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New Company Restructuring Act welcomed by many

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Introduction

Under a loan agreement, the lender typically has the right to rescind or terminate the loan on grounds such as delay in payment of interest and amortisation or due to other events of default grounds. The right to exercise such a right is, however, restricted in the event that the borrower becomes subject to a company restructuring procedure. As of 1 of August 2022, a new company restructuring act, implementing the EU Directive 2019/1023 on restructuring and insolvency, entered into force in Sweden (the new Act).⁽¹⁾ The new Act introduces several new provisions and principles not included in the former company restructuring act (the former Act).⁽²⁾ This article highlights some new and/or amended provisions that could be useful to consider in connection with negotiating finance and security contracts.

Lower threshold for petitioning company restructuring procedure

The new Act enables a company restructuring procedure to be initiated at an earlier stage compared to what was possible under the former Act. A company is, pursuant to the new Act, granted access to the company restructuring procedure:

- if there is a likelihood of insolvency;
- where the company is deemed unable to make payments as they become due; or
- where such inability will exist within a short time.

A company restructuring can, in other words, be petitioned at an early stage to increase the likelihood of achieving a successful company restructuring.

Ipso facto clauses are invalid

Before the new Act entered into force, there was uncertainty as to what extent so-called *ipso facto* clauses were to be deemed valid under Swedish law. An "*ipso facto*" clause is a clause that enables a party to, among other things, terminate the agreement as a result of a company restructuring having been initiated in respect of the other party. The new Act explicitly states that *ipso facto* clauses are invalid if the defaulting party becomes subject to company restructuring under the new Act. This also applies if the agreement is terminated due to the application or the order regarding company restructuring or plan negotiation, or due to the debtor's financial difficulties on which the application for company restructuring was based. There are, however, certain exemptions for, among other things, netting arrangements or if the lender has financial instruments or currency as a security asset.

Provision on enforcement of share pledge

While a company restructuring is ongoing, enforcement of security or other enforcement measures may not take place against the borrower. In the former Act, enforcement of security over assets could be carried out in respect of, among other things, chattel mortgages.⁽³⁾ This provision has been slightly modified in the new Act. Pursuant to the new Act, an enforcement of a chattel mortgage by the lender can only take place if it is not likely that either the company restructuring thereby would be jeopardised, or that the impact on the lender would otherwise be unreasonably adverse, and, further, the reconstructor shall in each case approve a realisation of a chattel mortgage. As a result, enforcement of a chattel mortgage such as a pledge over shares in subsidiaries of the company being subject to the restructuring proceedings may be restricted. Where a lender takes enforcement measures of the assets of the borrower in breach of the requirement of consent from the reconstructor, the act is deemed invalid. There is, however, an exception where special cause exists to believe that the borrower is taking or failing to take a particular measure and thereby jeopardising a lender's rights – in such cases, the court may, if requested by the lender, order that a suitable measure be taken to secure the lender's rights.

Reconstruction plan

A new feature introduced in the new Act is the reconstruction plan, which is seen by many as a great development in a Swedish company restructuring context. The restructuring plan shall set out measures that are necessary to be implemented in order for the company to survive and to reduce its financial difficulties. The plan may, among other things, contain debt settlements. The borrower has the initial exclusive right to suggest the restructuring plan and that the court request a commencement of a restructuring plan procedure. Lenders whose claims arose prior to the order regarding company restructuring, as well as shareholders and other parties with an ownership interest in the borrower or the borrower's business, are invited to participate in a plan negotiation. All participants are

divided into groups on the basis of their interests in the restructuring. The restructuring plan can then be adopted if approved by the groups of stakeholders and the court.

Conversion of debt to equity

The former Act provided no procedures regarding the conversion of debt to equity (debt-to-equity swap), which sometimes could result in shareholders in a company under restructuring getting an unfair advantage in comparison to lenders, since they could gain most of the benefits of a successful restructuring. It is now possible, for the benefit of lenders, to include in the restructuring plan that certain claims shall be converted into equity.

Comment

Parties under loan agreements shall be aware of the lower threshold for petitioning a company restructuring procedure, since the commencement of a company restructuring indeed affects the possibilities to successfully initiate enforcement actions against a defaulting party under a contract. When a company restructuring is ongoing, no enforcement actions may take place, save for an enforcement of, among other things, chattel mortgages, provided that the conditions for enforcement – which have become more restrictive under the new Act – are met. A consequence of the modified provision on enforcement of chattel mortgages during a company restructuring may lead to banks seeking enforcement of chattel mortgages at an earlier stage compared to what was done previously.

The provisions in the new Act on restructuring plans have been welcomed by many. All known lenders with claims that have arisen prior to the resolution on company restructuring will be invited to participate in the restructuring plan procedure and will thus have a possibility to influence the outcome of the restructuring.

For further information on this topic please contact [Klara Larsson](#), [Andreas Malmberg](#) or [Jonathan Riddersholm](#) at Wigge & Partners by telephone (+46(0)72 062 60 86) or email (klara.larsson@wiggepartners.se, andreas.malmberg@wiggepartners.se or jonathan.riddersholm@wiggepartners.se). The Wigge & Partners website can be accessed at www.wiggepartners.se.

Endnotes

(1) SFS 2022:964.

(2) 1996:764.

(3) "Handpanträtt" in Swedish.