

THE THIRD PARTY
LITIGATION
FUNDING LAW
REVIEW

THIRD EDITION

Editor
Leslie Perrin

THE LAWREVIEWS

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CONTENTS

PREFACE.....	vii
<i>Leslie Perrin</i>	
Chapter 1 AUSTRALIA.....	1
<i>Jason Geisker and Dirk Luff</i>	
Chapter 2 AUSTRIA.....	20
<i>Marcel Wegmüller and Jonathan Barnett</i>	
Chapter 3 BRAZIL.....	29
<i>Luiz Olavo Baptista and Adriane Nakagawa Baptista</i>	
Chapter 4 CANADA.....	39
<i>Hugh A Meighen</i>	
Chapter 5 ENGLAND AND WALES.....	53
<i>Leslie Perrin</i>	
Chapter 6 GERMANY.....	63
<i>Daniel Sharma</i>	
Chapter 7 HONG KONG.....	81
<i>Melody Chan</i>	
Chapter 8 INDONESIA.....	91
<i>Tony Budidjaja, Narada Kumara and Reynalda Basya Ilyas</i>	
Chapter 9 ITALY.....	100
<i>Federico Banti and Eva de Götzen</i>	
Chapter 10 JAPAN.....	108
<i>Daniel Allen and Yuko Kanamaru</i>	

Chapter 11	NETHERLANDS.....	114
	<i>Rein Philips</i>	
Chapter 12	NEW ZEALAND.....	121
	<i>Adina Thorn and Rohan Havelock</i>	
Chapter 13	NIGERIA.....	133
	<i>Justina Ibebunjo, Iheanyichukwu Dick and Pascal Ememonu</i>	
Chapter 14	NORWAY.....	142
	<i>Andreas Nordby, Eivind Tandrevold and Jan Olav Aabo</i>	
Chapter 15	POLAND.....	151
	<i>Zbigniew Kruczkowski</i>	
Chapter 16	PORTUGAL.....	158
	<i>Duarte G Henriques and Joana Albuquerque</i>	
Chapter 17	SINGAPORE.....	171
	<i>Matthew Secomb, Adam Wallin and Gabriella Richmond</i>	
Chapter 18	SPAIN.....	182
	<i>Antonio Wesolowski</i>	
Chapter 19	SWEDEN.....	190
	<i>Johan Sidkev and Carl Persson</i>	
Chapter 20	SWITZERLAND.....	199
	<i>Urs Hoffmann-Nowotny and Louis Burrus</i>	
Chapter 21	UKRAINE.....	209
	<i>Olexander Droug</i>	
Chapter 22	UNITED ARAB EMIRATES: DUBAI INTERNATIONAL FINANCIAL CENTRE.....	211
	<i>Mohamed El Hawawy and Monika Humphreys-Davies</i>	

Contents

Chapter 23	UNITED STATES	217
	<i>Sean Thompson, Dai Wai Chin Feman and Aaron Katz</i>	
Appendix 1	ABOUT THE AUTHORS.....	233
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	249

PREFACE

When my phone rang one afternoon in February 2008 with a request from a lawyer at a major New York law firm for me to take on a role as a non-executive director on the listing on the Alternative Investment Market in London of a ‘third party funder’, all I could think to say was: ‘What is third party funding?’

Since then, with my partners at Calunius, I have raised hundreds of millions of pounds for three private funds that have successfully completed their investment periods, acted as Chairman of the Association of Litigation Funders of England and Wales (ALF) from its foundation in November 2011 until September 2019, been instrumental in the ALF’s intervention in the Court of Appeal’s leading case on third party litigation funding (TPF), known universally as *Excalibur*,¹ and have been one of the leaders in evidence before the Competition Appeals Tribunal in the Trucks Cartel case.

What a journey!

The essence of TPF remains the deployment of 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, things other than (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. In the absence of breach, the funded party is not personally liable to the funder and therefore it would (almost) always be a major solecism ever 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 each with a different approach to describing TPF and how it should be regulated (if at all).

In general, all common law jurisdictions are subject to the effects of the varying degrees to which the ancient doctrines of maintenance and champerty survive. Historically these 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 the Republic of Ireland, following the Supreme Court ruling in the *Persona Digital* case. It

1 *Excalibur Ventures LLC v. Texas Keystone Inc* [2017] 1 WLR 2221 (CA).

seems that, in the Republic, TPF must wait for the legislature to permit it. The civil law, on the other hand, has never held significant reservations about TPF in principle, although each jurisdiction, as will be clear from this book, has its own nuanced attitude.

Then there are a variety of controversies faced by TPF, which 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 controversies tend to revolve around four issues: the regulation of TPF providers; whether a provider of TPF should be liable in unsuccessful cases to pay the costs of a victorious defendant or to give security for costs (and if so, in what circumstances and according to what principles); whether disclosure to the court or the arbitral tribunal of the fact of TPF being used by a party is required; 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 that do not wish to expose themselves to the significant cost risks of resolving their disputes from their 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 of litigation and arbitration will be rooted in the law of a particular jurisdiction, and this is the landscape across which this book will travel. Enjoy your journey.

Leslie Perrin

Chairman

Calunius Capital LLP and Association of Litigation Funders of England and Wales

November 2019

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. In part, this is due to the fact that there is currently only a limited domestic market in Sweden for third-party funding. The instances in which third-party funding is currently used in Sweden are instead predominantly limited to international arbitration proceedings seated in Sweden.²

Historically, the most common type of litigation investment³ that has been established in Sweden has been sales of claims for damages. Sweden has seen many examples of companies established for the sole purpose of 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 Sweden in respect of acquisitions of damages claims is, nonetheless, of interest when assessing issues commonly seen in connection with arbitrations involving third-party funding, such as liability for legal fees and litigation costs. For this reason, in Section V, we will discuss the existing case law in relation to liability for legal fees and litigation costs in conjunction with acquisitions of damages claims.

-
- 1 Johan Sidklev is a partner and Carl Persson is a senior associate at Roschier Advokatbyrå AB. Bruno Gustafsson, associate at Roschier, has conducted research, revised, and provided updates to the current version of this article.
 - 2 For a brief overview of the prospective Swedish third-party funding market, see Johan Sidklev, Carl Persson, Bruno Gustafsson, *Third-party Funding in Sweden – Uncovering Uncharted Territory*, Kluwer Arbitration Blog (16 Sept 2018 <http://arbitrationblog.kluwerarbitration.com/2018/09/16/third-party-funding-in-sweden-uncovering-uncharted-territory/>).
 - 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 chapter, third-party funding refers to a situation in which an investor that is not party to the proceedings or otherwise connected to the dispute between the parties is funding the claimant's claim; the sole interest of the investor being to receive compensation for its funding by way of 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.

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 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 152 arbitration proceedings in 2018.⁶ Since third-party funding has grown on the international market, it is undoubtedly the case that at least some of these proceedings have been funded via third-party funding. The authors of this chapter know for certain that at least five major arbitration proceedings held in Sweden under the SCC rules were initiated by way of funding from a third-party funder between 2014 and 2018.⁷ However, the actual number of cases funded by third-party funders is most likely significantly higher.

II LEGAL AND REGULATORY FRAMEWORK

In Sweden, third-party funding is unregulated. Hence, there is no legislation or other mandatory rules in Sweden barring the use of third-party funding. Furthermore, given the absence of a substantial domestic third-party funding market, no domestic self-regulation exists. 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 that explicitly concerns third-party funding. 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 established by the International Bar Association (IBA).⁸ Arguably, 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 will be further elaborated upon in this chapter when discussing issues of conflicts of interest and disclosure.

A regulatory framework that also may be of importance to a third-party funding arrangement involving Swedish lawyers is the Swedish Bar Association's Code of Professional Conduct (the Bar Rules), which governs the financial interests of lawyers in disputes in which they act as counsel. The Bar Rules may be of importance since, in certain jurisdictions, it has become common practice to structure a third-party funding arrangement by way of a risk-sharing agreement between the third-party funder and the law firm, whereby the lawyer's fees are based fully or partially on the outcome of the dispute. Thus, similarly to third-party funding, the lawyer has a direct financial interest in the outcome of the dispute. However, this is not a viable option in a third-party funding arrangement involving a Swedish lawyer as counsel.

With the exception of a few narrow grounds set out in the Bar Rules, lawyers are prohibited from entering into risk agreements in Sweden.⁹ The existing exceptions apply primarily to situations where the client is financially unable to bring the legal action (access

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 Section 4.2.1 of the Swedish Bar Association's Code of Professional Conduct (the Bar Rules).

to justice) or where the arrangement constitutes part of a larger international dispute based on a contingency fee agreement. However, the Bar Association's Disciplinary Committee has applied these exemptions very restrictively. In one important case, the Disciplinary Committee reprimanded a lawyer for charging a risk-based fee.¹⁰ This was despite the fact that the client proposed the arrangement and the client explained that it would not be financially viable to bring the action unless the lawyer accepted the risk agreement. The client had contacted the lawyer to investigate 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 incurred from pursuing the legal action. The majority of the Disciplinary Committee held that the arrangement was not permissible. As far as we are aware, as at the time of writing, the Disciplinary Committee has given no rulings permitting risk agreements. Given this fact, the prevailing principle concerning risk agreements for lawyers can best be described as a general prohibition. This means that it will not be possible for Swedish lawyers to enter into a risk agreement when representing parties funded by a third party.

An alternative to risk agreements, however, is a 'conditional fee arrangement'. Arrangements of this kind allow for outcome-based increases or reductions of the lawyer's fee that come into effect once the dispute is concluded. As regards conditional fees, the situation is not as clear-cut under the Bar Rules. There is no case law from the Bar Association or indeed the courts to provide guidance on this type of arrangement. However, the Bar Rules do state that an agreement under which the lawyer assumes a financial risk in relation to the outcome of the case does not necessarily mean that the lawyer's financial self-interest will be disproportionate or could affect the way in which the lawyer performs his or her work on the case.¹¹ Consequently, in our assessment, the Bar Rules appear to permit conditional fee arrangements where the risk and the reward are reasonably balanced. This option might therefore be of interest when structuring the lawyer's fees in a third-party funding arrangement.

In summary, third-party funding remains an unregulated practice in Sweden. However, it is clear that a restrictive view applies in Sweden in relation to lawyers' financial interests in the outcome of a dispute when exercising their professional role. Conversely, third-party funders who engage Swedish legal counsel must come to terms with the fact that Swedish lawyers, as a rule, charge fees based on traditional fee models, possibly with the exception of conditional fees. This, in turn, may affect the construction of the funding arrangement, as some funders require the funded party's legal counsel to impart risk through the use of outcome-based fee arrangements.¹²

III STRUCTURING THE AGREEMENT

In light of the fact that there is only a limited 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 historically related to transfers of damages claims. The transfer agreement is diametrically different from an investment agreement. This type of transfer is also covered by

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

11 Section 4.2.2 of the Bar Rules.

12 See Jonas von Goeler, Third-Party Funding in International Arbitration and its Impact on Procedure, *International Arbitration Law Library*, Volume 35 (Kluwer Law International; 2016) pp. 33–34.

legal provisions setting out how the acquirer of the damages claim can take over the action.¹³ 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. In relation to these and other potential issues, it is important to bear in mind that, under the Swedish Bar Rules, a lawyer must carefully assess whether he or she might be considered to be representing both the claimant and the investor when third-party funding is used. How this situation should be dealt with is discussed below.

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 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 the legal action has changed to diminish the prospects of success, the lawyer undoubtedly has a duty under the Bar Rules to inform the client (i.e., the claimant).¹⁴ A lawyer's primary duty is a fiduciary duty to his or her client.¹⁵ However, the question is whether the lawyer has 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 if circumstances change. 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.¹⁶

The situation described above is rendered even more cumbersome 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 a case such as this, the lawyer is likely to 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 trigger 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 he or she may ultimately be compelled to decline acting for

13 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.

14 Section 2.3 of the Bar Rules.

15 Section 1 of the Bar Rules.

16 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 Bar Rules.

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 the way in which the investment agreement is structured to ensure that the agreement also works for all the parties involved.

IV DISCLOSURE

Another pressing issue relating to the procedural impact 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 in both domestic and international arbitration proceedings. Currently, neither Swedish legislation (i.e., the Swedish Arbitration Act (SAA)) nor the SCC's rules impose any obligation to disclose the existence of funding on a party's own motion.¹⁷ However, for the purpose of minimising risks of conflicts of interest among arbitrators, the SCC will issue guidelines encouraging parties to disclose the identity of any third-party interests in the dispute, including the existence of third-party funders. Furthermore, there are no such mandatory disclosure rules relating to litigation proceedings. Thus, as the law now stands, the parties in arbitration proceedings are not under any obligation to inform the arbitral tribunal that they are being funded by an investor.

However, it is important to note in this respect that 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 circumstances exist that could give reason to question the arbitrator's impartiality. The assessment of whether an arbitrator is impartial must be objective.¹⁸

The third-party funder's impact on the arbitrators' impartiality under Section 8 of the SAA has not been addressed by Swedish courts. However, internationally, these issues have been subject to extensive doctrinal developments as well as public discourse. The latter has given rise to a body of guiding principles that are seen, inter alia, in the provisions of the IBA Guidelines and also the general recommendations laid out in the Report of the ICCA-Queen Mary Task Force on Third-party Funding in International Arbitration. This raises the question

17 Numerous established arbitration institutes have assessed the need to implement provisions in their rules regarding disclosure of third-party funding and there are examples internationally of disclosure provisions specifically in relation to funded arbitrations. For instance, under the Singapore International Arbitration Centre (SIAC), the arbitral tribunal is authorised to enquire regarding the existence of third-party funding. With regard to investment treaty arbitration, the arbitral tribunal is expressly mandated under Rule 24(l) of the SIAC Investment Arbitration Rules to order disclosure of third-party funding, including certain pieces of information regarding the contents of the funding agreement, such as whether the funder has agreed to cover adverse costs. Furthermore, pursuant to Article 44 of the 2018 Administered Arbitration Rules of the Hong Kong International Arbitration Centre, the funded party is obligated (by written notice) to communicate to all other parties the existence of third-party funding, and the identity of the funder. Additionally, the proposed updated arbitration rules for investment treaty arbitration conducted under the auspices of the International Centre for Settlement of Investment Disputes include an obligation for the funded party to disclose, inter alia, the identity of the funder and the source of the funding.

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

of whether Swedish courts are inclined to resort to international guidelines and other sources of a 'soft-law' nature to decide on issues pertaining to international arbitration in general and third-party funding in particular.

In this respect, the Supreme Court has stated that, based on the similarity of the rules and the international elements that are often present, when assessing impartiality, not only should the provisions of the SAA be observed, but also international rules and guidelines.¹⁹ In our experience, it is rarely the case that parties agree on a strict application of, for instance, the IBA Guidelines on Conflicts of Interest. This notwithstanding, in one Supreme Court case, the court based a disqualification of an arbitrator partially on provisions laid out therein.²⁰ A similar line of argument with reference to the IBA Guidelines on Conflicts of Interest was also applied in a subsequent Supreme Court case.²¹ Consequently, applicable case law supports the notion that Swedish courts generally have a positive attitude towards deriving guidance from international rules when determining matters – both domestic and international – relating to, among other things, conflicts of interest. This has also been confirmed by leading authorities in the area, such as the former President of the Supreme Court, Stefan Lindskog.²²

In light of the above, it is noteworthy that the IBA Guidelines on Conflicts of Interest include the following provision:

*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.*²³

This means that, from a conflict-of-interest perspective, third-party funders can be deemed to be comparable to a party to the proceedings whose claim the investor has funded. The explanatory section further 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'.²⁴

Consequently, the IBA Guidelines advocate for a case-by-case assessment as to whether a third-party funder 'may be considered to bear the identity' of the funded 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 Article 7(a) of the IBA Guidelines on Conflicts of Interest, the parties are required to disclose any relationship with the arbitrator that may trigger impartiality concerns. In accordance with what has been stated above, the parties' duty to disclose 'any' relationship between the arbitrator and the party extends to relationships with persons or entities with a direct economic interest in the award, such as an external funder, or any individual or entity committed to indemnify a party for an adverse costs decision or award.²⁵ The fact that the rules of the IBA Guidelines are generally not binding upon the parties means that it is within their own discretion to decide whether or not to disclose the existence of funding. It has been argued in this respect that the arbitrators cannot be deemed conflicted if they are not aware

19 Case reported on p. 841 in NJA 2007.

20 Case reported on p. 841 in NJA 2007.

21 Case reported on p. 317 in NJA 2010.

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

23 IBA Guidelines on Conflicts of Interest 2014, General Standard 6(b).

24 IBA Guidelines on Conflicts of Interest 2014, Explanation to General Standard 6(b).

25 IBA Guidelines on Conflicts of Interest 2014, Explanation to General Standard 7.

of the circumstances triggering the conflict. However, under Swedish law, the presence of any conflict of interest is determined based on an objective assessment. Arguably, this means that a Swedish court will not take into consideration whether the arbitrator de facto has been influenced when deciding on the existence of conflicts with disqualifying potential.

Accordingly, in light of the above, should a claimant and a third-party funder fail to disclose the existence of funding, they do so accepting the inherent risk that this will be discovered later on during or after the proceedings. This, in turn, could induce a conflict of interest under the SAA, which could lead to one or more arbitrators being discharged. Moreover, if the conflicting realities come 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 it should be noted that challenges to arbitral awards are subject to a two-month limitation period under Swedish law.²⁶ If a challenge is not brought within this period, the grounds for challenge will be procedurally barred. This is the case even in situations where the party that wants to challenge the award became aware of the grounds for challenge after the expiry of the limitation period.²⁷

A typical case in which 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 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 34 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.

Regardless of the above, and specifically the fact that currently no obligation for a funded party to disclose its third-party funding seems to exist (neither for the funded party nor for the third-party funder), we are yet to experience how courts and arbitral tribunals in practice will handle the correlation between disclosure and third-party funding. In addition to the principles inherent in the IBA Guidelines on Conflicts of Interest, support for an open-ended view on imposing disclosure obligations can be found in the ICCA-Queen Mary Task Force Report. For the purpose of mitigating the risk of conflicts of interest, the report suggests that parties 'should, on their own initiative, disclose the existence of a third-party funding arrangement and the identity of the funder to the arbitrators'.²⁸ This should be done as soon as possible after the funding has taken place.²⁹ The report further advocates for a fairly generous view with respect to the arbitral tribunal's mandate to order disclosure of whether a party is funded, as well as the identity of the funder.³⁰ As noted above, transnational soft-law sources have influenced the Swedish Supreme Court's interpretation of the provisions relating

26 The Swedish Arbitration Act was updated as of 1 March 2019. In the previous version of the Swedish Arbitration Act, challenges to arbitral awards were subject to a three-month limitation period. The three-month limitation period still applies to arbitral proceedings that were commenced prior to the entry into force of the new Swedish Arbitration Act on 1 March 2019.

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

28 See Report for public discussion of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, Apr. 2018. The ICCA Reports No. 4. at 81.

29 id.

30 id.

to conflicts of interest in the SAA on numerous occasions. If applied in a third-party funding context, this tendency may predict a shift towards a stricter view on disclosure duties, at least with respect to the existence of funding and the identity of the funder.

V COSTS

Under Swedish law, 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 those 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 reasonable legal fees and litigation costs.³¹ 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 poor financial condition is entitled to bring a legal action.³² 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.³³ 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 a company in 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 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 a case such as this, the creditor in bankruptcy is the effective beneficiary in terms of the financial outcome of the dispute and probably also

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

32 Case reported on p. 144 in NJA 2000.

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

exercises 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.³⁴

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, there have been no significant changes in the Swedish market that bear relevance as to third-party funding. However, we have seen an increase in awareness and interest among Swedish lawyers towards third-party funding and its potential benefits. While third-party funding was previously regarded fairly negatively, during the course of the past few years we have noted a more positive attitude towards third-party funding.

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 near 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 and other soft-law sources.

As for the future, we predict 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 to third-party funders. Therefore, it is likely that the third-party funding market will increase in Sweden in the coming years.

³⁴ 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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