Third-Party Funders' Business Is Booming During Pandemic

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By **Caroline Simson**

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Law360 (April 8, 2020, 7:29 PM EDT) -- The economic turmoil unleashed by the COVID-19 pandemic has left few businesses throughout the world untouched, but for arbitration and litigation funders, the past few weeks may mark the beginning of a boom.

Even as uncertainty about the future has gripped the global marketplace, one certainty has pervaded the minds of many business owners and lawyers: Disputes are going to be inevitable as global supply chains break down and the hospitality, tourism and other industries struggle to keep their heads above water.

But even among enormous multinational corporations, the question of how they're going to fund the likely expensive and lengthy litigation and arbitration brought about by the current crisis has become a more pressing inquiry in recent weeks. It’s prompted many of them to begin turning to third-party funders.

"Frankly, we're drinking from a fire hose," said Allison Chock, U.S. chief investment officer for funder Omni Bridgeway. "One of the things we've been talking about for some time now is the trend in corporations that historically paid for the legal expenses beginning to explore using litigation financing instead. ... That is now becoming a more urgent trend."

And it's not just for new cases. In fact, many inquiries being fielded by Burford Capital for potential funding relate to claims that are underway. These potential clients may be midway through the process or have an arbitral award already in hand, said Jeffery Commission, a director for Burford who oversees the firm's underwriting and investment activity in investor-state and international commercial arbitration.

"In the last few weeks, there's definitely been a significant uptick in inquiries," he said. "Increasingly, we are seeing claimants or their counsel reaching out to us at various stages. ... They're under some stress to find ways to save capital, and one way to do that is to seek funding."

Third-party funding is somewhat unique among industries in that it's countercyclical, or at the very least uncorrelated to what the markets are doing generally, Chock said, referring to the fact that the value of claims in litigation and arbitration remains the same regardless of what the market is doing.

In other words, a $100 million breach of contract claim asserted today would still be worth that same amount six months from now.

But as with any investment, funding arbitration or litigation incorporates a degree of risk. Funders are certainly not immune from the effects of COVID-19 in that respect, since previously funded claims are likely to face increased delays now due to court shutdowns and related issues.

Moreover, respondents may now be facing liquidity problems they were not facing before the World Health Organization declared the coronavirus outbreak a pandemic in March.

But according to Steven Friel, CEO of Woodsford Litigation Funding, these things aren't likely to alter the risk analysis that firms like his have already undertaken.

"The pandemic itself is not an event that we have factored into our assessment. However, the effects of the pandemic on our business are all things we see," he said. "The effects are delay, financial distress, key individuals in businesses we support getting ill — these are all things we do factor in. ... If we have calibrated our business correctly, that will be outweighed by the rewards."

Even if disputes undergo particularly prolonged delays, he said the firm's agreements incorporate a formula to increase its recovery the longer time goes on. The arrangement is typical throughout the third-party funding industry.

As for how the funders themselves will fare during the pandemic — and how well they'll be able to secure the funding needed to support the likely deluge of litigation — it appears they're expecting to weather the upcoming months quite well.

Andrew Saker, the managing director and CEO of Omni Bridgeway, told Law360 that his company had cash and receivables on its balance sheet at the end of March of around AU$200 million ($124.75 million), with another AU$200 million expected soon in the form of cash returns on matters that have been settled or in which judgments have been issued.

Omni Bridgeway also has additional cash, receivables and estimated near-term completions in its fund structures of around AU$100 million, he said.

As for whether its investors were getting nervous due to the economic crisis, Saker dismissed the notion.

"Our fund investors agree that ... there will likely be additional demand for our type of funding as corporates and law firms seek to de-risk their litigation assets," he said, adding that the company's current and prospective investors have expressed an interest in potential new funds that may be required to meet that demand.

Burford, meanwhile, told its investors this month that its own liquidity is "more than sufficient for its needs." The company nevertheless added that it will seek to conserve some of its cash on hand to meet the inevitable rising demand for funding by not recommending a final 2019 dividend, among other things.

Burford said it had $146 million in cash on its balance sheet as of March 31, with another $15 million held in cash management investments. It also has $180 million invested in "complex strategies matters," which it said are typically resolved in less than one year, and has access to a further $758 million in undrawn capital that has been committed by institutional investors in its investment funds and from its sovereign wealth fund arrangement, Burford said.

--Editing by Aaron Pelc and Alanna Weissman.