

MARSH JLT SPECIALTY

Litigation Risk Solutions



Who We Are and What We Do

Whether you are pursuing a dispute by litigation or arbitration, our team of experts at Marsh JLT Specialty can provide you with tailored solutions that help you manage the costs and mitigate risk.

We work hard to understand your motivations. Whether this involves managing cash flow, downside risk, or a combination of the two, our dispute resolution specialists can put together the right mitigation strategy tailored to your needs.

The Marsh JLT Specialty Advantage

Our litigation risk solutions team has a wealth of experience, comprised of solicitors, experienced brokers, and insurance professionals. The team has close relationships with a vast array of markets across most jurisdictions globally. We place insurance and funding in most case types, from small insolvency matters all the way through to large class actions. We have experience in both one-off cases and providing portfolio solutions for corporate clients. Whilst our team operates internationally, they do so while demonstrating excellent local knowledge.

The Legal Risk Management Challenges Facing Business



Costs of litigation can be prohibitive.



David versus Goliath type scenarios often occur, where a smaller business has to take on a more well-heeled defendant that can simply outspend them.



Even for larger companies, annual budgets are limited and have to be prioritised. Furthermore, financing unforeseen spikes in litigation cases and/or costs can be a challenge.

52%

of in-house lawyers say their company has chosen to forgo legal claims due to the impact of legal expenses on the bottom line.

70%

of lawyers say that their companies and law firms are likely to use finance to offset recession impacts.

70%

of in-house lawyers say their companies have unenforced awards valued at US\$20 million or more, up from 65% in 2019.

87%

of in-house lawyers view legal finance as a path to transforming the legal department from a cost centre into a means of generating cash for the organisation.

Source: Burford Capital Legal Finance Survey 2020.





Litigation Risk Solutions



Insurance-Backed Solutions

Litigation is fraught with risk, yet defending one's commercial interests can make litigation necessary. In the UK, as with other Common Law jurisdictions, raising a claim unsuccessfully will trigger liability for your opponent's legal defence/adverse costs.

"After The Event" (ATE) insurance can be put in place to remove this risk and provide you with certainty over your cost exposure. ATE insurance can also cover your own legal expenses, such as expert fees, and can even indemnify a proportion of your solicitor fees. In addition, it is possible to insure your solicitor's contingent fees, if they are willing to work on a "no win no fee" or "no win reduced fee" basis.

Insurance-Backed Solutions	What Is Covered?	Key Benefits to you
 ATE Insurance	ATE insurance can cover any combination of: <ul style="list-style-type: none"> • Adverse cost insurance. • Own disbursements/expenses. • Own solicitor fees. 	<ul style="list-style-type: none"> • Provides costs certainty. • Balance sheet can reflect accurate fixed contingent liability. • Reduces the downside risk if the claim is ultimately unsuccessful.
 Contingent Fee Insurance	This policy insures a proportion of your own solicitor fees where they are acting on a contingent basis, either by way of "Conditional Fee Arrangement" (CFA) or "Damages-Based Agreement" (DBA).	<ul style="list-style-type: none"> • Allows a solicitor to act on a contingent basis whilst managing their risk. • Reduces the need to pay the solicitor's full fees as case progresses. • Can be a cheaper alternative to third-party funding. • Eases cash flow pressures.
 Security for Costs Cover	On occasions where the ATE policy is not accepted as adequate security for costs on its own, we can supplement the policy with either or both: <ol style="list-style-type: none"> An endorsement ensuring the policy is non-voidable/non-cancellable by the insurer. A deed of indemnity. 	<ul style="list-style-type: none"> • No need to provide a cash guarantee in court. • Reduces cash flow pressures. • Satisfies court and defendant over the issue of security for costs.
 Cross Undertakings in Damages Cover	When applying for an injunction, it is necessary to support this with a cross undertaking in damages. This means you will pay any damages and costs suffered by the defendant, if it later transpires that the injunction should not have been granted. This policy will cover such costs.	<ul style="list-style-type: none"> • Can satisfy court and defendant where there are limited or no funds available to collateralise as cash. • Removes need to post cash as security. • Eases cash flow burden.



Finance-Backed Solutions*





Pursuing a dispute, whether by litigation or arbitration, can be expensive.

The costs can be uncertain, should there be unexpected developments or budget overruns. Funding a dispute can also be a drain on a business' resources.

Third-party funding can step in to take the costs of pursuing a dispute off your balance sheet. This involves professional companies financing the legal costs of pursuing a party's dispute in return for a share of the winnings. If the case is unsuccessful, then the funder simply writes off their investment.

This form of funding alleviates cash flow constraints, takes the costs of litigation off your balance sheet, and provides budget certainty. Third-party funding means that you can pursue your dispute to its fullest extent, and level the playing field when taking on a larger, more well-heeled opponent.

We have strong relationships with all of the main funders available. We can assist you with third-party funding for disputes across all major jurisdictions and for every main arbitration centre.

Finance-Backed Solutions	How it Works	Key Benefits to you
 Third-Party Funding	Funds some or all of the legal costs in pursuing a dispute, whether by litigation or arbitration, in return for a share of the winnings.	<ul style="list-style-type: none"> • Takes legal spend off your balance sheet. • Provides budget certainty. • Lending is non-recourse.
 Enforcement Funding	You can only secure an award for part of the dispute. It is possible to secure funding to enforce an award against a defendant.	<ul style="list-style-type: none"> • Provides budget certainty. • Stops continued legal spend. • Eases cash flow pressures.
 Monetisation/Sale of an Arbitral Award	It is possible to sell either a share of, or the full amount of, an arbitral award.	<ul style="list-style-type: none"> • Unlocks the value of the award. • Reduces cash flow pressures.
 Sale of Insolvency Claims	Certain rights of action can be sold.	<ul style="list-style-type: none"> • Allows office holders to make a realisation sooner than pursuing the litigation themselves. • Removes risk of no return made for creditors in the event that the litigation is unsuccessful. • Frees up cash for creditors.

* This service, product, or activity is not regulated by the FCA.

Our Solutions in Action

In the following examples, the following set of facts applies. ABC Co. is pursuing litigation against XYZ Ltd for breach of contract. Each party’s legal spend will be £1 million and the damages sought are £15 million.



Case Study 1 – ATE Insurance

In order to manage the downside risk, ABC Co. purchased an ATE policy for £1 million. The premium is fully deferred and contingent, meaning that the premium is only payable if the case is successful. The case settles for £12 million plus £750,000 of costs around disclosure. The premium is £400,000. This means that ABC Co. will receive £12.35 million, and will have no adverse costs exposure.

If the Case Loses at Trial:

The ATE insurance policy will pay XYZ Ltd’s legal bill. The premium will NOT be payable, as it was contingent upon a successful outcome. ABC Co. have only had to bear their own costs of £1 million, so their exposure has been reduced by 50%.

Difference:

If Case Loses WITHOUT ATE				If Case Loses WITH ATE				Saving made by having ATE
ATE premium	Own costs paid	Adverse costs paid	Total exposure	ATE premium	Own costs paid	Adverse costs paid	Total exposure	
£0	£1 million	£1 million	£2 million	£0	£1 million	£0	£1 million	£1 million



Case Study 2 – Third-Party Funding and ATE Insurance

ABC Co.'s £1 million legal bill is financed by TPF Inc. The case settles for £12 million, plus £750,000 in costs. £400,000 will be paid in respect of the ATE insurance premium. The funder's £1 million will also have to be repaid, as will a further £2 million representing the funder's return on capital. Therefore, the client receives £9.35 million despite not spending any money pursuing this dispute.

If the Case Loses at Trial:

ABC Co. will not have paid their own legal costs nor the adverse costs. TPF Inc. will simply write off their £1 million investment, and the ATE policy will pay XYZ Ltd's legal costs. ABC Co.'s downside exposure will be ZERO.

Difference:

If Case Loses WITHOUT Funding and ATE				If Case Loses WITH funding and ATE				Saving made by having funding and ATE
ATE premium	Own costs paid	Adverse costs paid	Total exposure	ATE premium	Own costs paid	Adverse costs paid	Total exposure	
£0	£1 million	£1 million	£2 million	£0	£0	£0	£0	£2 million



Portfolio-Based Solutions

In addition to providing solutions on individual matters, we have experience of building portfolio solutions for law firms. These could be a portfolio insurance arrangement, a portfolio litigation funding solution, or a combination of the two.

Portfolios allow law firms and their clients to access a streamlined, more commercial underwriting approach, with preferred pricing as the insurer or funder's risk is spread.

Portfolio-Based Solutions	What it Does	Key Benefits to you
 Delegated Authority ATE Scheme	This is where the law firm has delegated authority to bind ATE policies within pre-agreed parameters on behalf of their clients.	<ul style="list-style-type: none"> • Saves time as under this scheme cases do not need to be individually underwritten. • Guarantees availability of ATE cover. • Reduced pricing to account for portfolio effect.
 Work in Progress Insurance Portfolio	A Work in Progress (WIP) insurance policy insures a percentage of a law firms' own contingent fees. It is possible to insure an existing book of work, a portfolio of future work, or a portfolio including a combination of the two.	<ul style="list-style-type: none"> • Allows a solicitor to act on a contingent basis whilst managing their risk. • Allows law firms to offer creative funding solutions to clients. • Such creative funding solutions can give law firms a competitive edge when tendering for work.
 Third-Party Funding Portfolio (for an existing book of work)	Third-party funding can be provided for a portfolio of cases rather than for just one individual case.	<ul style="list-style-type: none"> • Reduced pricing to account for portfolio effect. • More commercial underwriting approach as funders' risk is spread across a book of work. • More streamlined underwriting approach.
 Third-Party Funding Portfolio (for future cases/a law firm litigation fund)	A fund can be set up for a law firm where they will have access to a designated litigation fund to finance a book of future cases.	<ul style="list-style-type: none"> • Preferential pricing for clients of that law firm. • Streamlined underwriting approach. • Can help law firms unlock more cases. • Can give law firms a competitive edge when tendering for work.



Case Study 3 – Delegated ATE Scheme

A multi-office national law firm has a successful insolvency litigation department. They have a team in each of their five offices. The fee earners always obtain ATE for their cases. However, there is no standard approach. Different fee earners use different providers. They will be quoted various premium structures and rates. Neither the firm nor their clients obtain any benefit from the volume of ATE the firm purchases.

Portfolio ATE Solution

The client would benefit from a delegated authority ATE scheme. Marsh JLT Specialty can put in place an ATE scheme to cover all of their insolvency cases. Marsh JLT Specialty will work with the law firm and insurer to agree pre-set parameters. The law firm can then automatically have an ATE policy for any case falling within that criteria.

Benefits to the Law Firm

The client would benefit from a delegated authority ATE scheme. Marsh JLT Specialty can put in place an ATE scheme to cover all of their insolvency cases. Marsh JLT Specialty will work with the law firm and insurer to agree pre-set parameters. The law firm can then automatically have an ATE policy for any case falling within that criteria.



Case Study 4 – A Third-Party Funding Portfolio Arrangement for a Law Firm

A global law firm with offices across multiple jurisdictions handles a large volume of litigation. They are frequent users of third-party finance across their offices. However, their clients will receive different level of service from different funders, they receive different pricing and sometimes their applications for litigation funding are refused, even though the merits of a case are good.

Law Firm Litigation Fund Solution

The ideal solution is for the law firm to have access to its “own” litigation fund of around £150 million. Marsh JLT Specialty can conduct a full market appraisal process and line up a litigation funder to provide a designated sum for the use by that law firm across all of its offices.

Benefits to the Law Firm

The law firm and its clients will receive preferential pricing. There will be a streamlined underwriting process meaning deals can be concluded in a timely manner. Besides, the law firm will have a standardised approach to using third-party funding. Furthermore, the law firm will be able to use the funding arrangement to unlock more cases and provide greater assistance to clients.

Conclusion

The Litigation Risk Solutions team at Marsh JLT Specialty can help companies who are exposed to legal disputes. Our approach can provide the following benefits:



Preserve capital to invest in the growth of their business rather than pay legal fees.



Level the playing field against more well-funded opponents.



Provide solutions across a portfolio of litigation as well as one-off cases.



Unlock litigation which is a financial asset.



Takes the legal costs off balance sheet through litigation finance.



Manage their risk exposure.



Provide risk transfer solutions to mitigate the down side of unsuccessfully pursuing a dispute.

Litigation Risk Solutions Credentials

Experienced Team

Tailor-made advice bespoke to each client's individual litigation problems.

Significant experience of providing litigation solutions for tech clients.

Team composed of experienced solicitors and litigation finance brokers.

Global Capabilities

We have placed litigation finance and ATE risks in multiple countries.

Experience of working across Europe, AsiaPac, and North America.

Connected to all of the main litigation funders across the globe.



For further information, please contact your local Marsh office or visit our website at marsh.com.

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