Chambers

GLOBAL PRACTICE GUIDES

Definitive global law guides offering comparative analysis from top-ranked lawyers

Insolvency

Sweden

Contributed by
Lars-Henrik Andersson, Pierre Pettersson, Karl Björlin and Emmeli Neivak
Cirio Advokatbyrå AB

practiceguides.chambers.com

2020

SWEDEN

Law and Practice

Contributed by:
Lars-Henrik Andersson, Pierre Pettersson, Karl Björlin and Emmeli Neivak
Cirio Advokatbyrå AB see p.17

Contents

1. Market Trends and Developments

1.1 The State of the Restructuring Market

With the spread of COVID-19 many businesses have struggled. During the first half of the year the number of bankruptcies rose by 12% compared with the same period in 2019, with April showing the highest rise of 30% compared to the same month in 2019. However, during late summer and autumn the number of companies filing for bankruptcy has decreased dramatically. Comparing September 2020 with September 2019, the number of bankruptcies decreased by almost 40%. Due to the substantial increase during the first half of 2020, however, the Swedish market still shows a 3% increase in bankruptcies on a year-to-date basis.

Considering the turbulent year, the overall relatively low increase in bankruptcies is likely due to the low interest rates and the various government-funded COVID-19 rescue packages. Whether the measures taken will be sufficient to ensure the survival of the sectors which have been hit the hardest remains to be seen. Many industries have not yet picked up to their normal levels, which raises the question of how long business can hold out without additional aid from the government.

If those industries do not pick up soon, many businesses are likely to have severe financial difficulties. Many businesses have utilised one of the rescue package's options to postpone paying monthly VAT and general payroll taxes to carry them through the initial phase of the pandemic meaning that, unless the respite period is extended, these businesses will have large payments due in spring 2021.

The number of companies filing for formal court-protected business restructuring has increased considerably in 2020. During the first half of 2020, the number of businesses filing for restructuring more than doubled. As per week 41, 333 companies had filed for business restructuring. This equals the previous all-time high of 2009 and, as 2020 is not yet over, it is likely that the numbers for 2020 will exceed the numbers for 2009.

The effects of the pandemic have, unsurprisingly, been especially hard for businesses within the restaurant, event and travel sector.

Retail, a sector which has struggled for the last couple of years, has been put under extra pressure during the pandemic. Several large retail brands opened bankruptcy proceedings during the spring of 2020.

The pandemic has also had a clear impact on unemployment. The unemployment rate has increased by about 2% and is currently at the same level, if not slightly higher, than it was following the financial crisis of 2008/2010.

2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

2.1 Overview of Laws and Statutory Regimes

The principal laws relating to restructurings and insolvency in Sweden are the:

- Bankruptcy Act (1987:672);
- Business Restructuring Act (1996:764);
- Rights of Priority Act (1970:979);
- Swedish Act on Enforcement (1981:774); and
- Companies Act (2005:551).

2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

To wind up a company there are two main proceedings:

- voluntary liquidation under the Companies Act, which presupposes that the company is solvent; and
- bankruptcy under the Bankruptcy Act, which presupposes that the company is insolvent.

The main restructuring proceeding is formal restructuring under the Business Restructuring Act. It should be noted that the bankruptcy proceeding under the Bankruptcy Act may be utilised to restructure the de facto business, in which case, it may also be considered a formal restructuring proceeding.

2.3 Obligation to Commence Formal Insolvency Proceedings

Swedish legislation does not impose an explicit requirement for a company to commence insolvency proceedings if it is in financial distress or even insolvent. Indirectly, however, Swedish law does impose a requirement that the directors file for, or act towards, formal insolvency proceedings if it is clear that the company is financially distressed or insolvent. This liability is formalised in the rules regarding directors' personal liability for the company's debts, which state that the directors of a company can be held personally liable for new debts or taxes accrued by the company.

Under these "capital maintenance" rules a company is required to maintain equity corresponding to at least 50% of its registered share capital. If the company's equity falls below 50% of the share capital, and unless this is addressed by way of a balance sheet for liquidation purposes (which should be approved by a

shareholders' meeting), the board of directors is required to take steps to liquidate the company. If they do not do so, they can be held personally liable for the company's new debts.

2.4 Commencing Involuntary Proceedings

A creditor can force a company into bankruptcy (assuming the company is insolvent) by filing a request with the district court. If the district court finds that the company is insolvent, the company will be declared bankrupt. This procedure can be long and cumbersome depending on the debtor's defence strategy.

A formal restructuring can be initiated by a creditor. If the creditor applies for formal restructuring, the court may only rule in favour of restructuring if the debtor gives its consent to commencing the process.

2.5 Requirement for Insolvency

Bankruptcy presupposes that the company is insolvent, which means that the company is unable to pay its debts as they fall due, and such inability is not merely temporary.

The financial prerequisites for a debtor to pursue formal restructuring proceedings are that the debtor is illiquid, being unable to pay its debts as they fall due, or that such inability will arise within a short time. A formal restructuring also presupposes that the business can be continued in some form after its restructuring.

A voluntary, solvent liquidation does not presuppose insolvency.

2.6 Specific Statutory Restructuring and Insolvency Regimes

The Banking and Financing Business Act (2004:297) and Insurance Business Act (2010:2043) contain specific provisions applicable to banks and insurance companies and other credit institutions commencing restructuring, insolvency or voluntary liquidation proceedings. Furthermore, the EU Directive 2014/59/EU has been implemented in Swedish law through the Resolution Act (2015:1016).

3. Out-of-Court Restructurings and Consensual Workouts

3.1 Consensual and Other Out-of-Court Workouts and Restructurings

The INSOL Principles (formulated by the International Association of Restructuring, Insolvency & Bankruptcy Professionals) are not widely used among Swedish market participants. However, in cross-border restructuring involving Swedish companies, these principles may be used if the context so requires.

Consensual Restructuring

For larger lending structures, the market trend is for most restructurings to be dealt with in consensual processes. A formal restructuring or insolvency is normally a last resort used when a consensual solution is impossible, or where all or a majority of the creditors are affected, and all the unsecured debts are crammed down by way of a statutory composition.

There is no explicit legal requirement to hold consensual restructuring negotiations before commencement of a formal restructuring, even though in practice many formal proceedings are preceded by consensual negotiations.

The approach of banks and credit funds to companies experiencing financial difficulties varies from case to case but, for reasons of market environment and historically extremely low interest rates, the market trend is for financial institutions to be fairly tolerant and to have a supportive approach where there is a plan and a realistic chance of rescue and survival.

Argument for Formal Restructuring

When it comes to restructurings, a formal proceeding lacks flexibility, which makes the informal option preferable. However, the pending implementation of the Pre-Insolvency Directive means that formal restructuring proceedings may be more flexible in three years' time.

The strongest argument to opt for a formal proceeding, as opposed to a consensual one, is the implication of personal liability for directors. Under certain circumstances, the directors of a company can be held personally liable for the company's debts or taxes. Should an informal restructuring process fail, the directors could become personally liable under the Swedish Companies Act if they fail to prepare a balance sheet for liquidation purposes or if they continue the business without due care and act negligently. Under Swedish tax legislation, a director may also become personally liable for company taxes if insolvency proceedings (bankruptcy or formal restructuring) are not initiated before the unpaid taxes fall due. If appropriate action is taken to initiate insolvency proceedings prior to such critical tax debt or other debt becoming due, the directors can normally avoid personal liability for the company's debt and liabilities. It should be noted that commencing an informal procedure, for the negotiation of debt settlement or capital injection, etc, will not normally be sufficient to avoid personal liability if such informal solution does not succeed and the company subsequently goes into bankruptcy.

3.2 Consensual Restructuring and Workout Processes

Since loans made under Swedish law are normally made on a bilateral or club basis, the need for formal steering committees,

etc, is limited compared to restructurings dealing with multi-layered syndicated debt structures. Informal restructuring in Sweden is normally dealt with bilaterally or involving the club of lenders on an ad hoc basis. If relevant due to syndication and/or multiple debt layers, the process and documentation are almost identical to the approach adopted for similar restructurings in the London market.

Standstills, as part of an initial informal and consensual process, will normally be agreed among the major participating lenders. It is not uncommon for the debtor company to be subject to certain restrictive covenants during such processes. The legal infrastructure of all negotiations in a consensual deal will respect contractual priority, security/liens priority and structural (entity) priority, and the relative positions of the creditor classes in liquidation proceedings.

3.3 New Money

Super priority can only be granted to claims which arise during formal restructuring proceedings and have been approved by the appointed administrator. When it comes to informal restructurings, no such super priority is created by way of law.

3.4 Duties on Creditors

There are no principles of applicable law in Sweden that impose duties on creditors to each other, the company or third parties, or which otherwise regulate their conduct towards other creditors, the company or third parties. However, in extreme cases of negligence, damages may be sought.

3.5 Out-of-Court Financial Restructuring or Workout

Typically, credit agreements contain terms permitting a qualified majority (66% or two thirds) of lenders to bind dissenting lenders (who are parties to the agreement) to changed credit agreement terms. However, this presupposes that the dissenting party is a party to the credit agreement. In addition, certain key terms require all lenders' consent.

Unless the company enters formal restructuring proceedings, there is no compulsory composition mechanism under Swedish law according to which a majority of creditors may force a composition or cram-down on a minority.

Thus, a consensual informal restructuring, where a cram-down is necessary, will require the full support of all the creditors and not just the majority.

Historically, there was a cram-down mechanism which did not require the commencement of a formal proceeding. As an EU Pre-Insolvency Directive will be implemented in Sweden within the coming years, a standalone cram-down mechanism might be reintroduced.

4. Secured Creditor Rights, Remedies and Priorities

4.1 Liens/Security

Real estate mortgages, aircraft mortgages, ship mortgages, shares, movable property, intellectual property, accounts and floating charges can all be pledged as security for debt in accordance with the Rights of Priority Act (1970:979).

4.2 Rights and Remedies

Creditors with pledge over assets in the creditors' possession can exercise their rights and enforce the security at any time during a formal restructuring process or bankruptcy, but security over a floating charge cannot be exercised after a formal reconstruction process or bankruptcy proceeding has been initiated. During a formal restructuring process all other enforcement actions are stayed (with some minor exceptions). During a bankruptcy proceeding, enforcement actions may be taken to retrieve third-party (segregated) assets and in relation to claims on the bankruptcy estate (ie, not normal unsecured claims in the bankruptcy).

4.3 Special Procedural Protections and Rights

See above **4.2 Rights and Remedies**.

5. Unsecured Creditor Rights, Remedies and Priorities

5.1 Differing Rights and Priorities

The order in which secured and unsecured creditors' claims rank is governed by the Rights of Priority Act (1970: 979). It should be noted that the costs of insolvency proceedings (mainly the official receiver's fee and expenses) will rank higher than all other claims, except for (under certain circumstances) claims from fixed charge holders.

Claims rank as follows:

- claims from fixed charge holders;
- certain types of claims and claims from certain preferential creditors (note that these are only relevant in bankruptcy):
  - (a) bankruptcy filing costs;
  - (b) restructuring administrator's fees or costs prior to bankruptcy;
  - (c) super-priority claims approved by the restructuring administrator prior to bankruptcy; and
  - (d) claims for accounting and auditing services (for a

certain period prior to bankruptcy);
- claims from floating charge holders;
- salary claims and claims for contributions to pension schemes; and
- unsecured and non-preferential creditors.

5.2 Unsecured Trade Creditors

All creditors are entitled to full payment for goods and services delivered to the debtor during the ongoing restructuring process. However, all creditors with unsecured claims as of the date when the application for restructuring proceedings was filed will be reduced or crammed down by a statutory composition adopted by a qualified majority of the creditors. A statutory composition which reduces all unsecured debt is commonly an important part of the restructuring plan.

5.3 Rights and Remedies for Unsecured Creditors

Unsecured creditors can disrupt a voluntary liquidation process (meaning the winding-up of a solvent company) by successfully filing for bankruptcy or by taking enforcement measures unless such debt is fully settled.

During formal restructuring proceedings the debtor is generally prohibited from paying any old debts, and in order to uphold that protection, a petition for bankruptcy or other enforcement measures by a creditor will normally be stayed (except where a creditor's right is seriously jeopardised).

Bankruptcy proceedings cannot be disrupted or stopped by the creditors.

5.4 Pre-judgment Attachments

Swedish law allows for applications for provisional attachment awaiting a final judgment. Provisional attachment requires the claimant:

- to show probable cause for the claim;
- to demonstrate that it is reasonable to suspect that the debtor will not pay its debt; and
- to deposit security for the loss that the opposing party may suffer due to the provisional attachment.

5.5 Priority Claims in Restructuring and Insolvency Proceedings

The order in which secured, preferential and unsecured claims rank under the Swedish insolvency regime is shown in **5.1 Differing Rights and Priorities**. In short, priority claims in restructuring and bankruptcy proceedings are as follows.

- In bankruptcy proceedings: the fee to the official receiver and costs of the proceedings rank higher than any debt taken on by the company (with the exception of fixed charges).
- In restructuring proceedings: any new debt taken on with the consent of the receiver will have priority in a subsequent bankruptcy (and will not be included in the subsequent statutory composition), and the same applies for the fee of the restructuring administrator.

To the extent that secured claims are covered by a security over specific assets, and the value of the asset is at least equal to the claim, the priority claims listed above do not have priority over secured creditors' claims. However, such claims do have priority over creditors with general priority (statutory preferential right), such as salary claims, pension claims and floating charges in the business.

Tax claims are generally unsecured.

6. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings

6.1 Statutory Process for a Financial Restructuring/Reorganisation

The overall purpose of restructuring proceedings is to secure the continuation of a viable business which is in financial distress. The plan and the financial and operational measures required to save and restore the business will vary depending on several factors, such as the reasons behind the financial difficulties, the type and scope of the business operations, etc.

Application

Formal restructuring proceedings are supervised by the court. An application for restructuring protection is submitted to the district court where the company has its registered office, and if the court grants the application, an administrator (proposed by the debtor) will be appointed. The court supervises the formal steps of the restructuring, such as the meeting of creditors, to ensure that the administrator and the debtor comply with the obligations set forth in the Business Restructuring Act, as well as the voting process with regard to the statutory composition.

The financial prerequisite for restructuring is that the debtor is, or will soon be, unable to pay its debts. The debtor must also show that the business is viable and that there is reasonable cause to assume that the restructuring plan will be successful.

Creditors' Rights

A creditor may at any time during the ongoing proceedings challenge the court's decision granting a debtor restructuring protection, and the court may terminate the proceedings if and whenever it is shown that the purpose of the restructuring is no longer likely to be achieved.

At the creditors' meeting (which take place within three weeks from the court's decision to open restructuring proceedings), the creditors may express their opinion on the restructuring plan and whether the proceedings should be allowed to continue.

Timeline

Restructuring proceedings will be allowed to continue for three months from the date of commencement. However, if the proceedings are not completed in three months, and if the debtor presents reasons for continuation, the court may extend the proceedings for another three-month period, and upon the debtor's request, may do so again for a maximum period of one year.

A (preliminary) restructuring plan should be presented and filed with the court before the first creditors' meeting, which normally takes place within three weeks from the opening of the restructuring.

If the restructuring is successful and a judicial composition is decided, payment in accordance with the terms of the judicial composition must be made within one year.

Restructuring proceedings are in most cases formally terminated upon the judicial composition being decided and once it has gained legal force.

Cram-Down Mechanism

A judicial composition is available as part of the restructuring proceedings, but this mechanism lacks the flexibility of the UK equivalent scheme of arrangements. The judicial composition offers a simple cram-down mechanism applicable to all unsecured claims accrued up to the date of filing for restructuring. Upon voting, a qualified majority among the unsecured and non-preferential creditors accepting a cram-down (minimum dividend normally needs to be 25%) will bind all unsecured and non-preferential creditors. Under Swedish law, debt-for-equity swaps is not an option during formal proceedings, unless all affected creditors voluntarily accept it. In other words, composition creditors always have the right to receive a minimum 25% cash dividend.

Prioritisation of Claims

As a rule, the right of priority among the creditors is established (crystalises) as of the date of the application and pursuant to the rank of claims set forth in the Rights of Priority Act.

Re-prioritisation of claim

The only reason for re-prioritisation of the different rights is if there are new claims based on agreements made by the debtor during the proceedings, and with the administrator's consent. A super priority will be attached to such claims and they will rank higher than, for example, creditors secured by a floating charge. This super priority is, however, only relevant should the company later file for bankruptcy.

Date of origination of claim

All claims in the composition are recognised for their full amount as per the day of the restructuring application. Also, contingent claims existing at the time of the application for formal restructuring will be bound by the judicial composition (even if the future event perfecting the claim has not yet materialised at the time of the restructuring). The decisive moment, therefore, is when the claim originated (for contractual claims, the general rule is when the parties entered into the contract in question). For certain types of contract, such as employment contracts and lease agreements with a long time span, there is case law setting out specific principles to determine when a claim accrued.

Unsecured and non-preferential creditors

Only unsecured and non-preferential creditors, whose claims arose prior to the filing for restructuring, may participate and have a proportionate vote in the judicial composition procedure, and the judicial composition will bind all unsecured and non-preferential creditors (both known and unknown).

Forfeiture of the judicial composition

Rarely, but under certain circumstances, a creditor who is bound by the judicial composition can request that the judicial composition be forfeited, eg, if the equal treatment of creditors' principle has not been upheld or for other types of misconduct by the debtor.

Availability of documents

Swedish restructuring proceedings are public, and all documents filed with the court are publicly available (including commercial and economic information and statements, etc, that have been filed together with the restructuring plan).

6.2 Position of the Company

Appointment of an Administrator

When restructuring proceedings are opened, the court appoints an administrator (usually a lawyer specialised in insolvency and restructuring) whose role is to oversee the company and its management during the proceedings and weigh in on the company's decisions. However, the administrator does not replace the board, nor does the administrator have any signing powers, even if the administrator's approval is required on certain important actions (selling or pledging key assets, assuming new debt, etc). Management remains in place and the board continues to represent and sign on behalf of the company throughout the proceedings.

Payment of Debts
Once restructuring proceedings are commenced, the company must not pay any old debt that is included in the composition. The company therefore effectively gets a period of grace for the payment of its old debts. However, all claims and liabilities accrued during the ongoing proceedings must be paid in full, normally in cash or in advance.

Salary Guarantee Scheme
The commencement of restructuring proceedings will also trigger the state-financed salary guarantee scheme for the benefit of the debtor's employees, which can be a significant financial relief for the debtor for a limited period (the salary guarantee covers the salary bill for one month following the opening of the proceedings and certain old outstanding salaries, as well as salary taxes).

The ultimate purpose of restructuring is the survival of the debtor so it can continue its business and become profitable again. Consequently, the debtor will one way or another continue to carry on with its business throughout the proceedings, albeit in some cases on a reduced basis in order to cut costs, etc.

6.3 Roles of Creditors
During restructuring proceedings, creditors, somewhat simplified, are separated into two classes: secured and unsecured creditors.

At the request of the creditors, a creditors' committee may be formed for the purpose of representing the creditors' interests during the restructuring. This committee will consist of no more than three creditors, though under certain circumstances there may also be an additional person representing the employees. The committee does not have any real powers, but its members do have the right to be informed and to be heard by the debtor and the administrator in advance of important decisions relating to the restructuring.

The creditors receive information about the restructuring proceedings from the court and from the administrator. Early on in the proceedings (within a week from commencement of the restructuring), the administrator will send information to all known creditors. This information should include a preliminary statement of the debtor's assets and liabilities, information on the debtor's financial situation and on the reasons leading up to the financial difficulties and the restructuring, etc, as well as information about the creditors' meeting to be held in court. In addition, a restructuring plan will be prepared and presented to all the creditors.

6.4 Claims of Dissenting Creditors
The judicial composition will comprise and affect only unsecured and non-preferential creditors. Secured and preferential claims will not be subject to the composition and are expected to be settled in full. However, if the amount of a secured claim exceeds the value of the security or relevant asset held by that creditor, the excess amount will be deemed unsecured and will as such be included in the composition and crammed down.

As described in **6.1 Statutory Process for a Financial Restructuring/Reorganisation**, a minority of dissenting unsecured creditors can be forced to accept a cram-down by a qualified majority. The majority required depends on the percentage of dividend in the composition.

The implementation of the EU Pre-Insolvency Directive will likely lead to certain changes in the current partition of creditors, allowing for several and more distinctive classes of debt/creditors and this may also make cross-class cram-downs possible.

6.5 Trading of Claims Against a Company
Unless the original agreement states otherwise, the creditors may trade their claims even though there is an ongoing restructuring. If a claim is traded, notice of the trade and who the new creditor is should be given to the debtor. Note, however, that if claims are traded there may be certain limitations with regard to setting off such claims, if the purpose of such trading was to create a set-off situation.

6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group
As in other jurisdictions, Swedish law has a concept of corporate groups, but there is no concept of "group benefit" in the Swedish corporate restructuring regime. Each company is viewed as a separate legal entity and thus, restructuring will not apply to a group of companies but to each company individually. However, to increase efficiency and for co-ordination purposes, one restructuring administrator is usually appointed for all or several group companies.

6.7 Restrictions on a Company's Use of Its Assets
All material business decisions or transactions made by the debtor during the ongoing restructuring should be approved by the restructuring administrator. A transaction made without the approval of the restructuring administrator will not, however, be void, since management and the board have signatory rights and remain in place during the proceedings. The consequence of a debtor not complying with instructions from the administrator, may be that the administrator asks the court to discontinue the restructuring and also asks to be relieved of its assignment as administrator.

If the restructuring is unsuccessful and the company ends up filing for bankruptcy, a transaction made without the approval of the restructuring administrator may be easier to set aside and recover. In addition, unpaid claims under any such non-approved agreement will not have super priority.

There is no legal requirement to file any additional documentation in order for the company to use or sell any of its assets during the proceedings.

6.8 Asset Disposition and Related Procedures

See **6.7 Restrictions on a Company's Use of Its Assets** for information on who executes the sale of assets.

The creditors can credit-bid for the assets and act as a stalking horse in such sale. As long as all procedural rules are observed, such as the bid being subject to the judicial composition and payment being set off after the judicial composition has been approved, such credit bid can be accepted. It is always important that all arrangements observe the principle of equal treatment of creditors.

Pre-pack sales can be conducted as part of restructuring proceedings, but such pre-pack sales do not have any formal approval or protection from the court.

6.9 Secured Creditor Liens and Security Arrangements

Security and other claims can be released if secured claims are paid or resolved by other means. This is possible, as secured claims are not subject to or included in the judicial composition. Note, however, that although a secured claim will not be included or affected by a judicial composition, any and all old debts (incurred prior to the restructuring) will still be frozen while the proceedings are ongoing, and that payment of such debt will require the administrator's consent.

6.10 Priority New Money

As new lending during ongoing proceedings will have super priority, assuming it is approved by the administrator, it is often an important part of a restructuring plan. New money can also be secured by the debtor's assets, if there are any assets to be used as security, and if creating such security is approved by the administrator. As this may potentially be detrimental to, and questioned by, existing secured creditors for reasons of dilution, it is key that the administrator weighs up the decision to take on new debt with the existing secured creditors.

6.11 Determining the Value of Claims and Creditors

There are procedures within the restructuring proceedings to determine the value of individual claims, and ultimately the court will rule on such matters. It is important to understand, however, that the court will only rule on the value of a claim if the outcome of that dispute will or could potentially affect the outcome of the judicial composition vote. Also, the court's ruling will only affect the voting rights given to that creditor (and will not, therefore, determine with legally binding effect the value of a claim per se).

6.12 Restructuring or Reorganisation Agreement

There is no such concept as "fairness" or an equitable test under Swedish restructuring law. Under current Swedish legislation, the restructuring plan is not a binding document as such, and (aside from voting on a judicial composition) there is no vote or formal and binding approval of the plan.

There are no explicit rules regulating this, but existing contracts may effectively be rejected as part of the restructuring proceedings and the judicial composition. To put it simply, this would be done by a premature termination or by provoking a breach and termination of a contract. This, in turn, would give rise to a counterclaim for damages, etc, and this claim would normally be subject to the judicial composition as a non-preferential claim (since the agreement and any claim that stems from it were incurred prior to the proceedings). The total remaining liability/debt of that contract may therefore be reduced by way of the judicial composition (eg, down to 25%, assuming there is a sufficient majority in favour of the composition).

6.13 Non-debtor Parties

A non-debtor party will not be released from liability by the restructuring procedure. However, any payment received in the judicial composition procedure should be deducted from the non-debtor's liability.

6.14 Rights of Set-Off

A creditor with a claim against a debtor in restructuring can still exercise the right of set-off, provided that the claim and counterclaim meet the fundamental conditions of set-off, and that both the claim and counterclaim originated prior to the opening of the restructuring (or, of course, if both claims originate during the restructuring).

6.15 Failure to Observe the Terms of Agreements

Under Swedish law, the restructuring plan is not subject to any vote or formal approval and thus, strictly speaking, it cannot be breached.

6.16 Existing Equity Owners

Equity owners have very limited rights during restructuring proceedings. They are not viewed as creditors and have, for example, no voting rights in the judicial composition. Equi-

ty interests are, in effect, subordinated to all creditor claims (secured and unsecured).

7. Statutory Insolvency and Liquidation Proceedings

7.1 Types of Voluntary/Involuntary Proceedings

Bankruptcy

The main purpose of bankruptcy is to secure the interests of creditors as far as possible. Put simply, bankruptcy is a procedure for winding up a business and its assets. Bankruptcy presupposes insolvency, which means that the company's inability to pay its debts as they fall due must not be temporary. If the company is deemed insolvent, the district court will declare it bankrupt. The district court will appoint a receiver in bankruptcy. The receiver's task is to administer the bankrupt company's affairs and assets as a representative of the bankruptcy estate (which is considered a separate legal entity). The pros of a bankruptcy proceeding are that the business is discharged from all its debts, the business can be transferred, and the proceeding is independent of creditors' consent and co-operation. The cons of a bankruptcy proceeding are that there is often considerable destruction of value, the company loses control as all decisions are taken by the receiver, and the question of liability is investigated and highlighted.

Voluntary Liquidation

As for a voluntary liquidation proceeding, this will only be available if the company is solvent and the shareholders have decided at a general meeting that the company shall enter into liquidation. All assets will be sold, the debts and commitments will be paid off and wrapped up and the company as a legal entity will cease to exist. As in the case of bankruptcy, the directors will have to give up control of the company, but instead of a board of directors, a liquidator will be appointed to wind up the company.

Commencing Statutory Proceedings

Both a voluntary liquidation and a bankruptcy proceeding are commenced by application. To commence a voluntary liquidation proceeding, the company applies to the Swedish Companies Registration Offices. To have a company declared bankrupt, the company or a creditor files an application with the district court.

Bankruptcy

When a company has been declared bankrupt, if the assets of the bankruptcy estate are extensive enough to allow distribution to unsecured creditors, a lodging of claims proceeding will be commenced. This procedure is court-driven and all creditors must file their claim with the court. The receiver and all creditors who have filed a claim will then be able to challenge any claim they consider to be incorrect in any way. If a claim has been challenged this will be handled at a hearing in the court and the claim will finally be confirmed or rejected.

Liquidation

When a company has gone into liquidation, the liquidator determines the known creditors and issues a summons to unknown creditors to be published in the official gazette (*Post-och Inrikes Tidningar*). Any unknown creditors must contact the Swedish Companies Registration Office within six months of the summons for their claim to be recognised. Any claim brought forth by an unknown creditor after that period is precluded from the proceedings.

If at any point in voluntary liquidation the company is insolvent, the liquidator must apply for the company to be declared bankrupt.

There are no specific rules precluding contingent claims from being recognised in bankruptcy or liquidation.

A bankruptcy proceeding and a voluntary liquidation proceeding can be commenced at any point in time, as soon as all formal requirements have been fulfilled.

Timeline

Bankruptcy

Once a company is declared bankrupt the financial situation is "frozen". Title to all assets passes automatically to the bankruptcy estate, which is administered by the receiver. All property belonging to the company and accrued during the bankruptcy is included in the estate. The receiver's first task is therefore to take control and secure all assets belonging to the company on the day it was declared bankrupt. The court will schedule a meeting approximately one month from the day of the bankruptcy at which the directors of the company have to swear an oath to confirm the estate inventory. The estate inventory is prepared by the receiver and should be filed with the court one week prior to this meeting. Within six months of the company's bankruptcy the receiver is to prepare and submit the "receiver's report" which includes information about the company prior to the bankruptcy, as well as an analysis of why the company became insolvent.

Liquidation

In a solvent liquidation, the six-month period for unknown creditors to state their claims against the company must be observed, meaning that the liquidation cannot be completed before that period has expired. When the six months have expired and all known debts have been paid, the liquidator distributes the remaining assets.

There are no expedited proceedings.

Trading Claims
Claims against the bankrupt company can be traded at any point during the ongoing proceedings. A transfer of a claim should be communicated to the bankrupt company. The same applies in a solvent liquidation.

Moratorium or "Stay on Proceedings"
If there are ongoing legal proceedings against the company at the time of bankruptcy these will continue. However, the receiver can decide that the estate should enter the proceedings in the company's stead. In a solvent liquidation, there is no stay of legal proceedings.

Winding-Up
The purpose of a bankruptcy is to wind up the company and its business, therefore the business is not normally continued after the bankruptcy. If the receiver deems that it will be favourable, the business can be kept going in order to ensure that it can be sold as a "going concern".

The purpose of a solvent liquidation is also to wind up the company. The business may nevertheless continue operating during the liquidation and the liquidator may decide to keep the management and directors on at that stage (but not members of the board, who will have been replaced by the liquidator). The liquidator may not take any measures to keep the business going for any longer than necessary for winding-up.

Rejecting or Disclaiming Contracts
The bankruptcy estate has the right, but no obligation, to enter into any of the company's former agreements. The deciding factor should always be whether it is in the best interest of the creditors to enter into an agreement. If the bankruptcy estate enters into an agreement, the bankruptcy estate is bound to respect the obligations under that agreement.

A company may not reject or disclaim a contract solely on the grounds that the company has entered into liquidation.

Creditors' Rights
A creditor with a claim towards a company in bankruptcy can still exercise the right of set-off provided that the claim and counterclaim meet the fundamental conditions of set-off and that the counterclaim was not acquired for the purpose of putting the creditor in a better position than they were previously.

Creditors may exercise rights of set-off towards companies that have entered into liquidation under the same conditions as they may towards companies that have not entered into liquidation.

Information Made Available to Creditors
As many aspects of bankruptcy proceedings are court-driven, much of the information available to creditors will be public documents such as the estate inventory, the receiver's report and all claims made during the lodging-of-claims process.

In a solvent liquidation, certain information will be public, such as the company's known creditors and the liquidator's final report.

Conclusion of Statutory Proceedings
The Rights of Priority Act contains rules for the order in which different creditors will receive payment. If the estate has the funds to make a distribution to unsecured creditors, this will be conducted by a lodging-of-claims proceeding. This is a court-driven proceeding where all creditors will be able to state their claim. Once the deadline (decided by the court) has passed, the receiver will review all claims. If any claim is disputed there will be a court hearing where the claim can finally be settled.

In a solvent liquidation, where all known debts have been paid and the six-month period of the summons to unknown creditors has expired, the remaining assets can be distributed to the shareholders. The liquidator prepares a final report containing, inter alia, a management report and a description of the distribution of assets. The company's auditor will present an auditor's report and the reports will all be presented to the shareholders at a general meeting.

7.2 Distressed Disposals

In a Voluntary Liquidation
In a voluntary solvent liquidation, the liquidator replaces the board of directors and is the sole person authorised to dispose of the assets. The liquidator can do this without any formal restrictions and has in principle the same mandate as the board of directors.

In Bankruptcy
The official receiver normally executes sales of assets in a bankruptcy proceeding but must consult with the regulator and major creditors affected if a sale is deemed to have a major impact on the creditors. Furthermore, there are some exceptions set out in the Bankruptcy Act where the sale may, under certain conditions, be executed by a creditor, but these are limited to pledged collateral in the possession of a creditor or third party and the sale of mortgaged real estate. In addition, the Swedish Enforcement Authority may under some conditions handle the sale of assets by public auction, but this seldom occurs and mainly when jointly-owned real estates are sold involuntarily.

Sale of Assets

At public auction

When an asset is sold by the Swedish Enforcement Authority at a public auction, the purchaser normally acquires good title in a sale, free and clear of claims. There are, however, exceptions such as encumbrances, which are usually known and of which the buyer is usually aware, and this is reflected in the price. When the purchase is made directly from the estate, the purchaser does not automatically gain protection from third parties that can prove a better claim.

Sale of entire business

It should also be noted that when an entire business is sold, a charge in the business will, under certain circumstances, follow the assets even though these are transferred to a new owner.

Sale of assets to creditors and closely related parties

When a sale is made, creditors can bid without any limitations; when selling assets to closely related parties, the regulator is normally heard, as well as the major creditor.

Pre-pack Sales

Under certain circumstances, it is possible to conduct pre-pack sales (provided the rules under the Bankruptcy Act and the Rights of Priority Act are followed) but pre-pack sales cannot formally be authorised in advance by the court or the receiver. Pre-pack transactions are therefore at risk of being set aside.

7.3 Organisation of Creditors or Committees

In voluntary and involuntary liquidations, there is no formal basis to appoint a creditors' committee.

In formal restructuring, however, a creditors' committee may, following a request from a creditor, be appointed by the court. The administrator must discuss material decisions with the committee, but the committee is only consultative. The members of the committee do not get paid and their expenses are not covered.

8. International/Cross-Border Issues and Processes

8.1 Recognition or Relief in Connection with Overseas Proceedings

Sweden recognises international insolvency proceedings under the EU Insolvency Regulation and the Nordic Insolvency Treaty. Involuntary liquidations and official receivers in jurisdictions other than the EU or the Nordic countries are not recognised in a way that such proceedings stay the possibility to open proceedings in Sweden, nor are assets located in Sweden ring-fenced by such a proceeding, meaning Swedish parallel or competing proceedings may be opened.

8.2 Co-ordination in Cross-Border Cases

As Sweden is a member of the EU, the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings applies. The EU Insolvency Regulation containsspecific co-ordination obligations.

8.3 Rules, Standards and Guidelines

The EU Insolvency Regulation and the Nordic Insolvency Treaty have sections on jurisdiction which rule when and in which state an insolvency proceeding may be commenced. The guiding principle of these rules is that the "centre of business" controls jurisdiction.

8.4 Foreign Creditors

Foreign creditors are regarded as equal to Swedish creditors in relation to insolvency proceedings in Sweden.

9. Trustees/Receivers/Statutory Officers

9.1 Types of Statutory Officers

In a voluntary liquidation, a liquidator is appointed.

In a bankruptcy proceeding, an official receiver is appointed. Should it be necessary, several official receivers may be appointed. This is often the case where there is a conflict of interest for the main official receiver in respect to a specific creditor in the bankruptcy.

In a formal restructuring, an administrator is appointed.

9.2 Statutory Roles, Rights and Responsibilities of Officers

Liquidator

A liquidator is appointed to wind up a company in a voluntary (solvent) liquidation. The liquidator replaces the board of directors and any other managing director in place. The liquidator is the sole person authorised to dispose of the assets and can do this without any formal restrictions, having in principle the same mandate as the board of directors. The liquidator's responsibilities are similar to those of the board of directors, with the main difference being that the company shall be wound up.

A liquidator may be held personally liable for the company's debts or taxes, under the same conditions as the board of directors. Their duties include applying for a summons of unknown creditors to be published, preparing annual reports, liquidating assets, and submitting a final report on the liquidation process.

They have a fiduciary duty towards the shareholders and the creditors of the company. If the company is insolvent, the liquidator must apply for the company to be declared bankrupt. The liquidator reports to the shareholders.

Official Receiver
An official receiver is appointed to wind up a company that has been declared bankrupt. The receiver assumes full and sole control over the business and all assets of the debtor. If the receiver decides to continue the business during the proceedings, they may let management or key personnel stay in place to run the business, but this will always be on instructions from and under the supervision of the receiver.

The official receiver is the sole representative of the bankruptcy estate, and dismantling and divesting the business and all its assets will be carried out at their sole discretion. Thus, all decisions throughout the bankruptcy proceedings will be taken by the receiver. Even so, the receiver has an obligation to inform and hear any affected creditor(s) as well as the regulator.

The district court, together with the regulator, has a supervisory role and will rule on any disputes during the proceedings, and will eventually approve the costs of the proceedings (the receiver's fee) and how the surplus is to be distributed among the creditors.

Restructuring Administrator
An administrator in a formal restructuring enjoys the confidence of the creditors and, as a result, the administrator is not typically appointed as a board member or director. Furthermore, the appointment of an administrator in a formal restructuring does not cause the board of directors or management to lose their legal capacity. This can be compared to a bankruptcy where the official receiver represents the estate.

9.3 Selection of Officers

Liquidator
In voluntary liquidation, the proposed liquidator is usually formally appointed by either a court or the Swedish Companies Registration Office. A liquidator can be proposed at the general shareholders' meeting when the company decides to enter into liquidation.

A liquidator may resign or be dismissed if they are not deemed suitable for the assignment. The court or the Swedish Companies Registration Office will in such a case dismiss the liquidator upon application by the office itself, the liquidator, a shareholder or any party affected by the liquidation. A decision to dismiss a liquidator must immediately be followed by a decision to appoint a new liquidator.

Official Receiver
In bankruptcy, an official receiver is appointed by the relevant district court in conjunction with the bankruptcy decision. A debtor or creditor may propose a receiver to the court in the application for bankruptcy. If there are competing proposals, the receiver favoured by the creditors will generally be appointed. If no receiver is proposed, the court will appoint a receiver known to the court.

A receiver may be relieved of their duties by the court if deemed unsuitable, either upon application by a creditor or by the regulator. The receiver may be deemed unsuitable if a conflict of interest has emerged or following deficiencies in the management of the bankruptcy estate.

Restructuring Administrator
In formal restructuring, the court appoints the administrator proposed in the company's application to enter restructuring. The administrator should have the confidence of the creditors. The administrator may be relieved of their duties by the court if deemed unsuitable, upon application by the administrator, a creditor or the company.

Interaction of Statutory Officers with Management and Directors
In voluntary liquidation, the liquidator replaces the board of directors and will thus interact with the company's shareholders rather than company management. However, the former board of directors generally provides the liquidator with information during the liquidation, especially in the early phase.

In bankruptcy, the board of directors of the debtor is obliged to provide the official receiver with any information regarding the debtor requested or required by the receiver. Should they not comply with this obligation, they may be detained by law enforcement.

In formal restructuring, the administrator acts as a qualified adviser to the company and advises the company during the ongoing restructuring. The administrator must consent to certain important decisions, such as the sale of assets crucial to the company's operations.

Who Can Serve as a Statutory Officer?
Liquidator
If the company's most recently submitted annual report has been audited, a member of the board or a shareholder can be appointed as liquidator. In those instances, there must be no obvious deficiencies in the company, nor can there be any grounds for involuntary liquidation. The liquidator is subject to the same rules regarding conflicts of interest as a member of the

board, meaning that it would be unlikely that a creditor would be considered suitable for the task.

If a company is forced into liquidation, the Swedish Companies Registration Office normally appoints a lawyer who has announced that they are open to accepting such appointments.

Official receiver
An official receiver needs to have the special insight and experience required for the task, as well as being suitable in other respects. An employee of a court may not be an official receiver. Anyone who has a relationship with the debtor, a creditor or someone else such that it is likely to undermine confidence in their impartiality in the bankruptcy, may not be appointed as an official receiver. This also applies if there are other circumstances present which could cause confidence in the receiver's impartiality to be questioned or otherwise undermined.

Before the court appoints a receiver, the regulator is to be heard. This requirement is met by the courts by listing approved receivers known to the court, from which a receiver is appointed in each bankruptcy where no proposal has been made. A creditor, creditor representative, owner, officer or director may not serve as an official receiver.

Restructuring administrator
An administrator in a formal restructuring must have the special insight and experience required for the task, have the creditors' trust and be suitable for the task in other respects. There is no equivalent to the listing of official receivers known to the court.

Statutory requirements
The statutory requirements for liquidators, official receivers and administrators in formal restructuring refer to the capacity of the persons involved rather than their formal qualifications, such as education. In theory, a restructuring professional, attorney, accountant or other professional may serve as an officer in the different proceedings. In practice, however, only attorneys are eligible to act as official receivers, whereas liquidators and administrators in formal restructuring may be chosen from a wider cohort of professionals.

10. Duties and Personal Liability of Directors and Officers of Financially Troubled Companies

10.1 Duties of Directors

Under certain circumstances, a director is liable for the company's debts, eg, any shortage in connection with a value transfer executed in breach of the law, or unpaid taxes and damages caused in the course of their work as director. Under Swedish law, the board of directors must draw up a balance sheet for liquidation purposes if they believe the equity of the company may fall below 50% of the registered share capital. The balance sheet should be reviewed by the company's auditor. If such a balance sheet shows that the equity is less than 50%, the company should convene a shareholders' meeting. Such a meeting may open a voluntary liquidation or allow the business to continue for another eight months. If the board fails to comply with this process in any respect, the directors become liable for any new debt accrued. In this respect, they may be personally liable for the company's pre-insolvency obligations and, furthermore, for deepening the insolvency of the company.

How Financial Distress/Insolvency Is Determined
The measure applied to determine financial distress in the context of personal liability for the company's new debt is that the equity of the company has fallen below 50% of the share capital.

The measure of determining insolvency in the context of liability for damages following crimes against creditors is the same as the statutory requirement for commencing bankruptcy proceedings, ie, insolvency is the inability of the debtor to pay its debts as they fall due, where such inability is not temporary.

Duties in Relation to Creditors
A director is elected at the general meeting of the shareholders but owes duties to the company and must act in the best interests of the company to prevent it from suffering loss, harm or damage.

A director has a duty and responsibility to treat all creditors (of the same level of priority) equally and not to favour a particular creditor if the company is insolvent or in danger of becoming insolvent.

Duties to Owners/Shareholders/Subsidiaries, Etc
A director may be held liable for damages caused, intentionally or negligently, in the performance of their duties, to a shareholder or others because of a violation of the Swedish Companies Act, applicable annual reports legislation or the articles of association of the company in question.

There are, furthermore, specific rules protecting minority shareholders, inter alia, the right to convene shareholders' meetings, which must be observed by a director. No specific duties are owed to affiliates or subsidiaries.

Directors' Liability
Pursuant to the Swedish Penal Code (1962:700), a director can be liable for crimes against creditors. A director who has com-

mitted a crime against creditors under the Penal Code may be disqualified from carrying on business.

10.2 Direct Fiduciary Breach Claims

In a bankruptcy proceeding, a claim for damages against a former director can be pursued either by a creditor or the official receiver as a representative of the insolvent entity. However, a director is only responsible for the company's obligations towards creditors under certain circumstances. The restrictions on creditors to claim damages are set out in **10.1 Duties of Directors**.

11. Transfers/Transactions That May Be Set Aside

11.1 Historical Transactions

Examples of historical transactions that may be set aside include:

- evidently unwarranted transactions made during a five-year period before the initiation of the proceedings (no time limit for closely related parties), if the debtor was insolvent or became insolvent as a result of the transaction and the benefiting party knew the factual circumstances;
- payments (and in some cases set-offs) made within three months before the initiation of the proceeding (two years for closely related parties if the debtor was deemed to be insolvent at the time) if these:
  - (a) exceed 10% of the assets;
  - (b) are made in kind; or
  - (c) are paid before due, if the transaction had a negative effect on the other creditors;
- security that has been provided or turned over within three months before the initiation of the proceeding. This can be set aside if the secured debt was pre-existing and the action had a negative effect on the other creditors; and
- gifts, distribution of matrimonial property, salary payments, pension payments and some other legal transactions may also be set aside, but this is not commonly done. There are shifting time limits for set-aside claims from the estate and these are normally three to six months before the initiation of the proceeding.

11.2 Look-Back Period

See **11.1 Historical Transactions**.

11.3 Claims to Set Aside or Annul Transactions

In almost all cases, it is the receiver that pursues claims of recovery. If the receiver is not willing to do this, a creditor may do this on behalf of the estate, but this rarely happens. However, depending on the financial status of the estate, it is quite common for one or several of the major creditors to grant the estate a guarantee for litigation costs.

Recovery claims can be brought in both restructuring and insolvency proceedings, but not in voluntary liquidations.

Contributed by: Lars-Henrik Andersson, Pierre Pettersson, Karl Björlin and Emmeli Neivak, ***Cirio Advokatbyrå AB***

Cirio Advokatbyrå AB is a Swedish law firm based in Stockholm with some 130 employees and 100 fee earners. The firm changed its name to Cirio on 1 January 2019, but its heritage dates back to 1918 and it still maintains its reputation for long-standing capacity, with cutting-edge specialists in all relevant areas of business law. Cirio also has a strong insolvency/restructuring and banking and finance team of some 20 individuals. The firm's capabilities in restructuring and insolvency are renowned, and both the practice and its insolvency specialists are top-ranked leaders in their field. Recent high-profile cases include, for example, Lars-Henrik Andersson's appointment as official receiver in the bankruptcy of the Swedish retail chain MQ and Pierre Pettersson's appointment as restructuring administrator in the business restructuring of Big Travel.

Authors

Lars-Henrik Andersson is a partner and specialises in banking and finance, insolvency, restructuring and acquisitions. Lars-Henrik acts for Swedish and international banks and financial institutions in financing and restructuring. He has been recognised among the top lawyers in insolvency/reconstruction and banking and finance since 2010. He is also one of Sweden's most sought-after official receivers for complex and high-profile cases and has led domestic and cross-border bankruptcy proceedings and restructurings in most major industries, including retail, security, airlines, telecoms, steel manufacturing and real estate. Lars-Henrik is also vice president of REKON (Swedish Association for Insolvency Practitioners).

Pierre Pettersson is a partner who specialises in insolvency and restructuring and has extensive experience of corporate restructurings, distressed debt and workouts, as well as liquidations (insolvent and solvent). Pierre handles both domestic and cross-border insolvencies and is regularly retained in complex and high-profile cases, both acting for creditors and other stakeholders, and taking appointments as administrator/trustee in restructurings and bankruptcies. He is also experienced in related litigation and dispute resolution, and regularly appears before the court. Pierre is a member of the board of REKON (Swedish Association for Insolvency Practitioners). He is also an active member internationally and co-chair of the IBA insolvency and restructuring section and the financial institutions sub-committee.

Karl Björlin is a partner who specialises in restructuring and insolvency, and banking and finance. He has extensive experience of corporate restructuring, liquidations (solvent and insolvent), advising on directors' duties and responsibilities and other matters related to financially distressed companies. Karl is accredited and regularly appointed as an administrator/official receiver in bankruptcies and restructurings, and as a liquidator, both by the courts and the Swedish Companies Registration Office. He also represents banks, financial institutions and other creditors in various insolvency proceedings, as well as clients in litigation. Karl is secretary of REKON (Swedish Association for Insolvency Practitioners) and is on the board of TMA Sweden.

Emmeli Neivak is a senior associate on Cirio's banking and finance team. Her main practice areas are restructuring and insolvency.

Cirio Advokatbyrå AB

Mäster Samuelsgatan 20
Box 3294
103 65 Stockholm

Tel: +46 8 527 916 00
Email: contact@cirio.se
Web: www.cirio.se