

TECHNOLOGY INDUSTRY PRACTICE

Technology Industry Litigation

Litigation Risk Solutions



Introduction

The technology sectors drive innovation, intellectual capital, and industry disruption. Such innovations require a significant amount of upfront and ongoing investment, as well as protection of intellectual property and commercial interests. Companies ranging from start-ups all the way through to major technology conglomerates with more than US\$100 billion in revenue, rely on these innovations to stay relevant, drive growth, and protect market share.

Aligned to this, the protection of such intellectual property, patents and commercial interests is of utmost importance, and is a key aspect of active risk management. Naturally, where there is such innovation and investment, disputes can and do occur. Our technology industry clients – who comprise telecommunications, IT services, software, internet and e-commerce, sharing/gig economy, semiconductors, and technology manufacturers – tell us that this is an unavoidable part of their business model.

40% *Around 40% of global R&D spending is by technology* firms.*

SOURCE: STATISTA 2020.

7/10 *7 of the top 10 R&D spenders are in the technology sector.*

SOURCE: RESEARCH BY RIFT RESEARCH AND DEVELOPMENT LTD ON R&D SPEND, 2019.

83% *Tech companies' intangible assets make up an average 83% of the enterprise's value.*

SOURCE: BRAND FINANCE – GLOBAL INTANGIBLE FINANCE TRACKER 2019.

8/10 *Technology companies make up 8 of the top 10 ranked by intangible value.*

SOURCE: BRAND FINANCE – GLOBAL INTANGIBLE FINANCE TRACKER 2019.

* based on figures for Computing & Electronics, Software & Internet and Telecoms combined.

The Risk Management Challenges for Technology Companies



Costs of litigation can be prohibitive.



David versus Goliath type scenarios often occur, where a small start-up has to take on a more well-heeled defendant that can simply out spend 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.

Traditionally such risk exposures have been managed and financed in-house. To respond to their risk management challenges, and support our technology clients, Marsh offers two innovative alternatives, insurance-backed and finance-backed solutions.

72%

of in-house lawyers say their companies have failed to pursue meritorious legal claims, because of the worry of the impact on the bottom line.

67%

of lawyers agree that an important benefit of legal finance is that it allows companies and law firms to recession-proof their legal budgets.

65%

of in-house lawyers report that their companies have unenforced judgements or uncollected awards valued at US\$20 million or more.

67%

of in-house lawyers agree that even large companies benefit by reducing the cost impact of litigation.

SOURCE: BURFORD CAPITAL LEGAL FINANCE SURVEY 2019.

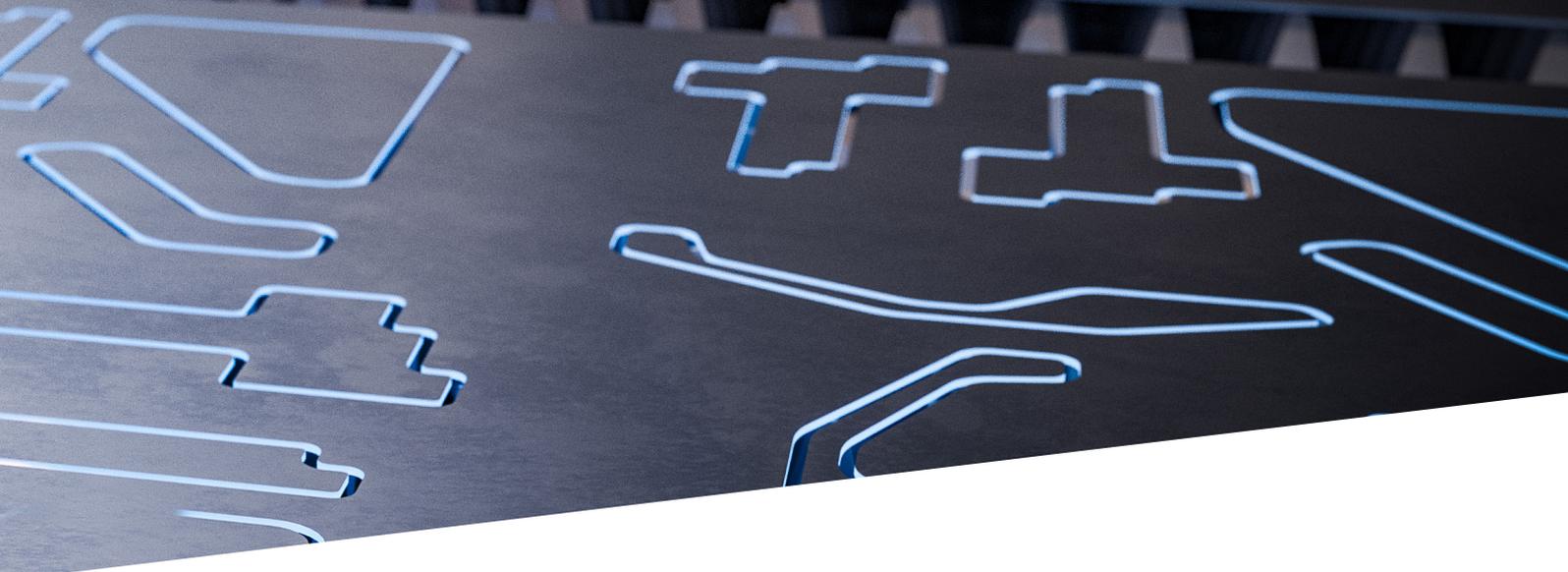


Litigation Risk Solutions

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 the opponent’s legal defence/adverse costs. After The Event (ATE) insurance can be put in place to remove this risk and provide certainty over cost exposures. 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 solution	What’s covered	Key benefits
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 down side risk if the claim is ultimately unsuccessful.
Work in Progress (WIP)/ DBA 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: <p>(a) an endorsement ensuring the policy is non-voidable/non-cancellable by the insurer.</p> <p>(b) a deed of indemnity.</p>	<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 over-runs. 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.

Marsh has developed 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 solution	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. • Allows a company to pursue meritorious claims that may sit outside of the allocated legal budget for that particular year.
Enforcement Funding	Securing the award is only part of the process. Defendants may simply refuse to pay an award of damages. 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.
Portfolio funding solutions	Fund a portfolio of cases or provides a litigation finance facility, which can cover all litigation cost of offensive litigation for a year or multiple years. This can also unlock the ability to finance defensive litigation.	<ul style="list-style-type: none"> • Can increase a company's litigation budget without impacting the bottom line. • Can take cost of all offensive litigation off balance sheet.

Litigation Scenarios¹

Litigation Funding and Insurance for a Patent Dispute

SCENARIO

A tech start-up, which has developed ground-breaking new technology, has had its patents infringed by a major corporation. The loss to the start-up is in excess of £100 million. However, the start-up has little cash flow and the defendant is a global corporation that can afford to defend the claim in full, hoping to use its financial advantage to simply outlast the start-up.

Further, if the case fails, the start-up will have to pay the corporation's costs. It could potentially ruin its business.

Each party's costs are £5 million.

SOLUTION

Marsh can secure the start-up litigation funding to cover its own £5 million legal spend. Additionally, Marsh can arrange ATE insurance to protect the start-up from having to pay the defendant's costs if the case fails. The initial premium for this could be around £600 thousand including taxes. This will be financed by the litigation funder, meaning the total financing commitment is £5.6 million.

If the case wins, the funder will recover its capital and a further 2x return on the money - a total of £16.8 million - leaving the start up with £83.2 million.

If the case fails, then the funder writes off its investment and the ATE policy pays the defendant's costs. Meaning that, although the case has failed, the start-up has not incurred any losses in pursuing the litigation.



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	£5m	£5m	£10 m	£0	£0m	£0	£0m	£10m

m=millions

¹ These are hypothetical examples, based on Marsh's knowledge and experience

Portfolio Arrangements

1

Enabling the pursuit of additional offensive litigation

SCENARIO

A diversified telecoms company owns a large portfolio of patents. It regularly enforces its commercial rights through the pursuit of litigation. It spends around £50 million a year in doing so. The cases it pursues are deemed 'certainties' that will almost definitely settle, or are very likely to succeed at trial.

It has a portfolio of other good claims that, whilst not 'certainties', are highly likely to settle. It does not pursue these claims for concern over the impact on the bottom line. The required budget is around £10 million and would generate revenue of around £100 million.

SOLUTION

Marsh can put in place a litigation financing facility to fund the cost of the additional litigation. This would mean that the business can pursue more claims and potentially generate significant further revenue, but at no additional upfront cost. The legal budget remains the same but the company is now able to pursue more of its litigation and generate more recoveries.

In this scenario, litigation finance could also just as easily be secured for some or all of the £50 million annual spend.

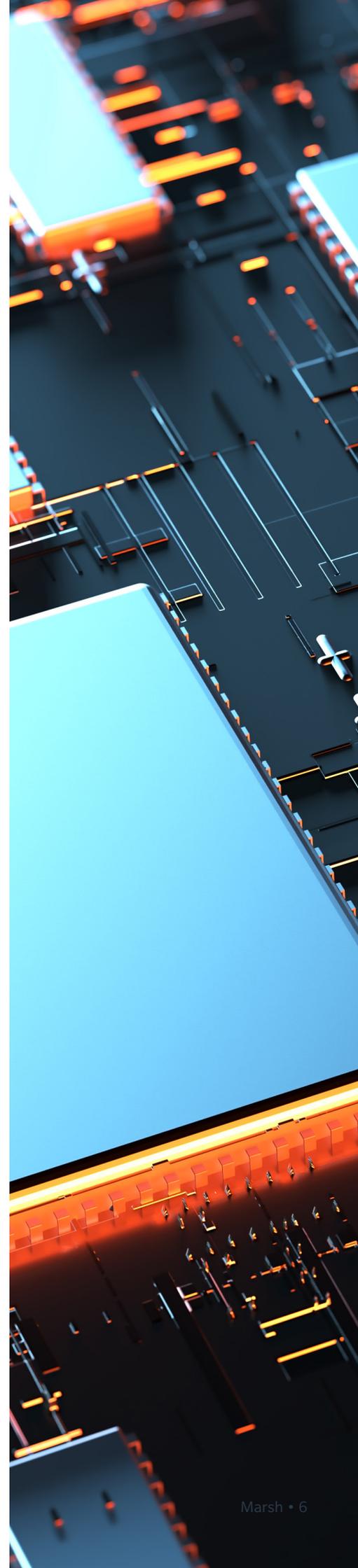
2

Financing defensive litigation

One of the advantages of financing a portfolio of work is that it affords greater flexibility.

If, in the above scenario, the company spends £10 million a year financing the cost of defensive litigation, funding can be secured for this cost, thus taking it off balance sheet. The cost of the £10 million of litigation financing for the defensive costs can be off-set by the winnings on the portfolio of offensive litigation.

For example, if the funder is financing £20 million of offensive litigation and £10 million of defensive litigation it would simply make a return on its £30 million investment from the winnings of the offensive litigation.



Conclusion

Marsh's Litigation Risk Solutions can help technology companies who are exposed to legal disputes. Our approach can provide the following benefits:

- Takes the legal costs off balance sheet through litigation finance.
- Level the playing field against more well-funded opponents.
- Provide risk transfer solutions to mitigate the down side of unsuccessfully pursuing a dispute.
- Provide solutions across a portfolio of litigation as well as one-off cases.
- Preserve capital to invest in the growth of their business rather than pay legal fees.
- Unlock litigation which is a financial asset.
- Manage their risk exposure.

Litigation Risk Solutions Credentials

Experienced Team	Global Capabilities
Tailor made advice bespoke to each client's individual litigation problems.	We have placed litigation finance and ATE risks in multiple countries.
Significant experience of providing litigation solutions for tech clients.	Experience of working across Europe, AsiaPac, and North America
Team composed of experienced solicitors and litigation finance brokers.	Connected to all of the main litigation funders across the globe.



Technology Industry Practice

Marsh is the global leader in insurance broking and innovative risk management solutions. Our Technology Industry Practice is dedicated to helping you identify, quantify, manage, and mitigate your composite risks.

Most companies that operate in Technology sectors are on the frontier of emerging risks, pushing boundaries with their business models and disrupting industries. This means they require tailored advice and customised solutions which go way beyond “standard”. Our flexible approach combined with our significant human and knowledge resources enables us to advise across the entire journey of risk services, or advise on specific projects, risk categories, or challenges.

For further information, please contact your local Marsh office or visit our website at [marsh.com](https://www.marsh.com)

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