

NIVALION

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Il finanziamento delle controversie in Svizzera, Germania e Austria: il punto di vista del finanziatore

Torino, 28 Maggio 2019

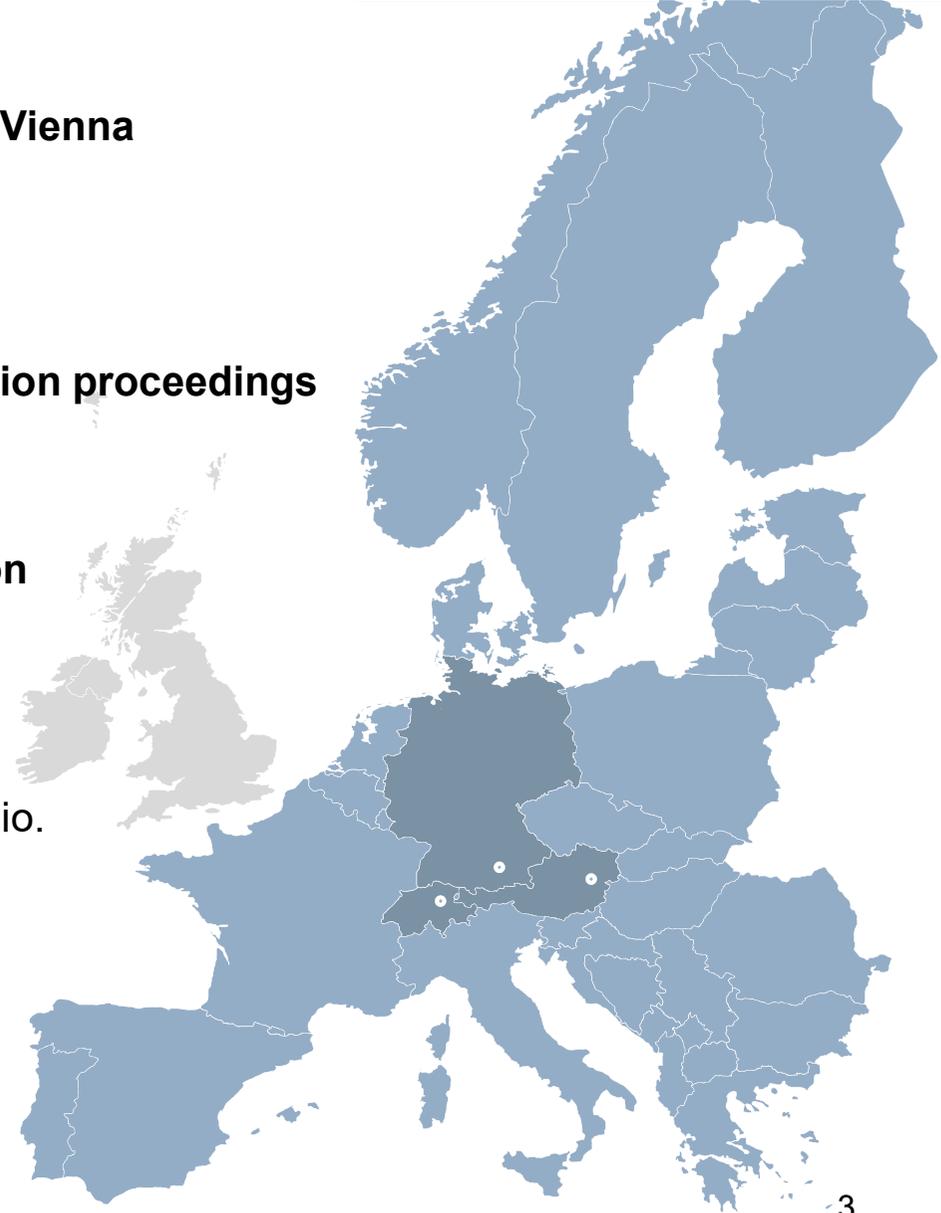
Agenda

- 1. The Basics of Third Party Funding from a Funder's Perspective**
- 2. The Current Funding Practice**
- 3. Recent Developments & Outlook**

About Nivalion



- **Swiss Funder with offices in Zug, Munich and Vienna**
- Funding across **Continental Europe**
- Focus on funding of complex **litigation & arbitration proceedings**
- Combining more than **40 years of professional funding experience**, profound **dispute resolution expertise** and the **financial strength of its Swiss key investors**
- **Investor commitments** of more than EUR 250 mio.
- **Self regulation:** Member of the Association of Litigation Funders and support of the ICCA-Principles/Best Practices as well as the SIArb Third Party Funding Guidelines



The basics of TPF (1/2)



Core Offering

- Funding **to finance** part, or all, of **the costs of litigation or arbitration**.
- In the event of a win, **funder receives a share of the proceeds**. If the claim is unsuccessful, **funding does not have to be repaid**.
- **Funder does not control the way litigation/arbitration is conducted**.

Clients

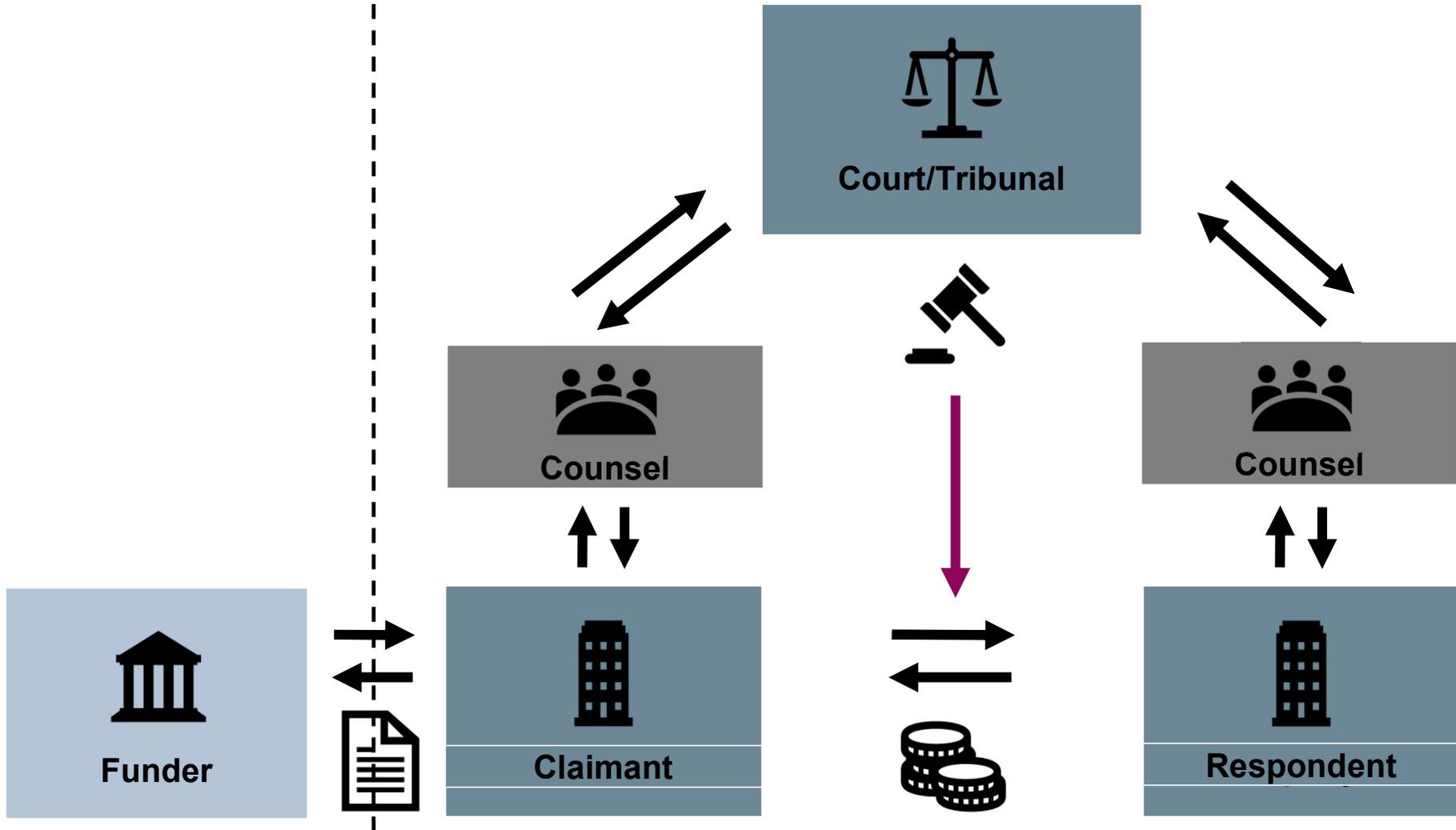
- Private clients
- Corporate clients
- Insolvency practitioners

“Access to justice”
or rather all about
“liquidity, risk & opportunity costs”

Areas of Law

- In principle, all areas of private law
- Focus on corporate & commercial, energy & infrastructure, IP & competition law

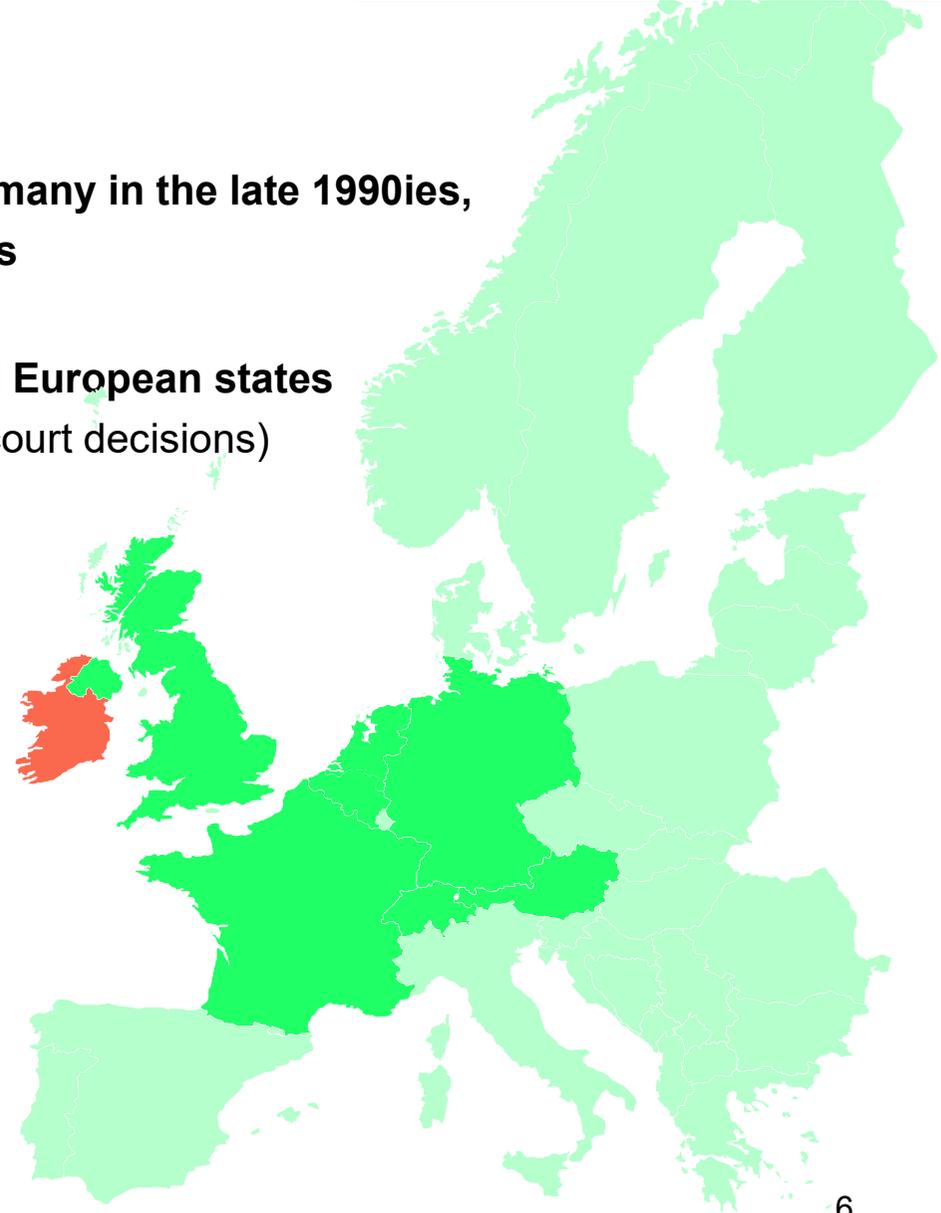
The basics of TPF (2/2)



Development in Europe



- First commercial third-party funder set off in **Germany in the late 1990ies**, **today funders are located in various countries**
- Also, funding is **accepted practice in almost all European states** (in some countries even confirmed by supreme court decisions)
- **Best practices available** (ICCA report, ALF Code of Conduct, SIArb TPF)
- Seen as a **potential answer to increasing costs** of litigation/arbitration
- Traditional litigation funding is increasingly being complemented by modern forms



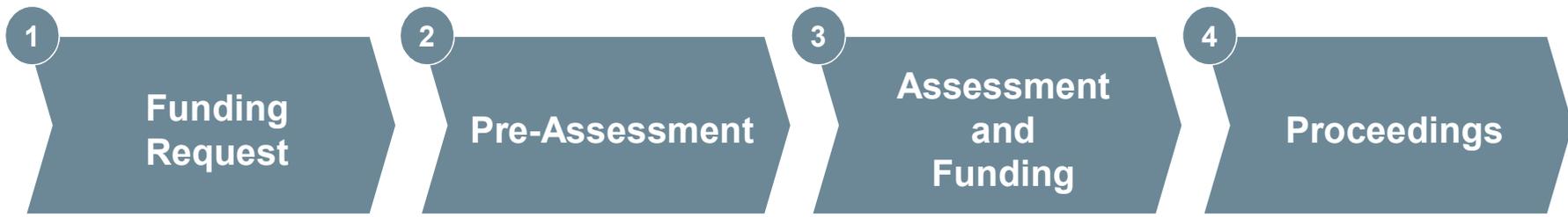
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How Funders work with Counsels and Claimants



	1	2	3	4
Claimant/Counsel	<ul style="list-style-type: none"> - Request for funding <ul style="list-style-type: none"> - good legal merits - creditworthy defendant - claim value > EUR 7.5m - Delivery of high level information on legal case and background 	<ul style="list-style-type: none"> - Delivery of first batch of case documents and - draft claim and/or legal opinion covering factual & legal background, merits, estimate of damages, budget and plan for enforcement 	<ul style="list-style-type: none"> - Signing of Litigation Funding Agreement: <ul style="list-style-type: none"> - Fix terms of funding - Grant period of exclusivity to conclude detailed assessment - Provide access to case data (room) 	<ul style="list-style-type: none"> - Independent prosecution of the claim - Regular information and billing (usually monthly) - Communication with funder along pre-defined milestones
Nivalion	<ul style="list-style-type: none"> - Conduct conflict check - Execution of Confidentiality Agreement - Conduct investment check (merits, recoverability, economics and legal team experience) 	<ul style="list-style-type: none"> - Conduct pre-assessment - Delivery of non-binding offer within 2-3 days - Set-out of pricing and other terms in draft Litigation Funding Agreement 	<ul style="list-style-type: none"> - Detailed due diligence review and assessment - Interim discussion and interview with counsel and claimant - Investment decision usually within 4 weeks after claimant's signing of Funding Agreement 	<ul style="list-style-type: none"> - Payment of invoices in line with the Funding Agreement and Budget - Communication with counsel/claimant along pre-defined milestones

Case Characteristics



- **Minimum Amount in Dispute**
 - EUR 100'000 up to a high single-digit million amount
- **Good Chances of Success**
 - Starting from 60-70%
- **Financial Standing of Counterparty and Enforceability**
 - Claimant must actually receive funds
- **Cost / Income Ratio**
 - The funder shall receive a multiple of its invested costs while the claimant shall retain the bulk of the proceeds

Funding Process



- **Funding Request**
 - Conflict Check
 - Confidentiality Agreement
 - Investment Check
- **Assessment of Case and Signing of Litigation Funding Agreement**
 - Pre-Assessment with summary legal and comprehensive economic review of case
 - Term Sheet: terms of funding und exclusivity period
 - Detailed case assessment and finalization of litigation funding agreement
- **Conducting of Proceeding**
 - Strict separation of roles between funder and lawyers
 - Funder has right to say in all steps that potentially entail a disposal of the claim in dispute

Pricing Details



Budget/Recovery & Return Expectations

- Case budget should not exceed 10% of the expected litigation recovery
- Return expectations depend on the individual case risk but are generally around 20% p.a. of the budget

Success Fee: Calculation and Models

- Basis of success fee is **amount that client has received**
- Pre-agreed success fee based on **risk assessment, budget, actual investment and duration of proceedings**
- Today often **multiple-approach** rather than **percentage-approach**
- Often increased success fee for long lasting proceedings

“Waterfall-Logic”

- Step 1: Funder gets a **reimbursement** of the invested costs
- Step 2: **Success fee** according to funding agreement, often a combination of «Priorities», «Floors» und «Catch-ups»

Value added



In general

- Shifting the entire **financial litigation risk** from the client to the funder
- **Independent assessment** of legal & commercial merits
- Potentially **improved settlement prospects** due to financial strength

For corporate clients

- The client's financial resources are preserved for its **core business**
- No negative **accounting impact** of litigation costs
- Availability of **funding of claim portfolios**
- Availability of **monetization of claims**

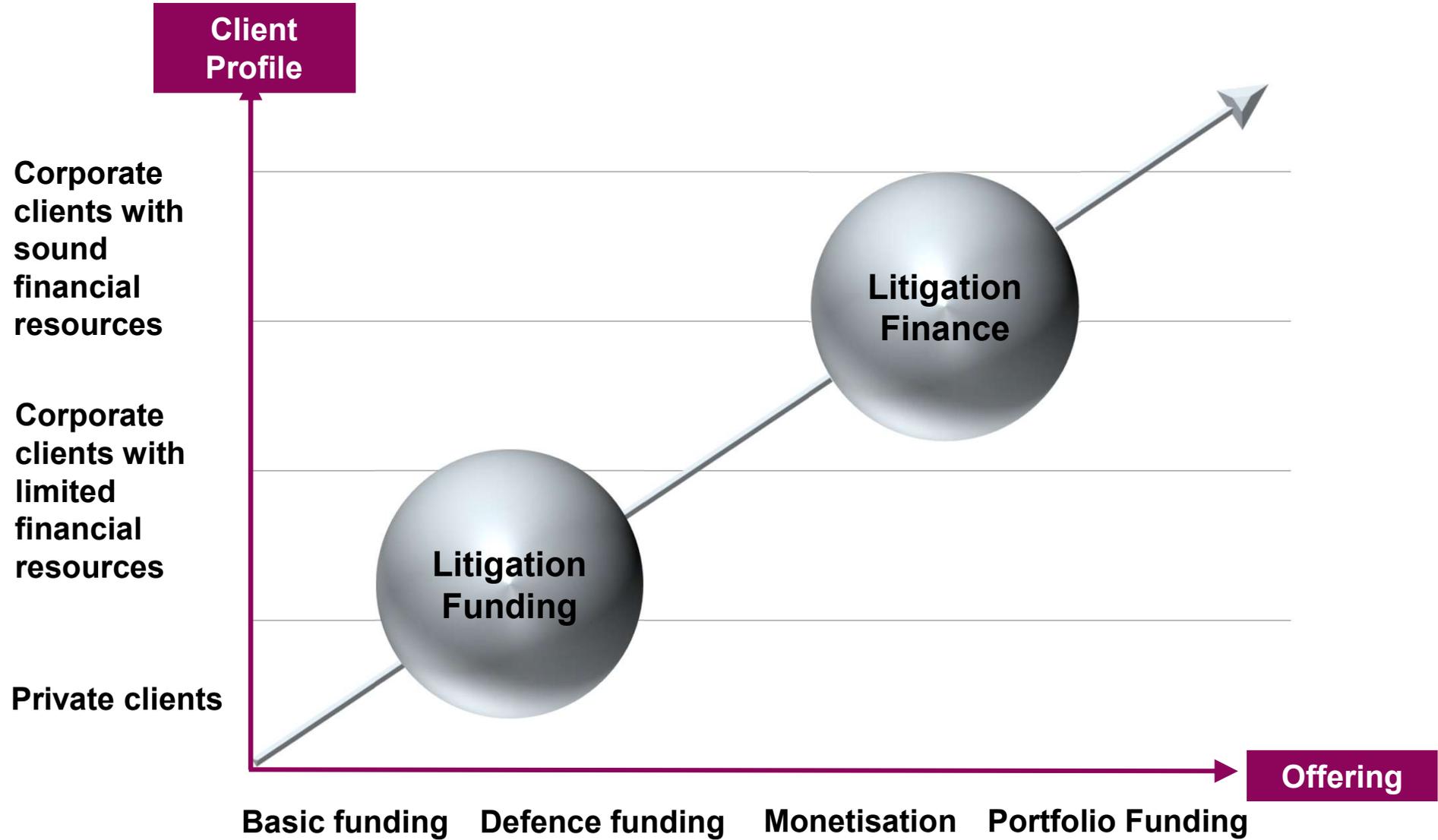
For lawyers

- Legal **invoices will be paid** reliably and timely
- Possibility to rely on **additional expert support** in managing disputes
- **Increased competitiveness** by including funding options in pitches

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Development of Litigation Funding



Changed Client Profile



- **Parties with Limited Financial Resources (Private Clients and Companies)**

- Third-party funding provides access to justice
- David vs. Goliath

- **Solvent Companies**

- Third-party funding as a finance- and risk-management tool
- Outsourcing of costs and risks of litigation / arbitration
- Keep liquidity for the core business
- Financial accounting advantages

Changed Offering



- **Defense case funding**
- **Combination with ATE insurance**
- **Monetisation**
 - Counterparty appeals against a favorable first-instance judgment; or
 - Final judgment has to be enforced
 - Funder assumes costs of proceeding and pays an advance on the judgment amount
- **Portfolio Funding**
 - Funding of several claims
 - Better financial terms and higher risk-tolerance of funder
 - Tailor-made solutions

«Whether in favour or against, third-party funding of litigation and, more recently, arbitration, is an undeniable and important reality»

Prof. Bernardo M. Cremades



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