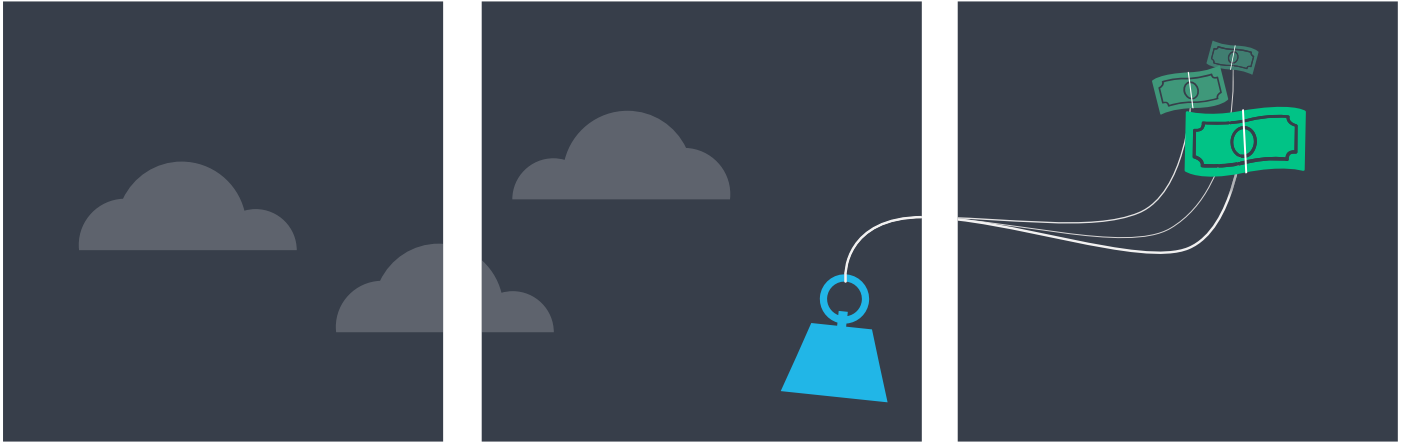


## Funded litigation: viewing disputes as potential assets



Over the past 10 years there has been a sea change in the way in which disputes can be conducted. Gone at last is the worry that if the original loss didn't bankrupt you, the cost of fighting to recover it might. Although it has been a slow process, as changes in legal practice inevitably are, at last we are now seeing the beginnings of real traction within the business community.

So why is this? Possibly because some very large, high profile claims have been funded by third-party funders. Possibly because some very strong recent results in this area have demonstrated the attraction of this asset class. Or possibly because high profile judges have publicly endorsed third-party funding as a way of facilitating access to justice.

Whatever the reason, third-party disputes funding is here, and it's here to stay.

If you are not familiar with it, then the concept is simple. A third party provides cash to fund a legal claim in return for repayment with a profit from the winnings. That share can be quite large, but then so is the risk.

Third-party funding has developed significantly. The benefits that it can provide now attract 'Goliaths' involved in litigation or arbitration as much as 'Davids'. Third-party funders offer considerably more options, like cross-collateralised portfolio funding, pre-judgment monetisation of claims, and after the event (ATE) insurance for own-side costs. Equally, the range of disputes in which, and the parties for whom, third-party funding is available has grown exponentially.

For all companies, disputes funding can be a godsend. Instead of leaving a claim festering in the corner, it can be pursued. In some cases, funders will advance cash, creating an instant boost to cash flow. If there is a portfolio of claims, then the funders can consider making funds available for the defence of claims as well.

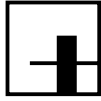
Traditionally, funders advanced an agreed sum of money to cover lawyers' fees and other expenses and contracted with the client to get back a fixed amount, regardless of the amount awarded or whether it could be collected or not.

More recently, funders have been prepared to offer Damages Based Agreements (DBAs) as a form of contingency fee. Under a DBA, a client only needs to pay for the legal services if they are successful in their claim and the amount payable to the funders is determined as a percentage of the damages actually recovered.

When coupled with insurance against paying the other side's costs in the event of the dispute being unsuccessful, it is most commonly referred to as 'no win - no risk - no fee'. Psychologically, this moves a dispute from pain in the neck to potential asset.

Of course funding can be appropriate across a range of energy-related disputes; not just court-based litigation in the growing number of jurisdictions that allow it, but also in arbitrations under most of the recognised protocols, whether International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), or the International Centre for Settlement of Investment Disputes (ICSID), etc.

Indeed, many forward-thinking disputes centres, such as Singapore and Hong Kong, are introducing legislation to ensure they are not left behind in the disputes funding race.



## SHEPHERD+ WEDDERBURN

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A judicious mix of funding options and insurance-based products can level the playing field in complex energy disputes, lend credibility to claims and provide enviable flexibility to keep both internal counsel and finance departments happy.

Last year, Shepherd and Wedderburn secured an innovative disputes litigation finance portfolio agreement with global litigation finance specialist Burford Capital in what was a ground-breaking offering from a top 100 UK law firm and a major funder.

So, a brighter, funded future beckons.

Guy Harvey has many years of experience dealing with commercial disputes, advising on high value cases at all levels in the English courts and abroad. Now a consultant to the firm, Guy is bringing his considerable experience and expertise in litigation funding to help grow the commercial and international disputes practice.

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