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The International Comparative Legal Guide to:

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A practical cross-border insight into corporate recovery and insolvency work

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Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
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Sweden

Carolina Wahlby

Fredrik Olsson

Hannes Snellman Attorneys

1 Overview

1.1 Where would you place your jurisdiction on the spectrum of debtor to creditor-friendly jurisdictions?

Sweden has elements of offering a debtor-friendly procedure – company restructuring and protecting over-indebted debtors from its creditors in order to recover the business. At the same time, company restructurings cannot go on forever (a bit more than one year is the maximum) and no write down of debt will occur unless a qualified majority of creditors vote in favour of it.

The second procedure – the bankruptcy processes – is a creditor-friendly procedure where the administrator shall strive to achieve the best possible outcome for the creditors.

In general, when it comes to insolvency proceedings, we would place Sweden on the more creditor-friendly end of the scale.

Please note that our answers below are only taking into account debtors as limited liability companies and do not include the special provisions that apply for companies under the supervision of the Swedish Financial Supervisory Authority.

1.2 Does the legislative framework in your jurisdiction allow for informal work-outs, as well as formal restructuring and insolvency proceedings, and to what extent are each of these used in practice?

The Business Reorganisation Act (Sw. *lag (1996:764) om företagsrekonstruktion*) provides for formal proceedings involving a court, and is used in practice. The intention of the legislator has been that the reorganisation would be used at an early stage of the financial difficulties, but in practice companies tend to then try to find solutions through informal out-of-court restructurings while applying for a formal reorganisation procedure first when the difficulties are rather advanced. The reason for this is often to avoid the publicity that the formal reorganisation procedure entails.

There is no legislative framework for informal out-of-court restructurings. However, informal debt write-downs and extensions involving only the main creditors are commonplace. Informal elements may also occur within formal insolvency proceedings, as some creditors may be willing to accept a renegotiation of terms to enable the company to continue as a going concern.

If the parties involved in an informal work-out so agree, they can amend existing agreements between them. However, it will only bind the parties involved. To also bind non-consenting parties, the company will have to initiate a formal reorganisation in accordance with the Business Reorganisation Act. In case of a negotiated agreement being made during a formal restructuring, the administrator is generally involved.

2 Key Issues to Consider When the Company is in Financial Difficulties

2.1 What duties and potential liabilities should the directors/managers have regard to when managing a company in financial difficulties? Is there a specific point at which a company must enter a restructuring or insolvency process?

The board of a limited liability company is obliged to prepare a control balance sheet if the board members have reason to believe that the net assets of the company are less than half of the share capital or if an attempt of levy of execution (Sw. *utmätning*) has taken place without there being sufficient assets.

Upon preparing the control balance sheet, the board must promptly summon an extraordinary general meeting (referred to as the first control general meeting) at which the shareholders shall decide whether to liquidate the company or not. If no liquidation decision is made despite the first control balance sheet showing that less than half of the share capital was intact, a second control balance sheet must be prepared and a second control general meeting must be held within eight months from the first general meeting. Should the share capital then not be fully restored, the shareholders are obliged to resolve to liquidate the company. Absent such decision, the board members are obliged to initiate the liquidation process themselves.

Should the board fail to take any of the required measures in a timely manner and incur further liabilities, the board members become personally and jointly liable for all such liabilities incurred from the date they should have taken the relevant action until doing so. The same applies to any representative of the company or a shareholder of the company that is aware of the board's failure and nonetheless participates in incurring further liabilities.

There is no obligation to enter any reorganisation proceeding or to apply for bankruptcy. However, the board members should be aware of the risk of becoming personally liable for tax payments (see question 5.1 below). Further, not initiating an insolvency proceeding may under certain circumstances have consequences. For example, the Swedish Penal Act (Sw. *brottsbalken*) comprises certain criminal acts jointly referred to as crimes against creditors, of which one is to continue to run a business, utilising thereby considerable means without a corresponding benefit to the company, although the representatives of the company are aware

that the company is insolvent or is in manifest danger of becoming insolvent.

In addition thereto, the general provisions regarding liability for damages by negligence are stipulated by the Swedish Companies Act (Sw. *aktiebolagslagen (2005:551)*) will apply.

2.2 Which other stakeholders may influence the company's situation? Are there any restrictions on the action that they can take against the company? For example, are there any special rules or regimes which apply to particular types of unsecured creditor (such as landlords, employees or creditors with retention of title arrangements) applicable to the laws of your jurisdiction? Are moratoria and stays on enforcement available?

Counterparties, employees and creditors may try to influence the company's situation within the boundaries of their agreement with the company. Once starting to suspect that the company may be in financial difficulties, most counterparties and creditors will start to investigate what actions they may take to limit their losses in case a formal insolvency procedure would follow. Counterparties and creditors should in their interactions with the company be aware of the clawback risks (see question 2.3 below).

A creditor may try to collect a claim through the Swedish Enforcement Authority or apply for the debtor to be put in bankruptcy (or, very rarely, company restructuring). However, should the company be in a company restructuring, a stay on enforcement will apply (see question 3.2 below), and no levy of execution or other enforcement measures may take place in respect of the debtor, unless the creditor possesses a general or particular lien or if special cause exists to believe that the debtor is executing or failing to execute a particular measure and is thereby jeopardising a creditor's rights. If creditors wish to take actions otherwise, they must first make the court decide on a cessation of the company restructuring.

There are no special rules or regimes which apply to particular types of unsecured creditor prior to entering into any formal insolvency proceeding.

2.3 In what circumstances are transactions entered into by a company in financial difficulties at risk of challenge? What remedies are available?

Once in a formal reorganisation procedure (provided that it involves debt composition proceedings) or in a bankruptcy, an administrator may seek to challenge transactions taken by the company prior to proceedings initiated by way of clawback, upon which a transaction is recovered to the company or the bankruptcy estate.

Generally, a prerequisite for clawback is that the transaction has adversely affected the creditors and the purpose of a clawback is that the clawback shall return the financial position of the relevant company to as if the challenged transaction had not taken place.

The time limits (the hardening periods) range from between three months to eternity, depending on the type of transaction, but transactions between related parties are generally easier to claw back than transactions with third parties.

The general clawback provision stipulates that any action whereby a creditor is unduly put in a better position than other creditors, or assets of the debtor are being deprived from the creditors or the debts of the debtor are increasing, may be clawed back if the debtor was, or as a result (directly or indirectly) of the action, has become insolvent. However, this shall only apply if the counterparty knew, or should have known, about the debtor's insolvency and the circumstances that made the action undue. It is assumed that related parties have such knowledge.

Further, payment of a debt which has been made prior to initiating a formal insolvency proceeding and which was made by other than ordinary means of payment, or prior to the due date or with such amount that the financial situation of the debtor became considerably worse, may be clawed back if the circumstances under which the payment was made do not make it an ordinary payment.

Other clawback provisions relate to, *inter alia*, gifts, salaries or other remunerations. Another example is that security that the debtor has transferred within a hardening period is annulled unless it was provided when the debt was created or was transferred without delay after the creation of the debt.

It is not a general requirement that the transaction was made with actual intent to defraud creditors, and some clawback provisions can be applied even if the company was not insolvent or became insolvent as a result of the transaction but thereafter entered into company restructuring or bankruptcy.

3 Restructuring Options

3.1 Is it possible to implement an informal work-out in your jurisdiction?

See question 1.2 above.

3.2 What formal rescue procedures are available in your jurisdiction to restructure the liabilities of distressed companies? Are debt-for-equity swaps and pre-packaged sales possible? To what extent can creditors and/or shareholders block such procedures or threaten action (including enforcement of security) to seek an advantage? Do your procedures allow you to cram-down dissenting stakeholders? Can you cram-down dissenting classes of stakeholder?

The key restructuring procedure is reorganisation in accordance with the Business Reorganisation Act. The purpose of such procedure is to give companies in financial difficulties a possibility to avoid bankruptcy, by, for example, providing protection from certain enforcement actions from creditors or giving a grace period in respect of payments of debts that had arisen before the reorganisation was initiated. Further, one common reason to apply for company restructuring is to try to achieve a debt write-down. Provided that a qualified majority has approved thereof, all unsecured debt will be written down *pro rata* and the company shall be given a grace period of up to one year. A debt composition proposal, which yields at least 50 per cent of the amount of the unsecured debt, shall be deemed to be accepted by the creditors, where three-fifths of the creditors voting have accepted the proposal and their claims amount to three-fifths of the total amount of claims held by the creditors entitled to vote. Where the debt composition percentage is lower, the debt composition proposal shall be deemed to be accepted where three-fourths of the creditors voting have approved the proposal and their claims amount to three-fourths of the total amount of the claims held by the creditors entitled to vote.

During the reorganisation process, the management continues to control the business and to run the daily operations of the relevant company, and the board of directors have full capacity to represent the company. However, an administrator is appointed by the court to supervise all activities. The company may not assume new legal

obligations, nor may it transfer, pledge or grant a third party any rights to property which is of substantial importance to the business operations without the consent of the administrator. Furthermore, the company is prohibited from paying, or granting security for, any debt that occurred prior to filing for company reorganisation without the consent of the administrator. However, the absence of such consent does not affect the validity of the transaction.

As a general rule, a reorganisation may not continue for more than a year.

Swedish law does not as such recognise a "pre-pack" as an instrument. However, Swedish law does not explicitly prohibit entities from taking steps and measures prior to a bankruptcy, such as finding suitable buyers for assets, which can be implemented in the bankruptcy. Which pre-pack measures may be taken must be decided on a case-by-case basis.

Debt-for-equity swaps may be made both by shareholders and by third parties if the shareholders approve of the equity issue. Third parties who acquire distressed debt may use it to gain an equity interest in the debtor.

During the reorganisation, secured creditors may still enforce certain types of security. Other enforcement measures may only take place in respect of the debtor if there are special reasons to believe that the rights of a creditor are jeopardised. The court may then take appropriate measures to safeguard such rights.

Upon request by a creditor, the court may appoint a creditors' committee who the administrator should consult with during the reorganisation. A creditors' committee may consist of a maximum of three creditors, and if the company has more than 25 employees, it is entitled to appoint a fourth member.

3.3 What are the criteria for entry into each restructuring procedure?

A prerequisite for entering into a reorganisation process pursuant to the Business Reorganisation Act is that the company is incapable of paying its debts, or that such incapacity presumably will occur in the near future. Further, an application to enter into a reorganisation shall be dismissed if there is no reason to expect that the reorganisation will be successful. In practice, courts often approve an application for reorganisation so that an administrator is appointed and can investigate this further.

3.4 Who manages each process? Is there any court involvement?

A court approval is required in order to enter a reorganisation and the court will also make the decision to terminate the reorganisation. As described in question 3.2, an administrator is appointed by the court to supervise the activities of the company.

3.5 What impact does each restructuring procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? What protections are there for those who are forced to perform their outstanding obligations? Will termination and set-off provisions be upheld?

A reorganisation provides protection to the company, as it prevents counterparties from terminating agreements by sole reason of the company's late payments or performance (or anticipated delays of such nature) if the company (with the consent of the administrator) upon request by the counterparty informs the counterparty that it wishes the agreement to continue in force. A provision in a contract that a party may be entitled to terminate the agreement due to the insolvency of the company may be unenforceable.

If the contract stipulates that it is time for the counterparty to perform its obligation under the contract, the counterparty may require that the company performs its obligations (e.g. pays) simultaneously, or that the counterparty receives security for such performance. A counterparty may also in other situations be entitled to request security if necessary, in order to protect it from making a loss.

Set-offs will be accepted, with a few exceptions. A set-off is not permitted if the debt was acquired (from someone else not having the right of set-off) within a three-month period starting from when the reorganisation was initiated or if the creditor reasonably should have known about the insolvency.

3.6 How is each restructuring process funded? Is any protection given to rescue financing?

Most suppliers will start to require advance payments or payments upfront in order to deliver goods needed, wherefore the company will need cash at hand during the reorganisation.

The state wage guarantee (see question 6.1 below) will provide some support, but a company is often dependent on contributions from its shareholders or external funding in order to be able to continue to run the business.

Although not provided for by law, in practice an administrator takes control of the funds of the company by having them transferred to an escrow account controlled by the administrator during the reorganisation.

4 Insolvency Procedures

4.1 What is/are the key insolvency procedure(s) available to wind up a company?

The key insolvency procedure is bankruptcy in accordance with the Bankruptcy Act (Sw. *konkurslag (1987:672)*), providing for all assets of the debtor to be fairly distributed to the creditors and for the company to be subsequently dissolved. Further, the Companies Act entails certain provisions regarding mandatory liquidation.

4.2 On what grounds can a company be placed into each winding up procedure?

A company can apply for bankruptcy voluntarily or be forced into bankruptcy upon the application of a creditor, if the company is considered insolvent. A company is considered insolvent if it cannot pay its debts as they fall due and this incapacity is not temporary. A statement by a company that it is insolvent is assumed to be correct, unless there are circumstances giving the court reason to believe that this is not the case.

In case a creditor files for bankruptcy, it would have to provide evidence as to why the company would be insolvent or would have to rely on certain stipulated presumption rules. A creditor cannot force a company into bankruptcy if its claim is protected by sufficient security.

A mandatory liquidation must be initiated, *inter alia*, when the solidity is below the levels stipulated by the Companies Act (see question 2.1 above).

4.3 Who manages each winding up process? Is there any court involvement?

An application for bankruptcy must be submitted to the district court, which should then make a prompt decision on the matter. The bankruptcy is managed by one or more administrators appointed by the court who have the special insight and experience required and are otherwise appropriate for the assignment, and the work of the administrator is supervised by the Swedish Enforcement Authority (Sw. *kronofogdemyndigheten*).

A liquidation will be administrated by a liquidator proposed by the company and approved by the court or the Companies Registration Office (Sw. *bolagsverket*) (the former if the liquidation is a part of a court proceeding).

4.4 How are the creditors and/or shareholders able to influence each winding up process? Are there any restrictions on the action that they can take (including the enforcement of security)?

During the reorganisation, secured creditors may still enforce security if the creditor has the security assets in its possession, i.e. excluding, for example, business mortgages and security obtained through registration.

Levy of execution (Sw. *utmätning*) may not take place in respect of the debtor other than if the creditor has priority rights in respect of its claims (see question 4.6 below).

4.5 What impact does each winding up procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

The bankruptcy estate may choose not to honour existing agreements, and the counterparty will then have a claim on the company. However, there are no unified rules that apply to the contracts of a company in bankruptcy. If there are specific provisions set out in any legal act, those will, however, override any clause in the agreement. Hence, all contracts will not automatically terminate and a clause stipulating that a counterparty may terminate the agreement due to the bankruptcy may be unenforceable. If not regulated by law, the terms of the contract will apply.

One law limiting the right to terminate an agreement is the Sales of Goods Act, but that provision is also invoked analogously in other contractual relationships. The creditor (or supplier or similar) may not terminate the agreement before giving the bankruptcy estate the opportunity to step into the contract. If the estate decides to do so and the performance by the creditor is due, the creditor may demand that the estate completes its performance as well or, under certain circumstances, that the estate provides security if necessary in order to protect him against loss. If the estate does not step into the agreement or grant security in accordance with the aforesaid, the creditor may terminate the agreement.

As regards set-offs, please see question 3.2 above.

4.6 What is the ranking of claims in each procedure, including the costs of the procedure?

The Bankruptcy Act prioritises all costs of the bankruptcy procedure and debt arising after the time of bankruptcy. Any surplus thereafter shall be distributed to the creditors in accordance with the Priority Rights Act (Sw. *förmånsrättslag (1970:979)*). If, however, the creditor enforces a security on its own, which is possible for certain so-called possessory liens (see question 4.4 above), the costs of the bankruptcy estate cannot be taken from such proceeds.

According to the Priority Rights Act, firstly, debts secured by specific property are paid out of the proceeds of the sale of that specific property, including, *inter alia*, (in the order of priority as listed): maritime liens and aircraft liens; international interests in aircraft and aircraft engines which are registered pursuant to the International Interests (Mobile Equipment) Act (*2015:860*); pledges and rights to retain possession of personal property as security for a debt (possessory liens); as well as grants of security interests made on the basis of registration or notice pursuant to the Central Securities Depositories and Financial Instruments Accounts Act (*SFS 1998:1479*), security interests based upon mortgages granted in ships, or shipbuilding, or aircraft and reserve parts for aircraft.

Thereafter would be a creditor having received security in the form of business mortgages or security in the form of real property mortgages.

Thereafter there are claims of general priority, i.e. in the following order of priority: costs for filing for bankruptcy; the costs for a previous reorganisation process; costs arising with the consent of a reorganisation administrator (in case there has been a preceding reorganisation procedure) provided that it has clearly arisen in the best interests of the creditors; audit costs; and employees' salaries and remunerations.

Lastly, all other unsecured creditors will share the remaining funds (if any) *pro rata* between themselves and if all unsecured creditors have been fully paid, the surplus will be paid to the shareholders.

4.7 Is it possible for the company to be revived in the future?

While the company is typically dissolved after its assets are liquidated, assets of the company, such as the brand name or business model, may be acquired for use in a new venture. If there is a surplus after a bankruptcy, the company itself must, however, not be liquidated, but this is a rather unlikely scenario.

5 Tax

5.1 What are the tax risks which might apply to a restructuring or insolvency procedure?

Generally, a restructuring or insolvency procedure does not give rise to any further tax risks, but the procedure may result in forfeiture of tax losses. However, taxable income may crystallise in case of informal work-outs.

A failure to apply for a restructuring or insolvency procedure when a company becomes unable to pay all taxes in a due manner may result in the board members incurring personal liability for the tax payments of the company. Hence, it is important that all taxes are duly paid.

6 Employees

6.1 What is the effect of each restructuring or insolvency procedure on employees? What claims would employees have and where do they rank?

A bankruptcy or reorganisation does not automatically cause the employments to be terminated. If a Swedish company is insolvent and therefore unable to pay salaries due to its employees, the state wage guarantee (Sw. *lönegaranti*) will be triggered. A prerequisite for the guarantee to be applicable is that the company has been declared bankrupt or is in a company reorganisation procedure and the total amount per employee that can be paid out corresponds to four base income amounts (Sw. *prisbasbelopp*), which for 2019 adds up to a total of SEK 186,000. All different categories of employees are covered, excluding, however, independent contractors. As a general rule, the guarantee only covers salary claims that have fallen due within three months prior to the date of the bankruptcy filing.

Normally, employees have a general right of priority (Sw. *allmän förmånsrätt*) for wages or other compensation arising from the employment. The general right of priority is however limited in time and certain criteria must be fulfilled. As claims having a specific right of priority (for example, secured creditors) has precedence over claims having a general right of priority, secured creditors rank ahead of employees. However, the employees rank before, for example, unsecured creditors and shareholders.

7 Cross-Border Issues

7.1 Can companies incorporated elsewhere use restructuring procedures or enter into insolvency proceedings in your jurisdiction?

For members of the EU (other than Denmark), the new Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (the Insolvency Regulation), which came into force on 26 June 2017, provides that the courts of the EU Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings (main insolvency proceedings). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. However, if a company has an establishment within the territory of another Member State, the courts of such Member State may open insolvency proceedings in respect of such assets (territorial proceedings). Generally, territorial proceedings may not be opened if main insolvency proceedings have been initiated, but there are certain exceptions to this general rule.

As regards situations where the Insolvency Regulation does not apply, a Swedish court may initiate insolvency proceedings to the extent it deems that the centre of main interests of the company is located in Sweden, if the company has assets in Sweden or in a limited number of other scenarios.

7.2 Is there scope for a restructuring or insolvency process commenced elsewhere to be recognised in your jurisdiction?

The main rule is that foreign insolvency proceedings will not be recognised or enforced in Sweden. Notwithstanding the aforesaid, Swedish authorities must recognise restructuring and insolvency proceedings initiated in accordance with the Insolvency Regulations (see question 7.1 above). Further, the Nordic countries have agreed on the Convention between Denmark, Finland, Norway, Sweden and Iceland on Bankruptcy which continues to apply between all Nordic countries except between Sweden and Finland (as the Insolvency Regulation supersedes the convention).

7.3 Do companies incorporated in your jurisdiction restructure or enter into insolvency proceedings in other jurisdictions? Is this common practice?

It would be unusual for a Swedish company to restructure or enter into an insolvency proceeding in a jurisdiction other than Sweden.

8 Groups

8.1 How are groups of companies treated on the insolvency of one or more members? Is there scope for co-operation between officeholders?

From a legal point of view, each entity is treated separately from one another. Notwithstanding the aforesaid, it is commonplace that members of the group file at the same time and request that the same administrator should be appointed for all Swedish members of the group.

The new Insolvency Regulation (see question 9.1 for further details) includes provisions to enable an administrator to request the opening of group coordination proceedings if one or more members of a group are in bankruptcy proceedings in different jurisdictions. If the request is approved, a coordinator will be appointed and may make recommendations to the administrator.

9 Reform

9.1 Are there any other governmental proposals for reform of the corporate rescue and insolvency regime in your jurisdiction?

The Insolvency Regulation came into force on 26 June 2017, and will further harmonise the insolvency proceedings in the EU. A new EU proposal has been presented on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, which will further harmonise the EU insolvency regime.

Carolina Wahlby
Hannes Snellman Attorneys
Kungsträdgårdsgatan 20
SE-103 96 Stockholm
Sweden

Tel: +46 760 000 070
Email: carolina.wahlby@hannessnellman.com
URL: www.hannessnellman.com

Carolina Wahlby is a Managing Associate in the Finance and Restructuring team, and specialises in financing, including providing advice on restructurings and bankruptcies, where she has acted as counsel on all sides of the proceedings.

Her more recent experience includes representing a blue chip company in its strategic counterparty insolvency, representing a creditor considering a pre-pack in relation to the bankruptcy of one of its key counterparties as well as representing clients in debt-to-equity swap discussions.

Fredrik Olsson
Hannes Snellman Attorneys
Kungsträdgårdsgatan 20
SE-103 96 Stockholm
Sweden

Tel: +46 760 000 006
Email: fredrik.olsson@hannessnellman.com
URL: www.hannessnellman.com

The head of the Finance and Restructuring practice at the Stockholm office, Fredrik Olsson has vast experience of finance-related work, including restructurings and insolvencies. He has experience of representing a variety of different parties, including debtors, distressed financial institutes, syndicates of banks and other creditors and counterparties. He is experienced both in formal and informal reorganisations, and of providing advice in cases in simultaneous proceedings in several jurisdictions. In addition thereto, he advises clients on transactions involving the purchase of debt and debt-for-equity swaps.

Examples of his previous experience include representing groups with insolvency procedures in their Swedish subsidiaries, as well as representing a company within the public sector in connection with the company reorganisation of its counterparty and being counsel to a company investigating the possibility of doing a debt-to-equity swap.

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glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com