THE THIRD PARTY LITIGATION FUNDING LAW REVIEW

Editor
Leslie Perrin

THE LAWREVIEWS

THE Third-Party Litigation Funding Law Review

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PREFACE

One afternoon in February 2008, my phone rang. It was a partner from a major New York law firm asking if I would like to be a non-executive director on the listing on the Alternative Investment Market in London of a 'third party funder'. I feel now that I was speaking then for (effectively) the entire London lawyer community when I asked my first question: 'What is third party funding?'

Well, now we know! Or do we? The decision by The Law Reviews to publish its inaugural *Third Party Litigation Funding Law Review* is certainly a sign of a substantial build-up of interest in the subject, but the contents of the *Review* itself show that it is perfectly possible for experienced practitioners who are well versed in the subject to differ when it comes to outlining their answers to what is essentially the same question that I asked back in February 2008 – once again, what is third party funding?

Even the naming of third party funding (TPF) can cause difficulties, as besides TPF we have litigation funding, arbitration funding, litigation finance, settlement funding, claims purchase, monetisation (of awards and judgments), law firm funding and in-house legal department finance – the list grows as awareness spreads. Perhaps the best way of describing what TPF has become is 'legal capital'.

The essence of TPF is the deployment of legal capital to fund the realisation of assets that are contingent on the resolution of some form of legal process. If the assets are sufficiently attractive, other things besides (or instead of) legal costs can be funded, including corporate expenses.

Legal capital is (almost) invariably invested on the basis that the investor is without recourse, other than to the proceeds of the legal asset whose realisation is being pursued. The investor's recovery is therefore limited to what can be realised in cash or kind from the legal asset itself. Absent breach, the funded party is not personally liable to the funder and therefore it would almost always be a major solecism to describe a TPF investment as a loan.

There are, of course, fundamental differences in approach between jurisdictions following the common law and those where civil law principles rule, but even within those two broadly distinct systems, there are a host of differences. In the United States alone, there are 50 states with 50 different approaches to describing TPF and how it should (if at all) be regulated.

In general, all common law jurisdictions have various degrees of survival of the ancient doctrines of maintenance and champerty, which historically prevented third parties from intervening in litigation in which they were not already directly involved as parties, although, having said that, maintenance and champerty have been abolished in Australia. On the other wing of opinion, TPF is absolutely forbidden in Ireland, following the Supreme Court ruling

in the *Persona Digital* case. It seems that in Ireland TPF must wait for the legislature to permit it. The civil law, on the other hand, has never held any significant reservations about TPF.

In some common law jurisdictions, there is a difference of approach depending on whether the legal process is arbitration or litigation. In Hong Kong until recently, only insolvency office holders were permitted to access TPF because claims farming remains such a severe problem in personal injury litigation. Now a regulatory framework has been approved in Hong Kong for TPF to operate in commercial arbitration seated there. Singapore immediately followed suit.

Then there are a variety of controversies facing TPF that are generally resolved by individual jurisdictions in individual ways that suit them, thus defying any attempt to identify general principles that apply globally. Currently, those issues tend to revolve around three topics regarding the regulation of TPF providers; whether (and if so, in what circumstances and by what principles) a provider of TPF should be liable in unsuccessful cases to pay the costs of a victorious defendant or to give security for costs; whether disclosure to the court or the arbitral tribunal is required of the fact of TPF being used by a party; and the issue of privilege and confidentiality with reference to documents that are disclosed to a funder by a party to funded litigation or arbitration.

TPF provides access to justice for those who could otherwise not afford to fight their claims, and it brings access to rational commercial risk management for eminently solvent entities who do not wish to expose themselves to the significant costs of resolving their disputes from the own resources. TPF thus serves both those who are unable and those who are unwilling to fund the resolution of their disputes.

Demand grows as acceptance of TPF spreads. Acceptance spreads as law firms increasingly perceive that unless TPF becomes part of their offering, they will become less able to compete for valuable work from every kind of client.

This is a global phenomenon, but the resolution of every dispute by the principal international dispute resolution mechanisms, litigation and arbitration, will be rooted in the law of a particular jurisdiction. The choice of jurisdiction is not always made with wisdom or foresight, and providers and users of TPF sometimes have to reflect that, as the proverb goes, 'as you make your bed so you must lie in it'. This book, covering as it does all the principal TPF centres, should, in the best possible way, help users and providers of TPF to a good night's rest!

Leslie Perrin
Calunius Capital LLP and the Association of Litigation Funders of England & Wales
London
November 2017

Chapter 15

SWEDEN

Johan Sidklev and Carl Persson[1]

I MARKET OVERVIEW

Despite its breakthrough at the global level, third party funding is still a relatively new and unfamiliar phenomenon in Sweden. The subject has barely been discussed by legal commentators and has only been referred to on a few occasions in articles written by Swedish lawyers.[2] Moreover, currently, there does not appear to be a domestic market in Sweden for third party funding. The instances in which third party funding currently occurs in Sweden are probably limited to international arbitration proceedings in which the Swedish element in the dispute is the location of the seat of arbitration in Sweden.

Rather, the type of litigation investment[3] that has been established in Sweden has mainly related to sales of claims for damages. A number of companies have been set up that specialise in acquiring smaller claims, typically damages claims against company directors. Lately, this trend has also evolved into larger damages claims, including claims in cartel cases. Formerly, this was primarily a trend in other Nordic countries, such as Finland, but there is reason to believe that we will see more of this phenomenon on the Swedish market in the future.[4]

In our view, investors that acquire damages claims do not fall within the scope of the type of litigation investment that has come to be referred to as third party funding.[5] However, the case law that has evolved in respect of acquisitions of damages claims is of interest as regards issues such as liability for legal fees and litigation costs when financing disputes via third party funding. For this reason, in Section V below, we will discuss the case law that has evolved in relation to liability for legal fees and litigation costs in conjunction with acquisitions of damages claims.

As noted above, the instances in which third party funding is currently used in Sweden are probably limited to international arbitration proceedings in which the seat of arbitration

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1 Johan Sidklev is a partner and Carl Persson is a senior associate at Roschier Advokatbyrå AB.

2 See, for example, Peter Mühlenbock, 'Tvistinvestering – särskilt om vissa kostnadsfrågor' ['Litigation investment – especially regarding certain issues relating to costs'], *Juridisk Publikation*, 1/2016; and Christer Söderlund, 'Tredjepartsfinansiering av skiljeförfaranden' ['Third party funding in arbitration'], *Juridisk Tidskrift,* No. 4 2015/16.

3 This term also includes investments relating to claims pursued by arbitration.

4 Linn Sundqvist and Gabriel Löwander, 'Pursuing claims in undercapitalised claims vehicles', *Europarättslig Tidskrift*, No. 4 (2014).

5 In this article, third party funding refers to a situation where an investor, that is not party to the proceedings or otherwise connected to the dispute between the parties, is funding the claimant's claim with the sole interest of receiving compensation for its funding by a proportion of the funds that are expected to be received as a result of the legal action. A similar definition is used by Catherine Rogers in *Ethics in International Arbitration* (Oxford, 2014), p. 185.

is located in Sweden. There are currently no statistics available as regards the number of arbitration proceedings that have been financed via third party funding in Sweden. However, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) dealt with 199 arbitration proceedings in 2016.[6] Since third party funding has grown on the international market, it must certainly be the case that at least some of these proceedings have been funded via a third party funder. The authors of this article know for certain that two major arbitration proceedings held in Sweden under the SCC rules were initiated by way of funding from a third party funder between 2014 and 2016.[7]

Since the existing market for third party funding in Sweden is concentrated on large international arbitration proceedings, it is likely that the third party funding market in Sweden is dominated primarily by international parties.

II LEGAL AND REGULATORY FRAMEWORK

There is no legislation or other mandatory rules in Sweden barring the use of third party funding. Consequently, since, historically, there has not been a domestic third party funding market, there has been no reason to regulate these activities, either by way of legislation or self-regulation. Given the perceived absence of a domestic market, it is unlikely that either mandatory rules or self-regulation will be introduced in Sweden in the near future.

In terms of the approach taken by the Swedish courts to third party funding, there is currently no case law relating to third party funding from which we are able to deduce the views of the courts. However, case law does exist in relation to issues that often arise in connection with third party funding, such as conflicts of interest. In relation to these issues, Swedish courts have been inclined to draw inspiration from international guidelines, such as guidelines from the International Bar Association (IBA).[8] It can reasonably be assumed that Swedish courts will take a similar approach with respect to third party funding as well (i.e., they will be guided by international guidelines in these areas). This issue is discussed in more detail in Section IV.

As noted above, another interesting development in Swedish law that could have repercussions for third party funding is that Swedish courts have recently become increasingly inclined to impose liability for legal fees and litigation costs in relation to the use of what are referred to as 'claims vehicles'. The courts have held in several cases that shareholders can be held personally liable for paying legal fees and litigation costs.[9] The case law that appears to have evolved is that such liability will be deemed to exist in cases where the third party has been the effective beneficiary in the dispute and the claim has been transferred to a company in a poor financial condition for the purpose of limiting the adverse financial consequences of a negative outcome in the dispute. In taking this approach, the Swedish courts appear to be trying to put a stop to arrangements whereby a creditor transfers a claim to a party that does not have the financial resources to discharge the liability for legal fees and litigation costs in the event the claim is unsuccessful, while the creditor retains a financial interest in the outcome of the dispute if the claim is successful. The situation relating to claims vehicles

6 Statistics from the SCC; http://sccinstitute.se/statistics/.

7 The cases have been financed by third party funders from the United Kingdom.

8 Case reported on p. 841 in NJA 2007. Stefan Lindskog, *Skiljeförfarande: En kommentar* [*Arbitration: A commentary*] (2nd edn), p. 4.

9 Case reported on p. 877 in NJA 2014 and on p. 420 in NJA 2006.

does not apply directly to the situation in which a third party funds a claim in litigation or arbitration proceedings. However, the underlying problem is the same, or, in any event, related. Therefore, liability for legal fees and litigation costs is discussed in more detail in Section V below.

The rules currently in effect that are most similar to the type of investment agreement entered into between a company and a third party funder are the Swedish Bar Association's rules concerning risk agreements. A risk agreement is an agreement under which the lawyer's fees are based fully or partially on the outcome of the dispute.[10] Thus, similarly to third party funding, a lawyer that has entered into a risk agreement has a direct financial interest in the outcome of the dispute. Of course, a difference between the various arrangements is that a lawyer performs work on the client's behalf, while a third party funder finances the legal action in return for a proportion of the funds that are expected to be received as a result of the legal action. However, the principle behind both phenomena is the same: a person independent of the client invests in the dispute, either in the form of work or capital, and hopes to be able to obtain a positive outcome financially. In light of this, it is worth taking a closer look at the rules and views on risk agreements under the Bar Association's rules.

In Sweden, financial interests of lawyers in the disputes in which they act are governed by the Bar Association's Code of Professional Conduct (CPC). The main principle under the CPC is that fees charged by lawyers must be reasonable.[11] In assessing what constitutes a reasonable fee for work performed, the following factors can be taken into account: what has been agreed with the client, the scope and nature of the work, its complexity and importance, the lawyer's expertise, the result of the work, and other similar factors.[12]

According to the CPC, unless there are special grounds for doing so, lawyers are not permitted to enter into risk agreements, namely agreements under which the lawyer's compensation for work performed constitutes a percentage of the amount recovered by the client.[13] The special grounds are deemed to exist primarily where a party would otherwise be unable to bring its legal action (access to justice) or where the arrangement constitutes part of a larger international dispute based on a contingency fee agreement.

Consequently, the prevailing principle concerning risk agreements for lawyers is that they are essentially prohibited in Sweden. The exemptions from this general rule have been applied restrictively by the Bar Association's Disciplinary Committee. In a case heard by the Disciplinary Committee, a risk agreement was not permitted, resulting in the lawyer being reprimanded.[14] This was despite the fact that the client proposed the arrangement and the client explained that the action would not be brought unless the lawyer accepted the risk agreement. In that case, an agency had contacted a lawyer to investigate from a legal perspective the prospects of recovering unpaid royalties. The parties agreed that the lawyer would receive 25 per cent of the royalties received in exchange for the lawyer bearing all the costs and being compensated for the work the lawyer performed. The majority of the Disciplinary Committee held that special grounds did not exist for permitting the risk agreement. As far as we are aware, as of the date of this article, the Disciplinary Committee has given no rulings in which risk agreements have been permitted.

10 In Sweden, the unsuccessful party is liable in full for the opposing party's legal fees and litigation costs.

11 Section 4.1.1 of the CPC.

12 Section 4.1.2 of the CPC.

13 Section 4.2.1 of the CPC.

14 Disciplinary Committee's decision in D-2014/1967.

An alternative to a risk agreement is what is referred to as a 'conditional fee' arrangement relating to the lawyer's fees. This entails that the lawyer's fees can be increased or reduced based on the outcome of the dispute. In respect of this type of arrangement, the CPC states that an agreement under which the lawyer assumes a financial risk in relation to the outcome of the case does not have to mean that the lawyer's financial self-interest in the case will be disproportionate or could otherwise have an adverse effect on the way in which the lawyer performs his or her work on the case.[15] Consequently, the proportion between risk and reward should be reasonable.

As regards conditional fees, the situation is not as clear cut under the CPC. There is no case law from the Bar Association or indeed the courts to provide guidance on this type of arrangement. However, in our view, these types of agreements should be permitted under the CPC, since they do not relate to a percentage of the amount recovered by the client and, therefore, do not constitute a risk agreement.

In summary, it can be stated that third party funding is an unregulated practice in Sweden. However, it is clear from the above that Sweden takes a restrictive view of lawyers taking financial risks and becoming involved in financial interests. As explained above, the likelihood of lawyers participating in third party funding in their work is very limited. Consequently, third party funders who engage Swedish legal counsel will need to accept that Swedish lawyers charge fees based on traditional fee models, possibly with the exception of conditional fees. However, in our view, there is currently no risk of the Bar Association's stringent rules concerning lawyers taking financial risks in any way being reflected in a general Swedish approach to third party funding agreements. As stated above, we believe that third party funding will continue to be permitted in Sweden and continue to be unregulated.

III STRUCTURING THE AGREEMENT

In light of the fact that there is no domestic third party funding market in Sweden, no common practice has developed in terms of the typical structure of an agreement between the claimant and the investor. As mentioned above, litigation investment on the Swedish market has generally related to transfers of damages claims. The transfer agreement is diametrically different from an investment agreement. This type of transfer is also covered by legal provisions setting out how the acquirer of the damages claim can take over the action.[16] However, this type of issue does not arise in the case of third party funding, since third party funding does not generally involve any transfer of the damages claim.

However, a number of other interesting issues arise in the case of third party funding, such as in relation to exclusivity, settlements and confidentiality. All these issues cannot be addressed within the scope of this article. Instead, we will focus on problems that can arise from the fact that, in principle, a lawyer can represent two parties where third party funding is used (i.e., both the claimant and the investor), and how this situation should be dealt with.

As regards the relationship between the claimant and the investor, initially the lawyer should make it very clear that the claimant is the client, which should also be stated in the

15 Section 4.2.2 of the CPC.

16 In the case of transfers of damages claims in litigation proceedings, the conditions that must be met for the third party acquirer to take over an ongoing action are set out in the Swedish Code of Judicial Procedure. If the claimant transfers the claim, the third party acquirer will be permitted to assume the claimant's claim and take over the action.

investment agreement between the claimant and the investor. Even though this relationship is evident, situations could arise that result in the lawyer facing serious ethical challenges. The following example illustrates this. Generally, investment agreements provide for a right for the investor to terminate the agreement if the prospects of success in the dispute diminish. If a lawyer perceives that because of some factor or other the legal action has changed to diminish the prospects of success, the lawyer is undoubtedly under a duty under the CPC to inform the client (i.e., the claimant).[17] A lawyer's primary duty is a fiduciary duty to his or her client.[18] However, the question is whether the lawyer is under an equivalent duty to the investor (i.e., whether the investor should also be informed of the poorer prospects of success). This question is further complicated by the fact that under the agreement the claimant is generally always under a contractual obligation to inform the investor of such circumstances. In all likelihood, the correct solution for the lawyer in this situation is to inform the claimant of the new circumstances and then remind the claimant of its contractual obligation to inform the investor.[19]

The situation described above is rendered even more difficult if the investor pays the lawyer's fees (which is typically the case) and the lawyer has agreed to regularly update the investor on the dispute (which is also typically the case). In this situation, the lawyer could owe a fiduciary duty to the investor, meaning that both the claimant and the investor are the lawyer's clients. If a claimant in this situation tells the lawyer that under no circumstances should the investor be informed of the new circumstances that have diminished the prospects of a successful outcome in the dispute, the lawyer will probably be placed in an impossible situation. In such a case, the lawyer would probably have no choice other than to decline to act for the client in the dispute. This means that, where possible, the lawyer should explain his or her role carefully to both the claimant and the investor at the outset of the engagement. If the lawyer assumes a role that could result in the laywer owing a fiduciary duty to the investor, the lawyer should explain clearly to the claimant what effect this has on the lawyer's role. The claimant must also comply in full with the provisions of the investment agreement to avoid placing the lawyer in an impossible situation, where the lawyer may ultimately be compelled to decline to act for the claimant in the dispute. The example given is only one of many examples of issues that need to be taken into account and considered in relation to third party funding. Accordingly, a great deal of importance should be placed on how the investment agreement is structured to ensure that the agreement also works for all the parties involved.

IV DISCLOSURE

Another interesting question in the context of third party funding is the extent to which a claimant that receives third party funding is under an obligation to disclose this to the arbitral tribunal or the other party to the dispute. This question is strongly linked to the requirement for an impartial and independent arbitral tribunal, which constitutes a fundamental principle

17 Section 2.3 of the CPC.

18 Section 1 of the CPC.

19 In this respect, it should be noted that a lawyer is not permitted to assist in the investor's deceptive conduct, according to the commentary on Section 1 of the CPC.

in both domestic and international arbitration proceedings. The main question that arises is how the arbitral tribunal will be able to ensure its independence if it is not informed that a party is being funded by a third party.

As the law now stands, the parties in arbitration proceedings are not under an obligation to inform the arbitral tribunal that they are being funded by an investor. No such obligation is imposed on the parties under Swedish legislation (i.e., the Swedish Arbitration Act (SAA)) or the rules of any arbitration institution (i.e., the SCC's rules). Furthermore, there are no such rules relating to litigation proceedings.

The general rule under Section 8 of the SAA is that an arbitrator must be impartial and that, upon application by a party, an arbitrator can be discharged if there is any circumstance that could diminish confidence in the arbitrator's impartiality. The assessment of whether an arbitrator is impartial must be objective.[20] Section 9 of the SAA imposes an obligation on the arbitrator to inform the parties and the other arbitrators of circumstances that, according to Section 8 of the SAA, might be considered to prevent the arbitrator from serving as an arbitrator in the proceedings.

The question of a third party funder's impact on the assessment of impartiality under Section 8 of the SAA has not been addressed by Swedish courts or in the preparatory works. In the absence of any guidance in this respect, the question that should be asked is what prospects a Swedish court has of ensuring that international guidelines relating to third party funding, such as the IBA Guidelines on Conflicts of Interest in International Arbitration (the IBA Guidelines), are applied in assessments that are made under Section 8 of the SAA.

In this respect, the Supreme Court has stated that, based on the similar rules and the international elements that are often present, when assessing impartiality, not only should the provisions of the SAA be observed, but the way in which international rules and guidelines are applied should also be taken into consideration.[21] In a Supreme Court case, it was held that circumstances existed that could diminish confidence in the arbitrator and stated that this position was supported by, among other things, the IBA Guidelines.[22] The same reference to the IBA Guidelines was subsequently also made in a later Supreme Court case.[23] Consequently, in this respect, case law appears to be relatively clear that Swedish courts can derive guidance from international rules when determining matters relating to, for example, conflicts of interest. This has also been confirmed by leading authorities in the area, such as the current President of the Supreme Court, Stefan Lindskog.[24] This principle applies not only in international arbitration proceedings, but also in domestic arbitration proceedings.

In light of the above, it is of interest in respect of third party funding that the IBA Guidelines have contained the following provision since 2014:

> *If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party.*[25]

20 Stefan Lindskog, *Skiljeförfarande: En kommmentar* [*Arbitration: A Commentary*] (2nd edn), p. 414.

21 Case reported on p. 841 in NJA 2007.

22 Case reported on p. 841 in NJA 2007.

23 Case reported on p. 317 in NJA 2010.

24 Stefan Lindskog, *Skiljeförfarande: En kommmentar* [*Arbitration: A Commentary*] (2nd edn), p. 412.

25 IBA Guidelines, General Standard 6(b).

This means that, in certain situations, third party funders can be deemed to be comparable to a party to the proceedings whose claim the investor has funded.

The commentary on the above provision also states that a third party funder 'may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party'.[26]

Consequently, it follows from the above that an assessment should be made on a case-by-case basis as to whether a third party funder 'may be considered to bear the identity' of the party funded by the third party. As far as the commentary is concerned, since a third party funder is generally likely to fall within the scope of the provision, it will bear the identity of the claimant.

According to General Standard 7(a) of the IBA Guidelines, the parties are required to disclose any relationship with the arbitrator. In accordance with what has been stated above, the parties' duty of disclosure of any relationship between the arbitrator and the party has been extended to relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, such as an entity providing funding for the arbitration, or having a duty to indemnify a party for the award.[27]

In our experience, it is rarely the case that parties agree that the IBA Guidelines should apply, but the rules can still be of major importance in making assessments as regards impartiality in the Swedish courts, since the Supreme Court has previously attached importance to these rules. The fact that the rules are generally not binding on the parties means that it is still up to them to determine at their discretion whether or not they want to disclose the fact that they are receiving third party funding. It has been argued in this respect that the arbitrators cannot be deemed to have a conflict of interest if they are not aware of the conflict. However, under Swedish law, the question of whether there is a conflict of interest is determined based on an objective assessment as set out above. This probably means that a Swedish court will not take into consideration whether the arbitrator has been influenced by the conflict of interest when determining whether or not the participation of the third party funder amounted to a conflict of interest.

Accordingly, in light of the above, a claimant and a third party funder run a risk under Swedish law if they fail to disclose that the action is being financed via a third party funder. There is an inherent risk that this fact will be discovered at a later time, which could amount to a conflict of interest under the SAA. During the arbitration proceedings, the arbitrator could be discharged if it turns out that the relevant circumstance could diminish confidence in the arbitrator's impartiality. If the conflict of interest only comes to light after the conclusion of the arbitration proceedings, the conflict of interest could constitute grounds for setting aside the arbitral award. However, in this respect, challenges to arbitral awards are subject to a limitation period under Swedish law, to the effect that challenges must be brought within a three-month period. If a challenge is not brought within this period, the grounds for challenge will be procedurally barred. The fact that the unsuccessful party may only have become aware of the grounds for challenge after the expiry of the limitation period is irrelevant.[28]

A typical case where it can be disclosed that a third party funder is funding a dispute is where the opposing party suspects that this is the case and requests that the arbitral tribunal

26 IBA Guidelines, Explanation to General Standard 6.

27 IBA Guidelines, Explanation to General Standard 7.

28 Stefan Lindskog, *Skiljeförfarande: En kommmentar* [*Arbitration: A Commentary*] (2nd edn), p. 917.

order the opposing party to disclose whether it is being funded by a third party. If the arbitral tribunal grants this request, the opposing party will have no choice other than to disclose the funding. If it turns out that there is a conflict of interest, this could create problems for both the parties and the arbitral tribunal. As stated above, it could mean that an arbitrator is required to resign from his or her appointment at a late stage in the proceedings. It could also constitute grounds for a challenge action against the arbitral award pursuant to Section 33 of the SAA. Consequently, the issue of whether or not the third party funding should be disclosed should be carefully considered when using such funding.

V COSTS

As explained in Section II above, a claimant that transfers a claim to a party that has no financial resources to pay the defendant's legal fees and litigation costs in the event the claim is unsuccessful could later be ordered to pay the defendant's legal fees and litigation costs. However, this requires that the claimant retains a financial interest in the outcome of the dispute insofar as the outcome is positive. The question is whether this can also be applied to third party funding and, if so, whether this means that a third party funder can later be ordered to pay the defendant's legal fees and litigation costs if the claimant does not have the financial resources to do so.

Under Swedish law, the assumption is that the party that loses the case must compensate the opposing party for its legal fees and litigation costs.[29] The problem described above arises when the claimant is in such a poor financial condition that it is unable to pay the defendant's legal fees and litigation costs and, furthermore, has not agreed that the third party funder will cover the opposing party's legal fees and litigation costs.

In this respect, it should be noted at the outset that Swedish courts have held that a party in a poor financial condition is entitled to bring a legal action.[30] However, the Supreme Court has held that, in a situation where the claimant is unable to pay the defendant's legal fees and litigation costs, in exceptional cases there may be grounds for imposing liability for paying these costs on a third party with a financial interest in the outcome of the dispute.[31] According to case law, this probably requires the third party to be the effective beneficiary in the dispute and the claim to have been transferred to an individual or company in a poor financial condition for the purpose of limiting the adverse financial consequences of a negative outcome in the dispute.

In light of the above and based on current case law, it is probably difficult to impose liability for legal fees and litigation costs on a third party funder, since third party funding does not generally involve the claim being transferred to an individual or company in a poor financial condition. The situation is reminiscent of that where an individual creditor in bankruptcy invests in the bankruptcy estate's action against a debtor in respect of a claim in favour of the bankruptcy estate. In such a case, the creditor in bankruptcy is the effective beneficiary in terms of the financial outcome of the dispute and probably also exercises

29 Chapter, 18, Section 1 of the Swedish Code of Judicial Procedure. This also applies to arbitration proceedings (see Stefan Lindskog, *Skiljeförfarande: En kommmentar* [*Arbitration: A Commentary*] (2nd edn), p. 1023).

30 P. 144 in NJA 2000.

31 The cases reported on p. 420 in NJA 2006 and p. 887 in NJA 2014.

a certain amount of influence over the action. Under Swedish law, in this situation the creditor in bankruptcy is unlikely to be ordered to pay the opposing party's legal fees and litigation costs in the event the action is unsuccessful.[32]

In light of this, it is unlikely that a third party funder will be held liable for paying legal fees and litigation costs based on current case law. However, this does not prevent the Supreme Court from altering this position when it has the opportunity to assess a situation relating to liability for legal fees and litigation costs where a third party funder has been involved.

VI THE YEAR IN REVIEW

In the past year, nothing has happened on the Swedish market that appears to have changed or affected the conditions relevant to third party funding. However, Swedish lawyers appear to have greater awareness and a more positive view of third party funding. Previously, third party funding was regarded as something new that was likely to cause problems. However, during the course of the past year, the authors of this chapter have detected a more positive attitude towards third party funding. This is illustrated by, among other things, the fact that the Swedish Arbitration Association arranged a seminar on the subject at which they invited various third party funders to present their services.

VII CONCLUSIONS AND OUTLOOK

In summary, third party funding is a phenomenon that is relatively new and unfamiliar in Sweden. The situations in which third party funding is used in Sweden are probably limited to international arbitration proceedings in which the seat of arbitration is located in Sweden. Furthermore, since third party funding is relatively new in Sweden, there is no legislation governing or barring the use of third party funding. In our view, this will remain the case in the future. If third party funding issues arise in the Swedish courts, it is reasonable to assume that the courts will be guided primarily by international guidelines in this area.

As for the future, we predict a great potential for the continued development of third party funding in Sweden. The SCC is one of the major arbitral institutions and will thus continue to attract many arbitration cases. Moreover, the SCC is noted as being one of the major institutions when it comes to larger disputes, which typically are of greatest interest for third party funders. Therefore, it is likely that the third party funding market will increase in Sweden in the coming years.

32 The trustee in bankruptcy can ask the creditor in bankruptcy to provide security for any compensation payable for the defendant's legal fees and litigation costs. However, if the creditor in bankruptcy is unwilling or unable to provide the security, the trustee in bankruptcy can still bring an action. However, if there is a risk that the bankruptcy estate will not be able to pay the defendant's legal fees and litigation costs if the claim is unsuccessful, an action should not be brought against the creditor in bankruptcy (see Lars Heuman, *Specialprocess* [*Special proceedings*] (6th edn), p. 227, and the cases reported on p. 131 in NJA 1999 and p. 420 in NJA 2006).

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