THE THIRD PARTY LITIGATION FUNDING LAW REVIEW

Fifth Edition

Editor
Simon Latham

THE LAWREVIEWS

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PREFACE

This now represents my sophomore year as editor, a role I undertook during the onset of the covid-19 pandemic. As the global economy begins to creak back into motion, I'm reminded of my first steps into the legal profession as a law graduate following the last global financial crisis. Much like now, it was a challenging time for those entering the profession. By happenstance (sheer bloody-mindedness), I found myself at the doors of the London branch of a US plaintiffs' firm, little-known on these shores at the time (I still recall the firm's name was spelled incorrectly by the court on most documents in those days). The firm's proactive and innovative culture naturally meant they were early adopters of third party funding (TPF). As such, I had the great fortune of being immersed in the world of TPF from my very first day as a trainee solicitor. I witnessed, first-hand, how TPF catalysed both the firm's growth and their clients' paths to a healthier balance sheet, notwithstanding the burdens that the global financial crisis had left in its wake. A spark was lit.

Fast forward to the present and TPF is very much a mainstay across the legal landscape in the UK. It feels like every week there are press releases announcing the latest funder on the scene, the latest law firm facility, the latest representative action in the Competition Appeal Tribunal, etc. But how does it all work in practice? Well, just as the list of legal remedies available to litigants varies between jurisdictions, so too does the menu of TPF options. The past couple of years has seen both shifts and endorsements of the respective regulatory frameworks that underpin the sector across the globe. In contrast to the booming UK landscape, for example, the Australian market has found itself on the receiving end of stringent regulations, both in terms of operating structure and commercial terms (in class actions). The overwhelming bigger picture, however, is one of growth, development and innovation. Savvy investors continue to navigate the nuances of each jurisdiction to devise new ways to provide finance to the market, all of which ultimately facilitates broader access to justice. Personally, I'm excited to see how this positive force for change can progress into something even more impactful, as TPF helps facilitate the latest evolution of ESG-related disputes . . . watch this space!

I hope this publication provides a useful guide for litigants, lawyers and investors alike as we take on the challenges the new year brings.

Simon Latham
Augusta Ventures
London
November 2021

Chapter 19

SWEDEN

Johan Sidklev, Carl Persson and Bruno Gustafsson[1]

I MARKET OVERVIEW

Despite its breakthrough at the global level, third party funding is still a relatively new phenomenon in Sweden. In part, this is due to the fact that there has historically only been a limited domestic market in Sweden for third party funding. The instances in which third party funding has been used in Sweden in the past couple of years have instead mainly been limited to international arbitration proceedings seated in Sweden.[2] However, the domestic market in Sweden is now on the rise and we have lately noticed a clear increase in the number of active third-party funders on the Swedish market.

Historically, the most common type of litigation investment 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. Over the past 10 years, this trend has also evolved into larger damages claims, including claims in cartel cases. However, there is reason to believe that we will see fewer 'claims vehicles' of this sort on the Swedish market in the future and that companies in these situations most likely will opt for third party funding instead.

II LEGAL AND REGULATORY FRAMEWORK

In Sweden, third party funding is unregulated.[3] Hence, there are no 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.

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1 Johan Sidklev is a partner, Carl Persson is a principal associate and Bruno Gustafsson is an associate at Roschier Advokatbyrå AB.

2 For a brief overview of the prospective Swedish TPF 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 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 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.

There is currently no case law from Swedish courts that specifically 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 arbitration. On these issues, Swedish courts have tended to rely on guidance from international soft law sources, such as the guidelines established by the International Bar Association (IBA).[4] When faced with legal issues concerning third party funding, Swedish courts are likely to take a similar approach (i.e., look for guidance in international soft law sources).

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). The Bar Rules govern the financial interests of lawyers in disputes in which they act as counsel. The Bar Rules are of interest since, in certain jurisdictions including the US 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 mainly or fully based on the outcome of the dispute. This type of risk arrangement is not a viable option in a third party funding arrangement where a member of the Swedish Bar Association acts a counsel in the dispute since risk agreements, as a general rule, are prohibited under the Bar Rules.[5]

However, there are two main exceptions to the prohibition against risk arrangements under the Bar Rules: (1) situations where the client is financially unable to bring the legal action (access to justice); and (2) where the arrangement constitutes part of a larger international dispute based on a contingency fee agreement. The Bar Association's Disciplinary Committee has applied these exemptions very restrictively. In one case, the Disciplinary Committee reprimanded a lawyer for charging a risk-based fee.[6] The client in the case had contacted a 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 of the costs incurred from pursuing the legal action. Despite the fact that it was the client that proposed the arrangement and explained that it would not be financially viable to bring the action unless the lawyer accepted it, the majority of the Disciplinary Committee held that the arrangement was not permissible. As far as we are aware, the Disciplinary Committee has as yet given no rulings permitting risk agreements. 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 is a 'conditional fee arrangement', which allows for outcome-based increases or reductions of the lawyer's fee that come into effect once the dispute is concluded. As to whether or not these arrangements are permissible, the situation is not as clear-cut under the Bar Rules. There is no case law from the Disciplinary Committee or the courts on this matter. 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 will not necessarily affect the way in which the lawyer performs his or her work on the case, at least as long as the lawyer's financial interest is not disproportionate.[7] Consequently, in our assessment, the

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

5 Section 4.2.1 of the CPC.

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

7 Section 4.2.2 of the CPC.

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 the dispute when exercising their professional role. Conversely, third-party funders who engage Swedish legal counsel should acknowledge 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.[8]

III STRUCTURING THE AGREEMENT

In light of the fact that the domestic third party funding market in Sweden has historically been limited, no common practice has developed in terms of the typical structure of an agreement between the claimant and the funder. As mentioned above, litigation investment on the Swedish market has historically related to transfers of damages claims. The transfer agreement differs from a funding agreement and is subject to legislative provisions regulating how the acquirer of the damages claim can take over the action.[9] However, this rarely becomes an issue in the case of third party funding, since third party funding typically does not involve transfer of the damages claim.

However, third party funding gives rise to other interesting legal issues. In addition to issues concerning exclusivity, settlements and confidentiality, third party funding may trigger complex issues concerning the relationship between the lawyer and the funded party. For this reason, the lawyer should make it clear at an early stage – preferably in the funding agreement entered into between the claimant and the funder – that the claimant (and not the third-party funder) is the client. In situations where this is not made clear, the lawyer may face serious ethical challenges. For example, funding agreements generally provide for a right for the funder to terminate the agreement if the prospects of success in the dispute diminish. If a lawyer perceives that the prospects of success of the case have decreased, the lawyer undoubtedly has a fiduciary duty under the Bar Rules to inform the client (i.e., the claimant).[10] However, the question is whether the lawyer has an equivalent duty to the funder, in particular in cases where the claimant is under a contractual obligation to inform the funder 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 funder.[11]

8 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.

9 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.

10 Section 2.3 of the CPC.

11 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.

The situation described above becomes more complicated if the lawyer has agreed to regularly update the funder on the dispute's progress. In this situation, the lawyer could owe a fiduciary duty to the funder, meaning that both the claimant and the funder are to be regarded as the lawyer's clients. Should the claimant under such circumstances instruct the lawyer not to inform the funder on developments in the case, the lawyer may have no choice other than to decline to act for the client due to conflict of interest. This means that, where possible, the lawyer should explain his or her role carefully to both the claimant and the funder at the outset of the engagement. If the lawyer assumes a role that could trigger a fiduciary duty to the funder, the lawyer should explain clearly to the claimant what effect this has on the lawyer's role. The claimant should comply with the provisions of the funding agreement to avoid placing the lawyer in an impossible situation where he or she may ultimately be compelled to decline acting for the claimant in the dispute. Issues of this kind illustrate that a great deal of importance should be placed on the way in which the funding agreement is structured to ensure that the agreement works for all of 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 of 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. 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, the SCC, in 2019, adopted a policy for disclosure of third parties with an interest in the outcome of the dispute for the purpose of minimising risks of conflict of interest among arbitrators.[12] The policy sets out that each party is encouraged to disclose in its first written submission the identity of any third-party interests in the dispute, including the existence of third-party funders.

Notwithstanding the absence of provisions providing for mandatory disclosure of third party funding, this obligation may in some cases be derived from generally applicable rules *vis-à-vis* conflicts of interest. The general rule under Section 8 of the SAA is that an arbitrator must be impartial and independent. Upon application by a party, an arbitrator may be disqualified if circumstances exist that could give reason to question the arbitrator's independence or impartiality.

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

12 SCC Policy disclosure of third parties with an interest in the outcome of the dispute. Adopted by the SCC Board on 11 September 2019.

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.[13] 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.[14] A similar line of argument with reference to the IBA Guidelines on Conflicts of Interest was also applied in a subsequent Supreme Court case.[15] 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.[16]

In light of the above, it is interesting to note 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.*[17]

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 funder 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'.[18]

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.[19] 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

13 Case reported on p. 841 in NJA 2007.

14 Case reported on p. 841 in NJA 2007.

15 Case reported on p. 317 in NJA 2010.

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

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

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

19 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 while accepting the 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.[20] If a challenge is not brought within this period, the ground 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 ground for challenge after the expiry of the limitation period.[21]

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 mandatory obligation for a funded party to disclose its third party funding exists under the SAA or the SCC's rules (neither for the funded party nor for the third-party funder), we are yet to experience how courts in practice will handle the correlation between disclosure and third party funding.

V COSTS

Under Swedish law, the general rule is that the losing party must compensate the opposing party for its legal fees and litigation costs.[22] Furthermore, Swedish courts have held that a claimant that transfers a claim to a party that is unable to pay the defendant's litigation costs could later be ordered to pay these costs in the event the claim is unsuccessful. However, this requires that the claimant retains a financial interest in the outcome of the dispute. An

20 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.

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

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

interesting question is whether this can also be applied with respect to a third-party funder (i.e., whether or not the third-party funder in cases where the funded claimant is in poor financial condition) can be held liable for adverse costs in subsequent court proceedings.

This issue is somewhat uncertain. Although Swedish law does not prevent parties in poor financial condition from bringing legal action,[23] the Supreme Court has held that, in a situation where the claimant is unable to pay adverse costs, there may, in exceptional cases exist grounds for imposing adverse costs liability upon a third party with a financial interest in the outcome of the dispute in a subsequent proceeding.[24] However, such an outcome would probably require that: (1) the third party is the effective beneficiary in the dispute; and (2) the claim in question was deliberately transferred to an individual or a company in poor financial condition for the explicit purpose of limiting the adverse financial consequences of a negative outcome in the dispute.

Based on this, it is not likely that a court would impose liability for adverse costs on a third-party funder, since third party funding generally does not involve that a claim is transferred to a company in poor financial condition. 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.

Another pressing issue in respect of legal costs, is whether a non-funded respondent in a dispute can request that the funded claimant post security for the respondent's legal costs at the outset of the proceedings (security for costs). In Swedish litigation proceedings, security for costs is not an available remedy if the claimant is registered within the EU/EES. However, if the claimant is incorporated outside the EU/EES, the court may, upon the respondent's request order the claimant to post security for costs.

As for arbitration proceedings, the generally held view is that an arbitral tribunal seated in Sweden has the authority to order security for costs. In connection with the most recent revision of the SCC rules in 2017, the SCC introduced a provision explicitly recognising the tribunal's mandate in this respect. The relevant provision (Article 38) permits the tribunal to order security for costs in 'exceptional circumstances' and subject to the consideration of certain criteria, including, among other things, the prospects of success of the claimant's claims, and the claimant's ability to comply with an adverse costs award.

An issue subject to debate has been whether or not – in the tribunal's assessment of a request for security for costs – the existence of third party funding per se is a factor that demonstrates the claimant's inability to cover an adverse costs award and, as a result, constitutes an argument in favour of ordering security for costs. In our view, this should be answered in the negative. The choice to resort to third party funding does not necessarily mean that the party seeking funding is in financial distress, as many parties seek external financing not because they lack funds to finance their legal costs, but to limit financial risk. Consequently, the presence of third party funding is not per se an argument for (or against) ordering security for costs. Instead, the decision whether or not to grant a request for security for costs should be based on other factors, such as the claimant's financial situation, the

23 P. 144 in NJA 2000.

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

location of the claimant's attachable assets (if any) and whether or not there is a commitment from the third-party funder to cover adverse costs (in which case there is no reason to grant security costs).[25]

VI THE YEAR IN REVIEW

In the past year, there have been no significant changes in the Swedish market that bear relevance to third party funding. However, as set out in the introductory market overview in Section I, we have in the past years seen an increase in third-party funders on the Swedish market and an increased 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 still relatively new in Sweden. As a result, there is no legislation governing the use of third party funding. In our view, this will remain the case in the near future. If issues relating to third party funding 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 a world-leading arbitral institution for investment treaty arbitrations and one of the major institutions when it comes to larger commercial disputes, both of which typically are of great interest to third-party funders. Therefore, it is likely that the third party funding market will increase in Sweden in the coming years.

25 Carl Persson & Bruno Gustafsson, 'A practitioner's guide to security for costs at the SCC', 13 November 2019, Global Arbitration Review.

Appendix 1

ABOUT THE AUTHORS

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Johan Sidklev heads Roschier's dispute resolution practice in Sweden. He is the presiding president of the Swedish Arbitration Association and also serves as a board member of the Arbitration Institute of the Stockholm Chamber of Commerce. Johan specialises in commercial dispute resolution and has extensive experience in international arbitration, often concerning energy-related disputes with an East–West angle. He has acted as counsel in a significant number of international arbitrations in Stockholm, London and Paris concerning oil and gas, construction and distribution matters. In the area of investment arbitration, Johan has experience of arbitrators' appointments, and of advising both private investors and various governments as counsel, inter alia, in matters concerning the Energy Charter Treaty.

Johan is recognised as one of the leading experts in Sweden within dispute resolution by international directories such as *Chambers Global, Chambers Europe*, *The Legal 500* and *Who's Who Legal*.

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Carl Persson is a principal associate in Roschier's dispute resolution practice in Sweden. Carl specialises in commercial dispute resolution. His practice covers arbitration and litigation, and he has experience in disputes across a wide range of different areas, including M&A transactions, shareholders' agreements, sale and purchase agreements, financial agreements and insurance agreements.

Carl is ranked as a future leader in *Who's Who Legal: Future Leaders – Arbitration 2020* and *Who's Who Legal: Future Leaders – Litigation 2020*.

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Bruno Gustafsson is an associate working in Roschier's Dispute Resolution team. In his daily work, Bruno advises multinational corporations in large international arbitrations as well as court proceedings. Bruno Gustafsson has published numerous academic articles, including with SCOPUS-indexed law journal University of Bologna Law Review, Stockholm Arbitration Yearbook and Creighton Law Review. His publications have focused mainly on security for costs in arbitrations involving third-party funding, sovereignty issues and provisional relief in the context of international investment law (in particular, investor-state arbitration), as well as on regulatory matters pertaining to the Swedish energy market.

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