Memorandum to the Swedish Ministry of Foreign Affairs

Regarding the possibility for individuals to bring actions in a Swedish court of law against Swedish companies due to human rights violations committed abroad

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I INTRODUCTION

1. Background and engagement

1. The Swedish Ministry of Foreign Affairs (the "Ministry") will hold consultations with companies and other interested parties in the spring of 2015 regarding a plan of action in order to implement the United Nations (the "UN") Guiding Principles on Business and Human Rights (the "UN Guiding Principles"), Appendix 1.

2. These principles state, among other things, that the states, as regards business-related violations of human rights, shall "*take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such violations occur within their territory and/or jurisdiction those affected have access to effective remedy*".[1] The principles further provide that the states should consider "*ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy*".[2] Notwithstanding the use of the term, "*their jurisdiction*", we understand that the principal interest of the Ministry is to examine the possibility available to individuals (non-Swedish citizens) who have been subjected to human rights violations by Swedish companies abroad to seek legal redress in a Swedish court of law.

3. Mannheimer Swartling Advokatbyrå[3] has been requested by the Ministry to assist in making a general inventory of the possibilities available to a foreign individual, who believes that his or her human rights have been violated by a Swedish company abroad, to seek legal redress in a Swedish court of law. Additionally, we have been asked to shed light on the impediments (legal, procedural, economic, temporal, etc.) which may stand in the way of such legal action. Finally, we have been asked to clarify the extent to which there are claims which must be determined by foreign courts of law due to compulsory rules or for other reasons.

4. We have found it appropriate, in certain cases, to distinguish between whether an individual, whose rights have been violated, is a non-Swedish EU citizen or a non-EU citizen. We have further assessed differences in respect of whether a violation has been carried out by (i) a Swedish company, (ii) a foreign branch of a Swedish company or (iii) a foreign subsidiary of a Swedish company.

5. We have not examined the possibility for aggrieved persons to bring claims against independent (in relation to the Swedish-controlled company) suppliers or foreign producers, who themselves have no ownership

[1] Appendix 1, section 25.

[2] Appendix 1, section 26.

[3] In addition to the undersigned, Robin Oldenstam and Christoffer Monell, this memorandum was prepared with the assistance of David Ackebo, Marcus Berglie, Johanna Holmström, Emelie Jivegård, Daniel Stålberg and Jenny Ulfsdotter.

connection to Sweden. The content of foreign law also fall outside the assignment irrespective of whether it is of a substantive nature or possess the character of private international law. However, we will illustrate the extent to which foreign law may be applicable to disputes before Swedish courts of law. To this end, we have assumed that the parties to such a dispute have no agreement regarding applicable law.

6. This memorandum only addresses the possibility of individuals to assert civil liability. Thus, we have not examined the possibilities available to Swedish prosecutors to bring criminal actions in Sweden for, by way of example, violations of public international law. However, we have considered civil claims in damages brought against a company by an individual based on alleged criminal acts. From a Swedish legal point of view, a company cannot itself commit a crime within the meaning of criminal law. However, civil liability in damages could be based upon a company's so-called liability as a principal for the tortious errors or omissions of its employees, including alleged criminal acts.

7. Finally, we have been specifically requested to examine the possibilities available to aggrieved individuals to file group or class actions in Sweden and, in doing so, to make a comparison with some other relevant jurisdiction(s), in which context we have chosen the US.

2. Summary of conclusions

2.1 Conditions for bringing an action in a Swedish court of law

8. A basic condition for a foreign individual to be able to bring an action in a Swedish court of law is that such individual can establish Swedish jurisdiction, *i.e.* demonstrate that the Swedish court is competent to determine the action on its merits. The possibility to do so differs according to the various types of situations considered in this Memorandum (see paragraph 4 above):

(i) Where an individual's human rights are violated by a Swedish company or its overseas branch (not being a separate legal entity), an action may, in principle, always be brought in Sweden against the company in question.

(ii) Where the violation has been committed by a Swedish-owned/controlled subsidiary (being a separate legal entity), which maintains its statutory seat in a third country (*i.e.* outside the EU, Iceland, Norway or Switzerland), an action may be brought in Sweden against the subsidiary only under certain, limited conditions.

(iii) Finally, where the violation has been committed by a Swedish-owned/ controlled subsidiary (being a separate legal entity), which maintains its statutory seat in another EU country or Iceland, Norway or Switzerland, the possibility to bring an action in Sweden against the subsidiary is limited to rare, exceptional cases.

2.2 The parent company's liability for violations of human rights committed by a subsidiary

9. In the event a Swedish parent company conducts operations through a foreign subsidiary, the question may arise as to whether the parent company may be held liable for human rights violations committed within the context of the operations of the subsidiary abroad (assuming that the parent company has not itself in any way committed such violations). This question may be relevant, for example, in situations in which the aggrieved individual wishes to bring an action in Sweden. As mentioned above, it is much easier to establish Swedish jurisdiction in respect of a company registered in Sweden (i.e. against the parent company) rather than in another country (i.e. against the subsidiary). It is also conceivable that the foreign subsidiary lacks distrainable assets and/or that the individual has no genuine possibility to obtain damages in any manner other than by means of an action for damages against the parent company in Sweden.

10. Since these cases involve an action which is based upon the operations of a foreign subsidiary, the question regarding potential liability on the part of the parent company is likely to be governed by the law of the country in which the subsidiary maintains its statutory seat, *i.e.* foreign law, irrespective of whether the action is brought against the parent company in a Swedish or foreign court of law. In the event Swedish law nonetheless applies, the starting point is that such liability typically cannot be asserted against the Swedish parent company, irrespective of the fact that there are examples of so-called piercing of the corporate veil in Swedish jurisprudence. All in all, it appears highly uncertain whether a foreign individual, who has suffered a violation of human rights abroad at the hands of a foreign subsidiary, could succeed in establishing direct liability on the part of the Swedish parent company.

2.3 Which human rights can be invoked in a Swedish court of law?

2.3.1 Applicable law

11. In order to determine which country's law is applicable to a claim arising from the violation of human rights, a Swedish court of law will consider the principles of Swedish international private law. This entails, as the main rule, that the law of the country in which the injury (resulting from the alleged human rights violation) was suffered is to be applied. If a violation of human rights has occurred beyond the borders of Sweden, the claim by the injured party will thus rarely be governed by Swedish law. The aforementioned holds true irrespective of whether the individual has chosen to formulate his or her claim on a contractual basis (*e.g.* an employment agreement) or non-contractual or tort basis (*i.e.* in the absence of any contractual relationship). The principal reason for this is that the connection to Sweden is not sufficiently strong in the various types of situations considered in this Memorandum (see paragraph 4 above).

12. The content of foreign law, as opposed to the content of Swedish law, is an evidentiary issue in Swedish courts of law. Individuals who base a claim on

foreign law must thus present evidence regarding its content, *e.g.* in the form of expert legal opinions. This can give rise to certain costs.

13. Even when the claim is subject to foreign law, Swedish courts of law have a certain leeway to apply Swedish law to the extent international mandatory rules are involved or where foreign law violates Swedish public order. However, these safety valves are rarely used. Pending precedents from, for example, the European Court of Justice, it remains unclear to what extent an action for damages based on a violation of human rights may trigger the application of these exceptions, *e.g.* as a consequence of deficiencies in the protection of human rights in the country in which the injury was suffered.

2.3.2 Protection of human rights under Swedish law

14. Sweden is a signatory to and has ratified all human rights conventions which are expressly referred to in the comments relating to Article 12 of the UN Guiding Principles (the "HR Conventions"). However, in order for a human right to be protected under Swedish law in such a manner that it may be invoked by an individual in a Swedish court of law, it is in principle necessary that the right has been implemented in European Union law (with direct effect) or domestic legislation. As a starting point, the fact that Sweden is bound by an international convention thus does not create any direct rights between individuals, so-called direct horizontal effect. This view has been confirmed in legal precedents both from the Swedish Supreme Court, the current Swedish Supreme Administrative Court and the Swedish Labour Court.

15. Sweden has appraised that it fulfils its commitments under the relevant HR Conventions by means of existing European Union law and domestic legislation. However, it must be noted that, even in case a certain right is protected by applicable European Union or Swedish law, the territorial application of the law may be restricted to the EU or Sweden. In other words, there is no certainty that violations of human rights in third countries are covered by the protection afforded by European Union or Swedish law to corresponding violations within the territory of the EU and/or Sweden.

16. As stated above, in the event the protection of human rights in existing European Union law and domestic legislation proves to be inadequate in any respect, the underlying HR Conventions cannot directly form the basis of individual rights. Keeping this in mind, consideration may be given to whether the substantive content of the relevant rights may instead be asserted by means of the European Convention on Human Rights (the "European Convention") – which enjoys legislative status in Sweden – or the Charter of Fundamental Rights of the European Union (the "Charter of Fundamental Rights").

17. As regards the possibility for a foreign legal subject to invoke the European Convention in order to bring an action in a Swedish court of law for damages from an undertaking in Sweden, the chances of success are currently regarded as being relatively small. First of all, it is not yet clear whether the European Convention may be invoked at all between private legal subjects (*e.g.*

between an individual person and a company). Second, it is doubtful whether the European Convention's territorial application may be extended beyond Europe to encompass cases where the alleged human rights violation has occurred in a third country.

18. As then regards the Charter of Fundamental Rights, it may be noted that it contains equivalents to the vast majority of the rights in the European Convention. In addition, the Charter of Fundamental Rights contains rights which are specifically tied to European Union citizenship, such as free movement and the right to vote and the principal provisions expressing the ambitions of the European Union relating to social and community development. The Charter of Fundamental Rights, together with the Treaties of the European Union, constitute part of the primary legislation of the EU.

19. Since the entry into force of the Treaty of Lisbon, it has been debated whether the articles of the Charter of Fundamental Rights may be invoked as grounds for a claim in damages between individuals in a national court of law. In certain respects, the articles of the Charter of Fundamental Rights and the provisions of the Treaties of the European Union overlap. As a consequence, precedents regarding so-called direct horizontal effect have already been developed, although only in certain, limited areas. For example, liability in damages between individuals has been deemed to arise in conjunction with discrimination based on nationality.

2.4 Practical possibilities for the individual to litigate in Swedish courts of law

20. Provided Swedish jurisdiction exists and there is a protected interest which may be invoked (*e.g.* based upon applicable foreign law), access to Swedish courts of law is relatively good. Moreover, the possibilities for a foreign individual to be granted standing as a party before a Swedish court are essentially equal to those enjoyed by Swedish citizens.

21. The administrative fee for bringing an action in a Swedish court of law is relatively low. Furthermore, it is our experience that Swedish courts of law are pragmatic in their application of rules regarding parties' personal attendance at court hearings. In the event economic or other practical impediments prevent a foreign individual from travelling to the relevant court in Sweden to attend a hearing, it may accordingly be expected that the court will strive to resolve the problem by, for example, allowing the party to appear by telephone or video link.

22. By international comparison, Swedish courts are highly robust in their observance of due process rights, and corruption is particularly rare. Such factors thus do not constitute any appreciable hurdle for foreign individuals who wish to bring a human rights action in a Swedish court of law. On the other hand, the requirement of using Swedish as the language of the proceedings may present a certain impediment to the possibility for foreign individuals to litigate in Swedish courts, even in light of the relatively good possibilities for obtaining assistance with interpretation and translation of documents.

23. Notwithstanding the fact that the turnaround time in Swedish courts overall have declined in recent years, complicated cases may still take several years to adjudicate in the court of first instance alone. The average turnaround time of Swedish courts, however, hardly constitutes a critical impediment, but may serve to dissuade a party in certain cases and will add to the costs of litigation.

24. There is no general requirement in Swedish courts of law that a party – whether Swedish or foreign – must be represented by a legal counsel. In order to effectively assert one's rights, however, it is a practical necessity for a foreign individual to retain a legal counsel. In addition, language rules in Swedish courts are such that a foreign individual in practice will need to be represented by legal counsel who is fluent in Swedish in order to be able to assert his or her rights. In light of the limited possibilities for obtaining external financing for counsel fees – which are elaborated upon below – this may constitute an appreciable limitation on the possibility for foreign individuals to obtain an efficient determination of their claims for human rights violations in Sweden.

25. In disputes before Swedish courts of law the main rule is that the losing party is obliged to compensate the winning party for the latter's costs of litigation. Consequently, an individual who is considering pursuing a claim in Sweden for compensation for a human rights violation must consider the fact that he or she is at risk not only of incurring his or her own costs, but also the cost of litigation of the opposing party. This may be assumed to have a certain discouraging effect.

26. Certain foreign citizens who are not domiciled in Sweden and who bring an action against a Swedish legal person in a Swedish court of law must, upon the request of the respondent, provide security for the respondent's future costs of litigation. When this obligation is imposed, it may constitute a further considerable impediment in so far as it requires that the individual muster and finance acceptable security for the duration of the litigation. The practical implication of this obstacle, however, may not be all that significant given, among other things, the possibility to assign claims to a Swedish legal entity (*e.g.* a limited liability company established for this very purpose), which will act as the formal claimant and thereby circumvent the obligation for certain foreigners to provide security.

27. The possibilities for a foreign individual to secure public financing for costs of litigation and counsel fees are limited, in any event where the individual is a citizen of a country outside the EU. The best chance of obtaining public financing is present when the claim in damages is asserted in relation to criminal proceedings. The potential for a private financing solution, in turn, is highly dependent upon the foreign individual's personal economic and social situation. A strongly limiting factor as regards private financing solutions follows from the fact that Swedish attorneys (Sw. *Advokater*) may only in exceptional cases work on the basis of so-called contingency fee arrangements (*i.e.* agreements whereby the counsel's fee is charged only in the event of success and then as a percentage of the damages awarded). In addition, there is a lack of tradition among Swedish attorneys of working on

the basis of contingency fee arrangements (to the extent such arrangements are at all permissible) as well as to do so-called *pro bono* work (*i.e.* providing legal assistance to particularly needy parties without charge).

2.5 The possibility of class action

28. There are no formal impediments to foreign claimants bringing a class or group action in accordance with the rules of the Swedish Group Proceedings Act (the "Group Proceedings Act"). At the same time, it may be noted (i) that the provisions of the Group Proceedings Act regarding delimitation of the suitable group, (ii) that membership requires an active step on the part of the members (*i.e.* that they need to opt in), (iii) that one of the members must assume the position as claimant with potential liability for the respondent's costs of litigation, and (iv) the difficulties of financing costs of counsel on the plaintiff side, have resulted in only a handful of group proceedings having been initiated during the slightly more than 10 years during which the legislation has been in force.

29. The most significant differences resulting from a comparison with the class action system in the US is that the US system instead of "opt-in" requires some active step by a member in order to "opt out" and that the parties participating in a trial, as a main rule, do not risk bearing the opposing party's costs of litigation in the event of a loss. Furthermore, there are far-reaching possibilities for US attorneys to base their fees on contingency fee arrangements and there are significantly higher levels of damages awarded in US courts, including the possibility to be granted so-called punitive damages, making such fee arrangements attractive.

30. In summary, it appears that the class action system in the US is more plaintiff friendly while the Swedish system is more respondent friendly.

II CONDITIONS FOR BRINGING AN ACTION IN A SWEDISH COURT OF LAW, ETC.

31. A foreign individual who is subjected to a rights violation abroad by a Swedish company or a foreign company in a Swedish corporate group may – irrespective of whether the right is based on Swedish or foreign law – conceivably want to bring an action for damages against the company in Sweden. This would be the case, for example, if the individual believes that his or her legal rights would be better served in Swedish court proceedings than would be the case in the courts of his or her own country. It is also conceivable that the Swedish company or the Swedish corporate group which is ultimately responsible for the rights violation maintains most of its distrainable assets in Sweden, and the individual will thus wish to ensure that the legal proceedings result in a judgment that can be enforced here. Finally, the media attention and, accordingly, the pressure on the Swedish company may be assumed to increase if the legal proceedings are conducted in public court proceedings in Sweden.

32. In order for a foreign individual to be able to bring an action in a Swedish court of law, he or she must establish Swedish jurisdiction, *i.e.* that Swedish courts of law have the authority to adjudicate the action on its merits. As will be developed in Section 3 below, there are very good possibilities of establishing Swedish jurisdiction in cases in which claims are brought against a company which has its statutory seat in Sweden (*e.g.* due to the fact that the company or its branch office situated abroad has violated the individual's rights), while the chance of persuading a Swedish court of law to try an action against a foreign subsidiary of a Swedish corporate group is limited. The latter is particularly true where the subsidiary in question maintains its statutory seat in another EU Member State or in Iceland, Norway or Switzerland.

3. The international jurisdiction of Swedish courts of law

3.1 General conditions for Swedish jurisdiction

33. Swedish courts must, on their own initiative, determine the existence of Swedish jurisdiction (jurisdictional competence). The fact that a claim falls under Swedish jurisdiction means that a Swedish court of law is authorised to hear the case and adjudicate the merits. Where Swedish jurisdiction does not exist, it is incumbent upon the court to dismiss the case without a determination on the merits.

34. In the event the defendant (in this case, the company committing the rights violation) resides in an EU state, the so-called Brussels I Regulation[4] is to be applied.[5] However, the Regulation also contains a number of jurisdictional rules which do not turn on where the defendant resides for their applicability.[6] If the defendant resides in Iceland, Norway or Switzerland, it is instead what is commonly referred to as the Lugano Convention[7] which dictates the jurisdiction issue. In cases in which the defendant does not reside within the EU or in a state which is a signatory to the Lugano Convention, the jurisdiction issue is determined by analogous application of the forum rules in Chapter 10 of the Code of Judicial Procedure (Sw. *rättegångsbalken*) taking into account the basic requirement that there must be a Swedish interest in administering justice in order for a Swedish court of law to avail itself.[8]

35. In all respects, the Brussels I Regulation is binding and directly applicable in all EU Member States and need not be incorporated by means of national legislation.[9] Through the nearly identical Lugano Convention, essentially the same rules also apply when the defendant resides in Iceland, Norway or Switzerland. Given that the substantive purport of the jurisdiction rules are essentially the same in the Brussels I Regulation and the Lugano Convention, we will refer to and discuss below the Brussels I Regulation only.

36. Where the claimant resides (in this case, the individual whose rights were violated) is generally immaterial to the applicability of the Brussels I Regulation.[10] In certain cases, however, it is a condition that the claimant reside in a Member State or that the circumstances forming the basis of jurisdiction are related to a Member State.

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[4] Regulation of the European Parliament and of the Council (EU) no. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. All references are to the 2012 Regulation. In order for the Regulation to be applicable, it is necessary that a dispute is cross-border in nature such that it does not appear to be a purely internal matter for a Member State. The territorial application of the Regulation is conditional upon the case having a distinct connection to a Member State and that, subject to certain exceptions, it is applicable to the private international law area. The EU Treaty and, accordingly, the Regulation apply to such areas within and outside Europe which constitute the territory of a Member State and its territorial area of application in accordance with Article 355 of the EU Treaty. The Regulation is not directly applicable in relation to Denmark, but Denmark has made a declaration according to which the country intends to apply the Regulation.

[5] *Cf.* Article 6 of the Brussels I Regulation.

[6] See Article 24 regarding exclusive jurisdiction of the courts of law of a Member State in certain types of disputes, *e.g.* regarding real property or intellectual property rights, and Article 25 regarding choice-of-forum agreements. In order for these provisions to apply, it is sufficient that one of the parties is a resident of a Member State.

[7] The 2007 Lugano Convention (convention on jurisdiction and the enforcement of judgements in civil and commercial matters of 30 October 2007) was adapted to the previous version of the Brussels I Regulation (Council Regulation (EC) no. 44/2001). A similar adjustment has not yet been made to the currently applicable Brussels I Regulation, but this will likely occur within several years (see Bogdan, *Svensk internationell privat- och processrätt* [Swedish International Private and Procedural Law], 8th ed., Norstedts Juridik, 2014 p. 102.

[8] *Cf.* Bogdan, *ibid.*, p. 100.

[9] With respect to Denmark, see footnote 4 above.

[10] Pålsson and Hellner, *Bryssel I-förordningen jämte Bryssel- och Luganokonventionerna* [The Brussels I Regulation, and the Brussels and Lugano Conventions] (March 2014, Zeteo), section A, point 33.

37. The circumstances forming the basis of jurisdiction at the time of initiating the action are decisive.[11] It is worth pointing out that courts in a Member State do not have jurisdiction to hear an action against a defendant residing in a Member State in cases or on grounds other than those set forth in the Brussels I Regulation, even if jurisdiction could be found in accordance with the national rules of the forum country. The Brussels I Regulation is exclusive in this respect.

38. As a main rule, the Brussels I Regulation prescribes the general jurisdiction of the court in the area in which the defendant resides.[12] Furthermore, the Brussels I Regulation contains a provision regarding determination of where a company and a legal person have their residence. Such an association shall be deemed to reside in the place where it maintains its statutory seat, central administration or principal place of business. This rule is alternative, which implies that a company may be deemed to reside in all three places if they are not situated in the same state.

39. In addition to the main rule regarding where the defendant resides, the Brussels I Regulation contains competing (alternative) and exclusive jurisdiction rules. The competing forum rules expand the number of courts with jurisdiction and, by virtue of these rules, the plaintiff may choose in certain cases between bringing an action in the state where the defendant resides or in another designated state. The exclusive forum rules, however, entail that a court of law in a Member State has exclusive jurisdiction irrespective of where the parties reside, which means that other courts are incompetent to determine the matter. This applies, for example, to situations in which the action involves rights *in rem* relating to real estate or registration or the validity of a patent, trade mark, pattern or similar rights.[13]

40. In the following, the issue regarding Swedish jurisdiction will be addressed from the perspective of several typical situations, namely where (i) the action is brought against a company with its statutory seat in Sweden (*e.g.* as a consequence of the fact that a Swedish company's foreign branch office has committed the rights violation), (ii) the action is brought against a foreign subsidiary in a Swedish corporate group with its statutory seat within the EU or in a state which is a signatory to the Lugano Convention, or (iii) the action is brought against a foreign subsidiary in a Swedish corporate group with its statutory seat in a country outside the EU which is also not a signatory to the Lugano Convention. Finally, (iv) something will be said regarding claims in

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[11] Pålsson and Hellner, *ibid.*, section A, point 35.

[12] According to domestic Swedish law, pursuant to Chapter 10, section 1 of the Code of Judicial Procedure, the place of residence shall be considered to be the place where the board of directors has its statutory seat or, if the board has no permanent seat or there is no board, at the place from which administration is carried out. As regards several legal areas, there are also special provisions regarding general forum for legal persons relating to the substantive legislation in the legal area. As regards other cases, a legal person is to be regarded as Swedish and thereby the forum is Sweden if the legal person has been established according to Swedish law and has been registered here.

[13] Article 24 of the Brussels I Regulation. *Cf.*, also, Chapter 10, section 10 of the Code of Judicial Procedure according to which disputes concerning title to immoveable property and enjoyment of immoveable property may be heard by the court in the place where the property is situated.

damages brought in conjunction with a criminal matter; this constitutes a special case involving non-contractual claims.

3.2 Actions against companies with a statutory seat in Sweden

41. Irrespective of whether a rights violation has been committed by the company in Sweden or its foreign branch, an action may as a general rule be brought in Sweden and such action may not be dismissed due to lack of jurisdiction.[14] Even where circumstances giving rise to competing jurisdiction rules are present, the plaintiff may accordingly nevertheless have the possibility to bring an action in Sweden. This means that there are good possibilities for bringing these kinds of actions in Sweden.

42. Where the circumstances giving rise to the exclusive jurisdiction of courts of law in another state are present, however, the possibilities of bringing an action in a Swedish court are limited. In these cases, it is not standing but, rather, the subject-matter which determines the jurisdiction of the court. Such cases distinguish themselves in that they have, as a rule, a strong connection to a certain state and are to be substantively adjudicated in accordance with the laws of that state, as well as the fact that the same state often has a substantial interest in the matter. Where the relevant violation pertains, for example, to *in rem* rights to, or enjoyment of, immovable property, the courts in the state in which the property is situated have exclusive jurisdiction.[15] If the action pertains to the registration or validity of patents, trademarks, patterns or similar rights, the courts in the state in which registration was effected have exclusive jurisdiction.[16] In order to trigger the application of an exclusive forum provision in the Brussels I Regulation, the relevant connection must be localised in another Member State.

3.3 Actions against a subsidiary in a Swedish corporate group with its statutory seat within the EU or in a state which is signatory to the Lugano Convention

43. The issue raised in this case is whether it is possible, as a consequence of a violation of a human right, to bring an action in Sweden against a subsidiary of a Swedish corporate group which resides in another country within the EU or in a state which is signatory to the Lugano Convention. Since the company resides in another Member/Convention State, the action may not be brought in Sweden pursuant to the main rule regarding the forum of residence. In order for an action to be able to be brought in Sweden, it is thus necessary that, as with the Brussels I Regulation or the Lugano Convention, there is a competing or exclusive ground for jurisdiction which is tied to Sweden.[17] The European Court of Justice has stated that the competing jurisdictional

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[14] The branch is not a separate legal subject, but is part of the Swedish legal person. Its assets and liabilities are thus a part of the total assets of the Swedish company.

[15] Article 24 of the Brussels I Regulation.

[16] Article 24 of the Brussels I Regulation.

[17] Where there is a competing ground for jurisdiction, it is also necessary that there is no circumstance which affords exclusive jurisdiction to the courts of another country.

grounds may not be afforded extensive interpretation since a multiplication of the number of competent courts cannot be regarded as promoting legal certainty.[18]

44. Where the action pertains to the performance of an obligation pursuant to an agreement, the action may be brought in Sweden where the obligation to which the action pertains was or should have been performed in Sweden.[19] A claimant may then choose between bringing an action in the state where the company resides or in Sweden.

45. Where the action relates to tort, delict or quasi-delic, the action may, according to the Brussels I Regulation, be brought in Sweden if the loss occurred or may occur here.[20] Accordingly, even the place of the harmful event may be significant to jurisdiction. If the harmful event and the loss occur in one and the same country, the jurisdiction issue is normally not a problem. However – notwithstanding the wording of the relevant provision – it may be more difficult to determine jurisdiction when the place of the event and the place of the loss are in two different states. It has been said, however, that precedence shall not be given in such case to the forum of the place of the event or the place of the loss since both may be equally suitable from the point of view of evidence and procedure. This means that both fora may be deemed to have jurisdiction and that the plaintiff can thereby choose between them.[21] In the determination, consideration is only to be given to the place in which the direct loss occurred and thus not to where any indirect loss or consequential loss arose. Where the action pertains to an infringement of patent, trade mark, pattern or similar rights, the immediate loss shall be deemed to have occurred in the country of protection, *i.e.* the country in which the right is applicable due to registration or establishment on the market. In other cases, it is necessary that the harmful event or the loss occurred in Sweden in order for a Swedish court of law to be deemed to have jurisdiction to determine the matter.

3.4 Actions against a subsidiary in a Swedish corporate group with its statutory seat in a third country

46. If a company which has committed a rights violation is a subsidiary of a Swedish corporate group with its statutory seat either within the EU or a state which is a signatory to the Lugano Convention, the question arises whether it is possible to bring an action against such a company in a Swedish court of law. Initially, it may be noted that these cases do not fall within the purview of the Brussels I Regulation or Lugano Convention. Since the subsidiary

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[18] See, in this regard, Hellner and Pålsson, *ibid.*, section 2.1, point 44 and the judgements of the EU Court of Justice in cases 33/78 *Somafer*, paragraph 7 and 189/87 *Kalfelis*, paragraph 19.

[19] Article 7.1 a) of the Brussels I Regulation.

[20] Article 7.2 of the Brussels I Regulation. The term, "relating to tort, delict or quasi-delic", is to be interpreted autonomously and in keeping with the system and purpose of the Regulation. Accordingly, the term shall cover every claim for damages which does not fall under the term, "contract", according to Article 7 of the Brussels I Regulation.

[21] See the judgement of the EU Court of Justice in case 21/76 *Bier*; cf. Pålsson and Hellner, *ibid.*, section 2.4.1.3, point 61.

resides in a state other than Sweden, the action cannot be brought in Sweden pursuant to the main rule regarding residence in Chapter 10 of the Code of Judicial Procedure but, rather, it is necessary that there are particular circumstances connected to Sweden forming the basis of jurisdiction in accordance with a competitive or exclusive forum provision.[22]

47. A foreign company in a dispute concerning a payment obligation may be sued in Sweden if the company has property here.[23] In order for the so-called asset forum to be applicable, it is necessary that the property actually belongs to the defendant. The value of the property in relation to the value of the object of the dispute is essentially irrelevant to the issue of jurisdiction, but it is necessary that the property has some value in order to be able to be considered.[24]

48. Furthermore, an action may be brought against a party who does not reside in Sweden in disputes relating to an obligation or a debt entered into or incurred in Sweden.[25] Given that this type of dispute applies to the given undertaking, this ground for jurisdiction is likely to be less relevant for the type of situations contemplated here.

49. In the event the action relates to tort, delict or quasi-delic, it may be brought in Sweden where the harmful event occurred in Sweden or the loss was incurred here.[26] To the extent a loss has been incurred as a consequence of the fact that the subsidiary took some measures in its operations in the country in which it maintains its statutory seat, however, it is as a rule too far-reaching to assert that the harmful event was took place in Sweden only because it was carried out on the advice or on instruction of the Swedish parent company.[27]

3.5 Civil claims associated with criminal cases

50. Where the action pertains to a civil claim arising from a criminal act, the court in the state in which the criminal proceedings are venued has jurisdiction according to the Brussels I Regulation, provided the court has jurisdiction under its own law to entertain civil proceedings.[28] According to

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[22] *Cf.* footnote 12 above.

[23] Chapter 10. section 3 of the Code of Judicial Procedure. Jurisdiction is based upon the location of the property. If the property is a non-negotiable promissory note, the defendant may be sued where the debtor resides but, as regards negotiable promissory notes, the defendant may be sued in the state where the document is situated. As regards intellectual property rights, whether or not the right may be seized in Sweden is decisive (see Bogdan, *ibid.*, p. 119 f.).

[24] Bogdan, *ibid.*, p. 120 f.

[25] Chapter 10, section 4 Code of Judicial Procedure. It is sufficient for jurisdiction that the defendant has placed a bid in Sweden notwithstanding that the other party has not accepted it before the defendant left the country. On the other hand, it is insufficient for jurisdiction that such agreement was entered into by fax, post, email or telephone from a location outside the country (see Bogdan, *ibid.*, p. 122 and case NJA 2001 p. 800).

[26] Chapter 10, section 8 of the Code of Judicial Procedure.

[27] See, however, Section 4 below regarding the principal of piercing the corporate veil.

[28] Article 7.3 of the Brussels I Regulation.

Swedish law, an action against a suspect or a third person for a civil claim as a consequence of a criminal offence may be brought in conjunction with the prosecution of the offence. Where the claim is not heard in conjunction with the prosecution, the action shall be instituted in the manner prescribed for civil actions.[29]

51. The above-described regime entails that a criminal action must be brought in a Swedish court of law in order for the special jurisdiction rule regarding civil claims to be applicable in the type of cases relevant here. In turn, this raises two questions: when does Swedish jurisdiction exist for crimes committed abroad and to what extent can claims in damages against legal persons be determined in criminal proceedings?

52. As regards the first issue, it may be pointed out initially that jurisdiction over criminal proceedings falls outside the scope of the Brussels I Regulation.[30] As far as Sweden is concerned, crimes committed abroad are subject to Swedish jurisdiction only in exceptional cases. As a starting point, it is necessary that the accused has a certain connection to Sweden, *e.g.* because he or she is a Swedish citizen or resides in Sweden (accordingly, only certain categories of persons are covered). In addition, there is a limitation in the form of the so-called double criminality requirement. The institution of legal proceedings in Sweden thus assumes as a main rule that the act is also a crime in the place of commission.[31] Swedish jurisdiction, however, may also arise in certain other exceptional cases, *e.g.* when the crime has been committed on board a Swedish vessel or aircraft, or where the crime has been committed by certain persons within, among others, the Swedish armed forces.[32] Finally, Swedish jurisdiction extends to certain types of grave crimes (*e.g.* hijacking and terrorism), grave crimes against public international law (*e.g.* crimes against humanity and war crimes) and when the minimum penalty is a term of imprisonment of four years.[33]

53. As regards the possibility of holding a company liable, it may be initially noted that legal persons cannot commit crimes according to Swedish conceptions of justice. The only criminal sanctions (alternative penalty) which may be imposed by Swedish law on legal persons as such are forfeiture and company fines.[34] In other words, it is relatively rare that legal persons in a formal sense are the accused in Swedish criminal proceedings. At the same time, it is clear that the definition of a civil claim ("*action against […] a third person […] as a consequence of an offence*") entails, among other things, claims in damages based upon an employer's liability as

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[29] Chapter 22, section 1 of the Code of Judicial Procedure.

[30] See Article 1 of the Brussels I Regulation.

[31] In addition to this, see Chapter 2, section 2 of the Swedish Penal Code (Sw. *Brottsbalken*). The requirement of double criminality, however, does not cover, for example, human trafficking or aggravated sexual assault; see, for example, Berggren, *et al.*, *Brottsbalken* [The Penal Code] (1 July 2014, Zeteo), comment to Chapter 2, section 2.

[32] See Chapter 2, section 3, sub-sections 1–3 of the Penal Code.

[33] See Chapter 2, section 3, sub-section 6 of the Penal Code with references and sub-section 7.

[34] See Chapter 36 of the Penal Code, primarily sections 1 and 7.

principal for its employees. In the event the foreign individual (the aggrieved) asserts such a claim, the employer, *i.e.* the company, will assume the position as a party in criminal proceedings alongside the accused.[35] The aforementioned entails that an injured party as a rule can bring a claim in damages against a Swedish company in a Swedish court when an action regarding a particular alternative penalty is brought against the company and when any of the company's employees are accused.

54. In addition, it may be noted that, in those cases in which the aggrieved brings a civil claim as a consequence of an offence which is subject to public prosecution, the prosecutor is duty-bound, upon request by the aggrieved, to prepare and pursue such party's action in conjunction with the prosecution, provided that no material inconvenience will result.[36] In certain cases of more serious offences, special counsel for the aggrieved party may also be appointed who shall assist, among other things, in pursuing the civil claim as a consequence of the offence where the prosecutor does not do so. In such cases, the costs for the counsel for the aggrieved are covered by public funding.[37]

4. Owner's liability for a company's obligations – principle of piercing the corporate veil

55. If a Swedish parent company conducts operations through a foreign subsidiary, the issue may arise as to whether the parent company may be held liable for violations which occurred within the framework of the subsidiary's operations abroad. This issue may be significant, for example, due to the fact that the aggrieved individual wishes to bring a legal action in Sweden. As explained in section 3 above, it is much easier to establish Swedish jurisdiction against a company with its statutory seat in Sweden than in another country. It is also conceivable that the subsidiary abroad lacks distrainable assets and that the individual thus has no genuine possibility of obtaining damages in a manner other than bringing a claim for damages against the parent company in Sweden.

56. Since the action in these cases is based upon a foreign subsidiary's operations, the issue arises as to any liability on the part of the parent company for the subsidiary's acts likely being governed by the law in the country in which the subsidiary maintains its statutory seat (*lex corporationis*), irrespective of whether the action is brought against the parent company in a Swedish court.[38] Since it is not possible in this context to

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[35] See, for example, Fitger, *et al.*, *Rättegångsbalken* [The Code of Judicial Procedure] (October 2014, Zeteo), comment to Chapter 22, section 1 of the Code of Judicial Procedure.

[36] Chapter 22, section 2 of the Code of Judicial Procedure.

[37] In addition to this, see the provisions of the Swedish Counsel for the Aggrieved Party Act (Sw. *lagen om målsägandebiträde*).

[38] Provided that the foreign legal system is not deemed to be in contravention of the Swedish system such that the court may nonetheless apply Swedish law (*ordre public*). See, also, Section 5 below with respect to the issue of applicable law.

give an exhaustive account of the application of foreign law, the following description will be based on Swedish law only.[39]

57. Since the limited liability company is an independent legal subject, it is a basic provision of company law that a shareholder of a limited liability company is not personally liable for the obligations of the company. This is so even where the shareholder as such is a limited liability company. This means that the possibility of imposing liability on a Swedish parent company for activities of its subsidiary are even more limited since the action in these cases is brought against a legal subject other than the one which committed the violation.[40] This notwithstanding, and in addition to the statutorily regulated liability for shareholders in certain situations (which are not relevant here), there is a partially developed principle of piercing the corporate veil which, in certain cases, renders it possible to bring a claim directly against the parent company.[41] However, it is not entirely clear which circumstances trigger the application of this principle. Since the determination in precedent has been made taking into account circumstances in each individual case, it is difficult to describe the basis for the principle's application in general terms.[42] However, certain main characteristics may be pointed out.

58. It has been stated in the literature that a principle of piercing the corporate veil should only be able to be applied to subsidiaries which have a limited number of shareholders and conduct an operation which is not independent relative to the parent company's own operations and thereby strive to ensure the interests of the owners more than achieve a profit in the company. Piercing the corporate veil should also require that the owners use the corporate form in a disingenuous way in order to limit their liability to pay compensation and that the company is under-capitalised. This should apply in particular when the company which is primarily liable for the violation is an asset-poor subsidiary of a financially stronger parent company. The principle may therefore be said to be a form of creditor protection, which makes it possible to impose liability on the parent company for a subsidiary's obligations where the arrangement with the subsidiary itself appears to be a deceitful abuse of the corporate form *vis-à-vis* the creditor.[43] In the determination of whether the corporate veil will be pierced, overall

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[39] It may be mentioned that there are examples from other countries in which a parent company was held liable for the obligations of a subsidiary notwithstanding the lack of support of contract law principles. In the US, the expressions "disregarding the legal entity" or "piercing the corporate veil" are used and, in Germany, piercing the corporate veil is used ("*Haftungsdurchgriff*"); see Johansson, *Svensk associationsrätt i huvuddrag* [The Main Features of Swedish Law of Associations], 11th ed., Norstedts Juridik, 2014, p. 248.

[40] Provided that no duty to be responsible for the subsidiary's obligations may be deemed to follow from general tort or contractual principles.

[41] See, for example, cases NJA 1947, p. 647; NJA 1975, p. 45; NJA 1982, p. 244 and the judgment of the Swedish Supreme Court of 11 December 2014 in case no. T 2133-14 (noted in paragraph 143 below).

[42] However, it is clear that the principle is to be applied restrictively since it is an exception to the basic principle regarding the owners' freedom from personal liability.

[43] See, for example, Bergström and Samuelsson, *Aktiebolagets grundproblem* [The Basic Problem of Limited Liability Companies], 4th ed., Norstedts Juridik, 2012, p. 235 and Johansson, *ibid.*, p. 251.

consideration is given to the circumstances, such as the lack of personal interest, dependence, disloyalty and under-capitalisation.[44]

59. Since piercing the corporate veil is not a statutory institution, it is not possible to state with certainty whether the principle will be able to be applied in any individual case. The fact that it is also not possible at this point to give an account of the legal ramifications in the country in which the subsidiary maintains its statutory seat adds to the uncertainty. Accordingly, it may be regarded as highly uncertain that a foreign individual who has suffered a rights violation abroad at the hands of a subsidiary can assert liability on the part of a Swedish parent company pursuant to this principle.

[44] *Cf.* Rodhe, *Moderbolagets ansvar för dotterbolags skulder* [The Parent Company's Liability for the Debts of the Subsidiary] in *Festskrift till Jan Hellner*, 1984, Jure, p. 481, ff.

III WHICH HUMAN RIGHTS MAY BE INVOKED IN SWEDISH COURTS OF LAW?

61. In the event a Swedish court chooses to entertain a claim for damages, the next issue relates to which human right has been violated and whether the violation forms the basis for damages when it was committed by a company, *i.e.* a private legal subject. Before the court has a possibility to take a stance on these issues, it must first determine which country's law is applicable.[45] The court will determine the applicable law on the basis of international private law rules. Depending on which country's laws are applicable, there may be differing possibilities to raise human rights.

62. Inherent in the term "human rights" is that it pertains to rights which are universal and enjoyed by everyone. In certain legal regimes, international conventions regarding human rights are directly applicable and are thus deemed to constitute a part of the legal regime in question. However, in Sweden, a so-called dualistic approach is applied according to which a convention or the like pertaining to human rights must in some way have been implemented by means of national legislation in order to have legal effect in relation to the individual. In order to succeed with a claim for damages based upon Swedish law as a consequence of a violation of human rights, it is accordingly necessary in principle that the right invoked has the status of Swedish law. An additional condition for success with such a claim for damages is that the right in question has extra-territorial applicability, *i.e.* that the protection may be extended to the location abroad where the violation occurred.

5. Applicable law

5.1 Introduction

63. As with the issue of jurisdiction, the issue of which country's law applies is determined by Swedish international private law. Thus it is not an issue of legal rules with international applicability but, rather, regarding domestic choice-of-law rules which determine that country's laws are to be applied in respect of a legal relationship with an international connection. In principle, the formulation of international private law rules may thus vary between different countries.

64. A Swedish court of law will determine which country's law is applicable on the basis of Swedish choice-of-law rules. In recent years, these rules have been harmonised to a large extent within the EU, as a consequence of which the choice-of-law rules in EU countries are quite similar. It is principally the Rome I Regulation[46] and the Rome II Regulation[47] which regulate the issue

[45] In this context, "law" means not only statutes but, to varying degrees in different jurisdictions, precedent, general legal principles, customs, etc.

[46] Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

regarding applicable law; the former applies to contractual obligations while the latter applies to non-contractual obligations. The Regulations apply universally and make no distinction as to whether the law specified is the law of a Member State or a non-Member State.[48]

65. In this context, it may also be noted that the purport of foreign law – as opposed to the purport of Swedish law – constitutes an evidentiary issue in Swedish courts of law. Individuals who base a claim on foreign law in Swedish legal proceedings will thus need to present evidence thereon, *i.e.* in the form of expert opinions. This may give rise to costs.

5.2 The Rome I Regulation

66. As mentioned above, the Rome I Regulation applies only to contractual obligations. As a consequence, its relevance to issues regarding rights violations based on human rights is likely to be limited. To the extent labour legislation based on the ILO conventions are relevant, however, the contractual relationship between employer and employee may be of interest.[49]

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[47] Regulation (EC) no. 846/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

[48] Article 2 of the Rome I Regulation and Article 3 of the Rome II Regulation.

[49] The starting point in the Rome I Regulation is that the parties have agreed upon the applicable law (Article 3). As regards the applicable law in respect of employment agreements, the starting point is the same (Article 8). However, the Regulation contains special provisions to ensure that the rights of the employee are not undermined. The parties may choose the law, but the employee may not be denied the protection assured to him or her according to compulsory rules in the otherwise applicable legal system (Article 8.1). In the absence of a choice of law or where the choice of law restricts the employee's rights, the starting point is that the law of the country in which (or from which) the employee in the performance of the agreement normally conducts his or her work (Article 8.2). Where this cannot be determined, the country where the place of business through which the employee was engaged is situated shall apply (Article 8.3; a company shall be deemed to be situated in the country in which the place of business which employed the person is situated (see decision of the EU Court of Justice in case C-384/10, *Jan Voogsgeerd v. Navimer SA.*)). In this context, it is irrelevant where the company maintains its statutory seat. Where it appears from the circumstances as a whole that the contract is more closely connected with another country, however, the law of such country shall be applied (Article 8.4). See, for example, the decision of the EU Court of Justice in case C-64/12, *Anton Schlecker v. Melitta Josefa Boedeker*, in which the Court was to apply a comparable provision in the Rome Convention (which essentially has the same content as the more recent Rome I Regulation). In the case, the Court stated that "*[…] the referring court [must] take account of all of the elements which define the employment relationship and single out one or more as being, in its view, the most significant. […] Among the significant factors suggestive of a connection with a particular country, account should be taken in particular of the country in which the employee pays takes on the income from his activity and the country in which he is covered by a social security scheme and pension, sickness insurance and invalidity schemes. In addition, the national court must take into account of all of the circumstances of the case such as the parameters relating to the salary determination and other working conditions*". In addition, it may be mentioned that the Rome I Regulation, like the Rome II Regulation, contains an exception for internationally mandatory rules (Article 9) and a reservation for *ordre public* (Article 21); see, further paragraphs 69 and 70 below. It is unclear which compulsory provisions may be relevant in this context. The issue regarding the extent to which rules may be deemed to be internationally mandatory without an express statement thereon has been left to legal precedent. Conceivable examples in Swedish law include, among other things, section 36 of the Swedish Contracts Act (Sw. *Lag om avtal och andra rättshandlingar på förmögenhetsrättens område*) and labour law and tenancy law protection legislation. However, the applicability of the rules presumes a certain connection to Sweden. For example, the Swedish Employment Protection Act should be applicable to all work carried out in Sweden (if other than entirely temporary) to the extent the EU's foreign post rules do not prescribe otherwise (see Government Bill 1973:129, p. 229, and Bogdan, *ibid.*,

In other cases, however, violations of human rights are often presumably comprised of non-contractual claims.

5.3 The Rome II Regulation

67. The Rome II Regulation applies to non-contractual relationships, *i.e.* rights and obligations which are not based upon a contractual relationship. The main rule in the Regulation is that the law of the country in which the damage occurs (*lex loci damni*) shall be applied.[50] The application shall take place on the basis of where the direct damage occurred and irrespective of in which country or countries indirect consequences may arise. However, there are exceptions to the main rule. If both the aggrieved party and the tortfeasor maintain their habitual residence in the same country in which the damage arises, the law of such country shall be applied.[51] In addition, taking into account all circumstances, it appears that the damage is manifestly more closely connected to another country, such country's law shall be applied.[52] The Regulation contains several special provisions for different types of damage. For example, as regards environmental damage, it is prescribed that the aggrieved party may choose to base his or her action on the law of the country in which the damage arose (*lex loci damni*) or the law of the country in which the harmful event occurred (*lex loci delicti commissi*).[53]

68. The area of application of the Regulation has certain limitations.[54] For example, the Regulation does not apply to non-contractual obligations based on violations of privacy and rights relating to personality, including defamation.[55] This exception is deemed to include infringements of privacy such as the publication of invasive information (irrespective of the amount of truth). It is likely that it also covers damages for computer fraud, unlawful video surveillance, unlawful telephone tapping, infringements of the secrecy of letters and the like.[56] It is an open question whether these cases are to be adjudicated in accordance with older Swedish choice-of-law rules or whether the solution is to be sought by analogous application of the Regulation.[57]

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p. 73). As regards work performed abroad, the same connection does not exist with Sweden, and the Employment Protection Act (Sw. *lagen om anställningsskydd*) should lose its compulsory character, in any event if both parties are not Swedish; see case AD 2004, no. 45 and Bogdan, *ibid.*, p. 74.

[50] Article 4.1 of the Rome II Regulation.

[51] Article 4.2 of the Rome II Regulation.

[52] Article 4.3. The Article states that manifest connection may be particularly based on "*[…] a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question*". However, there is no additional guidance in precedent as to the manner in which the provision is to be interpreted. The literature states that there is reason to assume that the application will be very restrictive (see Hellner, *Rom II-förordningen* [The Rome II Regulation], Norstedts Juridik, 2014, p. 125.

[53] Article 7 of the Rome II Regulation.

[54] Article 1.2 of the Rome II Regulation.

[55] Article 1.2 (g) of the Rome II Regulation.

[56] Hellner, *ibid.*, p. 66.

[57] Bogdan, *ibid.*, p. 256.

69. The provisions of the Rome II Regulation, however, do not prevent the application of so-called "*overriding mandatory provisions*".[58] In Sweden, it is very rare that the legislature expressly states that a provision is compulsory in this manner. Unlike the Rome I Regulation, the Rome II Regulation contains no definition of what are to be deemed to be internationally mandatory rules. However, the purport is of course to be understood to be the same in both Regulations.[59] The need to apply internationally mandatory rules, however, is much more limited in respect of non-contractual obligations.[60] In the area of contract law, by designating in their agreement the legal system of another country, the parties have the possibility of circumventing the legislation which a country may have a compelling interest in applying. A comparable problem does not really exist for non-contractual obligations. The reason for this is that the applicable law much more frequently overlaps with the country which may have a main interest in the application of their country's law, since the main rule is the law of the country in which the harm occurred.

70. A court may also refuse to apply foreign law if it is obviously incompatible with the bases of the legal system of the country in which the court exists, so-called *ordre public*.[61] The rules regarding overriding mandatory provisions and *ordre public* are usually regarded as two sides of the same coin. There are extremely few examples of when a Swedish court has chosen not to apply foreign law with reference to *ordre public*. If a foreign legal rule is disregarded, it is not clear which law is to be applied in its stead. Sometimes there is no need for a replacement rule but, in certain cases, the court needs to find a replacement rule since it is not always practicable to dismiss the applicability of a rule without falling back on another.[62]

5.4 In which cases is Swedish law applicable?

5.4.1 General starting points

71. In the typical situations which we must address within the context of our engagement, it may be observed that Swedish substantive law will rarely be applicable. This will be developed further below, and divided into whether the claim is based upon a contractual relationship or whether it is non-contractual. In addition, it should be noted that also in those cases in which a court finds that Swedish law is applicable, this does not mean that any rights

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[58] Article 16 of the Rome II Regulation. No conceptual distinction between "*internationally mandatory rules*" (Rome I Regulation, Article 9) and "*overriding mandatory provisions*" (Rome II Regulation, Article 16) is intended; see, further, the following note.

[59] In, for example, the English versions, the Article headings are the same ("*Internationally mandatory rules*"). In the Rome I Regulation, the phenomena is designated as internationally mandatory rules and is defined as rules which a country "*regarded as crucial … for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of how the law otherwise applicable to the contract under this Regulation*". The terms in the two Regulations are in principle deemed to be synonymous (see Hellner, *ibid.*, p. 269).

[60] Hellner, *ibid.*, p. 268.

[61] Article 26 of the Rome II Regulation.

[62] Bogdan, *ibid.*, p. 71.

following from a particular Swedish law may be asserted in respect of events occurring abroad if it is clear that the law in question is only intended to be applied to events in Sweden.

5.4.2 Contractual claims

72. If a claim is based upon a contractual obligation, the Rome I Regulation is applied.

73. In an employment relationship, this means that the foreign legal system will be applied if the employee has not performed any work in Sweden.[63] Swedish law will then likely also not be relevant to any other ground as the business which employed the individual is not situated in Sweden[64] and since, following an assessment of the overall circumstances, it is likely that the agreement cannot be deemed to have a close connection to Sweden.[65] In this respect, the fact that the place of business abroad belongs to a Swedish corporate group or a Swedish company should not, in light of the precedent of the European Court of Justice, in itself be a sufficient connection to establish Swedish law as applicable.

74. If a Swedish court entertains an action, Swedish law will thus be relevant only if the court finds cause to apply compulsory international rules to the employment relationship or indirectly through *ordre public*. As stated above, however, the application of *ordre public* presumes that the court first finds that the foreign legal rule is obviously incompatible with Swedish law and that the court subsequently finds itself compelled to apply another legal rule. This occurs only in rare, exceptional cases.

5.4.3 Non-contractual claims

75. Where the claim is based upon a non-contractual obligation, the Rome II Regulation is applicable.

76. In conjunction with a non-contractual obligation, the law of the country in which the damage occurred is applied (*lex loci damni*). Thus, Swedish law will not be relevant since the damage in typical situations which we are to address here always occurs outside Sweden.[66] Swedish law will also not be relevant due to the exceptions, since both the aggrieved party and the tortfeasor do not have their habitual residence in Sweden. It is also probably not possible to claim that the damage, for other reasons, has a manifestly closer connection to Sweden.[67]

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[63] Article 8.2 of the Rome II Regulation.

[64] Article 8.3 of the Rome II Regulation.

[65] Article 8.4 of the Rome I Regulation.

[66] *Cf.* Article 4.1 of the Rome II Regulation.

[67] Also, the exemption according to which the aggrieved party in conjunction with environmental damage may choose to apply the law of the country in which the harmful event occurred (*lex loci delicti commissi*) will typically not lead to the application of Swedish law.

77. If a Swedish court of law entertains the action, Swedish substantive law will thus be relevant only to the extent the court finds cause to apply overriding mandatory provisions or indirectly through *ordre public*. The conditions for the application of such compulsory rules to non-contractual claims, however, are particularly limited, especially when the connection to Sweden is weak. Furthermore, there are no examples either in precedents from the Swedish Supreme Court or the European Court of Justice of such an application. Notwithstanding the same, one could indeed theoretically contemplate the possibility of such an application with regard to protecting human rights which have been violated abroad.

5.4.4 Conclusion

78. In the event a Swedish court has jurisdiction to hear an action brought by a foreign individual who believes that his or her human rights have been violated by a Swedish company or subsidiary in a Swedish corporate group by virtue of activities beyond the borders of Sweden, it is only in exceptional cases in which Swedish law can be applied to the rights claim. The aforementioned applies irrespective of whether the individual has chosen to formulate his or her action on a contractual or non-contractual ground. The main reason for this is that the connection to Sweden is not sufficiently strong in the typical cases to be addressed by us. There is certainly room for Swedish courts to ascribe to Swedish law effect to the extent it contains an internationally compulsory rule or where foreign law violates Swedish *ordre public*, but these safety valves are rarely applied.

79. Pending precedent from the European Court of Justice and from Swedish courts, it is not clear what effects a claim in damages based on human rights may have on these rules. For example, the issue arises as to whether such an action could have effect in Sweden as a consequence of deficiencies of the legal protection in the country in which the harm occurred. With the development of an increasingly rights-focused EU and increased awareness regarding these issues, it remains possible that the rules will find application in precisely such cases as above, *i.e.* that the Rome I and Rome II Regulations will be applied in such a manner that the protection of human rights is maintained also outside the EU. Alternatively, it is conceivable that the European Court of Justice will open the way for an expanded application of the articles regarding internationally compulsory rules and *ordre public* in light of the Convention on Human Rights, the general purport of which for EU law is developed below.

6. Which human rights are protected under Swedish law?

6.1 Introduction

80. If Swedish law is only exceptionally deemed to be applicable to an action brought by a foreign individual, the question arises as to which human rights, in such cases, may be invoked in a Swedish court of law. The applicability of Swedish law does not guarantee that the right which has been violated is protected in the individual case. Whether a certain right may be invoked

depends *inter alia* on whether the right has been implemented in Swedish law. Thus, it is insufficient that Sweden has acceded to a convention in order for an individual to be able to invoke the right under the convention. Even less it is possible to assert the right against another private-law subject, such as a Swedish company. As will be developed below, it is necessary both that the right has been implemented in Swedish law and that it has been granted civil law effect. The European Convention and the EU's fundamental rights, including the Convention on Human Rights, play a special role here.

81. An additional problem is whether the (implemented) right may be asserted in conjunction with violations which have taken place outside of Sweden. In the typical situations addressed in this memorandum, the violation has occurred abroad. It is therefore necessary that the right in question may be extended to also cover events outside Sweden (or, in applicable cases, the EU) in order for the aggrieved party to be able to succeed in its claim.

6.2 The individual's possibility to invoke Sweden's convention obligations

6.2.1 General principles regarding binding effect on states

82. The consent by a state to be bound by a convention may be expressed in various ways. What is necessary to be bound depends on the constitutional system of the state and on whether the convention contains any special method in order for binding effect to arise. A state may become bound simply by the act of signing. Normally, however, in addition to signing, states require ratification in order for the convention to be binding. Ratification entails that the state issue an approval of a previously signed treaty. Ratification normally presupposes a parliamentary decision. Sweden applies general ratification, and Chapter 10, sections 1-4 of the Swedish Instrument of Government states that the Government must obtain the approval of the Swedish Parliament where the treaty entails amendment or abrogation of an act of law, the enactment of a new act of law, or where the agreement concerns a matter to be determined by the Parliament. Another form by which to accede to an international agreement is to accede by depositing an instrument of accession.[68]

83. The UN's Guiding Principles provide that all conventions regarding human rights are more directly relevant than others. Article 12 of the UN Guiding Principles states that "*[t]he responsibility of business enterprises to respect human rights refers to internationally recognised human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organisations Declaration on Fundamental Principles and Rights at Work*". In the comments to the same Article it is stated that, "*[t]he core internationally recognised human rights is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: The*

[68] Ratification of the ILO conventions is conditional upon general deposit of the ratification instrument with the General Director of the International Labour Organisation.

International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work."

84. All conventions expressly named in Article 12 have been signed and ratified by Sweden (Appendix 3).[69] In this context, however, it should be noted that the UN Declaration of Human Rights lacks convention status in an international law sense and is not a directly binding document. The UN Declaration of Human Rights is instead a resolution, *i.e.* a principal document which, however, in many ways expresses international customary law rules and thereby can be binding. Customary law, however, is not always binding in an international law perspective but, rather, can to some extent be contractually waived by a state by entering into a treaty with conflicting content. However, there is a limitation. Customary law obligations cannot be contractually waived if they are deemed to be so fundamental that they are compulsory and non-optional, so-called *jus cogens*.

85. International law instruments, such as treaties and conventions, are inter-state agreements and bind, as a starting point, only international law subjects; in principle states, but also international organisations. By virtue of a state's accession to a convention on human rights, the state undertakes to safeguard human rights within its jurisdiction. Such an assurance entails first and foremost that the state will ensure that national legislation fulfils the requirements imposed by the convention. It follows from this undertaking that the state has a duty to ensure that an individual can assert his or her rights by effective legal means. The question then arises whether an individual may invoke the conventions which the contracting state breached in its undertakings to uphold the conventions in the national legal system.

6.2.2 The status of conventions according to Swedish law

86. Sweden has entered into a large number of international agreements with other states and international organisations. As a main rule, all international agreements binding on Sweden which have been entered into by the Government are published in the Swedish Treaty Series (Sw. *Sveriges internationella överenskommelser (SÖ)*). Sweden has signed a total of 49 conventions regarding human rights.[70]

87. As noted above, Sweden applies a dualistic order according to which conventions, irrespective of whether or not they have been ratified, must be

[69] In the third paragraph of the comments to Article 12 of the UN Guiding Principles it is stated that business enterprises may need to consider standards in addition to those enumerated in the conventions depending on the circumstances. In addition, it is stated that United Nation instruments have elaborated further on the rights of, among others, indigenous peoples, women, persons with disabilities and migrant workers and their families. In this context it may be noted that Sweden has not ratified and, according to information from the Ministry of Foreign Affairs, it also does not plan to ratify the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

[70] See Appendix 3.

implemented in Swedish law in order to be able to be invoked before courts of law and other authorities.[71] In order for a convention obligation to be applicable on a national level, it is thus necessary that the convention be incorporated by a legal act. No automatic or immediate applicability may occur with a dualistic approach.[72] The Instrument of Government contains no provisions regarding the position of conventions in Swedish law. However, the State Statutory Publication Committee which, in 1974, published the Report, *Internationella överenskommelser och svensk rätt* [International Agreements and Swedish Law], confirmed that Sweden and other Nordic countries applied a system "*[…] which proceed on the assumption that special, domestic law provisions are necessary for the provisions of an international agreement to be applied domestically*."[73]

88. Even if precedent in the area is relatively sparse, it is clear that the courts have taken the position in the dualistic view. The Swedish Supreme Court[74], Labour Court[75] and Supreme Administrative Court[76] have all stated that convention text cannot be invoked as law, but that applicability requires some form of incorporation into law.

89. Thus, the starting point is that individuals may base their claims on national legislation through which the conventions have been implemented. An example of such legislation is the Swedish Discrimination Act (Sw. *diskrimineringslagen*). The Act is, to the highest degree, central to Sweden fulfilling its undertakings in other international obligations in the area of labour law. Other core legislation relating to the ILO conventions are, for example, the Instrument of Government, the Penal Code, a number of other acts regarding the Prohibition Against Discrimination in Working Life (Sw.

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[71] Svanberg, *Introduktion till traktaträtten – en lärobok i traktaträtt* [Introduction to Treaty Law – A Textbook on Treaty Law], 3rd ed., Jure, 2003, p. 20 f.

[72] Bring, Mahmoudi and Wrange, *Sverige och folkrätten* [Sweden and International Law], 5th ed., Norstedts Juridik, 2014, p. 57.

[73] Committee Report 1974:100, p. 44 f.

[74] In Labour Court case 1972, no. 5, the Labour Court stated that "*[a]s particularly regards previously relevant provisions in international agreements, is the conventional position in our country that such provisions – to the extent they do not have a counterpart in our legislation or customary law – cannot, without the agency of legislation, become applicable in Swedish law. However, they may eliminate the purport of laws instituted here, which may be assumed to be concordant with our country's international undertakings".*

[75] In case NJA 1973 p. 423, the Supreme Court stated that "*[e]ven if Sweden acceded to an international agreement, it does not directly apply to domestic application of law. To the extent the agreement expresses principles which did not previously prevail here in the Realm, corresponding legislation is implemented ("transformation"). No such step, however, has been deemed necessary in Sweden's ratification of the agreements adduced by the [claimant]. It is, in that respect, noteworthy that these cannot be deemed to have the purport asserted by the [claimant]"*.

[76] In case RÅ 1974:121, the Supreme Administrative Court stated that "*[o]ne of the international agreements to which Sweden has acceded does not directly apply to the domestic application of law in our country but, rather, the legal principles expressed in the agreement must, in order to be binding in our country, to the extent necessary, be incorporated in comparable Swedish legislation (transformation). No corresponding Swedish transformation act has come about in respect of Article 2 of Supplemental Protocol 29.3.52 of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms. Accordingly, no duty has come about by which the school board must observe in its operations the rules in the Supplemental Protocol.*"

lagen om förbud mot diskriminering i arbetslivet av personer med funktionshinder), the Co-Determination in the Workplace Act (Sw. *lagen om medbestämmande i arbetslivet*), the Work Environment Act (Sw. *arbetsmiljölagen*), the Employment Protection Act (Sw. *lagen om anställningsskydd*), and the Working Hours Act (Sw. *arbetstidslagen*).

6.2.3 Conclusion

90. All conventions which are expressly referred to in the comments to the UN Guiding Principles[77] have been signed and ratified by Sweden. In conjunction with ratification, Sweden intended to fulfil the undertakings in the conventions. In the event protection is regarded as being insufficient, the convention texts do not give direct rise to rights in light of the dualistic regime applied in Sweden. The protection may, in such case, instead be asserted via comparable rights in the European Convention or the Charter.

6.3 The European Convention on the Protection of Human Rights and Fundamental Freedoms

6.3.1 Content and effect between individuals

91. In addition to the conventions referred to in Article 12 of the UN Guiding Principles, the European Convention takes a central and special position in the Swedish legal system in the area of human rights. Sweden ratified the Convention as early as 1953, but it had its real impact only when, in conjunction with Sweden's accession to the EU in 1995, it was incorporated as law in the Swedish legal system with special backing in the Instrument of Government.[78]

92. The European Convention contains what may be regarded as the basic human rights and creates, like other international conventions as a starting point, obligations only on the part of the contracting states.[79] As a consequence thereof, the European Court of Human Rights (the "Court of Human Rights") is prevented from entertaining cases between individual legal subjects.[80] As further regards the contracting states' application of the European Convention in relationships between individual legal subjects, the Court of Human Rights has stated that it is neither desirable nor necessary to formulate a general principle thereon.[81] Accordingly, these states are free to afford the European Convention – with a term borrowed from EU law – direct horizontal effect to the extent deemed necessary.

93. The question then arises as to the extent Sweden has ascribed to the European Convention's effect between individual legal subjects. The answer to this

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[77] Article 12 of Appendix 1.

[78] Chapter 2, section 19 of the Instrument of Government.

[79] *Cf.*, Article 1 of the European Convention.

[80] Article 34 of the European Convention.

[81] Decision of the Court of Human Rights in *Verein gegen Tierfabriken v. Switzerland (I)*, 28 June 2001, paragraph 46.

question is both controversial and highly relevant. The European Convention's status and area of application in Sweden has been developed primarily through the judicial precedent of the Swedish Supreme Court and the Swedish Labour Court. The trend has been towards a stronger position and an expanded area of application for the European Convention, among other things in respect of the possibility of invoking the European Convention in dealings between individuals as well as the possibility to obtain compensation for damages based upon rights violations.[82] To date, however, the Supreme Court has answered in the negative the question of whether an individual may base a claim in damages against another individual directly on the European Convention.

94. The issue of whether the European Convention may be invoked in relationships between individuals was examined by the Swedish Supreme Court in case NJA 2007, p. 747. The background of the case was that Trygg-Hansa had secretly filmed one of its insureds in her home environment in order to investigate whether insurance fraud was being committed. The insured claimed damages in the District Court with reference firstly to the Swedish Torts Act (Sw. *skadeståndslagen*) and, in the alternative, that the company violated her privacy in accordance with Article 8 of the European Convention. The District Court found that compensation on the basis of the Tort Act could not be awarded since Trygg-Hansa's actions according to the then applicable law was not criminal. The question whether the insured could base her claim only on the Convention was referred by the District Court directly to the Supreme Court which stated the following. "*In an overall assessment, and since foreseeability has essential rule-of-law value, overriding reasons may be deemed to speak against an individual being ordered to pay damages due to an act or omission which entails a violation of Article 8 of the European Convention in cases in which liability in damages due to such act or omission do not follow from applicable Swedish tort law even within the context of a treaty-conforming application.*"[83]

95. To a certain extent, the Supreme Court's decision in case NJA 2007, p. 747, upset the legal precedent which had been previously developed by the Labour Court in the in the area of labour law. In several decisions, the Labour Court had namely ascribed to the European Convention direct horizontal effect in

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[82] See, for example, the decision of the Court of Human Rights in *Khurshid Mustafa v. Sweden*, 16 December 2008, and *Kotov v. Russia*, 3 April 2012, and judgements of the Supreme Court in cases NJA 2012, p. 1038 (part I - B 1982-11) and NJA 2012, p. 211.

[83] The insured subsequently brought an action against Sweden in the Court of Human Rights and claimed that the surveillance entails an unjustified infringement of her right to family life and that Swedish law lacked an effective legal remedy against the relevant type of violation (*cf.* Articles 8 and 13 of the European Convention). However, the Court of Human Rights recently decided to dismiss the insured's action as manifestly unfounded, among other things, claiming that the civil legal remedy which was available to the insured (a claim for damages) was satisfied and that the Swedish courts, in their examination of the insured's claim, did strike a reasonable balance between competing interests. However, the Court of Human Rights did not take a position on the principal issue of whether the state could be deemed to have a duty to ensure that an individual can base a claim in damages against another individual directly upon the European Convention. See the decision of the Court of Human Rights in *Dahlberg v. Sweden*, 9 December 2014.

relationships between private legal subjects.[84] However, the Labour Court has adapted following the decision by the Supreme Court in the *Trygg-Hansa* case, at the same time as the Labour Court, through case AD 2012, no. 74, has created what is referred to in the literature as "negative" direct horizontal effect. In this case, a labour union sued an employer organisation for payment of so-called monitoring fees. The system involving the monitoring fees, however, by virtue of the decision of the Court of Human Rights in the *Evaldsson, et al. v. Sweden* case, was found to violate the protection of property in Article 1 of the First Supplemental Protocol to the European Convention, and the Labour Court therefore needed to determine whether the employer organisation could invoke Article 1 of the European Convention as grounds for contesting the labour union's claim in damages. In this context, the Labour Court noted that, by virtue of case NJA 2007, p. 747, it was clear that an individual could not base a claim in damages against another individual in the European Convention but, in this instance, the issue was the converse. The Labour Court dismissed the action with reference to the fact that an award would violate the employees' rights in accordance with the European Convention.

96. The issue regarding direct horizontal effect between employees and labour unions is once again highly relevant by virtue of the case, *Gustafsson v. Byggnads*.[85] The background of this case is that the labour union, Byggnads, took industrial action in the form of a blockade against Henrik Gustafsson in order to induce him to sign a collective bargaining agreement including such monitoring fees as were disallowed by the Court of Human Rights in *Evaldsson, et al. v. Sweden*. In September 2014, the Supreme Court granted leave to appeal the principal issue of whether a labour organisation such as Byggnads could be liable in damages for violations of an individual's rights in accordance with the European Convention. Thereby, the Supreme Court also has the opportunity to clarify the area of application of its previous precedent and possibly extend the horizontal effect of the European Convention in the area of labour law.

6.3.2 Extra-territorial application of the European Convention

97. Article 1 of the European Convention establishes that the freedoms and rights guaranteed by the Convention must be guaranteed to every person within the jurisdiction of the contracting states. In addition to the fact that this prescription requires interpretation of what is covered by the jurisdiction of the contracting states, it may be noted that the European Convention thus does not impose any requirement that the victim of a violation be a citizen of any of the contracting states, but that it is sufficient that the victim is within the jurisdiction thereof.

98. It is important to distinguish here between the jurisdiction of the states and the jurisdiction of the Court of Human Rights over the compliance by the states with their responsibilities under the Convention. The jurisdiction of the

[84] See, for example, cases AD 1998, no. 17 and AD 1998, no. 97.

[85] Supreme Court case no. T 3269-13.

Court is regulated in Article 32 of the European Convention and covers everything concerning the interpretation and application of the Convention. However, the jurisdiction of the Court of Human Rights is conditional upon the petition falling within the Convention's so-called *ratione loci* which, in turn, means that the violation must have taken place within the jurisdiction of a contracting state. The issue regarding the jurisdiction of the state is thus often raised for adjudication by the Court of Human Rights when the Court examines its own jurisdiction, as a consequence of which there is a not insignificant amount of precedent in the area.

99. In the *Bankovic, et al.*[86] and *Al-Skeini, et al.*[87] cases the Court of Human Rights has noted that contracting state jurisdiction as a starting point is territorial. However, exceptions are granted from this main rule for exceptional cases which may be divided into two principal categories: (i) "*state agent authority and control*" which addresses situations in which the state, in various ways, exercises control over one or more individuals abroad, and (ii) "*effective control over an area*" which covers situations in which the state exercises control over a defined area beyond the territory of the state (primarily through military efforts).

100. Even if the Court of Human Rights thus has established the principle regarding the extent of the states' responsibility for ensuring individual rights in accordance with the Convention, the states are at liberty to extend the area of application of the Convention beyond their borders.

101. As far as Sweden is concerned, it may be noted that there are a number of pending cases regarding residence permits for Afghan citizens who were employed as interpreters for the Swedish military forces during peace-keeping missions in Afghanistan. As grounds for being granted a residency permit in Sweden, they have adduced that they have a special connection to Sweden and that they are at risk of being subjected to violence or killed in Afghanistan and that Sweden, according to the European Convention, has a responsibility for ensuring that their human rights are not violated. In a decision issued in October 2014, the Swedish Migration Court found that the European Convention in these cases may be applied extra-territorially, *i.e.* that the interpreters were within the jurisdiction of Sweden and that Sweden thus had responsibility for ensuring that their rights were not violated.[88] The cases were thereafter remanded to the Swedish Migration Office for determination.

102. The Swedish Migration Court's decision is interesting since it raises the issue of which rights otherwise may be deemed to inure to the state's (and other) employees abroad. This is an as-of-yet unexplored legal area but it may very well be – in any case, presently – regarded as unlikely that Swedish courts of

[86] Decision of the Court of Human Rights in *Bankovic, et al. v. Belgium and 16 other Contracting States*, 12 December 2001.

[87] Decision of the Court of Human Rights in *Al-Skeini and Others v. the United Kingdom*, 7 July 2011.

[88] Administrative Court in Malmö's decision of 1 October 2014 in case no. UM 3466/14.

law would extend the applicability of the Convention to also cover relationships between individual legal subjects abroad.

6.3.3 Conclusion

103. As regards the possibility of a foreign individual legal subject to invoke the European Convention in order to claim damages from a company in Sweden before a Swedish court of law, it may be summarily observed that the chances of success may be currently regarded as relatively small.

104. Firstly, it is unclear today whether the European Convention may be invoked at all between individual legal subjects. This issue, however, is subject to determination by the Swedish Supreme Court and it cannot be excluded that such a possibility may be recognised in the legal system in the future.

105. Secondly, there is doubt regarding the extent to which the European Convention's area of application may be extended beyond the territory of Sweden. However, in conjunction with asylum examinations, Swedish lower courts have been open to such a possibility. It remains to be seen whether this precedent will obtain any additional foothold and if it can be extended to also cover the actions of legal subjects abroad.

6.4 Union law protection of human rights

6.4.1 General starting points

106. Since Sweden's accession to the EU in 1995, the fundamental rights existing in union law have played an important role in the Swedish legal system. This area is subject to constant development and expansion, and the EU and Member States' obligations, and the individual legal protections, including Charter of Fundamental Rights, and the EU's accession to the European Convention may be particularly mentioned. In addition to both of these instruments, Union citizens are guaranteed rights through the Treaty provisions, the secondary Union legislation in the form of regulations and directives, and the non-codified, so-called general principles of EU law.

107. Since the entry into force of the Treaty of Lisbon in 2009, the Charter of Fundamental Rights has been legally binding and, according to Article 6.1 of the EU Treaty, constitutes a part of EU primary law together with the treaties. The Charter of Fundamental Rights contains equivalents to most of the rights set forth in the European Convention, but with a somewhat more precise and modern formulation. The Charter of Fundamental Rights also contains rights which are specifically tied to Union citizenship such as the rights regarding free movement and voting and principal provisions which express the EU social and community-building ambitions. The Charter's largest contribution to the protection of individual rights, however, is possibly that there is now a legally binding document on which an individual may base his or her claim regarding violations of human rights against the EU, and not only the

Member States, which has become all the more important in parallel with the gradual expansion of EU jurisdiction and legislative authority.[89]

108. On the one hand, the Charter applies only to areas covered by Union law and accordingly has a narrower area of application than the European Convention. On the other hand, it may be noted that the majority of Swedish legislation today has an EU-law connection in that it is based on EU law directives and regulations – not the least in the area of labour law which is of particular relevance to this memorandum.

6.4.2 Extra-territorial application of Union law

109. The Charter of Fundamental Rights contains no counterpart to Article 1 of the European Convention for the determination of its scope. Article 51.1 of the Charter instead provides that the area of application of the Charter, as far as the Member States are concerned, is limited to situations in which they apply Union law. The second paragraph of the Article also makes clear that the Charter does not entail any expansion of the area of application of Union law beyond the powers of the Union, that it neither entails any new power or any new task for the Union, and also that it does not modify the powers and tasks defined in the treaties. The area of application of the Charter thus accords with Union law as a whole.

110. The question thereby becomes when the Member States may be regarded as applying EU law. This issue has been the subject of extensive examination by the European Court of Justice. Three principle situations have been identified in the literature regarding when the Member States are deemed bound by EU regulations regarding human rights, namely (i) when the Member States apply legislation the purpose of which is to protect human rights, (ii) when the states act on behalf of the Union as a representative ("*as agents of the EU*") by implementing or enforcing EU legal acts and (iii) when the Member States deviate from EU law or limit EU rights.[90]

6.4.3 Direct horizontal effect

111. The issue whether the Articles of the Charter of Fundamental Rights may be relied upon as grounds for a claim in damages between individuals in the national courts has been debated since the Treaty of Lisbon entered into force.

112. To begin with, it may be noted that the Articles of the Charter, in certain respects, overlap with the provisions of the treaties, in respect of which precedent regarding horizontal effect has already been developed. This is the case, for example, in respect of Article 18 of the Treaty on the Functioning of the European Union in respect of prohibitions on discrimination due to nationality in which the European Court of Justice, among other things, in the

[89] Bernitz, *Europarättens genomslag* [Impact of European Law], Norstedts Juridik, 2012, p. 35.

[90] Craig and De Búrca, *EU Law – text, cases and material,* 5th ed., Oxford University Press, 2011, pp. 381–389.

Raccanelli case[91] found that a private research foundation which discriminated against a doctoral candidate from another EU country was liable in damages on the basis of Union law.

113. Of greatest interest to this discussion is the final decision of the Labour Court in the *Laval* case.[92] The background of the case was that a Latvian construction company moved for damages from the Byggnads labour union because it prevented, in violation of the freedom of free establishment, Laval from establishing the business and performing services in Sweden. The Labour Court found that a treaty violation was present which could be invoked in the relationships between Laval and Byggnads and that the violation formed the basis for damages. What was controversial about the Labour Court's decision in the *Laval* case was primarily the latter, *i.e.* the fact that the Court not only found that the provision of the Treaty regarding free movement has horizontal direct effect, but, by awarding damages, also granted individuals an effective legal means to exercise such right.

114. Even if no broad precedent exists yet in respect of the horizontal effect of individual articles in the Charter, it may be assumed that the European Court of Justice, when it deems appropriate, will attempt to ensure the effective impact of union law in Member States and thereby afford the Charter effect even in the relationship between individuals.

6.4.4 Conclusion

115. In summary, it may be noted that it is the nature of EU law that it is extra-territorial in the sense that it reaches beyond Sweden's borders while, at the same time, it does not have universal application either geographically or in terms of the area of law. The difficulty lies in determining which situations fall within the area of application of Union law as a whole. The area of Union law, however, is currently relatively extensive. As is apparent from *inter alia* the decision by the Labour Court in the *Laval* case, it is thus possible that individual legal subjects from other Member States, with support from the rights inuring to them in accordance with Union law, may bring claims in damages against Swedish legal subjects in a Swedish court of law.

[91] Case C-94/07, *Andrea Raccanelli v. Max-Planck-Gesellschaft*, REG 2008, p. I-5939.

[92] Case AD 2009, no. 89.

IV CERTAIN PRACTICAL ISSUES

116. In order for foreign individuals to be able to be deemed to have effective means to demand accountability in Sweden on the part of a Swedish company or a company in a Swedish corporate group, it is not sufficient that there are jurisdiction rules which allow the claim to be brought in Swedish courts. The proceedings themselves must also be such that the individual has reasonable practical and financial possibilities of succeeding in his or her claim. In this Section IV, we will survey how basic procedural provisions in Swedish law – including standing, right to counsel, language, oral proceedings and the allocation of costs of litigation – can effect a foreign individual's possibilities to effectively pursue an action in Sweden. In this context, we will also address related issues such as administration times in Swedish courts, the requirement that foreign plaintiffs provide security for costs of litigation, the possibility of financing costs of counsel and the presence of corruption. Finally, we will address the conditions for group litigation in Swedish courts, including a comparison with what applies in the US in this respect.

7. Proceedings in Swedish courts of law

7.1 Initiation of legal proceedings

117. As addressed in the introduction, it may be assumed that a foreign individual who has been subjected to a rights violation will wish to demand accountability through a civil claim for damages against the company responsible for the relevant event. In such cases – and presuming that Swedish jurisdiction exists (*cf.* section 3 above) – the foreign individual may theoretically choose between initiating legal proceedings through (i) an application for an order to pay issued by the Swedish Enforcement Authority[93] or (ii) initiate legal proceedings in a court of general jurisdiction. However, the regime for the application for an order to pay is not meaningful in this context other than in those cases in which the foreign individual wishes to obtain a judgement claim at the same time as it may be assumed that the company will not contest the order. Claims in damages as a consequence of violations of human rights are, as a rule, contested by the defendant company and it may therefore be assumed that, in principle, it is only legal proceedings before courts of general jurisdiction which are the relevant form of proceeding.

[93] Within the EU there is also the possibility to apply for a European order for payment. The European order for payment is intended to establish that someone is obligated to pay a debt in cross-border cases – in the event the applicant and the alleged debtor live in different countries within the EU (Denmark not included). The application is administered in essentially the same way as the Swedish order for payment. The European order for payment is issued as a rule by competent courts. In Sweden, it is still the Swedish Enforcement Authority which also issues the European order. The main rule is that the application is sent to the courts of the country in which the defendant resides. When the requirement of a European order for payment has been established by the Swedish Enforcement Authority or foreign court, the decision is valid throughout the EU and may be enforced in all EU countries.

118. When legal proceedings are initiated in a court of law, such is done by the submission of a statement of claim to the District Court which, pursuant to Chapter 10 of the Code of Judicial Procedure, possesses local jurisdiction to entertain the matter. In conjunction therewith, the foreign individual must pay an application fee to the District Court, the amount of which is linked to the amount in dispute. In the event the requested damages are less than half a statutory base amount, currently SEK 22,250, the application fee is SEK 900; in cases involving a claim exceeding half a statutory base amount, the application fee is slightly more than triple, or SEK 2,800.

119. As soon as the District Court has reviewed the statement of claim and received the application fee, the opposing party is ordered to submit a written statement of defence. Thereafter, the preparatory phase of the case, during which the District Court clarifies the matter in dispute and the position of the parties on the facts adduced in the case. This phase is conducted principally through an exchange of documents, but regularly also includes meetings for oral hearings. When this phase has been concluded, the case is scheduled for the main oral hearing at which evidence is taken and the parties may present their respective arguments on the merits. Where the value claimed in the case does not exceed half a statutory base amount, a so-called FT case, the District Court consists of only one professional judge.[94] Where the value claimed exceeds half a statutory base amount, the court instead, as a rule, consists of three professional judges.[95] As a rule, a judgment is rendered in the case – based on the complexity of the case and the court's workload – within not more than a couple of months after the conclusion of the main hearing.

120. The application fees for bringing an action in Sweden are, in an international perspective, relatively low and should not deter a party from initiating legal proceedings in order to assert liability for a rights violation. In this context, it may be noted that paid application fees constitute a cost which the defendant company, as a rule, is obligated to pay if the foreign individual succeeds in the case (see, further, Section 7.8 below).

7.2 Standing as a party and standing to bring legal proceedings for foreign individuals

121. According to Chapter 11, section 1 of the Code of Judicial Procedure, "*any person*" may be a party to litigation. This means that all natural persons have standing as a party in a civil proceeding before a Swedish court of law. This applies without any particular limitations as regards, for example, age or citizenship. All foreign individuals thus have the possibility to be a party in Swedish legal proceedings.

122. According to Chapter 11, section 3 of the Code of Judicial Procedure, the issue of whether a foreign individual also has standing to bring proceedings, *i.e.* the right to independently pursue the action, must be determined by

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[94] Chapter 1, section 3 d of the Code of Judicial Procedure. The provision is applicable to legal proceedings in which settlement of the matter is permitted.

[95] Chapter 1, section 3 a of the Code of Judicial Procedure (the main rule).

application of Swedish rules.[96] This means, in brief, that a foreign individual has standing to pursue legal proceedings to the extent he or she, according to Swedish law, is vested in the subject-matter of the dispute. To the extent any limitation in the standing to bring legal proceedings exists, the foreign individual must be represented at the trial.[97] The representative may, depending on the circumstances, be, for example, a guardian or administrator.

123. All in all, the legal possibilities for a foreign individual to appear as a party in Swedish legal proceedings is very broad in the objective sense and, furthermore, in principle comparable to that applicable to Swedish citizens. As a consequence, we do not believe that Swedish legal rules regarding standing as a party or to bring legal proceedings may be assumed to constitute any noteworthy impediment to foreign individuals who wish to pursue a legal claim by means of legal proceedings before a Swedish court of law.

7.3 Requirement of personal appearance, etc.

124. A party in legal proceedings in a Swedish court must appear personally at the main hearing provided the court is not of the opinion that the presence of the party may be regarded as immaterial to the inquiry. At other oral hearings, it is instead such that the party only need appear personally if the court is of the opinion that such presence may be assumed to promote the purpose of the hearing.

125. In theory, the rules governing personal appearance for parties could conceivably create problems for foreign individuals who wish to pursue their action regarding rights violations in Swedish courts of law. This is so in so far as it may be practically difficult for an individual to travel to, and personally appear in, courtroom proceedings in Sweden. In reality, however, the rules regarding personal appearance of a party should not constitute any major obstacle. First of all, the foreign individual called to a meeting in legal proceedings is granted under certain conditions compensation from public funds for the costs of travel if it is reasonable taking into account his or her financial situation, the costs which may be incurred in conjunction with the appearance and the circumstances in general. [98] The court may grant the party an advance in compensation. Secondly, following the so-called EMR reform,[99] there is room for the court to allow the foreign individual to appear at a meeting by telephone or video link.[100] In the assessment of what is sufficient cause for such participation, the court particularly shall consider the

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[96] The relevant provision, according to the preparatory works, is intended only for physical persons and thus does not apply to foreign companies (see case NJA II 1943, p. 123).

[97] Rules regarding limitations of the competence to perform legal acts are found, among others, for minors, and in certain cases persons who, due to sickness, mental disturbance, impaired health condition or similar conditions require help to preserve their rights.

[98] Chapter 11, section 6 of the Code of Judicial Procedure. See, also, case NJA 2006, p. 569 (II).

[99] *En modernare rättegång – reformering av process i allmän domstol* [A More Modern Trial – Reforming Litigation in Courts of General Jurisdiction] (Government Bill 2004/05:131; Committee Report 2001:103).

[100] Chapter 5, section 10 of the Code of Judicial Procedure.

costs or inconvenience which would arise if the party must appear personally in the courtroom, which means that there are particularly good chances for foreign individuals to be granted leave to appear only be telephone or via video link.

126. In our experience, the Swedish courts are pragmatic in their application of the rules regarding personal appearance for parties. In the event there are financial or other practical impediments for an individual to travel to the relevant court in Sweden, it may accordingly be assumed that the court will strive to solve this by allowing the foreign individual to appear only through counsel, grant compensation for travel, or allow appearance by telephone or video link.

7.4 Counsel

127. A party in Swedish legal proceedings may pursue an action through counsel.[101] Chapter 12, section 2 of the Code of Judicial Procedure provides that counsel shall be suitable taking into account "*honesty, knowledge and earlier activities*" and master the Swedish language. In addition, counsel must, as a main rule, reside in Sweden or another state within the EEA or Switzerland.

128. There is no general requirement of counsel in courts of general jurisdiction, either for Swedish or foreign parties.[102] A foreign individual thus has a right to choose to pursue the action himself in a Swedish court of law.[103] In our experience, however, the retention of a legally trained attorney – with extremely rare exception – is necessary in order for a foreign individual to effectively be able to safeguard his or her interests in Swedish courtroom proceedings. Taking into account the aforementioned requirements regarding the knowledge and language abilities of counsel, the foreign individual will consequently, as a rule, need to retain a Swedish-law trained attorney, *i.e.* a jurist or member of the Swedish Bar Association with good knowledge of the Swedish language and solid experience with the Swedish legal system in general and litigation in courts of general jurisdiction in particular.[104]

129. The fact that a foreign individual in practice must retain a Swedish-law trained attorney in order to be able to effectively pursue its action in a Swedish court of law is naturally problematic in so far as it entails counsel fees which, depending on the circumstances, may be considerable. As far as Swedish attorneys are concerned, it may be noted in this context that the fee

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[101] Chapter 12, section 1, 1st paragraph of the Code of Judicial Procedure.

[102] Group litigation constitutes an exception in this context (see, further section 8.4 below).

[103] This applies on condition that the foreign individual has standing to bring legal proceedings (see section 7.2 above). Where such standing does not exist, the foreign individual is represented by a representative who is entitled to pursue the action and appoint counsel to pursue the action.

[104] This applies naturally to cases in which the foreign individual's rights claim is based on Swedish law, but it is our position that counsel trained in Swedish law must be retained also in cases in which the Swedish court must examine rights violations on the basis of foreign law. This is primarily so since both the language of trial as well as the applicable procedural rules is Swedish after all (with respect to the language, see, further, Section 7.5 below).

charged by counsel according to generally accepted attorney practices must be reasonable taking into account what was agreed upon with the party, the scope of the engagement, the nature thereof and degree of difficulty and significance as well as counsel skill, work result and other such circumstances.[105] Notwithstanding this, the fee levels of Swedish attorneys vary substantially depending on, among other things, firm affiliation, area of practice and experience. However, certain guidance may be obtained from the standard hourly cost which dictates compensation for, among other things, legal aid representatives. For 2015, this amount was established at SEK 1,302, excluding VAT. This hourly cost may be deemed to constitute a sort of lower limit for what a member of the Swedish Bar Association may be assumed to charge a foreign individual for assistance in Swedish courtroom litigation. From a western European perspective, the fees charged by Swedish attorneys are not particularly high, but they are also not uncommonly low. The issue regarding the possibilities for a foreign individual to finance his or her action is developed further in section 7.8.3 below.

7.5 Language

130. For a party in litigation, it is naturally of fundamental importance that he or she can assimilate all information processed during the proceedings, and to be heard and communicate efficiently with both the opposing party and the members of the court. The language of the proceedings and access to interpreters thus affects to the highest degree the possibilities for a foreign individual to effectively pursue an action in a court of law.

131. The language of Swedish courts is Swedish.[106] The documents submitted to a Swedish court accordingly, as a main rule, must be written in Swedish. If a document submitted to the court is written in another language, it is incumbent upon the court "where necessary" to cause the document to be translated.[107] In certain cases, the court recognises also a need to cause documents to be translated which are sent from the court to the parties, but this possibility is used with caution (for reasons of cost).[108]

132. Proceedings in courts of general jurisdiction in Sweden are based, among other things, upon the principles of orality and concentration which, somewhat simplified, entails that the court shall consider in its decision on the matter only that which was presented orally by the parties during a continuous main hearing. The hearing as such shall be conducted in the

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[105] The Swedish Bar Association's Code of Professional Conduct, section 4.1.2.

[106] Section 10 of the Swedish Language Act (Sw. *språklagen*).

[107] According to Chapter 33, section 9, 1st paragraph of the Code of Judicial Procedure, the court may, where necessary, cause documents which are submitted to, or sent out by, the court to be translated. The Swedish National Courts Administration Handbook, *Tvistemål* [Civil Actions] states, however, that the court should not routinely cause translations to be carried out of material authored in a foreign language.

[108] *Cf.*, for example, Government Bill 1973:30, p. 73 and Government Bill 1986/87:89, p. 170. In case NJA 1996, p. 342, the Supreme Court stated that courts "[…] *should determine what other possibilities the party has to have the document translated, e.g. through relatives or under the auspices of an immigration firm. Only if the party cannot obtain a translation of the document in another way, should the court cause it to be translated".*

Swedish language. Naturally, it may be thought that this would constitute a significant impediment for many foreign individuals who wish to pursue actions in Sweden. A party who is not fluent in Swedish, however, is entitled – following a decision by the court – to have the assistance of an interpreter during oral meetings. The cost for the interpreter is paid from public funds and thus is not borne by a foreign individual who has brought a rights claim in a Swedish court.

133. All in all, the requirement of Swedish as the language of the proceedings constitutes a certain impediment to the possibilities for foreign individuals to litigate in Swedish courts. However, there are relatively good possibilities to obtain the assistance of interpreters at oral hearings, and the courts are helpful to some extent in translating documents. In line with what was stated in section 7.4 above, however, it is our position that the language rules in Swedish courts are such that a foreign individual, in practice, will need to be represented by counsel who is fluent in Swedish in order to fully be able to safeguard his or her rights.

7.6 Legal certainty in general

134. The courts constitute the framework of the Swedish judicial system, and they shall strive in an objective and unbiased way for the legal security and rights of the individual. According to Transparency International, Sweden is one of the least corrupt countries in the world.[109] Among other things, the organisation has awarded Sweden the maximum number of points for judicial independence (*i.e.* the extent to which the judiciary is independent in a legal respect), independent application (*i.e.* the extent to which the courts may conduct their activities without the interference of the government or other agents) and accountability legislation and application (*i.e.* the extent to which there are rules which ensure that court staff report in a proper way and are held accountable for their actions and the extent to which the judiciary's employees must report activities and the extent to which they may be held accountable for the same).[110] With regard thereto, as well as our own extensive experience from many years of litigating in Sweden, it is our belief that legal security in Swedish courts is very high and corruption is very low. Accordingly, such factors do not constitute any significant impediment for foreign individuals who wish to assert rights claims in Swedish courts.

7.7 Adjudication within a reasonable time

135. Efficient adjudication of a rights claim entails that the matter be conclusively resolved by a court within a reasonable amount of time. This is important for several reasons including the fact that, since an individual has been exposed to a rights violation, redress should be had somewhat shortly after the

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[109] See the country profile for Sweden on Transparency International's website: https://www.transparency.org/country/#SWE (March 2015).

[110] See Transparency International Sweden's report, *Motståndskraft, oberoende, integritet – kan det svenska samhället stå emot korruption?* [Resistance, Independence, Integrity – Can Swedish Society Resist Corruption?], 2011.

violation. In addition, it is not uncommon for pending disputes to be psychologically stressful for individuals who are not accustomed to courtroom proceedings. Furthermore, a long, drawn-out dispute naturally imposes a financial burden on the individual, not the least because he or she must finance their own costs of litigation until the court has rendered a judgment in the case and taken a decision regarding the allocation of the cost of litigation.

136. Previously, the Swedish courts have been criticised by the Parliamentary Ombudsman, and Sweden has been found responsible a number of times by the Court of Human Rights, for the courts' unreasonably long processing times. Swedish courts, however, have actively worked to correct this problem. In 2014, it could thus be observed that Swedish courts overall – for the first time in history – exceeded the operational targets established by the Government; that 75 per cent of all of a court's civil suits would be resolved within seven months. For 2015, the same operational targets have been established as had been in 2014.[111] Provided that Swedish courts succeed in keeping to the targets in this respect, it is hardly necessary to suggest that the average processing time constitutes a material obstacle to the possibilities of foreign individuals to seek redress for rights violations by filing actions in Swedish courts. In complicated cases, the processing times, however, in certain cases may be many years, which may be a deterrent in individual cases.[112]

7.8 Costs of litigation

7.8.1 Generally

137. In civil actions in Swedish courts, the general rule is that the losing party is obligated to compensate the opposing party for its costs of litigation.[113] Costs

[111] See the appropriations directions for the 2015 budget year with respect to Swedish courts (*Regleringsbrev för budgetåret 2015 avseende Sveriges Domstolar* (Ju2014/7875/DOM)).

[112] By way of example, mention may be made of the remarkable case, *Gustafsson v. Byggnads* (see Section 6.3.1 above) which has been pending for five and a half years; at the time of this writing, there is an impending interlocutory judgment from the Swedish Supreme Court.

[113] Chapter 18, section 1 Code of Judicial Procedure. However, deviations from the main rule occur in the following cases: (i) If a case concerns a legal relationship that may not be settled by means other than a judgment, the court may order each party to bear his or her own litigation costs, (ii) if the winning party has initiated unnecessary litigation, he or she shall reimburse the opposing party for the latter's costs of litigation and/or each party shall bear its own costs, (iii) if the circumstances upon which the outcome rested were not known nor should have been known by the losing party, the court may order each party to bear their own costs, (iv) compensation to the winning party may be limited if such party initiated the action by a summons application even though the case could have been resolved through summary proceedings, an order for payment or provisional attachment and (v) when a case contains several claims and the parties win or lose in different parts or when a motion is granted only to a certain extent, there are three different solutions, fully liability for costs, or that the parties each bear their own costs or that the costs are adjusted. – In those cases in which a party's action is dismissed due to an impediment to proceedings, such party is considered to be the losing party. If a case is written off due to the fact that a party has withdrawn its action or failed to appear, such party shall compensate the other party for his or her costs of litigation unless there is special circumstances why the liability to compensate should be otherwise allocated. Additional aspects which may affect the cost allocation is either party's careless pursuit of the action or where the parties settle.

of litigation include (i) costs of counsel, (ii) costs for evidence in the case, (iii) costs for own appearance, own work and time expended and (iv) costs for preparing the trial. Until the court's final determination of the costs of litigation, a party itself must bear the costs of any disbursements it incurs, *e.g.* regular payments of fees to counsel and compensation for party experts and translators.

138. As a general rule, in order to be approved by the court, claims for compensation for costs of litigation must appear reasonably necessary to safeguard a party's right. However, there is no cap on the amount of costs of litigation which a Swedish court may order the losing party to pay to the other party in ordinary disputes. In so-called FT cases, on the other hand, the possibilities of obtaining compensation for litigation costs from the other party are very limited.[114]

139. As mentioned above, the main principle in Swedish court proceedings is that the loser pays the other party's costs of litigation. The purpose of the principle is, among other things, to limit the inclination to litigate and avoid groundless claims for compensation being referred to courts for speculative or extortion purposes. Based on a socio-economic perspective, this certainly appears rational, but the principle is not unproblematic from the perspective of "*access to justice*". It is problematic because an individual – irrespective of citizenship – who considers bringing a claim for compensation for a rights violation in Sweden must keep in mind that he or she is risking not only losing the (often considerable) amount which must be invested in his or her own costs of litigation in order to put on the case, but may also incur a significant debt to the other party for its costs of litigation.[115] However, the significance of this may be assumed to vary, among other things, depending on where the plaintiff resides. Even if the plaintiff loses and is ordered to compensate the defendant's costs of litigation, it is not certain that such a judgment can be enforced in the plaintiff's home country or where he or she otherwise has distrainable assets. As regards plaintiffs outside the European Union, the risk of being required to compensate the other party's costs of litigation is accordingly low in reality (see, however, the next section).

7.8.2 Obligation of certain foreign claimants to provide security for costs of litigation

140. The Swedish Requirement for Foreign Claimants to Furnish Security for Cost of Litigation Act (Sw. *lagen om skyldighet för utländska kärande att ställa*

[114] In cases in which the amount in dispute is less than half of a statutory base amount, the main rule is that the costs of litigation may not pertain to anything other than as specifically prescribed in Chapter 18, section 8 a of the Code of Judicial Procedure: (i) counselling for a period of one hour on one occasion for each instance and in an amount which equals not more than the compensation paid for advice under the Legal Aid Act, (ii) application fees or additional fees, (iii) travel and subsistence for a party or legal representative for appearance at court sessions or, when personal attendance is not required, travel and maintenance for the attorney, (iv) witness testimony and (v) translation of documents.

[115] To a certain extent, this risk may be limited by the foreign individual assigning its claim to a legal person with limited liability, *e.g.* a limited liability company, which subsequently pursues the action in court. See, however, the judgment of the Supreme Court of 11 December 2014 in case no. T 2133-14 regarding so-called litigation companies.

säkerhet för rättegångskostnader) provides, among other things, that certain foreign citizens who are not resident in Sweden and who bring an action against a Swedish company in a Swedish court must, upon motion of the company, furnish security for the costs of litigation which he or she may be obliged to pay to the company.

141. The obligation to furnish security for costs of litigation constitutes a considerable impediment when it arises in so far as this requires the individual to provide both acceptable security (as a rule, in the form of liquid funds) and do without such property for a relatively long period of time during which the trial is pending. However, the practical significance of the impediment varies substantially.

142. Firstly, there are relatively few foreign citizens who are affected by the provision of the relevant Act governing the obligation to furnish security. The foreigners who are subjected to the requirement of furnishing security, however, are principally citizens of certain developing countries, while citizens of, for example, EEA countries are entirely exempted from the requirement.[116]

143. Secondly, there is a relatively simple way of circumventing the requirement of furnishing security whereby the foreign individual registers or acquires a Swedish legal entity (*e.g.*, by purchasing an off-the-shelf company), transferring its claim in damages to this so-called litigation company, and subsequently causing the litigation company to be the claimant in the legal proceedings in the Swedish court. As a result of such an approach, the foreign individual need not provide any security for costs of litigation.[117]

7.8.3 Financing of counsel fees and cost of litigation

Generally

144. As set forth above, each party in Swedish legal proceedings must bear their own costs until the court has taken a decision regarding the allocation of liability for the costs of litigation, which normally occurs when the court dispenses with the case. A foreign individual who intends to initiate legal proceedings in Sweden must therefore consider if and how he or she will finance day-to-day expenses for the trial in the form of, for example, counsel fees and compensation to party experts and translators until the final decision.

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[116] See the list in the Swedish Proclamation Regarding a Waiver in Certain Cases for Foreign Claimants to Provide Security for Costs of Litigation (Sw. *tillkännagivande (2014:333) om befrielse i vissa fall för utländska kärande att ställa säkerhet för rättegångskostnader*), Appendix 4.

[117] However, there is a certain risk of incurring personal liability for the opposing party's costs of litigation when using so-called litigation companies (see the judgment of the Supreme Court of 11 December 2014 in case no. T 2133-14).

Public financing solutions[118]

145. As first regards public financing, there are certain possibilities for foreign individuals to be granted legal aid in Sweden. Thus, persons who have previously resided in Sweden, but now reside in another country which is covered by section 35 of the Swedish Legal Aid Ordinance (Sw. *rättshjälps-förordningen*),[119] can be granted legal aid in accordance with the Legal Aid Act's (Sw. *rättshjälpslagen*) other provisions[120] if the matter is to be dealt with in Sweden. At this point, it may be noted that the limitations in the area of application of the legal aid regime for foreign citizens – like the obligation to furnish security for costs of litigation, principally pertains to citizens in developing countries, while citizens of EU Member States enjoy the possibility of being granted legal aid in Sweden.

146. As regards citizens from states other than those covered by section 35 of the Swedish Legal Aid Ordinance, legal aid may only be granted if the matter is to be dealt with in Sweden and there is special cause therefor. The assessment of what constitutes special cause is very restrictive and, in those cases in which legal aid has been granted, the matter very nearly always relates to family law situations. The question of whether special cause may be deemed to exist for granting a foreign individual legal aid due to the fact that he or she is pursuing a claim based upon a violation of human rights has not, as far as we know, been determined by a court and may thus be regarded as uncertain. In addition, there is a requirement that the matter be dealt with in Sweden. This may be understood to mean that there is exclusive Swedish jurisdiction or – in the event that there is a competing forum abroad – that the action was brought in a Swedish court and such court found that Swedish jurisdiction exists.[121]

Private financing solutions

147. Since the possibilities for a non-EU citizen to be granted legal aid from the Swedish state in order to pursue an action regarding a rights violation is

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[118] *Cf.*, paragraph 54 above regarding the possibility of counsel for the aggrieved party in certain cases.

[119] See Appendix 5. In this context it may be noted that section 12, 2nd paragraph of the Swedish Legal Aid Act contains the possibility for the Government to order that the citizens of a certain foreign state be treated on equal footing with Swedish citizens on the issue of legal aid.

[120] Sections 6-8 of the Swedish Legal Aid Act state, for example, that legal aid may be granted to a physical person whose financial base pursuant to section 38 does not exceed SEK 260,000 and if the applicant needs legal assistance in addition to counselling and such need cannot be fulfilled in any other manner. Furthermore, legal aid may be granted if, taking into account the type and importance of the matter, the amount in dispute and other circumstances, it is reasonable that the public should contribute to the costs.

[121] *Cf.* the decision of the Legal Aid Board in case RN 298/1997. The case involved the issue of adjustment of child support. The father resided in Sweden, while the child resided in France. The father applied for legal aid and stated that it was not impossible that Swedish jurisdiction existed. Since the matter was one to be tried outside the Realm, the Legal Aid Board was of the opinion that special cause was necessary for legal aid, even if it was not impossible that it could also be heard by a Swedish court. The Legal Aid Board was of the opinion that such special cause did not exist and denied the appeal. However, the Board specifically noted that, had the action been brought in a Swedish court and it found that Swedish jurisdiction existed, the same court could grant legal aid.

limited, in many cases they will be referred to identifying private financing solutions. Access to such solutions may be assumed to vary largely depending on the country in which the individual is resident, as well as his or her financial and social situation. For example, it is conceivable that the individual has some form of legal expenses insurance which covers certain compensation for counsel fees, even if the legal proceedings are conducted in a country other than where the individual resides. In exceptional cases, there may be a possibility for the foreign individual to take a bank loan which covers the regular expenses for counsel fees, etc.

148. In primarily the US and Great Britain, there are special investment companies, so-called third-party dispute investors, who sometimes offer to finance costs of litigation in exchange for a percentage of the amount awarded to the plaintiff by the court. Such an arrangement could, in theory, be practicable as a financing solution for foreign individuals who have limited financial resources. However, in reality, very few – if any – third-party dispute investors would be prepared to invest in disputes involving damages as a consequence of rights violations in Swedish courts. This is mainly due to the fact that the expected damages in such proceedings are very rarely in an amount which justifies an investment by the third-party dispute investor in the outcome. A foreign individual should, in practice, have greater possibilities of obtaining financial support (and, sometimes, even legal aid) from non-for-profit interest organisations which work with the type of legal issues raised in a given case (*cf.*, however, paragraph 152 below).

149. Another financing solution for counsel fees which is common in the US and particularly suited for individuals with limited financial resources are so-called contingency fee arrangements. Such an arrangement typically entails that counsel does not regularly charge any fee but, instead, obtains payment in the form of a percentage or share of the damages which may be obtained through the trial. In the event the court does not award any damages, counsel is thus not entitled to any fees.

150. As regards Swedish attorneys, historically it has been deemed inappropriate to enter into similar agreements with clients which, among other things, is consistent with such agreements being assumed to negatively affect the independence of the attorney, including the attorney's ability to faithfully see to his client's interests without regard to personal gain.[122] Agreements which grant the attorney the right to a share of the results of the engagement have thus long been prohibited. However, the prohibition is not entirely without exception. According to the Swedish Bar Association's Code of Professional Conduct, it may be compatible with good advocate conduct to procure a right to a share of the results of the engagement where "*there is special cause therefor*".[123] The cases in which special cause may justify the use of such contingency fee agreements includes those in which the client, in the absence of such an agreement, would have difficulty in obtaining an adjudication of his or her matter, *i.e.* access-to-justice cases. Consequently, there are certain

[122] The Swedish Bar Association's Code of Professional Conduct, section 4.2.2.

[123] The Swedish Bar Association's Code of Professional Conduct, section p. 4.2.1.

possibilities for Swedish attorneys to accept a request from a foreign individual with very limited financial resources to represent them in tort cases in exchange for a share of the outcome of the trial.

151. In reality, however, it is our experience that Swedish attorneys are rarely prepared to work on the basis of contingency fee agreements. This is due, in large part, to the fact that it is not yet clear under which specific circumstances such agreements may be entered into without constituting a breach of professional conduct. It is also significant that Swedish courts in general are quite cautious about awarding high amounts of damages (not the least as regards nominal damages), which means that the possibility of obtaining a share of any awarded damages rarely constitutes a sufficient incentive for attorneys to assume the financial risk entailed in working on a contingency-fee basis.

152. In this context, it may also be noted that, unfortunately, there is no strong tradition of *pro bono* work among Swedish lawyers, *i.e.* providing legal counsel to especially needy parties without requiring compensation. Even if several large Swedish law firms have today begun to engage in charity or public-interest work, it is not yet sufficiently common that Swedish attorneys or jurists undertake to represent a client in a court *pro bono*.

7.8.4 Conclusion

153. In summary, it is our opinion that the possibilities for a foreign individual to secure public financing for the costs of litigation and counsel from the Swedish state are limited, in any case where the individual is a citizen in a country outside the EU. The possibility of finding a private financing solution is, to a large extent, dependent on the foreign individual's personal financial and social situation. A more generally limiting factor as regards private financing solutions consists of the fact that Swedish attorneys are generally disinclined to work on the basis of contingency fee agreement as well as the fact that there is a lack of tradition of *pro bono* work among Swedish lawyers.

8. Particularly regarding group proceedings

8.1 Introduction

154. In the event a number of foreign individuals are subject to a rights violation, there is the possibility for the aggrieved group to jointly seek redress by bringing a group action for damages in a Swedish court of law against the company which is responsible for the relevant offence (assuming that there is Swedish jurisdiction).

155. The Swedish group action regime sets up no obstacles preventing foreign group members from filing an action with a Swedish court when the defendant is a Swedish company. The advantages of bringing a group action in lieu of acting as a sole, and primarily as a foreign, individual is principally financial. Through a group action, it is also possible to procure a

determination of individual financial claims which would otherwise not be the subject of adjudication, so-called *negative value claims* (*i.e.* when the cost, even upon success in an individual trial, exceeds the value of the amount in dispute – a financial net loss).

8.2 The group proceedings regime

156. The Swedish Group Proceedings Act (Sw. *lagen om grupprättegång*) entered into force 1 January 2003. The possibility of bringing a group action would, according to the reasons for the Act, fill several important social functions and thereby contribute to a better outcome for the purposes underlying the substantive legislation.[124] Nonetheless, the number of group actions has been very small since the implementation of the Group Proceedings Act.

157. The Swedish group action procedure is based upon a so-called *opt-in* procedure which limits the trial to the persons who demonstrate interest in adjudicating their claim. The application procedure entails that a person who wishes to be included in the group must take active steps to do so. In the event foreign individuals are subjected to rights violations which are the subject of a group action in a Swedish court, the provision of information regarding the group action may constitute a problem. The question then becomes how the individuals who may be in the group are afforded a genuine possibility to notify their participation.

158. In addition, consideration should be given to other problem factors that may arise in the application procedure such as financial, social and psychological factors.[125] Similar barriers which (in normal cases) can prevent an individual from litigating will likely be particularly present in those cases in which the aggrieved group consists of foreign individuals who, in addition, are at a

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[124] The purpose of implementing the Group Proceedings Act was to counteract the lack of legal protection arising as a consequence of the new types of claims to which modern society has given rise, *e.g.* if a company's environmentally hazardous activities have affected many persons in a similar way. The preparatory works regarding the Group Proceedings Act (Government Bill 2001/02:107) state the following, among other things. "*In the consumer and environmental areas, large groups of people are currently covered by the same or similar claims. Group interests which are difficult to prove and difficult to define arise when, for example, an accident, a hazardous product or a discharge from an environmentally hazardous activity affects many persons in a similar way. It creates a temporary group which has similar claims against, for example, a company or public utility*" (p. 21). In addition, the following is also stated. "*The goal of a reform is to create a form of trial which [is] adapted to the requirements imposed by today's society. The rules of the Code of Judicial Procedure proceed on the basis of two equal parties opposing one another. A reform is, as pointed out by the Competition Authority, intended to even-out the procedural imbalance which may prevail between, for example, individual consumers and a company*." (p. 25).

[125] The Group Proceedings Committee observed, among other things, the following problem involving the opt-in procedure (Committee Report 1994:151, part B, p.158): "*[t]here is a deficiency in the procedural legal protection for group claims as a consequence of which persons do not assert their rights to a sufficient extent. They lack courage, power and the ability to act on their own. In addition to financial circumstances, social and psychological factors also play a role in their real possibilities to go to court. […] The same conditions will affect people when they are presented with the question of whether they will join a group action or not. The barriers which prevent them from litigating on their own also have as a consequence that they do not give notice of their participation in a group*."

geographic distance and, for this reason, will have a (presumed) lack of knowledge regarding the Swedish legal system.

8.3 Adjudication in a court of law

159. The procedure during a group action corresponds in large part to what applies in normal legal proceedings. To the extent the Group Proceedings Act does not prescribe otherwise, the rules of the Code of Judicial Procedure regarding contentious matters are applied also to group actions.[126] The Group Proceedings Act allows a group action to be brought before a court of general jurisdiction (including environmental courts) without limitation as to the legal subject matter. It is with the guidance of the Code of Judicial Procedure that the area of the court's competence, like the area of application of the Group Proceedings Act, may be determined. A group action may thus not pertain to disputes to be addressed by a governmental authority other than a court, or by a special court, or be a dispute which, by law or ordinance, is to be determined directly by an arbitrator. A group action can still be pursued in a civil suit which is, in whole or in part, not amenable to out-of-court settlement, but not in matters addressed in accordance with the Swedish Judicial Matters Act (Sw. *lagen om domstolsärenden*) or in criminal matters.[127] The group action relating to individual claims as a consequence of a crime may thus not be brought in the criminal action, but as a separate action.[128]

160. The group action may be instituted by (i) a natural or legal person who has a claim covered by the action and is thereby part of the group (private group action), or (ii) a non-for-profit association of certain types (organisation action) or (iii) by a governmental authority which has been authorised by the Government to bring public group actions. By assigning a group of members' claim (or part thereof) to an organisation or governmental authority, it becomes a group member and can then pursue the private group action. Individual compensation may be claimed for the group members in both private and public group actions as well as organisation actions.

161. In a group action, it is only the group representative who is plaintiff and a party. The group representative pursues the action on behalf of the entire group. The plaintiff's claims, pleadings and presentation of evidence in the process thus occurs on behalf of all physical and legal persons who are group members. It is thus a condition that one member assumes a leadership role.

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[126] Irrespective of the amount claimed, however, the provisions of the Code of Judicial Procedure on FT regarding is never applied (Chapter 1, section 3 d of the Code of Judicial Procedure and rules relating thereto). In environmental cases, the Code of Judicial Procedure is subsidiary in application to the procedural rules in the Swedish Environmental Code (Sw. *miljöbalken*) (Swedish Code of Statutes 1998:808). The Group Proceedings Act, with the exception of certain respects, is applicable also in group actions before environmental courts (see Chapter 32, section 13, paragraph 2 of the Environmental Code).

[127] Committee Report 1994:151, part B, p. 546.

[128] From a future perspective, it may still be said that there should be a possibility to bring a group action concerning the aggrieved person's claim even in criminal cases in certain cases (as a consequence of the fact that such adjudication takes place by means of the application of several civil matter rules) (see Committee Report 1994:151, part B, p. 545.

The other group members are not liable, for example, for a successful defendant's costs of litigation and normally need not appear at the main proceeding or issue powers of attorney to be represented by plaintiff's counsel. It is entirely uncontroversial to create a separate legal person in order to bring a group action, a so-called litigation company.[129] In conjunction with an organisation action, a non-for-profit association may be set up which fulfils the requirements of standing and the conditions for being the group representative. In a private group action, this may take place by means of an assignment of a claim (or part of a claim) from one of the contemplated group members to the contemplated plaintiff; as mentioned above, the plaintiff may either be a natural or legal person.

162. As stated above, the Group Proceedings Act does not prevent foreign group members from bringing their claims to the Swedish court when the defendant is a Swedish company. This follows from the basic principle that a defendant may be sued in a Swedish court if he or she resides in the country. Even if a foreign legal subject may initiate a trial in Sweden if the defendant resides in Sweden. Foreign group members should therefore be able to notify claims when there is Swedish jurisdiction, provided that the group has been defined so as to include foreign members.[130]

8.4 Various cost aspects

163. The cost rules and the parties' ability to finance the proceedings play a major role in the group action regime. Financing the group action is firstly based on the parties' general cost liability in accordance with the Code of Judicial Procedure. The factors which are set forth in Section 7.8 above are therefore relevant also in relation to the group action proceedings.

164. It should be kept in mind that the passive members are not parties and thus, as a rule, also have no liability for costs. Keeping in mind that the Swedish regime has not established any impediments to financial support for the action, or the assumption of responsibility of another type, being obtained from private sources, however, there is a possibility for other group members to undertake responsibility for costs. However, it is more likely that the financing phase will be solved by means of the group action being brought through a so-called litigation company or through an organisation action (*i.e.* a non-for-profit organisation is established and fulfils both the requirements of standing and the conditions for a group representative).[131]

165. In group actions, legal representatives and legal representation by a member of the Swedish Bar Association are in principle compulsory.[132] In order for the high counsel fees not to discourage a group action, the Group Proceedings Act includes a possibility of entering into a so-called risk agreement with

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[129] *Cf.*, paragraph 143 above.

[130] See Heuman, *Bör reglerna om grupptalan ändras?* [Should the Rules Regarding Group Actions Be Changed?], JT 2007–08, p. 841 f.

[131] *Cf.* paragraph 142 above.

[132] *Cf.* section 11 of the Group Proceedings Act.

counsel.[133] Such a risk agreement is to be approved by the court in which the action is brought. Notwithstanding the possibility of entering into a risk agreement with counsel, only a handful of group actions have been initiated in Sweden following the entry into force of the Group Proceedings Act.

8.5 A comparative view – the US

166. The prototype for nearly all group action – or class action – regimes throughout the world is in the US. From a comparative perspective, it may be worth noting certain differences between the American and Swedish models as regards, for example, opting out as opposed to opting in, cost control, and calculation of damages. Initially, it should be noted that civil proceedings in the US are regarded as relatively plaintiff-friendly, as opposed to the Swedish system which is more defendant-friendly. This is exemplified, among other things, by the fact that the losing plaintiff in the US rarely needs to compensate the winning defendant's cost of litigation.

167. In the US, one applies the opt-out system in so-called class actions, according to which everyone in the described group is covered as long as they do not opt out. In order to opt out of the group, it is thus necessary to take active steps, as opposed to the Swedish model in which the Group Proceedings Act requires an application ("opt in") by those who want to be included in the group. By opting out, a class member may leave the group and thereby avoid being bound by a judgment in the case. A judgment in a class action case namely has legal effect against the entire remaining class (like the legal effect of a judgment in a case involving a group action in Sweden).

168. When a class action is initiated in the US where there is a claim for damages for the group members, it is necessary to provide "notice" of the proceedings to all presumptive group members.[134] Contrary to that which applies in accordance with the Group Proceedings Act, it is normally the plaintiff who must both see to and at least initially bear the cost of this notice. The requirement of the notice has a strong connection to the right to opt out which, in tort cases, often occurs during the initial phase of the proceedings.

169. General cost rules for civil proceedings are applied to class actions, which means that the cost of litigation to a large extent is borne by the respective parties. The parties are thus liable irrespective of the outcome only for their own costs of counsel and, in principle, never for the costs of the other party. In addition, plaintiff's counsel usually works on the basis of a so-called contingency fee.[135] Since class actions often apply to very large groups (in

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[133] "Risk agreement" means an agreement between counsel and a party which renders counsel's entitlement to fees dependent, in whole or in part, on the outcome of the proceedings (*cf.* paragraphs149–151 above as regards contingency fee agreements).

[134] In the absence of particular difficulties in obtaining the names and address information regarding group members, notice is to be given individually. In other cases, the court may allow notice to be given collectively, *i.e.* a non-individualised description of the group ("*all buyers of product x during the period of time y...*") and in the form, for example, advertisements or via the defendant's regular mailings to the group members (in conjunction with account statements, and the like).

[135] *Cf.* paragraph 149 above.

total), group actions are relatively attractive to the attorneys. Consequently, the plaintiff has the possibility of obtaining very competent legal counsel if he or she chooses the class action form.[136] In a class action for damages, the plaintiff in principle litigates without any cost risk in the event of loss and with great possibilities for substantial compensation in case of success.

170. In a comparison with Sweden, the US applies relatively high damages levels. In addition, damages are prescribed a preventive function to a much higher extent in the USA than in Sweden, and there is, among other things, a possibility for the plaintiff in certain cases to obtain "punitive damages", *i.e.* damages which are higher than the actual loss. In class actions in which the number of affected parties is very large, the total amount of damages may thus be extremely high.

171. Essentially all of the aforementioned litigation incentives are absent in a group action in Sweden. The fact that the American proceedings are thus more plaintiff-friendly, and the Swedish more defendant-friendly, accordingly becomes extra clear in a comparison of the group action regime in each country. This is why, and for other reasons as well, it is logical that the tendency to litigate in general, and in group actions in particular, is significantly lower in our country than in the US. The social context[137] as well as the tendency to litigate and the formulation of civil litigation, however, differs far too greatly between the countries in order for any certain conclusions to be drawn in respect of which factors play the greatest role.[138]

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[136] It may be noted that the court subsequently assesses the reasonableness of the fee in a class action, however against the background of abundant precedent in the context of contingency fees.

[137] For example, the existence of, and access to, various social insurance coverage.

[138] See, for example, Lindblom, *Grupptalan i Sverige* [Group Proceedings in Sweden], Norstedts Juridik, 2008, pp. 60–62.

List of appendices

1	United Nations Guiding Principles on Business and Human Rights
2	English translation of section 2. Summary of conclusions
3	Human rights conventions signed by Sweden
4	Swedish Proclamation Regarding a Waiver in Certain Cases for Foreign Claimants to Provide Security for Costs of Litigation (Swedish Code of Statutes 2014:333)
5	Section 35 of the Swedish Legal Aid Ordinance (Swedish Code of Statutes 1997:404)