

# WISTRAND

## MEMORANDUM

## INSOL Europe Survey

**WISTRAND STOCKHOLM**

**Box 7543, SE-103 93 STOCKHOLM**

**TEL: + 46 (0) 8 50 72 00 00**

**FAX: + 46 (0) 8 50 73 00 00**

**NIKLAS KÖRLING AND STEFAN SCHANNING**

**25 JANUARY 2016**

### **1 TYPES OF INSOLVENCY OFFICE HOLDER (IOH)**

Sweden has two formal insolvency procedures, *bankruptcy* and *company reorganization*. Bankruptcy proceedings can be opened for companies and individuals. For individuals there is also a separate debt restructuring procedure as a bankruptcy does not release the debtor from his debts.

#### **1.1 Bankruptcy**

A bankruptcy can be opened by an application to the court, filed either by a creditor or by the insolvent company or individual ("the Debtor"). If the Debtor is declared bankrupt a bankruptcy administrator (the IOH) is appointed by the court at the same time. The bankruptcy administrator assumes full authority over the Debtor's property and he or she may, if it is considered appropriate, allow a bankrupt company to continue trading. The bankruptcy administrator is under a duty to safeguard the rights and interests of the creditors and to take measures necessary to achieve a favourable and rapid liquidation, often by selling the business. No creditors meetings are held and no formal committees are formed.

#### **1.2 Company reorganization**

As the name suggests *company reorganization*, which is a procedure aimed at a financial rehabilitation, only applies to companies. If company reorganization is opened by the court the company is provided with a moratorium against legal actions by creditors. The purpose of the procedure is to allow companies with temporary economic problems to rehabilitate and avoid going into bankruptcy. If company reorganization is decided an IOH is appointed by the court. The company continues to trade under the control of the directors subject to the supervision of the IOH. The initial moratorium lasts for three months and the moratorium can be prolonged by the court for additional periods of three months up to twelve months totally. The procedure can also include a public composition which can reduce the unsecured debts down to 25 per cent.

## 1.3 **Debt restructuring for individuals**

A *debt restructuring* is a procedure for individuals who are deeply indebted. However, no IOH officer is appointed for this procedure.

## 2 **SIZE OF THE PROFESSION**

There are about 400 bankruptcy administrators in Sweden. There are no formal restrictions on the size of the profession, other than the qualifying requirements for an IOH.

## 3 **PRACTICING NORMS**

Swedish IOHs range from senior partners of the larger full-service law firms to members of small law firms with some practitioners. In between these, there are many medium sized firms, either specialising in restructuring and insolvency work, or providing such services as part of other legal specialities.

## 4 **QUALIFICATION, TRAINING AND ENTRY INTO THE PROFESSION**

An administrator in bankruptcy is required to be a member of the Swedish Bar Association. The only exception is employees of Ackordcentralen which also work with insolvency proceedings. A lawyer or an employee at Ackordcentralen, has to have been an active practitioner of Swedish insolvency law for several years in order for them to be able to be considered to become a bankruptcy administrator. The required experience differs from region to region in the country. In Stockholm the requirement is at least five years of practicing Swedish insolvency law before he or she can become an administrator in bankruptcy. In addition to this requirement the aspiring IOH candidates will be reviewed by the courts, the Swedish Reorganization and Administrator's Organization and the Supervisory Authority.

## 5 **PROFESSIONAL BODIES**

IOHs working as bankruptcy administrators are lawyers who have chosen to specialise in restructuring and insolvency work. IOHs working with company reorganization are usually also lawyers but in some rare cases also other specialists.

IOHs working as bankruptcy administrators are typically lawyers who are members of the Swedish Bar Association established in 1887. The Swedish Bar Association is an authorizing body for lawyers. The association undertake regulatory activity within statutory framework such as setting and enforcing minimum professional standards, specifying ethical standards, requiring members to undertake minimum annual continued professional education, conducting case conduct reviews, adjudicating complaints regarding member's conduct and excluding members from membership. Normally bankruptcy administrators are also members of the Swedish Reorganization and Administrator's Organization which works with best practice etc.

## **6 CONTINUING PROFESSIONAL EDUCATION**

The Swedish Bar Association requires members to undergo continuing annual professional education. Minimum requirement is 18 hours of structured education per year that has to be documented and accounted in the lawyer's annual financial statement. To continue to take bankruptcy appointments, a bankruptcy administrator has to work regularly with bankruptcies.

## **7 BODY CORPORATE OR INDIVIDUAL**

IOHs are in all cases individuals that normally take appointments solely but can in more substantial cases also be appointed with other IOHs jointly. They may be employees or partners of a corporate entity or partnership. Typically the IOH will utilise their firm's resources to assist in undertaking their role.

## **8 SANCTION FOR ACTING AS AN IOH WITHOUT PROPER AUTHORISATION**

All Swedish formal insolvency procedures are court driven and the courts will only appoint approved individuals.

## **9 BONDING AND INSURANCE**

Members of the Swedish Bar Association are required to maintain professional indemnity insurance which normally is also added by additional indemnity insurance. Professional indemnity insurance cover is provided by a number of insurance firms.

## **10 APPOINTMENT OF IOHS**

IOHs are appointed by the court based on suitability for the assignment. The Debtor or a creditor may suggest a certain individual to be appointed IOH which often is accepted by the court. The court's decision can be appealed.

## **11 REMUNERATION**

The remuneration of an IOH and other costs in a bankruptcy procedure, are drawn from the proceeds of the assets of the bankruptcy estate and the remuneration in company reorganization is paid by the Debtor. If there are no funds available in a bankruptcy the Swedish state will pay the remuneration. The IOH's remuneration is set by the insolvency legislation and in a bankruptcy the remuneration may not be determined to an amount greater than what may be considered to constitute reasonable remuneration for the assignment. In this assessment the work acquired by the assignment, the care and skill with which it is performed and the extent of the estate is taken into consideration. In smaller cases a fixed fee applies. The remuneration in a bankruptcy is decided by the court and the remuneration can be disputed by the Debtor or a creditor. In a bankruptcy procedure the Supervisory Authority will also comment on the requested remuneration. In a company reorganization there is a possibility to have the fee decided upon by the court but it is normally not a court issue.

## **12 PERSONAL LIABILITY OF IOHs**

IOHs act in a personal capacity, and are therefore potentially personally liable for their actions in relation to the insolvent estate and the creditors.

Regarding bankruptcy there is a statutory liability under which the bankruptcy administrator is liable for damages that he or she has caused the Debtor or a creditor, intentionally or negligently, in the performance of his or her duties.

Regarding company reorganizations there is no statutory liability in the Swedish Company Reorganization Act. Liability for the IOH may however arise under general liability principles.

## **13 RELEASE OF IOHs FROM LIABILITY**

An action against an administrator in bankruptcy for damages caused by him or her shall be initiated by a challenge of the administrator's final report. When the time for such an action has expired an action against the administrator can only be made for damages caused the administrators criminal actions.

As mentioned above there is no statutory liability in the Swedish Company Reorganization Act regarding the IOH's liability towards the company in such a procedure. Ordinary principles for tortious liability is however applicable in these situations including statutory limitation.

## **14 INDEPENDENCE**

There is no special code of ethics for IOHs in particular aside from that the Swedish Reorganization and Administrator's Organization works with best practice issues. The Swedish Bankruptcy Act regulates certain situations regarding conflict of interest for administrators in bankruptcy and offers a possibility for the court to discharge an administrator or appoint a second administrator in such situations.

IOHs who are members of the Swedish Bar Association are subject to the ordinary code of ethics for lawyers which requires them to identify and avoid threats to their objectivity or integrity. Before agreeing to accept any insolvency appointment IOHs must consider whether acceptance would entail any conflict of interest. If so the appointment should not be accepted.