GLOBAL FORUM ON LAW, JUSTICE AND DEVELOPMENT (GFLJD)

COMMUNITY OF PRACTICE

QUESTIONNAIRE ON INSOLVENCY LAW AND COMPANY LAW

Introduction

The Swedish System is credit-driven. It aims to primarily protect those creditors who have an active interest in the proceeding.

We do not have any formal pre-insolvency procedures in Sweden. Our main proceedings are for bankruptcy and reorganisation.

Normally, the shareholders are not part of the proceedings as far as bankruptcy is concerned. However, there are no such rules for reorganisation. Therefore, shareholders can play a role e.g. in raising capital for company reorganisation, which has to be on a voluntary basis. It should be further noted that Swedish law does not provide for such practices such as schemes of arrangement. Finally, the answers below are directed at companies and not at private individuals.

I. Introductory questions on the insolvency procedures available in the relevant jurisdiction.

1. What insolvency procedures – either liquidation or reorganization procedures – are available for distressed or insolvent companies?

   Insolvency liquidations (Bankruptcy, Sw: konkurs) - an official receiver (Sw. Konkursförvaltare) is appointed by the court to handle the winding-up of the insolvent company in accordance with the Swedish Bankruptcy Act. All the real property, chattels and other assets of the insolvent company forms the bankruptcy estate (Sw: konkursbo), which is administrated by the official receiver.

   Company reorganizations (Sw: företagsrekonstruktion) – an administrator is appointed by the court to investigate whether the business in question is in a position to operate in whole or in part, and if so, how continued operations may be conducted. Furthermore, the administrator will examine whether if it is necessary, and whether there exists the possibility, for the debtor to reach a financial agreement with its creditors (composition, Sw: offentligt accord). In a reorganisation the board of directors and the management maintain control of the company and its operations, but they and the shareholders have an obligation to comply with the administrator’s instructions regarding the manner in which the business shall be conducted.

2. Are there special insolvency procedures available for financial institutions or for other special classes of companies?

   No. Our company reorganization proceedings are not available for banks and certain other financial institutions. Furthermore, company reorganization proceedings are not available for companies in which a public body holds a controlling influence. However, the question has been put forward to the European Union (EU) regarding the adoption of a regulation covering insolvency procedures for financial institutions similar to the
Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. The EU has adopted two directives on reorganization and the winding-up of credit institutions and of insurance undertakings, see directive 2001/17/EC and 2001/24/EC.

3. Are there any specific legal provisions that apply to debt restructurings achieved without a full formal insolvency process?
No.

4. What are the commencement criteria for insolvency procedures?
Bankruptcies - the debtor shall be declared bankrupt by the court on the ground of insolvency. Under the Swedish Bankruptcy Act, insolvency means that the debtor cannot pay his debts when due. The incapacity to pay debts when due is not to be construed as merely a temporary incapacity.

Company reorganization – the debtor shall have "difficulties fulfilling its payment obligations". This means that the debtor must be deemed to be unable to pay the debts when due or that such an inability will occur within a short time frame.

5. Who can propose a restructuring plan? (e.g. corporate bodies, insolvency representatives, creditors)
A reorganization plan is to be made by the administrator of the distressed company in consultation with the board of directors.

6. Please describe whether and to what extent shareholders’ rights can be affected by a situation of distress/insolvency of a company before and/or irrespective of the opening of a formal insolvency proceeding (e.g., are there any fiduciary duties of the shareholders to approve corrective measures/plans proposed by the board?)

In Sweden there are two formal insolvency proceedings, bankruptcy and company reorganization. When a company is declared bankrupt, the official receiver takes over the possession of the bankruptcy estate's assets. As a result, the board of directors of the company in bankruptcy, along with the company's shareholders, have no influence over the official receiver's work. In practice, these two corporate bodies are completely pacified by the bankruptcy per se.

Regarding company reorganization the debtor maintains its control over the business. The board and the shareholders in conjunction with the administrator continues the business with the exception that these two corporate bodies are obliged to follow the instructions of the administrator regarding how the business is to be operated. If the board or the shareholders do not follow these instructions then the administrator may resign and request the termination of the reorganization proceedings. In Swedish reorganization procedures, share ownership may not be changed in any way other than through voluntary agreements.

II. Shareholders’ Rights in Companies Subject to Insolvency Proceedings

7. Are shareholders notified of the initiation of an insolvency process? If notification is individualized, what are the mechanisms used to identify shareholders?
Shareholders are not individually notified by the insolvency court, however, as a matter of company law the directors have a duty to notify the shareholders.
Furthermore, decisions of the insolvency court are made public and published. This has the effect that the shareholders, among others, have constructive notice of the court's decision.

8. Are shareholders required to file claims in the insolvency proceeding? What are the consequences of not filing a claim?

The shareholders do not, in that capacity, need to file a claim in order to receive any funds, which are left after the insolvency proceeding has been finalized.

9. Can shareholders continue to trade and transfer shares after the initiation of an insolvency proceeding affecting the company?

In principle, yes. However, this is not usual due to a lack of a market for the shares of an insolvent company. Such a company is, if publicly traded, usually delisted according to Swedish stock market regulations.

10. Do shareholders have the right to request that a shareholders’ meeting is held, even if the company is insolvent? (If there are separate reorganization and liquidation procedures, does this affect the response?)

In reorganizations the decision-making bodies within the company remain in charge of conducting the company's affairs. As a result, the shareholders’ meeting has the same function as normal.

In bankruptcies a meeting of shareholders may be convened, however such a meeting does not have any decision-making capacity as that capacity, as a whole, has been taken over by the court appointed official receiver (Sw: Konkursförvaltare).

11. Do shareholders have the right to request information in an insolvent company? Do they have information rights as to the progress of a reorganization procedure? Can they exercise that right vis-à-vis the directors of the company - if they remain in charge of the company - or vis-à-vis the insolvency representative?

Shareholders do not have any special position to request and obtain information in an insolvent company. Shareholders obtain information by way of the usual channels e.g. reports regarding the insolvency proceedings.

12. Can shareholders make proposals for nomination of directors, if the directors continue managing the company?

The directors do not remain in charge of the company in a bankruptcy.

In reorganization the shareholders may appoint directors according to general company law set out under the Swedish Company Act.

13. If special categories of shares exist whose holders are granted additional governance rights, are these additional rights affected by the opening of an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)

In reorganization, any such rights remain in force.

In bankruptcy the official receiver's capacity to run the affairs of the estate supersedes the decision-making bodies of the company. The decision-making bodies of the company do not have any influence over the estate.

14. Can shareholders challenge the decisions of the shareholder meeting, if it is still active? Do they retain the possibility of taking action against the acts of the directors? And
against the acts of an insolvency representative? Is any authorization by a judicial or administrative body required to do so, or, more generally, to exercise corporate rights? (If there are separate reorganization and liquidation procedures, does this affect the response?)

In a bankruptcy a breach of duty by the official receiver may be challenged according to the Bankruptcy Act. In reorganizations, the shareholders may challenge decisions of the shareholders’ meeting according to general company law rules (*Sw: Klandertalan, Ge: Anfechtungsklage*), and may bring an action of breach of duty against the directors.

In an company reorganization, a breach of duty by the administrator may be challenged in accordance with the Reorganization Act.

15. Do shareholders have the right to call a special investigation of the affairs of the insolvent company?

No, regarding bankruptcy.

Yes, in reorganization, with a 10% minority vote (*Sw: Särskild granskning*).

16. Does the law provide for the establishment of a shareholders’ committee (or several committees, in case of different share classes)? What are their powers? Who bears the related costs?

No.

17. Can shareholders voluntarily transfer shares of the company undergoing insolvency proceedings against any provisions in the articles/bylaws restricting transfers of shares?

No.

18. Can outstanding shares of the company undergoing insolvency proceedings be assigned to third parties without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguards are provided? (e.g., does the law include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

Swedish law does not recognize the concept of "outstanding shares".

19. Can outstanding shares of the company undergoing insolvency proceedings be cancelled without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguards are provided? (e.g., does the law include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

See answer number 18.

20. Do shareholders of the company undergoing insolvency proceedings have pre-emption rights over new issues of shares? (1) Are there special conditions for the suppression of pre-emption rights if the company is insolvent (if there are separate reorganization and liquidation procedures, does this affect the response?).

Yes. In principle pre-emption rights can never be superseded, however, it would be

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(1) Please, note that the power to decide new issues or conversions of shares, as well as the power to decide operations that affect the structure of the corporate entity (e.g., by merger, spin-off, or change of the legal form) are dealt with in Questions 33 and 34 below.
very unusual to issue new shares to the shareholders in an insolvent company. If shareholders are to participate in a recapitalization of the company, this is usually done by means of a shareholders’ contribution (which is an unregulated act of beneficial character).

21. Can shareholders retain a participation in the company undergoing an insolvency process even if the company is insolvent according to a balance-sheet test? (i.e., where the value of its liabilities exceeds the value of its assets) If yes, under what conditions? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Yes. Shareholders retain participation in their capacity as residual claimants. However, it should be noted that shareholders’ actions may hinder a reorganization. This is due to the fact that Sweden has no special rules to protect shareholders acting against what would objectively be the company’s best interests in a reorganization. In the worst-case scenario, a potentially viable company may be declared bankrupt as a direct result of shareholders’ unwillingness to support the reorganization.

22. Are the ranking of classes of shares and the preferential rights of classes of shares affected (and if yes, to what extent) by the fact that the company is undergoing an insolvency process? (If there are separate reorganization and liquidation procedures, does this affect the response?)

No.

23. Can shareholders, in the course of an insolvency procedure, supply goods, services or financial resources to the company? If yes, under what conditions (e.g., judicial authorization)? What would their ranking position be towards other creditors?

Bankruptcy – if a shareholder enters into a business contract with the bankruptcy estate then normal contract law applies. The same applies to reorganizations, however, if a shareholder should lend a company money during a reorganization and the administrator accepts this loan then the lender will have a super priority as security for the loan.

24. Can shareholders, in their capacity as counterparties, be under a duty to continue a contractual relationship with the insolvent company during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?).

This is effectively governed by contract law. In general, contracts may be repudiated, but exceptions do exist.

25. Can shareholders (or companies of the same group) holding credit claims against the company under insolvency procedure participate in the creditors’ meeting and vote on the insolvency plan without restrictions? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Yes. All creditors of the same class are treated equally regardless of whether they are shareholders or not.

26. If shareholders (or companies of the same group) do not hold credit claims against the company under insolvency procedure, must/can they participate in the creditors’ meeting? If that is the case, what rights or duties do they have in that meeting? (If there are separate reorganization and liquidation procedures, does this affect the response?)

No.
27. Do shareholders in an individual company have information rights as to the filing of insolvency proceedings by the parent or other related companies?

Under Swedish law there are no concepts of substantive group law. This implies that all companies are treated as separate legal entities. The main rule is that there has to be a formal board meeting decision regarding the application for bankruptcy or reorganization.

III. The Role of the Shareholders’ Meeting in Companies Subject to Insolvency Proceedings

28. Does the shareholders’ meeting continue to exist in insolvency proceedings? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Yes. However, all material decision-making capacity is taken over by the official receiver in a bankruptcy proceeding, whereas the shareholders’ meeting maintains its function in reorganization proceedings.

29. Does the shareholders’ meeting preserve all of its competences, generally? (If there are separate reorganization and liquidation procedures, does this affect the response?)

In reorganizations, the general answer is yes. However, the reorganized company has to follow the instructions of the administrator regarding the conduct of its business.

In bankruptcy, there are, for the most part, no such powers that can be exercised in the shareholders’ meeting.

30. Does the shareholders’ meeting need to approve the accounts of the distressed/insolvent company?

In reorganizations, yes.

In bankruptcy, no.

31. Does the shareholders’ meeting have the power to dismiss directors – if directors are still in charge of the insolvent company? Can the shareholders’ meeting request the removal of the insolvency representative? (If there are separate reorganization and liquidation procedures, does this affect the response?)

In reorganizations, the shareholders’ meeting has the same right to dismiss the directors, as it would normally have.

In a bankruptcy, the same rights applies in principle, however, it may be considered meaningless, as the directors are not in charge of the bankruptcy estate.

32. Is a shareholders’ meeting authorisation required to start an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)

No. As mentioned above, the Board of the Company has to apply for bankruptcy. However, if the Board cannot act, then in some cases the shareholders’ meeting may act to instigate proceedings.

33. Does the shareholders’ meeting need to approve an insolvency or reorganization plan? Can shareholders, even individually, challenge an insolvency or reorganization plan?

The approval of shareholders is not needed in respect of an insolvency plan.
In a reorganization, the shareholders are not always part of the plan. However, approval may be needed, in part or as a whole, depending on the contents of the reorganization plan. This applies, for instance, if the reorganization plan calls for an issuance of new shares.

34. Is a shareholders’ meeting decision required to issue new shares of the company undergoing insolvency proceeding? Can a new share issue be decided by the board? Can a new share issue be decided by the insolvency representative? (2) If a capital increase has to take place through the conversion of claims into new shares, does this affect the response?

A decision at the shareholders’ meeting is in principle always required to issue new shares, however, the board may receive a power of attorney from the shareholders’ meeting to issue new shares during a period of no longer than one (1) year.

The official receiver cannot issue new shares.

The same applies for a conversion of claims into new shares.

35. Can an insolvency/reorganization plan affect the structure of the corporate entity (e.g., by merger, spin-off, or change of the legal form)? Is a shareholders’ meeting authorization required for this?

Yes. In a reorganization, authorization from a competent decision-making body within the company is required. The competent body may, depending on the change of structure, be the shareholders’ meeting or the board of directors.

In bankruptcies the official receiver has the competency to make decisions regarding changes of structure relating to the business.

In the case of a change of legal form, the authorization from the shareholders’ meeting is always required in a reorganization. The rules on insolvency proceedings do not provide for changes to the legal form of the company. This implies that no changes of legal format will occur.

36. On what conditions can the company carry on business during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?). Is a shareholders’ meeting authorisation required?

In reorganizations, the company may carry on business as usual under the direction of the board of directors. However, they have to follow instructions from the administrator.

In bankruptcy, the official receiver supersedes the board of directors.

In both cases, approval of the shareholders’ meeting is not required. However, it is at the sole discretion of the official receiver if the business is to continue or be stopped.

37. In the course of an insolvency procedure, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business operation of the company? Is a shareholders’ meeting authorisation required? (If there are separate reorganization and liquidation procedures, does this affect the response?)

(2) These questions are aimed at understanding whether the fact that the company is subject to insolvency proceedings allows or causes deviations from the company law rules determining the body competent to take decisions on the issue of new shares of the company and/or establishing the criteria and purposes with which such decisions must comply.
In reorganizations, decisions as to the sale of the business in part, or as a whole, is governed by general company rules. This entails that the sale of the whole (or almost the whole) of the business would require the approval of the shareholders’ meeting.

In bankruptcies the competence to sell assets or the business as a whole rests with the official receiver. Thus no approval is required from the shareholders.

38. Does the shareholders’ meeting have any power in relation to a decision of the board or the insolvency representative to continue or reject any favourable, unfavourable or essential contract during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?).

In a reorganization, the shareholders’ meeting has a right to issue a special resolution directing the board of directors on how to act. However, such a resolution has to be within a framework approved by the administrator.

In insolvency, no similar right exists.

39. If an insolvency plan can be presented for a whole corporate group, must that plan be approved by the shareholders’ meetings of each company of the group, including of those that are balance-sheet insolvent? How are the different meetings’ decisions coordinated? Are there specific safeguards (e.g., any veto power or other remedy) for the minority shareholders of the companies that are not insolvent?

As a matter of law, an insolvency plan cannot be presented for a whole corporate group due to the fact that Swedish law does not recognize the concept of substantive group law (Sw: Materiell koncernrätt) (Ge: Konzernrecht). In practice, of course, nothing hinders the administrator to take a whole group of companies into account as long as this is not against the interests of shareholders or creditors of individual companies. However, the court’s function is to monitor the plan. Therefore, to some degree, it is at the discretion of the administrator to suggest solutions as part of the plan and this may de facto involve other companies in a concern.

40. If companies belonging to the same group file separate insolvency proceedings, are there specific requirements/mechanisms to provide for coordination of those proceedings? Are shareholders’ meetings of the relevant companies involved in the coordination mechanisms, if any?

No coordinating mechanisms exist in company law or in insolvency law. However, one official receiver/administrator should be appointed if there are no conflict of interest issues and there are savings in terms of cost and time.

IV. Other Obstacles for Insolvency Procedures Found in Company Law

41. Please list any other legal provision in company law that, in your opinion or in your experience, may interfere with the insolvency procedure of a company in your jurisdiction.

The main obstacle for an efficient insolvency procedure in Swedish company law is the lack on legal competency for the official receiver to a) issue new shares and b) squeeze out existing shareholders.

a) In order to refinance a company, which may be viable even if it has run into financial distress, the law should provide for a possibility to issue new shares
without having to call a shareholders’ meeting and thus be subject to the decision-making of the existing shareholders.

b) Likewise the possibility to squeeze out existing shareholders whose shares are in reality worthless would facilitate recapitalization of viable companies. At present the existing shareholders will benefit from recapitalization regardless of the fact that their shares are worthless and that their acts and/or omissions may have contributed to the distress of the company.

A proposal to that effect was drawn up by the Royal commission on Insolvency Law (Sw: Insolvensutredningen, SOU 2010:2, in particular section 9.7.6 et seq.), but was rejected.