PANORAMIC

LITIGATION FUNDING 2024

Contributing Editors

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Woodsford

NIVALION
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Quick reference guide enabling side-by-side comparison of local insights, including regulation and regulators; funders' rights (choice of counsel, participation in proceedings, veto of settlement and funding termination rights); conditional and contingency fee agreements; judgment, appeal and enforcement; collective actions; costs and insurance; disclosure and privilege; disputes between litigants and funders; and recent trends.

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Sweden

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Sweden

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REGULATION

Overview

1 | Is third-party litigation funding permitted? Is it commonly used?

Third-party funding (TPF) is permitted under Swedish law.

The Swedish TPF market is growing and funding is provided by local as well as international funders. The presence of international funders is largely limited to very large cases (claim size exceeding 100 million kronor). Local funders serve a broader range of cases (claims exceeding 10 million kronor), which has led to a more widespread use of TPF. The Arbitration Institute at the Stockholm Chamber of Commerce (the SCC) has reported an increase in the number of funded arbitrations at the institute since 2021 (Third Party Funding in arbitration – more commonly used).

Although the number of cases funded has increased significantly, TPF cannot yet claim to be 'commonly used'. The number of funded cases in relation to the total number of litigations and arbitration brought in Sweden still represents a small fraction.

Restrictions on funding fees

2 | Are there limits on the fees and interest funders can charge?

TPF is not subject to regulation, and freedom of contract prevails.

In theory, a TPF arrangement could be subject to the general contract rules on usury, which would automatically make a funding agreement invalid if a funder has recklessly abused a significantly weaker party's lack of understanding or dependent position. However, it would be difficult to foresee a situation in a commercial context with an established funder and a professional client where this rule would be relevant to consider in practice, as usury is practically never applied to begin with.

Specific rules for litigation funding

3 | Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?

TPF is not subject to any specific legislative or regulatory provisions.

With respect to disclosure of a funder's involvement in a dispute, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) adopted a policy in 2019 addressing disclosure of third parties with an interest in the outcome of the dispute. The policy aims to encourage a party to disclose the identity of any funder in its first written submission. The policy is not obligatory; consequently, the parties are not formally obliged to disclose the existence of a funder.

In the legislative proposal implementing the EU Collective Redress Directive, suggested to enter into force on 1 January 2024, TPF will be subject to specific regulation. The proposed regulation as relevant for TPF corresponds to articles 10.2 (a) and (b) in the Directive.

Legal advice

4 | Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?

Section 4.4.1 of the Code of Professional Conduct for Members of the Swedish Bar Association (CPC) provides an obligation for attorneys to inform their clients of available funding options through public benefits or insurance products. Although the provision does not explicitly comprise an obligation to inform about TPF, the provision is certainly closely related. As the TPF market continues to develop and become more widespread to the broad range of attorneys, one may foresee that attorneys may feel obliged to mention TPF as a funding option in the light of said provision and their general duties to their clients.

The CPC would prevent an attorney from acting on behalf of the client and the third-party funder at the same time. Consequently, Swedish attorneys should be mindful of not creating a fiduciary duty to the funder. TPF arrangements where attorneys sign a transaction document in the TPF arrangement, or otherwise accept contractual duties directly towards the funder, will likely not be accepted.

In assisting clients with their obligations to the third-party funder under a TPF arrangement, such as disclosure of information, attorneys should regularly consider whether such disclosures are in the best interests of their clients and in compliance with the CPC.

Regulators

5 | Do any public bodies have any particular interest in or oversight over third-party litigation funding?

No public body is monitoring or supervising TPF, as TPF, in and of itself, is not subject to regulation. However, depending on how the third-party funder is organised, other compliance regulations may be applicable. For instance, a locally domiciled funder could be to be subject to registration or supervision by the Swedish Financial Supervisory Authority.

FUNDERS' RIGHTS

Choice of counsel

6 | May third-party funders insist on their choice of counsel?

It is of vital importance for a third-party funder that a reputable and skilled counsel represents the funded party in the dispute. Unless the funder has comfort in the quality of

the counsel, the funder is likely to decline funding. In that sense, the funder has an indirect influence over the choice of counsel.

However, once having entered into the funding agreement, it is unheard of in the Swedish market that a third-party funder would retain a contractual right to actively change the already appointed counsel.

Adversely, however, funding agreements commonly contain provisions where the funder would need to consent to the client changing counsel. Failure to obtain such consent would constitute a breach of the funding agreement by the client, with termination rights and other available remedies for the funder as a consequence.

Participation in proceedings

7 | May funders attend or participate in hearings and settlement proceedings?

A funder is not a party to the dispute and consequently has no statutory rights to attend hearings or settlement proceedings. The funder and the funded party can agree that the funder shall have the right to attend such events. However, such an agreement would be subject to certain limitations in practice.

Swedish arbitrations are, as a general rule, to be carried out behind closed doors (ie, are not open to the public). This means that only the parties to the arbitration agreement have the right to attend hearings. Unless the opposing party in the arbitration consents to the funder's presence, the funder would not be granted access to attend hearings.

If the hearing takes place in a public court, a funder has the right to attend, as such proceedings are open to the public. There are certain situations where a court could order a hearing, or parts thereof, to be conducted behind closed doors. In commercial litigation, that could be relevant in cases involving trade secrets. Settlement discussions moderated by the court (or even mediation) are very rare in commercial cases in Sweden. If the judge were to invite the parties to such sessions, the funder would be excluded.

Veto of settlements

8 | Do funders have veto rights in respect of settlements?

The extent of involvement in connection with settlements varies from funder to funder. This is therefore something clients and their lawyers should clarify when discussing a potential TPF arrangement.

Normally, a funder would at least require to consent to a settlement offer, or even pre-agree settlement thresholds in the funding agreement above which the client in its discretion can settle or decide to proceed. More actively oriented funders may require clients to settle above a certain level and demand to be more actively involved in the negotiation phase.

A funder's involvement as to settlements would be a contractual point between the funder in question and the client. Any agreed 'veto' or other provision on settlements in the funding

agreement would not be enforceable on the funded party, but any breach against such veto clause would constitute a breach of the funding agreement.

Termination of funding

9 | In what circumstances may a funder terminate funding?

The parties to a funding agreement are at liberty to agree on grounds for termination, as well as the remedies as a consequence thereof. The terms may thus vary from funder to funder. However, the following are some examples of typical termination grounds:

- a change of circumstances significantly reducing the chance of success in the dispute;
- a covenant breach by the funded party, such as an intentional failure to provide essential information about the dispute to the funder;
- a funded party's material breach of contractual obligations, remaining unremedied;
- the insolvency of the funded party; and
- the insolvency of the opposing party.

Other permitted activities

10 | In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

A funder is not commonly required to take an active role in the litigation process. The level of involvement required by the funder differs from funder to funder. Some funders prefer to be significantly involved while others prefer to remain in the background. However, if the funding agreement prescribes that the funder has an obligation to take an active role in the proceedings, such a clause is binding between the parties.

Irrespective of what has been agreed in the funding agreement, however, what normally happens in practice is that funders, clients and the counsel commonly work together. As funders have an interest in a successful conclusion of the funded dispute, funders are usually willing to provide input and assistance whenever offered or requested.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

11 | May litigation lawyers enter into conditional or contingency fee agreements?

Section 4.2.1 of the Code of Professional Conduct for Members of the Swedish Bar Association (CPC) provides that attorneys are not, unless in extraordinary circumstances, allowed to work with contingency fee arrangements (ie, damage-based arrangements).

Extraordinary circumstances would for instance be in a situation where the attorney acts on behalf of a group in a collective redress action.

Conditional fee arrangements are allowed under the CPC to a limited extent, but precise guidance is not available and the situation is unclear. Pursuant to Section 4.2.2 of the CPC, an agreement where the attorney assumes some degree of financial risk in relation to the outcome of the case is allowed, provided that the attorney's interest in the matter does not become disproportional or otherwise has an adverse effect on the attorney's performance of its mandate. Our experience is that attorneys in Sweden are willing to provide a 10–20 per cent discount on their normal hourly rates, in consideration of charging full fees (or an additional bonus on top of these) should the case go well.

Other funding options

12 | What other funding options are available to litigants?

Besides third-party funding, there are other funding options available to litigants in Sweden.

- General business insurance policies commonly include coverage of legal costs. Such coverage is typically limited, in most small and medium-sized businesses to roughly 250,000 kronor and the typical insurance also excludes certain types of disputes (such as labour disputes and disputes related to intellectual property). The policyholder needs must notice to the insurance company in connection with the dispute arising to make use of the insurance.
- Legal expense insurance (LEI) is included in all household insurance policies and covers litigation costs up to a stipulated limitation similar to general business insurance or less. The terms of LEI vary between the insurance companies offering it. LEI normally covers certain types of disputes in general court and usually excludes disputes handled by administrative courts.
- Legal aid is available to natural persons with a low annual income (260,000 kronor per annum). Legal aid is a public support from the Swedish state. Legal aid may not be granted if the claimant has LEI or any other similar legal protection that covers the matter.

JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance decisions

13 | How long does a commercial claim usually take to reach a decision at first instance?

According to the 2022 data from the Swedish National Courts Administration, the turnaround time for civil actions in the first instance of the public courts is 6½ months (in 75 per cent of the cases). However, this data refers to all civil actions and there is no further breakdown available for different case types. In our experience, parties to more complex commercial disputes will have to factor in a turnaround time of 18–24 months in the first instance, depending on which district court the case is brought before.

Sweden has a strong institutional arbitration tradition, with the Stockholm Chamber of Commerce (SCC) as the dominant institution in both international and domestic contexts. Pursuant to SCC's statistics for 2022, 67 per cent of the arbitrations conducted under the SCC Arbitration Rules were finally resolved in less than 12 months.

Time frame for appeals

14 What proportion of first-instance judgments are appealed? How long do appeals usually take?

According to data from the Swedish National Courts Administration, the number of civil actions appealed to the second instance in public courts has been steady at 5 per cent during the period 2020 to 2022. The data applies to civil actions in general.

Most civil actions in Sweden require leave to appeal from the higher instance to be tried. A decision to leave to appeal shall be rendered no later than two months, which also is complied with in most cases. The average turnaround time during 2022 in the second instance (in 75 per cent of cases) is around 16 months from the decision to leave to appeal. The data applies to civil actions in general.

An arbitral award cannot be challenged on material grounds. It is, however, possible for a party to challenge the award on procedural grounds, in accordance with sections 33 and 34 of the Swedish Arbitration Act of 1999. There are no official statistics on what proportion of arbitral awards are challenged or data that specifically refer to the processing time of challenge proceedings before the Swedish courts, but according to data from public courts during the period 2015–2021, compiled by Mannheimer Swartling, the number of challenged arbitral awards in Sweden is less than 10 per cent, 4 per cent of which were successful (thus representing a few per mille of all arbitral awards delivered).

Enforcement

15 What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?

There is no published data on the proportion of judgments necessitating contentious enforcement procedures.

If a party does not comply with a domestic court judgment voluntarily, the opposing party can seek enforcement through the Swedish Enforcement Authority (SEA), for both monetary claims and specific performance. Upon submitting the application, the SEA will normally get in touch with the opposing party and set a timeframe for them to fulfil their obligations. Failure to do so will cause the SEA to perform a foreclosure of the party's assets.

For judgments from courts in other EU member states, Regulation (EU) No. 1215/2012 of 12 December 2012, dealing with jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, applies.

To enforce a judgment from a foreign court outside the European Union, there must be a treaty in force between Sweden and the foreign state in question. In the absence of such a treaty, the judgment cannot be enforced in Sweden unless the parties have an exclusive jurisdiction agreement. Additionally, for a foreign court judgment to be enforceable, it must pertain to a civil law matter and must not conflict with Swedish *ordre public*.

An arbitral award issued by an arbitral tribunal based in Sweden is considered a Swedish award and can be enforced in Sweden upon its delivery. This applies even if none of the parties involved are Swedish and the underlying contract has no connection to Sweden, as well as irrespective of which substantive laws were applied in the award. The SEA can enforce a Swedish award upon application by a party, provided that the award meets the formal requirements: namely, it must be in writing and signed by the arbitrators.

A foreign award (from an arbitration outside Sweden) cannot be enforced until it has undergone a recognition procedure. To enforce foreign arbitral awards in Sweden, a party must submit an application for recognition and enforcement to the Svea Court of Appeal. The requirements in sections 54 and 55 of the Swedish Arbitration Act are equivalent to those in article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. An exception applies to awards from the International Centre for Settlement of Investment Disputes, which do not require an exequatur procedure.

COLLECTIVE ACTIONS

Funding of collective actions

16 | Are class actions or group actions permitted? May they be funded by third parties?

Under Swedish law, group actions are permitted. Group actions are regulated by the Swedish Group Proceedings Act of 2002. The Swedish Group Proceedings Act has been in force since January 2003, but has seldom been used. Under the existing law, third-party funding (TPF) is allowed, but a funding agreement will not automatically be binding on the entire group. This means a funder must enter into a funding agreement with each individual group member (which essentially makes TPF impossible to utilise in group actions in Sweden).

The pending implementation of the Collective Redress Directive (suggested to enter into force on 1 January 2024) is recognising TPF. Following its implementation (as it is proposed), funding will be able to be utilised and the funding agreement will be binding on the whole group. The regulation provided in articles 10.2 (a) and (b) (ie, information requirements to the group members, prevention of undue influence by the funder and avoiding conflict of interests related to the funder) will apply according to the legislative proposal.

Sweden intends to continue to have an opt-in regime also following the new legislation entering into force.

COSTS AND INSURANCE

Award of costs

17 | May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

Sweden applies the English rule (loser pays principle) and the general rule is that the successful party shall be compensated in full for costs of the preparations and conduction of the proceedings, as well as costs for counsel, provided the costs are deemed 'reasonable and necessary' to protect the interests of the party in the dispute (Chapter 18, section 8 of the Swedish Code of Judicial Procedure (SCJP)). Such costs may be both external costs for counsel and evidence (experts etc) and also costs for internal resources, such as management and in-house counsel.

The courts have wide discretion as to the allocation of costs, both in determining what is a 'reasonable and necessary' cost and determining who the successful party is (in the event of partial success). Therefore, the cost exposure is particularly complicated to foresee for a party litigating before the Swedish courts.

Under Swedish law, a party with third-party funding (TPF) would most likely be able to claim compensation for the actual costs in the case, irrespective of such costs having been borne by another party (the funder). A prerequisite for this position is that the litigating party has the obligation to pay these costs to the funder in the event of success (which is the case in TPF arrangements). This conclusion rests on case law from the lower courts and legal literature, but there is no precedent on the subject matter.

The situation in respect of the funder's success fee (ie, the funding costs in excess of the reimbursement of funding deployed) is likely different. The SCJP explicitly refers to reimbursement for the costs of preparing and conducting the proceedings, which implies that the costs shall be directly associated with the litigation as such. Indirect costs, such as funding costs (whether through a TPF arrangement or other financing costs, such as interest paid to lenders), would likely not be covered by the wording of said provision. Although the position is not unanimous under Swedish law, it would be very unlikely that a Swedish court would regard the funder's success fee as a reimbursable cost under the SCJP.

Although the SCJP is not directly applicable to arbitrations in Sweden, and the provisions governing costs in arbitrations (the Swedish Arbitration Act) and institutional arbitrations are drafted somewhat differently, it would be rather safe to assume that the position on allocation of costs, and funding costs, as described further above would be the same in arbitration as in courts.

Liability for costs

18 | Can a third-party litigation funder be held liable for adverse costs?

Under Swedish law, a disputing party initiating litigation or arbitral proceedings is not required to have the financial resources to be able to compensate the opposing party in accordance with an adverse costs award (except regarding security for costs). As a general rule, the obligation to pay security or potential adverse costs may only be directed at parties

to the proceedings. A funder is not a party to the proceedings and, thus, cannot be held liable for adverse costs.

As an exception to the general rule, in its ruling at NJA 2014, p 877, the Swedish Supreme Court held shareholders of a company liable for an adverse cost of a limited liability company which had been the unsuccessful party to a (previous) litigation. The case related to the shareholders of a special purpose vehicle (SPV) established solely for the purposes of conducting a litigation. The original claimant assigned the claim to the SPV prior to the litigation and the shareholders capitalised the company only to the extent necessary for the SPV to bear its own costs. After the successful party in the dispute was not compensated for the costs awarded, it sued the shareholders of its counterparty in a separate dispute. The Supreme Court in this subsequent case found that the SPV arrangement had been set up with the intention of avoiding liability for adverse costs and circumventing the rules on reimbursement of costs as set forth in the Swedish Code of Judicial Procedure. The case is an unusual example of a piercing of the corporate veil.

It is likely that the effects of the case will be limited to situations where a corporate structure is set up with illicit intentions in the same way as the facts at hand in the case. Former Chief Justice Lindskog has expressed that in situations where the claim at all times has been with the original claimant, as opposed to a structure tailored for the dispute, it should be excluded to place liability for costs on someone else than the litigating parties. This situation is common in bankruptcy situations, where neither the trustee nor the creditors are liable for the cost obligations of the bankruptcy estate under established case law.

A funder is not subject to the authority of the arbitral tribunal because the funder is not a party to the arbitration agreement. Hence, the funder cannot be held liable by the arbitral tribunal for adverse costs in relation to a successful opposing party. Such action would have to be brought against the funder in subsequent court proceedings.

Security for costs

19 May the courts order a claimant or a third party to provide security for costs? (Do courts typically order security for funded claims? How is security calculated and deposited?)

In domestic court litigation, on the request of the defendant, the court may order a claimant domiciled outside of the EEA to provide security for the defendant's estimated adverse costs (cf section 1 of the Act on the Obligation for Foreign Plaintiffs to Provide Security for Legal Costs of 1980). The court cannot order a third party to provide security for costs. Nonetheless, a third party is permitted to provide security on the claimant's behalf in the form of a guarantee or a deposit. If the claimant is a national of an EEA country (or a company registered in an EEA country), the court may not order a claimant to provide security for costs, irrespective of its financial situation.

According to the recently introduced article 38 of the Stockholm Chamber of Commerce (SCC) Arbitration Rules, an arbitral tribunal may, in exceptional circumstances and at the request of a party, order a claimant to provide security for costs. In determining whether to order security for costs, the tribunal shall have regard to:

- the prospects of success of the claims, counterclaims and defences;
- the claimant's ability to comply with an adverse costs award and the availability of assets for enforcement of an adverse costs award;
- whether it is appropriate in all the circumstances of the case to order one party to provide security; and
- any other relevant circumstances.

Since 2017, this provision has reportedly only rarely been applied by SCC tribunals. Usually, the tribunal will consider the claimant's access to justice argument. During the public hearings at the SCC in preparation for the new rule, it was noted several times that tribunals should be cautious about applying the provision and seek guidance in the Chartered Institute of Arbitrators' 2015 guidelines 'Applications for Security for Costs'.

The arbitral tribunal may, under section 38 of the Swedish Arbitration Act of 1999 as well as under article 51 of the SCC Rules, request security for its compensation, regardless of the involvement of a funder. The requested security should correspond to the estimated amount of the fees and expenses of the arbitral tribunal and the administrative fee (in institutional arbitrations). Security for costs is usually provided in the form of advance payments by the parties.

20 If a claim is funded by a third party, does this influence the court's decision on security for costs?

Where the claimant is not a national of an EEA country, security may be ordered by the court if requested by the other party. The security shall, according to the law, consist of a pledge or a guarantee. The fact that a claim is funded by a third party does not influence the court's decision on security for costs. A third-party funder may, however, be the party that could issue the guarantee to be submitted to the court. Unless accepted by the defendant, it is up to the court to determine whether said security constitutes proper security to safeguard the defendant's interests.

In arbitration proceedings, the mere existence of a third-party funding agreement is not in itself a decisive reason for granting a security request. Instead, the deciding factors will be the parties' financial situation, the availability of assets and whether or not the funder has made a commitment to cover adverse costs. In an SCC arbitration case brought in 2021, where one of the parties was funded by Litigium Capital, the issue of security on cost was at hand (as the claimant was a bankruptcy estate). Upon voluntarily disclosing relevant sections of the funding agreement (including an adverse cost exposure for the funded party) the issue was sufficiently taken care of.

Insurance

21 Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

ATE insurance is permitted in Sweden, albeit not commonly used.

Business insurance policies and legal expenses insurances cover legal costs generally, including adverse costs.

DISCLOSURE AND PRIVILEGE

Disclosure of funding

22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

There is no general obligation to disclose the existence of a litigation funding agreement to the opposing party or to the court. The issue has been tried in the Svea Court of Appeal as a procedural decision in Case No. ÖÄ 7709-19 (*The Republic of Kazakhstan v Ascom Group SA and Others)* and the court dismissed a motion where a party requested production of the funding agreement.

That said, should a court be convinced that a funding agreement would be of importance as evidence relating to the matter in dispute, general rules on document production would provide an obligation to disclose the funding agreement accordingly.

With regard to arbitral proceedings, on 11 September 2019, the Stockholm Chamber of Commerce adopted a policy for the disclosure of third parties with an interest in the outcome of the dispute. The policy aims to encourage a party to disclose the identity of any funder in its first written submission to the tribunal. However, the policy is not mandatory and the parties are thus not formally obliged to disclose the existence of funders.

Privileged communications

23 Are communications between litigants or their lawyers and funders protected by privilege?

Communications obtained by a Swedish attorney in his or her professional capacity are protected by privilege. Swedish attorneys are also required to maintain confidentiality according to the Code of Professional Conduct for Members of the Swedish Bar Association. Information provided by a client to an attorney is consequently safe from having to be disclosed. Attorneys cannot be ordered to testify in a national court or in front of an arbitral tribunal in regard to privileged information.

There is no confidentiality provision or privilege protecting communications between a funded party and the funder. The funder and the funded party may, however, enter into a non-disclosure agreement to protect their exchange of information. To better protect sensitive information shared between the party and the funder, it may be considered if such communication shall go through the funded party's attorney or with the attorney in copy.

DISPUTES AND OTHER ISSUES

Disputes with funders

24 | Have there been any reported disputes between litigants and their funders?

To our knowledge, there have been no reports of disputes between litigants and their funders.

Other issues

25 | Are there any other issues relating to the law or practice of litigation funding that practitioners should be aware of?

As there is no legislation governing the use of funding and little to no case law, the funding agreement is of central importance. Swedish law takes a liberal approach to contracts. Accordingly, practitioners should draw up the funding agreement making sure that the contract thoroughly regulates the parties' respective obligations and rights. Normally the funded clients are advised by their attorney when negotiating the funding agreement.

UPDATE AND TRENDS

Current developments

26 | Are there any other current developments or emerging trends that should be noted?

Until as late as 2018, it was noted that no domestic market for third-party funding existed in Sweden (Josefsson/Neway Herrman, 'Extern finansiering av tvister och riskavtal – en möjlighet att stärka Sverige som säte för internationella skiljeförfaranden?' ('External Financing of Disputes and Risk Agreements – A Possibility to Strengthen Sweden as a Seat for International Arbitration?'), *Ny Juridik* 2018/1, 85–94 (86)). Over time, international funders, such as Burford and Nivalion, have increased their presence in Sweden. On the domestic level, Kapatens and Litigium Capital are the main market players with headquarters in Sweden.

In 2023, Therium closed its office in Stockholm following which its staff joined Deminor. The former management of Therium Nordic in Oslo has established the legal financing brokerage firm Nordic Legal Risk, which is to operate out of Sweden.