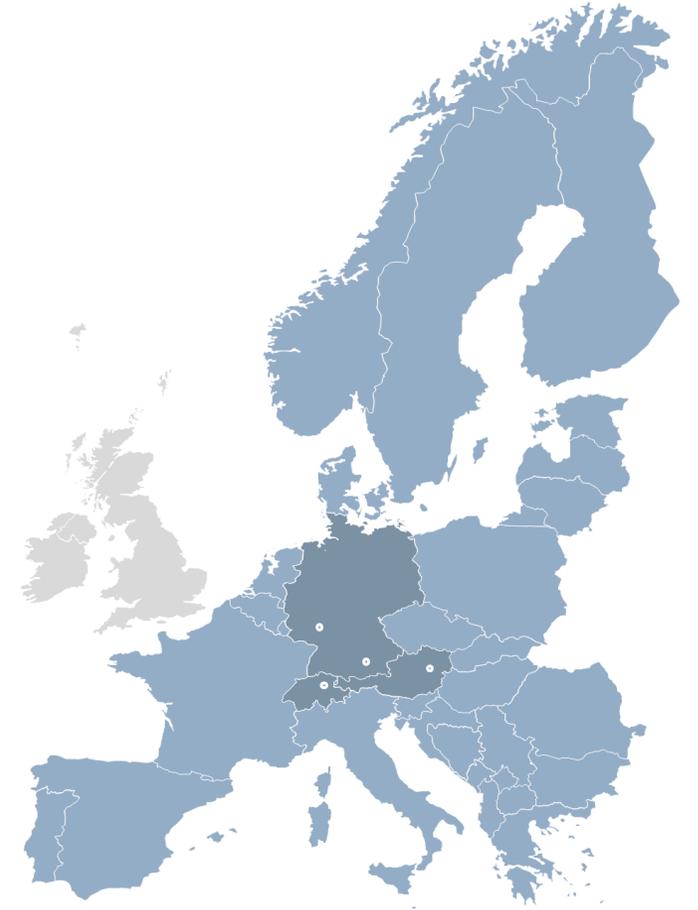


INTRODUCTION TO TPF
IN CIVIL LAW JURISDICTIONS

NIVALION

About Nivalion

- Swiss legal finance provider with offices in Zug, Munich, Frankfurt and Vienna
- Civil-law rooted with a strong footprint in Continental Europe
- Financing of court-based litigation and arbitration
- 29 professionals with substantial experience in dispute financing and private practice in leading law firms
- Financial strength of Swiss core investors, total investor commitments of > EUR 250 million
- Member of the International Legal Finance Association (ILFA), compliant with the ICCA Principles/Best Practices and the SIArb Third Party Funding Guidelines



Basics of Litigation Funding (1 | 2)

Core Offering

- Funding all or part of the costs of litigation/arbitration **including adverse costs** (→ ATE-insurance)
- If successful, the funder receives a share of the proceeds. If unsuccessful, the funded party does not repay the funder (**fully non-recourse**)
- **Clear separation of roles:** Funder does not control the litigation/arbitration

Users

- Corporate claimants (and defendants)
- Insolvency practitioners
- Private claimants

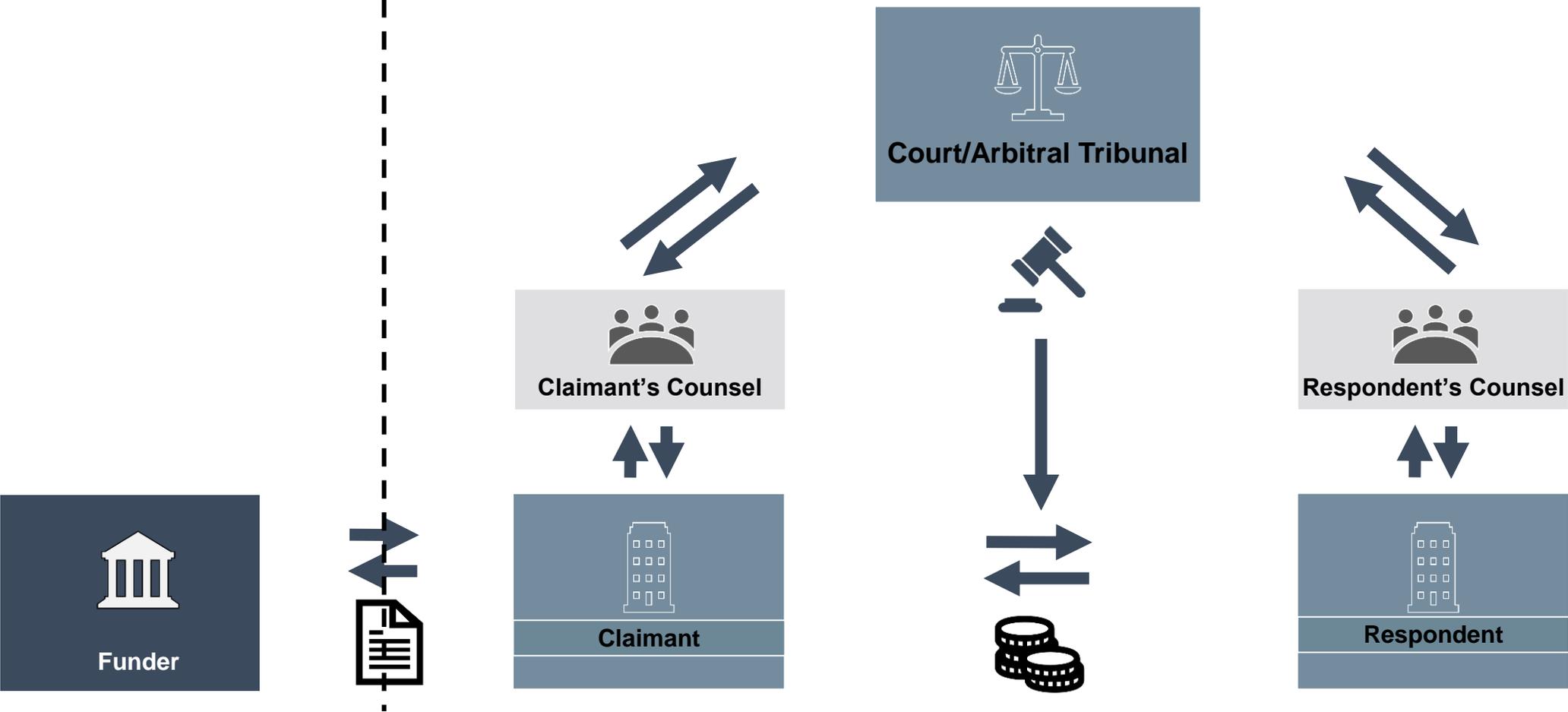
Areas of law

- In principle, all areas of law (focus on corporate & commercial)

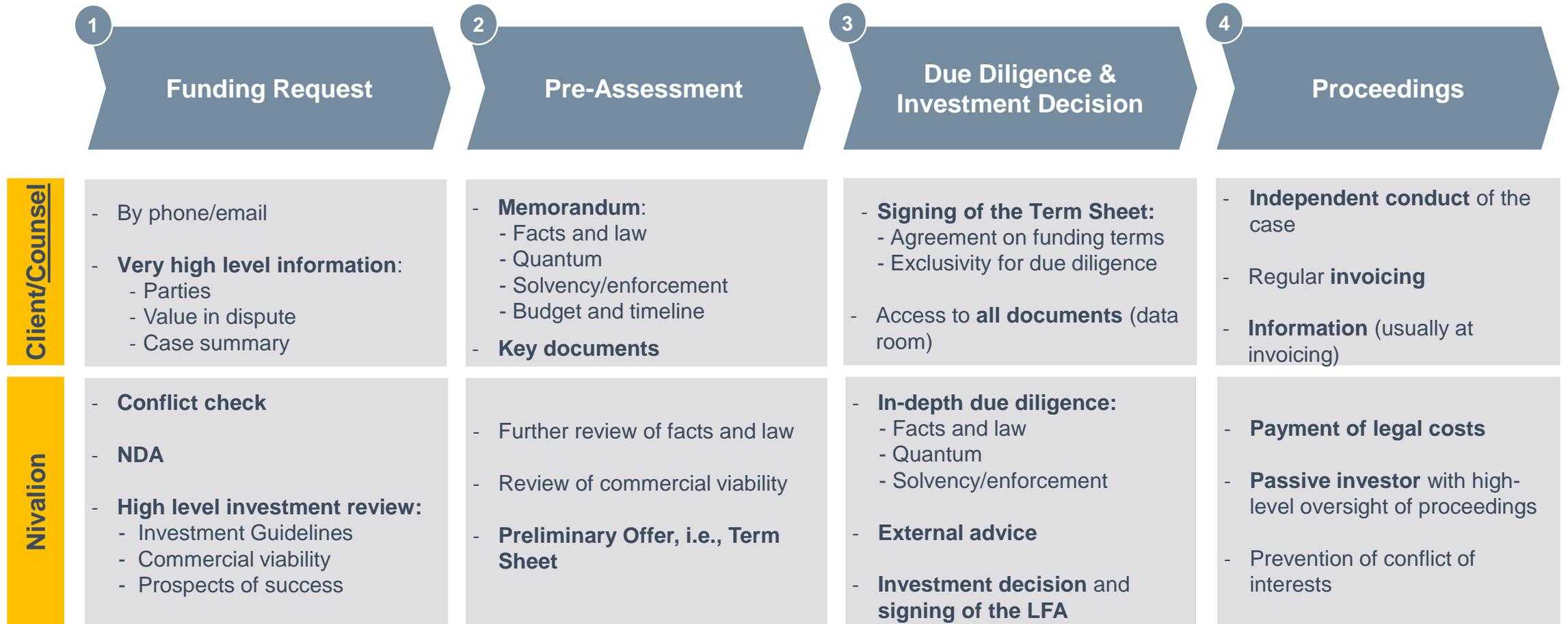
Cases Fit for Funding

- At any stage funding (at outset, during proceedings or at enforcement stage)
 - Claim size & case budget
 - Good prospects (facts & evidence, merits, overall predictability)
 - Solvency & enforceability
 - Lawyers & client
- Low
Risk
Appetite

Basics of Litigation Funding (2 | 2)



Funding Process



Pricing (1 | 2)

Budget vs Recovery

- **Case budget** should not exceed 10% of the **expected litigation recovery** (“1:10 rule”)
- Reason: **Greater share of recovery should remain with funded party**
- High budget combined with small expected recovery makes a case unsuitable for funding

Success Fee: Calculation and Models

- **Basis for calculation** is the amount of the claim **awarded** by a court/tribunal **and enforced**
- Pre-agreed success fee based on **risk assessment, budget, and duration**
- Success fee mainly based on a **multiple on committed capital**, sometimes combined with **percentage of proceeds** (often with a “cap”)
- Success fee increases with **duration** of proceedings

Waterfall

- 1: Funder receives **success fee**
- [2: Lawyer receives **partial contingency fee** (sometimes pari passu with funder)]
- 3: Funded party receives the **remainder**

Pricing (2 | 2)

Step 1: A time dependent multiple (the “**Multiple**”) on the Commitment as per the following table:

| Period from signing the Agreement to receipt of Proceeds | Multiple |
|---|-----------------|
| Up to 12 months | 1.60 |
| Exceeding 12 months up to 30 months | 2.35 |
| Exceeding 30 months up to 42 months | 2.85 |
| Exceeding 42 months up to 60 months | 3.30 |
| Exceeding 60 months | 3.80 |

plus

Step 2: An additional percentage share of the gross Proceeds (the “**Percentage**”) recovered in connection with the Funded Litigation as per the following table:

| Gross Proceeds | Percentage |
|---------------------------------|-------------------|
| Up to CHF 10m | 0% |
| Exceeding CHF 10m up to CHF 18m | 2% |
| Exceeding CHF 18m | 4% |

Example:

Funder’s Commitment: 2’150’000

Claimant recives EUR 18’300 EUR after 40 months

Funder’s Share as per Step 1:

EUR 6’128’000

(2’150’000 x 2.85)

Funder’s Share as per Step 2:

EUR 160k + EUR 12k

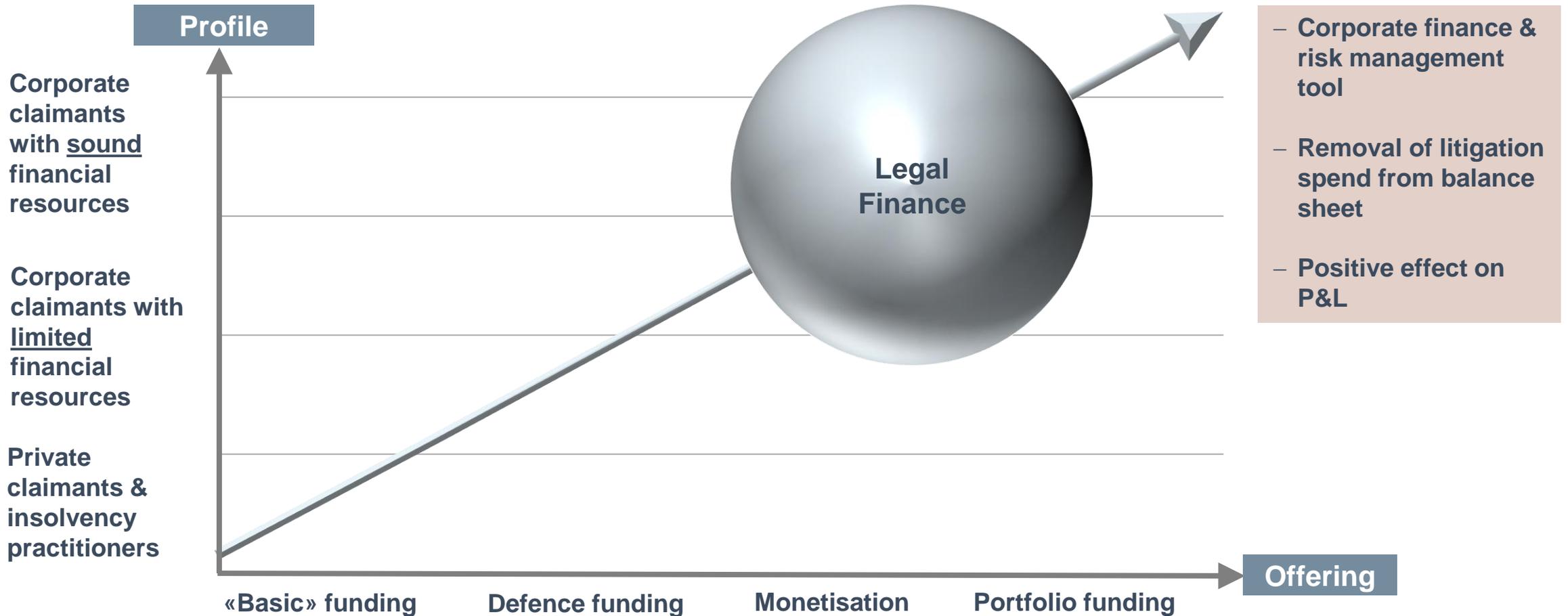
(8m x 2% + 300k x 4%)

Total for Funder: 6’300’000

Remaining for Claimant: 12’000’001

= 68% of Proceeds

Access to Justice vs Managing Legal Cost and Risk



Advising Clients on TPF

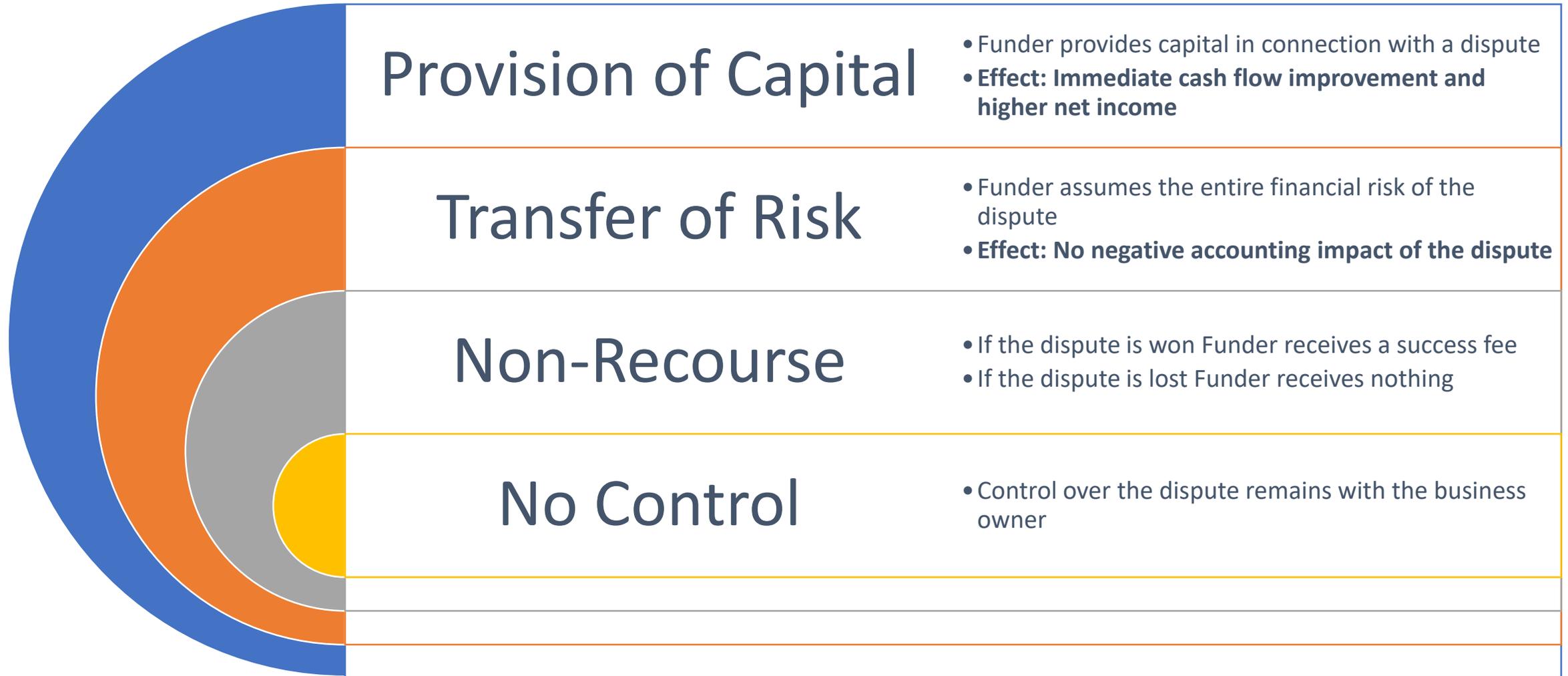
Get ready...

- Become familiar with litigation funding (basic knowledge)
- Assess the market and available funding options/products

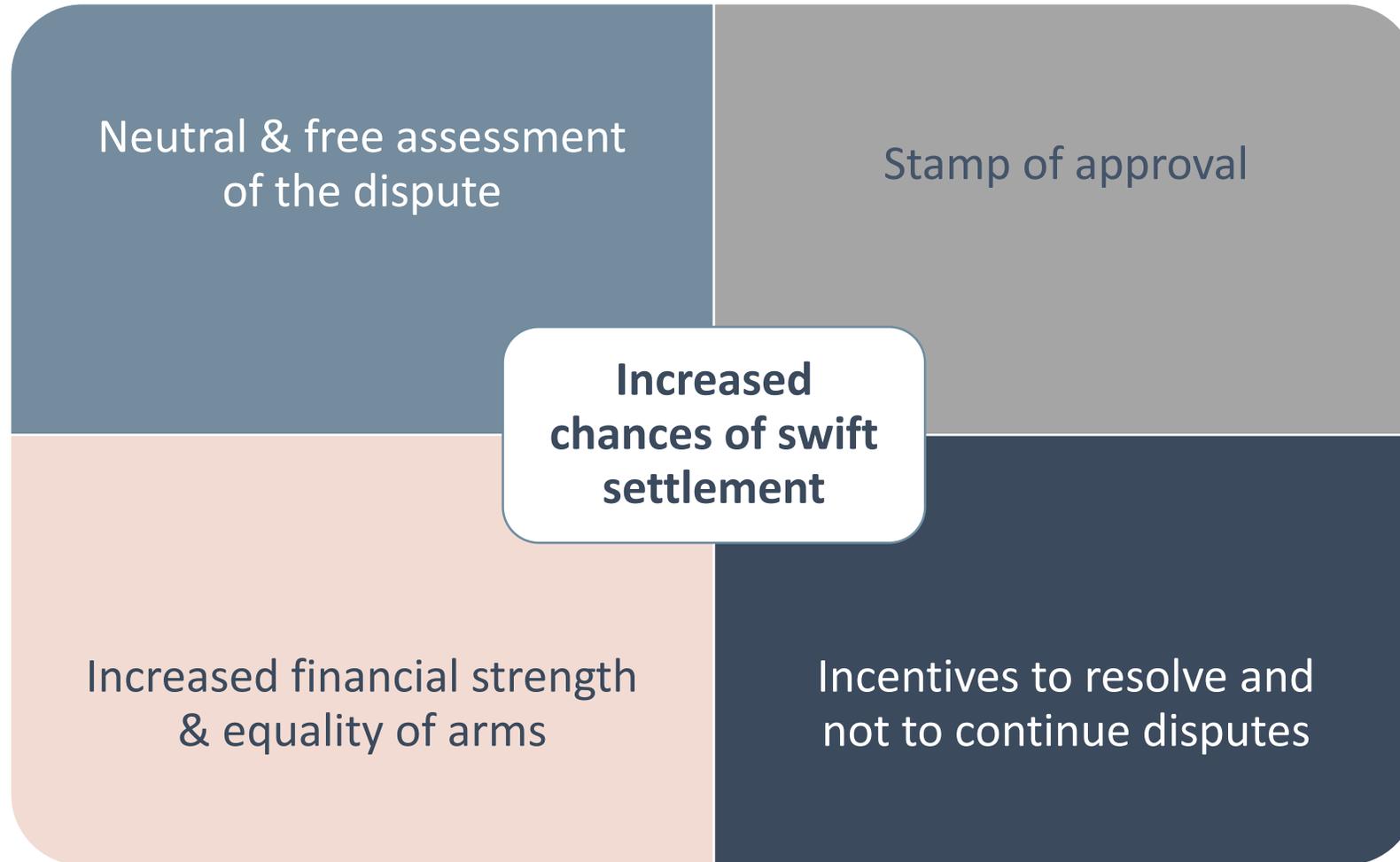
...for your first funding request

- Consider **timing** (funding process will take several weeks, sometimes more)
- Be **selective** when choosing a funder:
 - Professional and trustworthy funder adhering to industry best practice? (e.g., member of the International Legal Finance Association?; auditor?; track record?)
 - Passive or active funder?
 - Background and experience of case team?
- Know how to **scrutinise a litigation funding agreement**:
 - Are all costs covered (e.g., adverse costs, security for costs, historical costs)?
 - Calculation of the funder's return?
 - Termination rights?
 - Funder's involvement in the conduct of the proceedings?

Legal Finance Turns Disputes Into Assets



Legal Finance Speeds-Up Dispute Resolution



Contact



Dr. Isabelle Berger
CIO | Partner

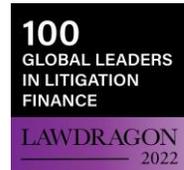
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WWL
THOUGHT LEADERS



Isabelle Berger is Nivalion’s Chief Investment Officer, responsible for Nivalion’s investment underwriting & management and human resources. She is recognised by Who’s Who Legal as a Thought Leader in Third Party Funding, by Lawdragon as an outstanding litigation funder and by Leaders League as a leading litigation funder in France. Before joining Nivalion, Isabelle was in private practice for over 10 years specialising in dispute resolution at leading Swiss law firms Homburger and Schellenberg Wittmer. She graduated in law from the University of Berne (lic. iur., best graduate student award), holds a PhD in law (Dr. iur., summa cum laude) and is admitted to the Swiss bar. Isabelle regularly publishes and speaks on dispute resolution issues, She speaks German, English and French.

“Isabelle, in particular, is very, very impressive, and a nice person to work with.”

*Third party providing feedback for
[Chambers Litigation Support 2021](#)*

Nivalion AG

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6312 Steinhausen | Zug
Switzerland

Nivalion AG

Redwitzstraße 4
81925 München
Germany

Nivalion AG

Opernplatz 14
60313 Frankfurt am Main
Germany

Nivalion AG (Austria)

Fichtegasse 5
1010 Wien
Austria

Settlement and Termination: Standard Clauses

Settlement

Claimant shall at all times keep Nivalion apprised of any settlement offers and/or settlement discussions and not make, accept or reject a settlement offer without prior consultation with Lawyers and Nivalion. For the avoidance of doubt, subject to such consultations, Claimant shall be **free to at any time make, accept or reject an offer of partial or full settlement** of the Disputed Claims.

Termination

Case prospects

Nivalion may terminate this Agreement within 30 calendar days from [...] **if the Proceeds are likely to be insufficient to reimburse Nivalion the full amount of its Commitment.**

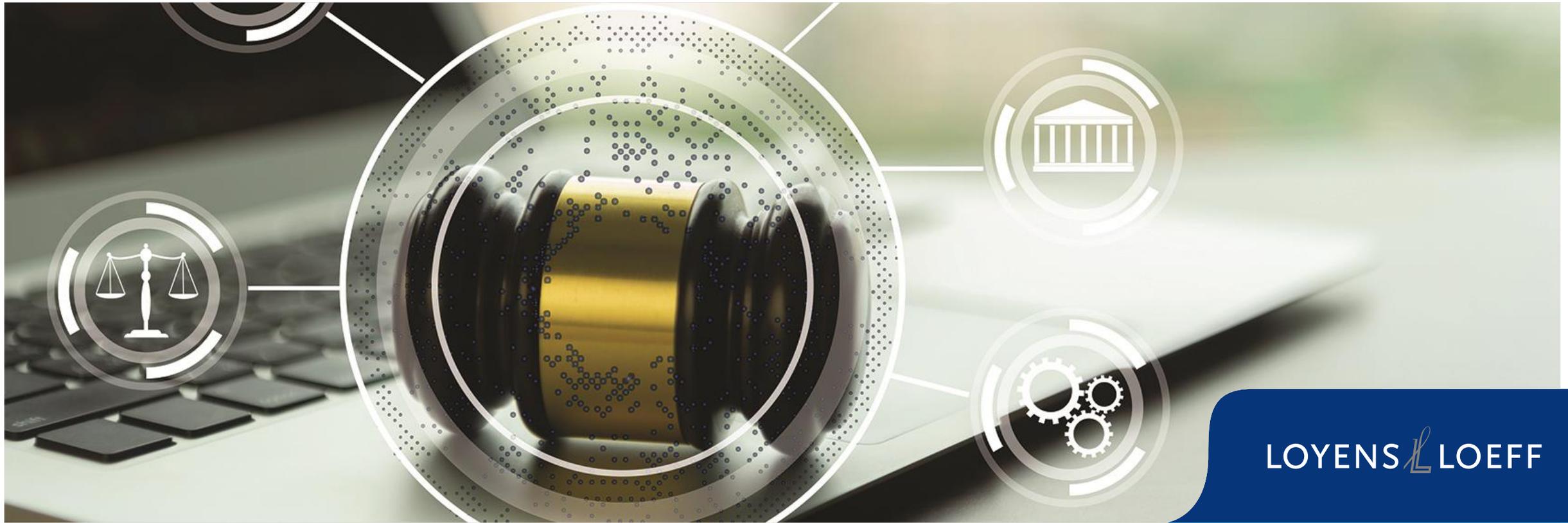
Nivalion shall remain obliged to pay the Costs of Litigation that were incurred by Claimant prior to the sending of the email providing notice of termination of the Agreement.

Termination

Breach of contract

If Nivalion considers that **Claimant has breached an obligation under this Agreement**, it shall notify Claimant of such breach in accordance [...]. In its notice, Nivalion shall set a reasonable time limit for Claimant to cure the alleged breach (“Notice Period”). If Claimant fails to cure the breach within the Notice Period, Nivalion may terminate the Agreement with immediate effect.

Claimant shall reimburse Nivalion within 30 calendar days its Actual Investment.



LOYENS  LOEFF

LITIGATION & RISK
MANAGEMENT

Third-party Litigation Funding in Luxembourg

Current practice and future developments

15 November – Olivier Marquais

Agenda

1. Introduction
2. TPF and the Luxembourg agenda
3. Whether and how to regulate TPF
4. Suggestions I – Through the LFA
5. Suggestions II – Through the corporate structure

1

Introduction



2 TPF and the Luxembourg agenda

A. BENEFITS FOR THE LEGAL COMMUNITY

- i. Access to justice, brings forward meritorious claims**
- ii. Cold hard objective look at finances**
- iii. Externalizing the costs of litigation**

B. INCREASING VISIBILITY AS A PLACE OF ARBITRATION

- i. Modernizing arbitration law**
- ii. Modern (ICC inspired) arbitration rules**
- iii. Logistics, pool of arbitrators, more arbitration practitioners, etc.**



3

Whether and how to regulate TPF

A. PROTECTING CLIENTS, ADVERSE PARTIES, LAWYERS

- i. Self-regulation provides no protection
- ii. Avoid opportunistic newcomers seeking a quick return (*Excalibur Ventures LLC v. Texas Keystone LLC* [2016] EWCA Civ 1144)

B. PROVIDING CERTAINTY TO INCREASE FUNDERS' OFFERING

- i. Funders' similarities and differences
- ii. Increasing tools available to litigants

C. REVIEWING SUCCESSFUL FOREIGN MODELS

- i. SG's law imposes requirements, amends relevant laws
- ii. Instruments of soft laws, guidelines establishing best practices



4 **Suggestions I – Through the LFA**

A. HIGH LEVEL SUGGESTIONS AND OBJECTIVES

- i. Discourage excessive risks & weak due diligence**
- ii. Encourage merits-driven funding & alignment of interests**
- iii. Educate external counsels and clients**

B. IMPLEMENTATION THROUGH THE LFA

- i. Rights and actions of funder contractually provided**
- ii. Reasonable compensation**
- iii. Clarity of roles and control (e.g. choice of counsel, settlement, termination)**



5

Suggestions II – Through the corporate structure

A. LUXEMBOURG'S REGULATORY ENVIRONMENT

- i. Move away from offshore jurisdictions / greater service to investors
- ii. Stricter rules, mix of flexibility and compliance, more investor protection
- iii. Funder's internal organization (ManCo / advising team)

B. INVESTMENT VEHICLES AND LEGAL FORMS

- i. SIFs / RAIFs (sophisticated investors, risk spreading, good fiscal regime)
- ii. SCSp (flexibility, contractual freedom, anglo-saxon equivalent, popular with PERE)