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Costs Issues in Arbitrations Involving Third Party Funding: The Swedish Example

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(*)

Third party funding in international arbitration provided by professional funders is no longer seen as an exotic tool for pursuing a claim. An increasing interest in third party funding has also been observed in Stockholm, the traditional hub for international arbitration also for parties with no, or only a very limited, link to Sweden as well as one of the world's most preferred venues for investment treaty arbitration. Whenever an arbitral tribunal in such proceedings decides on costs – either as part of its final award when allocating costs or in relation to requests for security for costs at the beginning of an arbitration – questions regarding the impact of third party funding on such decisions have become ever more common following the substantial increase in third party funding of international arbitrations. This article provides a broad review of the costs regulation and how the important issues raised by third party funding in the context of costs may be addressed and solved with respect to arbitrations seated in Sweden.

Gerade bei internationalen Schiedsverfahren ist die Verfahrensfinanzierung durch professionelle Finanzdienstleister zu einem nicht länger exotischen Mittel der Durchsetzung von Ansprüchen geworden. Am Schiedsplatz Stockholm, wo traditionell viele Verfahren zwischen Parteien ohne besondere Anknüpfung an Schweden – auch internationale Investitionsschiedsverfahren – durchgeführt werden, kann man ein steigendes Interesse der *third-party-funding*-Dienstleister erkennen. Wenn Schiedsgerichte dann über die Verteilung der Verfahrenskosten entscheiden – entweder als Teil des Endschiedsspruchs oder zu Beginn des Verfahrens bei der Entscheidung über Sicherheitsleistung für die Kosten – wird immer häufiger die Frage gestellt, welchen Einfluss die Verfahrensfinanzierung durch Dritte darauf hat. Dieser Artikel soll einen breiten Überblick über die Kostenregelungen und Lösungsansätze für Fragen im Zusammenhang mit der Verfahrensfinanzierung durch Dritte in Schiedsverfahren mit Sitz in Schweden geben.

I. Introduction

Over the last years, there has been a strong increase in the number of cases which are funded by a third party. (1) Because of the ever-changing forms that dispute funding may take, there is no agreed definition of third party funding (TPF) among arbitration
P 150 practitioners, ● academics or even the leading TPF entities themselves. (2) In short, TPF may in its simplest form be understood as a situation where a third party provides non-recourse financing to a disputing party, where repayment of the funds with an additional fee is contingent on the party's success in the dispute. (3)

The emergence of TPF has raised concerns within the arbitration community (and beyond) which warrant due consideration – most of which relate to the integrity of the arbitration process. (4) However, as the ICCA-Queen Mary TPF Task Force found in its 2018 Report, "*it is now generally accepted that funding will be part of the modern reality in international arbitration.*" (5) Also, as evident from the 2018 International Arbitration Survey, the view of TPF has shifted from neutral to positive. (6)

There seems to be consensus within the arbitration community that TPF is here to stay and will only increase in importance, as arbitration claims represent an "*untapped market*" that will only continue to grow as more and more parties and counsel become aware of TPF. (7) Thus, it is of course of utmost importance for any arbitration practitioner to get a grip on its impact on certain aspects of the arbitral procedure.

As pointed out by *Leslie Perrin*:

> "*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.*" (8)

One of the matters that is dependent on the jurisdiction of the arbitral proceedings is allocation of costs. (9) This article will provide a broad review of how issues relating to costs in arbitral cases involving TPF may be dealt with, when such arbitrations are seated in Sweden.

II. Swedish Law and Regulation Relating to Costs Issues in Cases Involving TPF

1. General

Stockholm is one of the world leading venues for international arbitration, due to the fact that the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) is among the world's five most preferred arbitral institutions. (10)

Although it is known that arbitral proceedings in Sweden have been funded by third parties, TPF is by commentators still seen as a "*relatively new and unfamiliar phenomenon in Sweden*". (11) As late as in 2018, it was noted that no domestic market existed at that time, (12) and it has also been held that TPF would never be available by any Swedish funder. (13) However, international funders such as *Burford*, *Therium* and *Nivalion* are increasing their presence in Sweden, and local third party funders *Kapatens* and *Litigium Capital* have now opened up offices to provide capital to the emerging Swedish TPF market.

The fact that TPF only recently has started to become more known and available in Sweden is of course the main reason why there are no specific legal rules or Supreme Court cases dealing with TPF, in general, and with costs issues relating to TPF, in particular. (14) Further, the subject has only occasionally been dealt with in Swedish scholarly writings. (15) Any costs issue relating to TPF, such as (i) whether a funded party
P 151 may claim compensation for costs paid by a funder; (ii) ● whether a funder may be held liable for adverse costs; and (iii) whether TPF affects any test for ordering security for costs, must be answered applying general rules on costs applicable to arbitrations seated in Sweden. These topics will be discussed below.

2. Liability for costs under Swedish law

a) General

The Swedish Arbitration Act, Section 42, provides the following with respect to liability for costs:

> *"Unless otherwise agreed by the parties, the arbitrators may, upon request by a party, order the opposing party to pay compensation for the party's costs and determine the manner in which the compensation to the arbitrators shall be finally allocated between the parties. The arbitrators' order may also include interest, if a party has so requested."* (16)

The Arbitration Act does not set out which type of costs are recoverable, but the general understanding is that the principles found in Chapter 18 of the Swedish Code of Judicial Procedure (Sw.: *Rättegångsbalken*) shall apply, unless the parties have agreed otherwise. (17) This means that the losing party shall compensate the other party for its costs of the proceedings. (18)

The former President of the Swedish Supreme Court, *Stefan Lindskog*, states that whereas it is not unusual in international arbitrations that the arbitral tribunal on a discretionary basis awards the winning party adjusted costs (Sw.: *jämkad kostnadsersättning*), that should not be the case with respect to Swedish arbitrations with an international connection. (19) *Lindskog* further states that the international trend is that the losing party is allocated the full liability for costs. (20) In case of partial success and loss, respectively, there is a mutual right to reimbursement for costs. (21)

In a 2016 study on the apportionment of costs under the SCC Rules, it was found that full apportionment of costs was awarded in 45 % of the cases, partial apportionment was awarded in 34 % of the cases, and standard apportionment (where parties bear the costs of arbitration in equal shares and their own costs for legal representation and other expenses) in 21 % of the cases. (22)

With respect to which costs are recoverable, the following is set out in Chapter 18, Section 8 of the Swedish Code of Judicial Procedure (which, as mentioned above, would apply also in arbitration):

> *"Compensation for litigation costs shall fully cover the costs of preparation for trial and presentation of the action including fees for representation and counsel, to the extent that the costs were reasonably incurred to safeguard the party's interest. Compensation shall also be paid for the time and effort expended by the party by reason of the litigation. Negotiations aimed at settling an issue in dispute that bear directly on the outcome of a party's action are deemed to be measures for the preparation of the trial."*

Against this background, compensation for costs in an arbitration seated in Sweden is generally said to include costs for legal representation and evidence, institutional charges and compensation for the winning party's own expenditure of work and time, as well as interest thereon. (23) Thus, in an international context, the right to recovery for costs may seem quite extensive, even allowing a party to recover costs of its employed in-house counsel with respect to such counsel's work relating to the dispute. Costs relating to expert witnesses and legal opinions are recoverable as costs of evidence. (24)

With respect to the reasonableness of costs for counsel, Swedish national courts regularly reduce the amount claimed as counsel fees, whereas it may be assumed that an arbitral tribunal consisting of experienced arbitrators (which are often practicing commercial

dispute lawyers themselves) will be more likely to accept the relatively high fees charged by well-recognized arbitration counsel.

As mentioned above, the succeeding party is entitled to interest on its costs, which runs with the reference rate of interest as determined each calendar half year by the Central Bank of Sweden (currently 0 %) plus 8 % per year, from the day of the award until payment is made.

The Arbitration Rules of the SCC (SCC Rules), under which the vast majority of arbitrations in Sweden are carried out, set out the following with respect to allocation and recoverability of costs:

> *"Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award, at the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case, each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances."* (25)

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Lindskog states that the parties' liability for costs under the SCC Rules do not deviate from what would otherwise apply under Section 42 of the Arbitration Act. (26)

However, it should be noted that while arbitrators deciding on issues of recoverable costs in an *ad hoc* arbitration seated in Sweden would seek guidance in the language of the Swedish Code of Judicial Procedure, which refers mainly to "*costs of preparation for trial and presentation of the action*", the language of the SCC Rules in this respect is more open-ended, referring to recovery of "*any reasonable costs*". We will return to this issue and any potential implications thereof in section II.2 b) (ii) below.

b) Claim for costs by a funded party

(i) A funded party's claim for costs borne by a funder

It is not settled under Swedish law how TPF would affect the right to recovery for costs. (27)

In an SCC case, *Quasar de Valores SICAV S. A. et al. v. The Russian Federation*, (28) where the claimants were funded by a third party with no direct economic interests in the award (i. e. no entitlement to share the proceeds or other reimbursement), the arbitral tribunal rejected the prevailing claimants' claim for compensation for costs on the basis that the claimants were not obliged to make any payment to the funder. However, when the Stockholm District Court subsequently ruled on the arbitral tribunal's jurisdiction in the same matter (*The Russian Federation v. Quasar de Valores SICAV S. A. et al.*), the Court concluded that, under Swedish law, there is a presumption that (i) a funded party may claim compensation from the opposing party, and that (ii) the liability for costs of the third party funder is merely subsidiary. (29)

As the District Court found that the plaintiff (i. e. the respondent in the arbitration) had not presented any evidence indicating that the third party funder's pledge to cover the litigation costs of the defendants (i. e. the claimants in the arbitration) should be interpreted otherwise, the District Court held that the plaintiff should compensate the defendants for their litigation costs (i. e. the costs in the court case regarding the arbitral tribunal's jurisdiction). (30) This implies that if the plaintiff had provided evidence showing that the defendants were not contractually obligated to reimburse the funder, the defendants may not have been awarded costs. In such case, the outcome with respect to the allocation of costs would have been the same before the District Court as in the arbitration. It should, however, be noted that the usual funding arrangements are of a commercial nature and involve a right for the funder to be reimbursed for the funding provided, and that the referenced case thus involved unusual circumstances.

In a more recent decision in a case regarding interim measures, *Ascom Group S. A. et al. v. The Republic of Kazakhstan*, the Stockholm District Court found that the non-funded party's argument that the funded party had not incurred any recoverable costs since any and all costs had been borne by a funder, lacked merit. The District Court thus stated that the circumstance that a party may have obtained financial assistance from a third party to fund the action, in part or entirely, does not mean that the party has not had any costs of the proceedings. (31)

The above referenced District Court decisions that a party should be able to be awarded costs even if the costs were funded by a third party is also in line with international best practice. (32) Against this background, we deem it likely that the main rule whereby a prevailing party may be compensated for costs of the arbitration will apply even if such party has received funding from a third party to pay for its legal representation and/or the fees to the arbitral tribunal and any arbitral institution (if applicable). (33) It should
P 153 however be noted that compensation for costs may be subject to a requirement that the funded party is under an obligation to share the proceeds of the award with the funder, or to otherwise reimburse the funder in case of success, and thus be said to have ultimately incurred the relevant costs of the arbitration.

(ii) A funded party's claim for costs with respect to the fees payable to the funder

With respect to compensation for the funding costs as such, i. e. the fees payable by the funded party to the funder in case of success, any such right will, as set out in the ICCA-Queen Mary TPF Report, "*depend on the definition of recoverable costs in the applicable national legislation and/or procedural rules*". (34)

The provision of recoverable costs under Chapter 18 of the Code (as quoted above) allows for recovery of costs mainly relating to the preparation for trial and presentation of the action and does not seem to make possible any claim for the costs of financing such preparations, i. e. costs relating to the funder's fee under the funding agreement (or any other type of financing of such costs, such as through a traditional bank loan or by other means). Thus, the premium payment made to the funder would not be recoverable in an *ad hoc* arbitration seated in Sweden. (35)

However, as mentioned above, the SCC Rules on costs use somewhat broader language with respect to recovery for costs, and set forth that the arbitral tribunal may order a party to pay "*any reasonable costs incurred by another party*", having regard to "*any relevant circumstances*", i. e. not being limited to costs relating to preparation for trial and presentation of the action, as under the Code. (36) It may, therefore, be noted that in an ICC arbitration seated in London, the claimant was awarded costs not only for legal fees and expenses, but also for its fees to the funder under the funding agreement, as such payment was held to fall within the term "*other costs*". The English High Court rejected the challenge of that decision. (37)

Even though the circumstances of the case were extraordinary (impecuniosity of the funded party was partly caused by the respondent and the funded party was deemed to have had no option but to seek funding to pursue its claim), considering the broad language of the SCC Rules ("*any reasonable costs incurred*"), it may not be ruled out that a party in an arbitration under the SCC Rules in rare cases with similar circumstances may also be awarded costs for its fees payable to the funder under the funding agreement.

In this respect, it should particularly be noted that almost half of the survey respondents in the 2018 International Arbitration Survey were positive to allow a successful party to recover also its costs of funding from the losing party. However, in the subgroup of respondents consisting of full-time arbitrators, nearly 60 % stated that recovery should not be possible. (38)

A funder's return is often calculated as the higher of (i) a percentage of the proceeds (often between 20-40 % or even 40-60 %); or (ii) a multiple of the capital invested (often three times the investment). (39) If recovery for funder's fees were to be allowed, one may expect that such fees would under any circumstance be scrutinized to pass a test of reasonableness, focusing on the amount payable rather than the fee mechanism as such. (40)

c) Adverse costs liability for a third party funder

In international arbitration, it is generally held that a funder is not subject to the authority of the arbitral tribunal and that an arbitral tribunal can therefore not order costs against a funder. (41) This would apply also for Swedish conditions. (42) It is however unsettled whether a third party funder may be held liable for adverse costs in a subsequent action before the Swedish courts, in case the prevailing non-funded party is unable to collect on the costs award against an impecunious funded party.

Under Swedish law, there is no requirement that a disputing party – funded by a third party or not – must have the financial resources to compensate the opposing party in case of an adverse costs award. (43) It may, however, be noted that the Swedish Supreme Court has held shareholders of an empty "litigation company" (a thinly capitalized, special purpose vehicle which had acquired and pursued a claim) liable for adverse costs. (44) The Supreme Court held that the corporate arrangement had been set up for the sole purpose of avoiding liability for adverse costs and thus to circumvent and disrupt the underlying balance of the Swedish rules on costs. (45)

Notably, this case related to a situation where the claim as such had been assigned to the litigation company, and it may thus be clearly distinguished from a TPF arrangement
P 154 where the original claim holder is the ● party also actually pursuing the claim. Nonetheless, on the basis of this case, it has been argued that it would be reasonable for a successful respondent in an arbitration under certain circumstances to recover on its costs of arbitration from a third party funder by filing a court action (i. e. not by making such claim to the tribunal, which has no jurisdiction over the funder). (46)

Some practitioners have, by referencing the said case and with respect particularly to TPF arrangements, even stated that "*if the losing side had external funding, it is possible that the financier will be (jointly) liable for the winning side's costs and expenses in certain cases.*" (47)

However, one must keep in mind that this case related to a situation where a claim had in fact been assigned to an otherwise empty litigation company and that the Supreme Court found that the sole purpose of the arrangement was to circumvent the Swedish rules on liability for costs. This is fundamentally different from the situation in a usual

TPF arrangement where the claimant pursues its own claim, albeit funding its costs through a third party. It should also be noted that former Head of the Supreme Court *Stefan Lindskog* has stated that responsibility for costs by any other party than the disputing party itself, may be conceivable only if (i) the claim has been assigned to another party than the original claim holder for purposes of pursuing the action, and (ii) such assignment was carried out for the purpose of circumventing liability for costs. (48)

Against this backdrop, we share the view of Swedish commentators taking the position that:

> "*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 position*." (49)

Further, if no assignment of the claim has been made, the arguments for allowing recovery from a funder for providing capital seems to apply equally to a bank providing a traditional loan, (50) or any other capital arrangement or injection by shareholders to a company about to engage in arbitration.

3. Security for costs in cases involving TPF

In international arbitration, it has up until recently often been stated that in case a claimant would be unable to satisfy a costs award and relies on TPF to pursue its claim, that should provide ground for ordering security for costs, (51) or at least that such situation would provide "*a strong prima facie case for security for costs*". (52)

The reason behind the position that TPF should negatively affect a claimant's potential obligation to provide security is not entirely clear. *John Fellas* suggests the following when considering the consequence of TPF on the three-part test for applications on security for costs set out by the Chartered Institute of Arbitrators (which consist of (i) claimant's ability to satisfy an adverse costs award; (ii) the prospects of success; and (iii) whether it is fair to require claimant to provide security):

> *"The first factor implicates third-party funding directly. If a party, which otherwise did not have sufficient funds to bring a claim, brought one with the assistance of third-party funding, the question arises as to whether it would have the assets to satisfy an adverse costs award if it were to lose its case."* (53)

However, even if TPF may indeed indicate that a claimant lacks sufficient assets to meet an adverse costs award (which need not be the case, as TPF is also used for a variety of other reasons, such as risk allocation), it does not affect the funded party's possibility to do so in the negative, but rather in the positive – depending on the terms of the funding agreement or any ATE insurance it may well be that the involvement of a funder (if taking on also the adverse costs risk, which is often the case) have instead increased the claimant's possibility to pay adverse costs.

Fellas further states the following:

> *"When it comes to the third factor, an issue of fairness comes into play; it is viewed to be unfair for a funder to be able to obtain a benefit from the arbitration process by sharing in a damages award when the funded claimant is successful, but to be able to escape the burden of that process by avoiding having to pay an adverse costs award if that claimant is not successful."* (54)

First, this argument seems rather circular and flawed as it is based on the supposition
P 155 that a funder "escapes" ● to pay an adverse costs award, indicating that it should in any way be obligated to meet such award. As set out in section II.2.c) above, a funder is not within the jurisdiction of the arbitral tribunal and may not be liable for adverse costs. In a losing scenario, a funder would under any circumstance lose its entire investment in the claim, which does not seem as a particular successful "escape". Further, the question arises why any issue of fairness "for a funder" should be taken into account, as such funder is under no circumstance a party to the arbitration. In our view, any issue of fairness should be determined only with respect to the parties in the proceedings.

The 2018 ICCA-Queen Mary TPF Report, drafted by distinguished Task Force members and said to reflect existing norms and emerging trends, states:

> "*An application for security for costs should, in the first instance, be determined on the basis of the applicable test, without regard to the existence of any funding arrangement*." (55)

Thus, when applying the test for the ordering of security for costs (as applicable under the relevant law or institutional rules), it should not matter whether the claimant is funded by a third party or not. This view thus provides a change in relation to what has previously been held as international best practice, i. e. that TPF may be weighed in favor of ordering security for costs.

In the ICCA-Queen Mary TPF Report, it is further set out:

> *"The terms of any funding arrangement, including ATE, may be relevant if relied upon to establish that the claimant (or counterclaimant) can meet any adverse costs award (including, in particular, the funder's termination rights)."* (56)

Thus, in contrast to the view that TPF would weigh in favor of ordering security for costs, the ICCA-Queen Mary TPF Report suggest not only that TPF should not automatically affect any obligation for claimant to provide security, but also that the claimant may rely on the terms of the funding agreement to show that it may indeed meet an adverse costs award and thus not be obligated to provide security.

Under the SCC Rules, an arbitral tribunal may, in exceptional circumstances, order a claimant to provide security for costs. (57) In cases involving TPF, any arbitral tribunal seated in Sweden would presumably seek guidance in the above referenced ICCA-Queen Mary TPF Report before ordering any security for costs.

In their guide to security for costs at the SCC, the Swedish attorneys *Carl Persson* and *Bruno Gustafson* draw the following conclusion:

> *"[T]he mere existence of third-party funding is an argument neither for nor against granting security for costs. Rather, the crucial factors will be the non-applicant's financial situation and availability of assets viewed in light of whether or not the third-party funder has committed to cover adverse costs."* (58)

Thus, the ICCA-Queen Mary TPF Report seems also to reflect the position among Swedish arbitrators and practitioners on this issue, i. e. that TPF in and of itself does not provide grounds for ordering security for costs. (59)

III. Conclusion

Third party funding raises a number of questions to be dealt with by arbitral tribunals acting in disputes where one of the parties has obtained such funding. Stockholm is one of the world leading venues for international arbitrations, and both international and local third party funders are active on the Swedish market.

In this article, we have provided a broad review with respect to costs issues in arbitrations involving third party funding in Sweden. We have found that under Swedish law, and the SCC Rules, a party should be able to be awarded costs even if the costs were funded by a third party. However, it should be noted that this may require that the funded party is under an obligation to share the proceeds of the award with the funder, and thus be said to have ultimately incurred the costs of the arbitration.

With respect to the premium payment to the funder (i. e. the funder's fee), such costs would not be recoverable in an *ad hoc* arbitration seated in Sweden, while it may not be ruled out that a party in an arbitration under the SCC Rules in rare cases and extraordinary circumstances may be awarded costs also for its fees payable to the funder. Such circumstances could for example be that the respondent's acts or omissions forced the funded party to seek funding to be able to pursue its claim.

A funder is not subject to the authority of the arbitral tribunal and can thus not be ordered by the arbitral tribunal to pay any costs of a successful non-funded party. We deem it unlikely that a non-funded party, which cannot recover its costs from an impecunious funded party in case of a favorable costs award, would be successful if initiating litigation before a Swedish court in order to be compensated for its costs of the arbitration by a third party funder which financed the claim of the losing party.

As regards security for costs, the fact that a party's claim is financed by a third party does not in and of itself provide any ground for making such order. Thus, the relevant test for ordering security for costs should be applied without regard to any funding agreement. However, the existence of a funding agreement may be taken into account when establishing whether a party will be able to meet an adverse costs award (e. g. if the funder has agreed to pay any adverse costs), and thus be relied upon to show that there is no need for security.

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References

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1) Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, The ICCA Reports No. 4, April 2018, 4. Said report is hereinafter referred to as the "ICCA-Queen Mary TPF Report", and the task force itself as the "ICCA-Queen Mary TPF Task Force".

2) *Scherer/Goldsmith/Fléchet*, Third Party Funding in International Arbitration in Europe: Part 1 – Funders' Perspectives, IBLJ 2012/2, 207-220 (209); ICCA-Queen Mary TPF Report, 46-47. See also *von Goeler* pointing out that "*[t]he terms 'third-party funding' and 'litigation funding' are sometimes used interchangeably.*" (Third-Party Funding in International Arbitration and its Impact on Procedure, 2016, 2). In his own work, *von Goeler* uses the term "litigation funding" "*to describe the provision of capital for dispute resolution – including international arbitration*" (at 3). Thus, one shall not understand the term "litigation funding" as being used solely with respect to the financing of court proceedings.

3) *Shannon/Bench Nieuwveld*, Third-Party Funding in International Arbitration, 2012, 8. It may be noted that the ICCA-Queen Mary TPF Task Force, when reviewing a number of definitions of TPF, found the key elements to be the following: "*1) a person or entity that is not a party to the dispute; 2) the provision of financing or material support; and 3) remuneration that is either dependent on the outcome of the dispute, or is given as a grant or in return for a premium.*" (ICCA-Queen Mary TPF Report, 51). The working definition of TPF used by the ICCA-Queen Mary TPF Task Force when drafting its Report was the following: "*The term 'third-party funding' refers to an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party, a) funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment.*" (ICCA-Queen Mary TPF Report, 50).

4) *Dimolitsa*, Introduction, in Cremades/Dimolitsa (eds.), Third-party Funding in International Arbitration, ICC Dossier, 2013, 7-9 (7).

5) ICCA-Queen Mary TPF Report, 6.

6) 2018 International Arbitration Survey: The Evolution of International Arbitration, 24, available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The... (this and all other links last accessed on 31.3.2020). It was concluded in the survey that "*this trend may be seen as an indication that the more users encounter third party funding in practice, the more favourably they tend to perceive it*" (at 25).

7) See, e. g. *Fellas*, Third-Party Funding: The Award of Costs and Security for Costs, in Tung et al. (eds.), Finances in International Arbitration: Liber Amoricum Patricia Shaughnessy, 2019, 107-114 (108); *Seidel*, Third-Party Investing in International Arbitration Claims – To invest or not to invest? A Daunting Question, in Cremades/Dimolitsa (eds.), Third-party Funding in International Arbitration, ICC Dossier, 2013, 16-31 (25); and *Goldsmith/Melchionda*, Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask): Part 2, IBLJ 2012/2, 221-243 (231).

8) *Perrin*, The Third Party Litigation Funding Law Review, 2017, vi.

9) *Von Goeler*, Third-Party Funding in International Arbitration and its Impact on Procedure, 2016, 370.

10) 2018 International Arbitration Survey: The Evolution of International Arbitration, 9.

11) *Sidklev/Persson*, Sweden, in Perrin (ed.), The Third Party Litigation Funding Law Review, 2018, 168-177 (168).

12) *Josefsson/Neway Herrman*, Extern finansiering av tvister och riskavtal – en möjlighet att stärka Sverige som säte för internationella skiljeförfaranden? (Eng.: External financing of disputes and risk agreements – a possibility to strengthen Sweden as a seat for international arbitration?), Ny Juridik 2018/1, 85-94 (86). See also *Mühlenbock*, Tvistinvestering – särskilt om vissa kostnadsfrågor (Eng.: Dispute Investment – especially regarding certain issues relating to costs), Juridisk Publikation 2016/1, 113-143 (116), commenting that no domestic market existed as of the time of his 2016 law review article.

13) See, e. g. *Söderlund*, Tredjepartsfinansiering av skiljeförfaranden (Eng.: Third Party Funding in Arbitral Proceedings), Juridisk Tidskrift 2015-2016/4, 959-964 (960, 964).

14) With respect to the lack of regulation, see *Sidklev/Persson* in Perrin (ed.), The Third Party Litigation Funding Law Review, 2018, 168 (169); *Foerster*, Sweden, in Pitkowitz (ed.), Handbook on Third-Party Funding in International Arbitration, 2018, 379-389 (379); and *Mühlenbock* Juridisk Publikation 2016/1, 113 (116).

15) For a few exceptions, see *Bellander*, Rättegångskostnader. Om kostnadsbördan i dispositiva tvistemål (Eng.: Costs in Civil Litigation), 2017 (however dealing only briefly with the TPF costs, and then in relation to litigation); and *Mühlenbock* Juridisk Publikation 2016/1, 113. Practicing Swedish attorneys have also provided shorter comments on the subject, see *Sidklev/Persson* in Perrin (ed.), The Third Party Litigation Funding Law Review, 2018, 168; *Foerster* in Pitkowitz (ed.), Handbook on Third-Party Funding in International Arbitration, 2018, 379; and *Söderlund* Juridisk Tidskrift 2015-2016/4, 959.

16) Swedish Arbitration Act (Sw.: *lagen (1999:116) om skiljeförfarande*), Sec. 42.

17) *Lindskog*, Skiljeförfarande: En kommentar (Eng.: Arbitration: A Commentary), JUNO Version 2C, item VI. 4.1.1; *Kvart/Olsson*, Tvistlösning genom skiljeförfarande. En handledning till lagen om skiljeförfarande (Eng.: Dispute Resolution through Arbitration. A Guide to the Arbitration Act), 2012, 157.

18) Swedish Code of Judicial Procedure, Ch. 18, Sec. 1. *Lindskog*, Skiljeförfarande: En kommentar, item VI. 4.2.2; *Heuman*, Arbitration Law of Sweden: Practice and Procedure, 2003, 567 f.
19) *Lindskog*, Skiljeförfarande: En kommentar, item VI. 4.2.2.
20) *Lindskog*, Skiljeförfarande: En kommentar, item VI. 4.2.2, fn. 236. *Lindskog* references *Julian D M Lew et al.*, Comparative International Commercial Arbitration, for support on the issue of the international trend on costs allocation. However, it may be noted that *Lew*'s book was published in 2003 and in its turn references case law dating from the mid-1990s, thus probably no longer suitable for trend analysis. See *Lew/Mistelis/Kröll*, Comparative International Commercial Arbitration, 2003, 654 paras. 24-82. *Von Goeler* notes that others have doubted the trend towards outcome based allocation and that such commentators "*believe that the allocation of costs in international arbitration remains unpredictable.*" (Third-Party Funding in International Arbitration and its Impact on Procedure, 2016, 376).
21) *Lindskog*, Skiljeförfarande: En kommentar, item VI. 4.2.3. However, see also *Heuman*, who takes the view that "*[i]f the claim is partially granted, sometimes it is not possible to establish liability for compensation by means of the proportionality principle. If, for example, half the damage claimed has been awarded by the tribunal, but the costs refer essentially to the question of whether the respondent has committed any breach of contract in the first place, not to the calculation of damages, the claimant shall be considered as the prevailing party.*" (Arbitration Law of Sweden: Practice and Procedure, 2003, 567 f., fn. 92).
22) *Salinas Quero*, Costs of arbitration and apportionment of costs under the SCC Rules, February 2016, 11, available at https://sccinstitute.com/media/93440/costs-of-arbitration_scc-report_2016.pdf.
23) *Heuman*, Arbitration Law of Sweden: Practice and Procedure, 2003, 568; see also *Kvart/Olsson*, Tvistlösning genom skiljeförfarande. En handledning till lagen om skiljeförfarande, 2012, 157.
24) It is not unusual that the issue of how costs relating to expert witnesses should be accounted for by the parties in order to be recoverable as costs is dealt with at the initial case management conference.
25) SCC Rules, Art. 50. Under the SCC Rules, the following applies with respect to the costs of arbitration (i. e. the fees of the arbitral tribunal, the administrative fee of the SCC and the expenses of the arbitral tribunal and the SCC): "*Unless otherwise agreed by the parties, the Arbitral Tribunal shall, at the request of a party, apportion the Costs of the Arbitration between the parties, having regard to the outcome of the case, each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances.*" (SCC Rules, Art. 49 (6)). Cf. *Foerster*, Die Stockholmer Regeln, in Schütze (ed.), Institutionelle Schiedsgerichtsbarkeit, 2018, 1262-1263.
26) *Lindskog*, Skiljeförfarande: En kommentar, item VI. 2.2.
27) *Westberg*, Civilrättskipning (Eng.: Civil Litigation), 2013, 110; *Bellander*, Rättegångskostnader. Om kostnadsbördan i dispositiva tvistemål, 2017, 268; *Mühlenbock* Juridisk Publikation 2016/1, 113 (131). It may be noted that *Thorsten Cars*, in his Lexino commentary (the leading online commentary on Swedish legislation) on Sec. 42 of the Arbitration Act (under which the arbitrators may render a costs order) makes an explicit reference to *Söderlund*'s above mentioned article on third party funding, as to which costs should be recoverable in cases involving TPF. However, *Söderlund*'s article is completely silent on the said issue. With respect to compensation for costs, *Söderlund* merely notes that in the "classical" TPF model, the funder takes on the funded party's costs in case of loss. However, that does not relate to the issue of whether a winning funded party may claim compensation for any costs which have in fact been borne by the funder, or even for the amount of the proceeds of the award which are to be distributed to the funder under the funding agreement. See *Cars*, Lexino Comment on Section 42 of the Arbitration Act, 28.5.2016 and *Söderlund* Juridisk Tidskrift 2015-2016/4, 959 (961).
28) *Quasar de Valores SICAV S. A. et al. v. The Russian Federation*, SCC Case No. 24/2007, 20.7.2012.
29) *The Russian Federation v. Quasar de Valores SICAV S. A. et al.*, Stockholm District Court, Case No. T 15045 09, 11.9.2014, 34.
30) For criticism of this position, see *Mühlenbock*, arguing that the burden of proof with respect to costs actually paid by a funder should be on the party claiming costs to prove not only the amount of costs claimed, but also that such costs shall ultimately be borne by the funded party by repaying such amount to the funder under the funding agreement in case of success (Juridisk Publikation 2016/1, 113 (133)). For support on this issue, *Mühlenbock* in his turn refers to *Ekelöf et al.*, who note that a party claiming costs shall state the ground on which the claim is based, i. e. specify how the costs were incurred (Rättegång III (Eng.: Litigation III), 8 ed., 300).

31) *Ascom Group S. A. et al. v. The Republic of Kazakhstan*, Stockholm District Court, Case No. T 10498-17, Final Decision, 24.1.2018, 33. It may be noted that in the subsequent enforcement proceedings before the appellate court, the Republic of Kazakhstan requested that *Ascom Group S. A. et al.* should be ordered to produce the funding agreement (for purposes of disclosing the terms of the funding arrangement and identifying the funder, in order to establish (i) whether the funded parties had in fact incurred any reimbursable costs and (ii) whether there was any conflict of interest because of unknown relations between the funder and any person involved in the proceedings). The request was denied by the Svea Court of Appeal, which did not provide any reasoning for its decision. *The Republic of Kazakhstan v. Ascom Group S. A. et al.*, Svea Court of Appeal, Case No. ÖÄ 7709-19, Decision on Production of Documents, 18.3.2020.

32) See, e. g. ICCA-Queen Mary TPF Report ("*recovery of costs should not be denied on the basis that a party seeking costs is funded by a third-party funder*"), 145; *von Goeler*, Third-Party Funding in International Arbitration and its Impact on Procedure, 2016, 410.

33) *Westberg* states in his 2013 publication (i. e. prior to the rendering of the above referenced District Court judgment and decision) that one may believe that Swedish law would imply that a succeeding party may only be awarded costs in case it has itself borne such costs, but that the language in Ch. 18, Sec. 8 of the Code does not specifically require that the party has used its own funds (Civilrättskipning, 2013, 110). *Bellander* concludes in his 2017 doctoral thesis, after accounting for the District Court's ruling in *The Russian Federation v. Quasar de Valores SICAV S. A. et al.*, that there may be reasons to treat TPF on equal footing with state legal aid and legal insurance, noting that Swedish courts apply the main rule of recovery for costs notwithstanding any right for a succeeding party to be reimbursed for its costs under an insurance coverage, i. e. the same reasoning as put forward by the District Court in the said case (Rättegångskostnader. Om kostnadsbördan i dispositiva tvistemål, 2017, 266, 270).

34) ICCA-Queen Mary TPF Report, 145.

35) *Bellander*, Rättegångskostnader. Om kostnadsbördan i dispositiva tvistemål, 2017, 269; *Mühlenbock* Juridisk Publikation 2016/1, 113 (134).

36) SCC Rules, Art. 50.

37) *Essar Oilfields Services Ltd v. Norscot Rig Management Pvt Ltd*, Queens Bench Division (Commercial Court), 15.9.2016.

38) 2018 International Arbitration Survey: The Evolution of International Arbitration, 26.

39) *Von Goeler*, Third-Party Funding in International Arbitration and its Impact on Procedure, 2016, 30 f; *Peysner*, Playing the man not the ball, in van Boom (ed.), Litigation, Costs, Funding and Behaviour. Implications for the Law, 2017, 55-79 (68).

40) See, e. g. the ICCA-Queen Mary TPF Report, which sets out the following: "*The question of whether any of the cost of funding, including a third-party funder's return, is recoverable as costs will depend on the definition of recoverable costs in the applicable national legislation and/or procedural rules, but generally should be subject to the test of reasonableness and disclosure of details of such funding costs from the outset of or during the arbitration so that the other party can assess its exposure*" (at 145).

41) ICCA-Queen Mary TPF Report, 161 ("*arbitral tribunals will typically lack jurisdiction to issue a costs order against a third-party funder because of the consensual nature of arbitration*"); *von Goeler*, Third-Party Funding in International Arbitration and its Impact on Procedure, 2016, 420 ("*the rise of litigation funding as a means of financing international arbitration proceedings does not give reason to relativize basic principles of arbitral consent*"). See also *Kaplan*, Third-Party Funding in International Arbitration – Issues for Counsel, in Cremades/Dimolitsa (eds.), Third-Party Funding in International Arbitration, ICC Dossier, 2013, 70-77 (70); and *Affaki*, Financing is a Financing is a Financing..., in Cremades/Dimolitsa (eds.), Third-party Funding in International Arbitration, ICC Dossier, 2013, 10-15 (11).

42) *Mühlenbock* Juridisk Publikation 2016/1, 113 (136).

43) Swedish Supreme Court cases NJA 2000 p. 144 and NJA 2006 p. 420; *Lindskog*, Om fattig mans rätt till rättegång. Några synpunkter med anledning av NJA 2006 s. 420 (Eng.: On the poor man's right to trial. Comments regarding NJA 2006 p. 420), in Kleineman et al. (ed.) Festskrift till Lars Heuman, 2008, 327-343 (342).

44) Swedish Supreme Court case NJA 2014 p. 877. It may be noted that under German law, the transfer of a claim to an empty special purpose vehicle (or "litigation company") as such may be deemed invalid, which would mean that such a case would not even be tried on the merits and thus not reach the issue of liability for costs, cf. Düsseldorf Court of Appeal, Decision of 18.2.2015 – VI-U (Kart) 3/14.

45) NJA 2014 p. 877 (891).

46) *Mühlenbock* Juridisk Publikation 2016/1, 113 (139, 141). *Mühlenbock* thus argues that in case the funder is the "real interested party", by controlling the dispute and having a right to receive a very substantial portion of any proceeds, such situation should be treated equally to that where a formal assignment of the claim has been made. However, *Mühlenbock*'s position is that also under such circumstances, recovery for costs against the funder would require that the undercapitalized formal claimant has been used as "protection" for any adverse costs by the funder (at 139).

47) *Arvmyren/Stridh*, Sweden, in Getting the Deal Through, Arb. 2019, item 52.

48) *Lindskog* in Kleineman, et al. (ed.) Festskrift till Lars Heuman, 2008, 327 (342).
49) *Sidklev/Persson* in Perrin (ed.), The Third Party Litigation Funding Law Review, 2018, 168 (176).
50) The analogy of a claimant funding its claim through a bank loan is a recurring theme by commentators disfavoring the argument that funders may be liable for adverse costs, see, e. g. *Bogart*, arguing that *"[n]o one would suggest that the bank should be liable for adverse costs if the claimant uses the bank's money to pursue an arbitration claim, and the same result should obtain for arbitration funders. The funder is not a party to the action and is not controlling it; the party is the proper obligor for any costs award."* (Overview of Arbitration Finance, in Cremades/Dimolitsa (eds.), Third-party Funding in International Arbitration, ICC Dossier, 2013, 50-56 (50)). For a different view as to the comparison of TPF to a bank loan, see, e. g. *Hong-Lin Yu*: *"TPF in arbitration is nothing like obtaining funding based on securing loans from other types of financial assistance such as banks [...]. TPF allows the funding party to speculate and benefit from the successful outcomes when the funder bears no interest in the dispute. In contrast, a loan arrangement involves a lender providing funding, but not being entitled to a share in any direct recovery in return."* (Can Third Party Funding Deliver Justice in International Commercial Arbitration?, Intl. Arb. L. Rev. 2017, 20-34 (22 f.)).
51) See, e. g. *Harwood et al.*: *"Assuming that the tribunal has the power to order security for costs, does the claimant's reliance on third-party funding constitute grounds for making such order? Many commentators respond positively. They point out that, in the absence of security, the respondent will be unable to enforce a potential costs award against the claimant because it has no funds of its own, and will also be unable to enforce it against the third-party funder because it is not a party to the arbitration and is outside the jurisdiction of the tribunal."* (Third-Party Funding: Security for Costs and other Key Issues, The Investment Treaty Arbitration Review, 2017, 103-121 (107 f.)).
52) *Born*, International Commercial Arbitration, 2014, 2496 (*"Where a party appears to lack assets to satisfy a final costs award, but is pursuing claims in an arbitration with the funding of a third party, then a strong prima facie case for security for costs exists."*).
53) *Fellas* in Tung et al. (eds.), Finances in International Arbitration: Liber Amoricum Patricia Shaughnessy, 2019, 107 (113).
54) *Fellas* in Tung et al. (eds.), Finances in International Arbitration: Liber Amoricum Patricia Shaughnessy, 2019, 107 (113).
55) ICCA-Queen Mary TPF Report, 145.
56) ICCA-Queen Mary TPF Report, 145.
57) SCC Rules, Art. 38(1). In Art. 38(2), the following is set out: *"In determining whether to order security for costs, the Arbitral Tribunal shall have regard to: (i) the prospects of success of the claims, counterclaims and defences; (ii) the Claimant's or Counterclaimant's ability to comply with an adverse costs award and the availability of assets for enforcement of an adverse costs award; (iii) whether it is appropriate in all the circumstances of the case to order one party to provide security; and (iv) any other relevant circumstances."*
58) *Persson/Gustafson*, A practitioner's guide to security for costs at the SCC, GAR News, 13.11.2019.
59) *Persson/Gustafson*, A practitioner's guide to security for costs at the SCC, GAR News, 13.11.2019. See also *Söderlund*, stating that the prevailing view is that TPF in and of itself does not provide grounds for ordering security for costs unless other circumstances implicating bad faith actions are at hand (Juridisk Tidskrift 2015-2016/4, 959 (963)).