' assets. However, the true asset position of such potential targets is rarely clear at a case's commencement. Specialized expertise will often be needed to investigate hidden assets to secure value in the event of a successful claim.

As the number of bankruptcies and insolvencies inevitably rises in the year ahead, judgment creditors will increasingly seek specific guidance and services from experts in asset tracing, intelligence gathering and enforcement techniques to help guarantee the design of a successful recovery strategy. Burford has an integrated in-house corporate intelligence and asset recovery business that combines capital provisions with top-level judgment enforcement to help creditors recover judgment debts while relieving the associated financial burden and risk.



[1] Q3 2021 growth was lower than expected with output remaining 2.1% below Q4 2019: Published by the Office for National Statistics on 12 February 2021 and GDP first quarterly estimate, UK: October to December 2020

[2] Insolvency Service Statistics for Q3 2021 recorded 3,765 corporate insolvencies (being the highest number since Q1 2020, and 90% of the Q3 2019) of which 3,471 were CVLs.

[3] Daniel Thomas, *Financial Times*, "UK taxpayers face billions in losses from Covid loan schemes", November 2021, available at: https://www.ft.com/content/d5576d0e-ed4d-4087-b3b5-2bed6076dde4.

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[1] Based on reporting of combined litigation finance investments, unfunded core litigation finance investments and other investments as of 22 September 2021.

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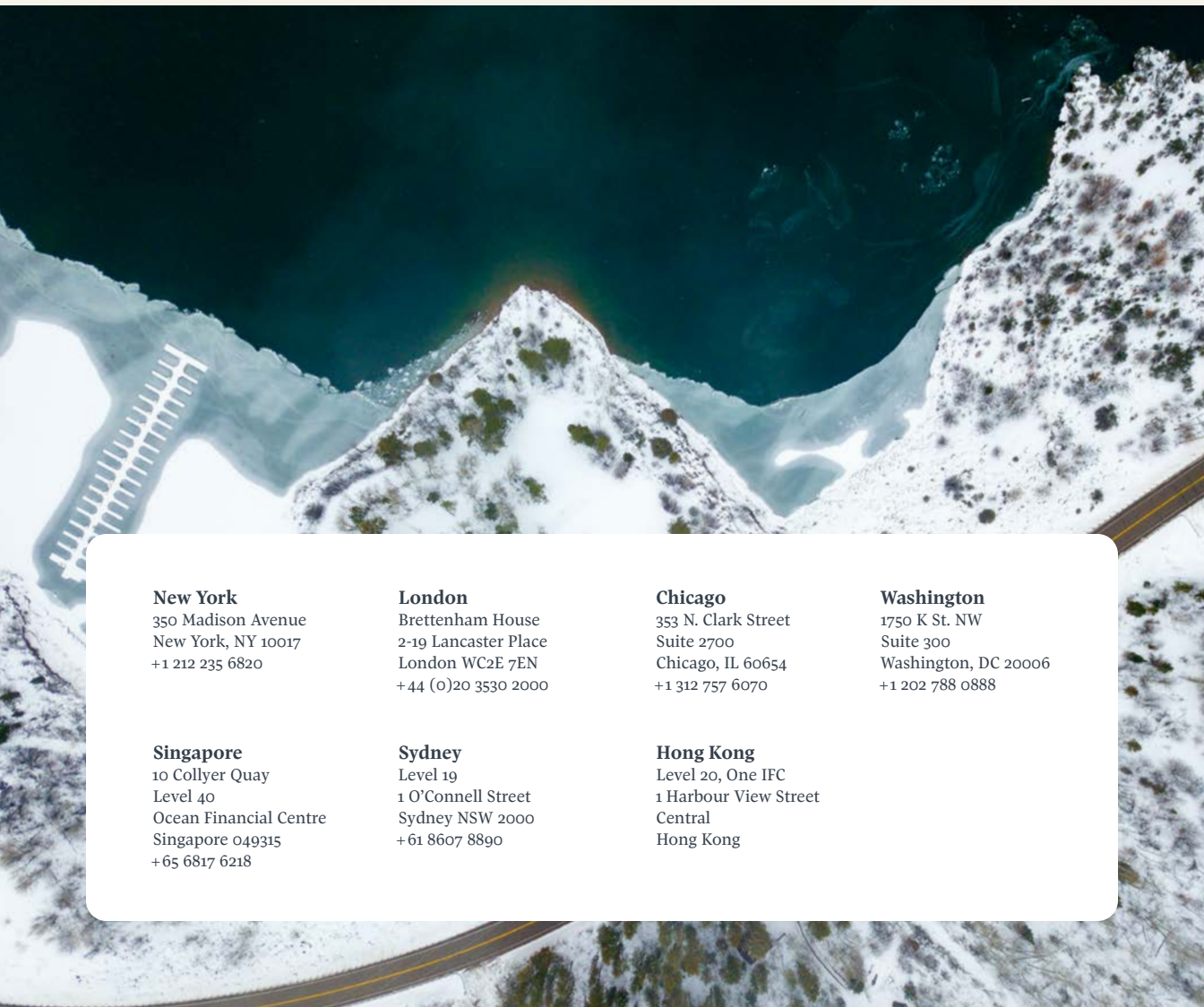

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