

Abstract

Introduction

Swedish law prescribes only one procedure for general debt enforcement, namely the institution of bankruptcy. The rules governing public accord and satisfaction do not make adequate provision for reconstruction as an alternative procedure.

The present institution of bankruptcy has a number of lacunae and limitations. This is particularly true with regard to the handling of bankruptcies of juridical persons, especially companies limited by shares.

Problem areas

The problems arising in the handling of bankruptcies relate first and foremost to the following areas:

- the concept of insolvency;
- conditions for dealing with a debtor's permanent contracts entered into before the insolvency;
- the possibilities of avoiding certain legal transactions executed during a certain period prior to the insolvency;
- the order of priority rights;
- the lack of an effective alternative to bankruptcy in those cases in which conditions exist for a reconstruction of the debtor's business; and
- the lack of congruence in the taxation of companies in bankruptcy vis-à-vis other companies, which, in turn, distorts competition.

Aims

The present report aims both to elucidate the aforementioned problems and to suggest changes through which the handling of bankruptcies of juridical persons could be made both more efficient and less expensive. A further goal of the suggestions is a reduction in the socioeconomic costs connected with the handling of bankruptcies.

Survey of problems

The concept of insolvency in Swedish bankruptcy law is such that a condition of insolvency is deemed to exist when a debtor cannot rightly pay his debts, and this inability is not of a merely temporary nature. Difficulties in analysing the conditions for bankruptcy according to this concept have, in many cases, resulted in belated declarations of bankruptcy.

With regard to certain types of contracts, the trustee in bankruptcy lacks the possibility of *partially admitting* the debtor's non-fixed term contracts, for example rental and leasing contracts. This means that the bankruptcy estate is forced to pay all the outstanding invoices related to the contract, in order to thereafter enter into the contractual relationship.

There are few possibilities of *avoiding* a contract or other legal transactions executed by the debtor in the period prior to the bankruptcy. In many cases this leads to a certain creditor being preferred over other creditors, and in other cases to the forced closure of an otherwise profitable business.

The present *order of priorities* results in the situation that creditors having an insight into a company's position, have no incentive to take steps to have that company placed in bankruptcy. The reason for this is that they usually have the best collateral.

A company bankruptcy today cannot be concluded other than with the liquidation of the company. What is lacking, therefore, is the possibility to *reconstruct* the company and to continue the operation of the business following an arrangement with the creditors.

Companies bankruptcy are not obliged to pay other *taxes* than VAT. When a receiver decides to continue to run a company's business, he will have the advantage of not having to pay tax on income or labour.

Proposals

A new *concept of insolvency* is proposed alongside with the existing one. It is envisaged that the concept of insolvency would also be coupled to a company's balances. At the same time, liability would be imposed on the management of the company to ensure that the company did not operate whilst insolvent. These measures should result in petitions for bankruptcy not being belatedly filed. As a consequence, unnecessary losses should not be incurred by the creditors.

Trustees in bankruptcy should be given the legal possibility of *partially admitting* the debtor's non-fixed term contracts. Trustees in bankruptcy should further be afforded the possibility of reducing the terms of such contracts. In this way, better conditions will be created for the reconstruction of the business.

The *rules of avoidance* should be made more effective in certain ways. At the same time, the trustee in bankruptcy should be given the right to rescind contracts entered into by the debtor within a period of six months prior to the bankruptcy. These steps should also lead to the creation of better conditions for the reconstruction of a company's business.

The report also discusses a change in the law regarding *order of priorities*, with the aim of creating an incentive for the creditors to petition for an insolvent company to be placed in bankruptcy.

Moreover, it is proposed that new rules be introduced into the bankruptcy law, enabling trustees in bankruptcy to *reconstruct* viable companies in bankruptcy.

Finally, it is proposed, as regards *fiscal issues* that companies in bankruptcy shall be treated as any other company.