

# The Swedish Business Reconstruction Act and SAAB

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## 1 Introduction

Corporate insolvency law has a significant impact on the structure of the commercial and financial markets.<sup>1</sup> This is because the failure of a corporate enterprise affects a wide range of interest creditors, employees and shareholders. When a company becomes insolvent and there are not enough assets to satisfy all interests involved, insolvency law indicates whom the legislator has chosen to favour. Insolvency law has been much debated by scholars in recent years. One important question that has been discussed is how one can prevent capital destruction by choosing an alternative insolvency procedure. France, Greece, Italy and Japan are some of the countries which have been promoting reorganisation of business instead of liquidation.<sup>2</sup> They have changed their legislation to a more debtor-friendly procedure modelled on the American Bankruptcy Code<sup>3</sup> (Chapter 11 Business Reorganisation).<sup>4</sup> Even though Chapter 11 Business Reorganisation has been criticised, it has been used as a model in several countries, and empirical studies have shown that the legislation, which is debtor friendly to unsecured creditors, can increase the return to them. In the U.S. the criticism has been that many debtors who have become reconstructive still goes bankrupt. Studies have shown that 40 per cent of the reconstructive companies continued to make financial losses years after the reconstruction, and to 32 per cent once again became subject to reorganisation within three years.<sup>5</sup> In addition it was found that 70 per cent of the reconstructive companies, after reconstruction, had a profit that was below the industry average.<sup>6</sup>

In many countries there are both classical and insolvency procedures intended to enable unprofitable companies to be reorganized and made profitable. In most countries, the reorganisation proceedings take place in a court of law. In Sweden, the court has a supervisory role. In the United States it plays a more active part, deciding, for example, how the debtor's agreement

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1 This article is partly based on the article *The American and the Swedish Bankruptcy Laws*, presented at the meeting held by the Institution for Economic History at Stockholm University, 2007.

2 Finland and Germany have also extensively modeled new and improved insolvency laws on Chapter 11 Business Reorganization of the American Bankruptcy Code. See Finland, *Lag om företagssanering*, 25.1 1993/47 and Germany *Insolvenzordnung* (BGBl. S.28866).

3 The United States Bankruptcy Code, BC, is codified 11 U.S.C. 101 et seq.

4 See Aghion, P, *Improving Bankruptcy Procedure*, 72 Wash.U.L.Q. 1994, pp. 849 et seq. See SOU 2010:2, p. 51, referring to ITPS, p. 55 and Hotchkiss, E, S, *Post-bankruptcy Performance and Management Turnover*, Journal of Finance, 50, pp. 3-21.

5 Hotchkiss, E, S, *Post-bankruptcy Performance and Management Turnover*, Journal of Finance, 50, pp. 3-21.

6 It has also been objected that the negotiations between creditors often become protracted in time and costly. This mostly affects small businesses. See Hotchkiss, E, S, *Post-bankruptcy Performance and Management Turnover*, Journal of Finance, 50, pp. 3-21. However, a special procedure has been introduced for small businesses. A small business (debt less than \$2,000,000) can elect to be treated as a "small business". The case is then fast-tracked and is treated differently from a regular Chapter 11 case.

should be handled during the procedure. No administrator is appointed in the United States. Instead the management itself continues the business as a debtor in possession (DIP).<sup>7</sup> The similarities between the different countries' regulations are often striking. There are differences of detail in terms of both systematics and procedure.

The Swedish legislation regarding insolvency has also been changed, through the Business Reorganisation Act.<sup>8</sup> The law on corporate restructuring is aimed at restoring the viability of the fundamentally viable businesses that have fallen into economic crisis. The procedure was introduced because the number of bankruptcies in Sweden had increased. In Sweden, we have a relatively large number of bankruptcies compared to the number of citizens and businesses. In 2010, there were 7,510 bankruptcies in a population of 9.34 million, whereas, for example, Germany that year, with a population of 82,551,000, had 32,100 bankruptcies.<sup>9</sup>

The legislator also wanted a reconstruction procedure addressing both reconstruction of the business and a financial reorganisation. A report was presented recently, outlining how insolvency law could be structured in Sweden in the future.<sup>10</sup> The proposals, presented in January 2010, have not yet led to any new legislation. A further topic of discussion in Sweden has been how the bankruptcy procedure should be designed so as to facilitate the prevention of financial crime.<sup>11</sup> Bankruptcy-related crimes include, for example, the debtor in various ways withholding the estate's assets or concealing assets so that they will not form part of the bankruptcy estate. These crimes come under Chapter 11 of the Swedish Penal Code (Brottsbalken).<sup>12</sup>

With the 1996 Business Reorganisation Act as my basis, this paper will discuss how the Swedish reorganisation procedure is designed and which powers and influence the debtor has in the Swedish reorganisation procedure. compared to what we should have. Furthermore it will be discussed what rights the creditors have over the procedure. This paper will also briefly discuss the legal problems in the Swedish Business Reorganisation that occurred in the reconstruction of SAAB.<sup>13</sup>

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7 See Hellners, T, Mellqvist, M. *Lagen om företagsrekonstruktion. En kommentar*, Sthlm, 2009, p. 37.

8 The Business Reorganisation Act, Lag om företagsrekonstruktion (1996:764).

9 See Commencement of Insolvency Proceedings [International and Comparative Insolvency Law Series, vol. 1] Dennis Faber, Niels Vermunt, Jason Kilborn & Tomas Richter, eds., *forthcoming* Oxford: Oxford University Press 2012, "ukcatalogue.oup.com/product/9780199644223.do"

10 SOU 2010:2.

11 Tuula-Karlsson, M. *Ekonomisk brottslighet vid företagsrekonstruktion och konkurs*, Stockholm 2011.

12 See SFS 1962:700.

13 See the District Court case, SAAB Automobile Aktiebolag, 556258-8912, Ä 3227-11. Saab Automobile Powertrain AB, 556602-9038, Ä 3228-11. Saab Automobile Tools AB, 556790-3322, Ä 3229-11.

## 2 The Problems with the Swedish Business Reorganisation Act and Bankruptcy Act

The existing Swedish legislation on insolvency is inchoate. Swedish law does not possess a coherent body of legal rules concerning insolvency. Scattered provisions regarding insolvency are to be found in a number of laws, e.g. the Bankruptcy Act,<sup>14</sup> the Business Reorganisation Act, the Sale of Goods Act,<sup>15</sup> and the Land Code.<sup>16</sup> There are several reasons for this fragmentation.<sup>17</sup> The laws have come into force at different periods of time or after specific needs have arisen. Moreover, the laws have different purposes. The Bankruptcy Act aims for liquidation instead of reorganisation as in the Business Reorganisation Act.<sup>18</sup> New legal forms have arisen and new laws or provisions have come into force, regardless of whether the needs have been indicated by foreign or domestic actors.<sup>19</sup>

It was the British government which wanted answers concerning the rules applying to trading in financial instruments when an estate in bankruptcy (konkursbo) concludes a settlement with its creditors. For lack of an answer, Sweden had to introduce a new special provision in Chapter 5. Section 1 of the Financial Instruments Trading Act, namely that any agreement on trading in financial instruments as part of the settlement, known as netting, shall, if the contract includes a requirement of final settlement in the event of a party's bankruptcy, apply to the bankruptcy estate and bankruptcy creditors in the bankruptcy. On the other hand there was no mention at this time of finding the reason for the legislator not having dealt with the whole field of insolvency law. Instead the work of the legislator can be said to have been guided by the need for legislation and rapid investigation of certain legal issues.

### 2.1 *Different Perspectives on Insolvency Law*

The development of a reorganisation procedure, as an alternative to bankruptcy, can be described by reference to the three different perspectives that can be built from the insolvency legislation.<sup>20</sup> The approach discussed in the Swedish legislation has been the focus of creditors, the debtor- and

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14 Konkurslagen utfärdad den 11 juni 1987. SFS 1987:672. In this paper called the Bankruptcy Act. See prop. 1986/87:86 and 90.

15 Köplagen (1990:931).

16 Jordabalken (1970:994).

17 Cf. Bengtsson, B. *Om den civilrättsliga splittringen*, Festskrift till Grönfors, 1991, pp. 20 et seq.

18 Prop. 1995/96:53 et seq.

19 See 5 kap. (1991:980) lag om handel med finansiella instrument.

20 Part 3 of this article is partly based on Persson, A., Tuula-Karlsson, M. *Lagen om företagsrekonstruktion i teori och praktik*. 2 ed. Sthlm, 2012. See also SOU 2010:2, pp. 76-78.

community-oriented perspective.<sup>21</sup> Most of the above mentioned governmental investigations have been based on the creditor-oriented, land and community-oriented perspective, while the debtor-oriented perspective has been less in evidence. In the creditor-oriented approach, the focus is on the executive proceedings and on creditors getting paid on as equal terms as possible, and the legislation is based on the old classic view that if several creditors' claims cannot be fully settled, the creditors shall bear the loss in proportion to the size of their respective claims (the equality principle). Hitherto, as mentioned above, Swedish insolvency law has been informed by the creditor-oriented perspective, thus giving priority to the interests of creditors.

### **2.1.1 The creditors' perspective**

The Bankruptcy Act was passed in order to satisfy creditors' demands for and interests in the swiftest possible settlement of the estate and the best possible financial outcome.<sup>22</sup> Both the 1921 Bankruptcy Act and the current Bankruptcy Act, KonkL are characterised primarily by accommodation of the creditors' interests.<sup>23</sup> The creditor-oriented perspective is revealed firstly and particularly by the provisions on security measures in Chapter 2, Sections 11-13 of the Bankruptcy Act, which are designed to safeguard creditors against loss. Second, the provision in Chapter 3, Section 1 of the Bankruptcy Act, which provides, as a safeguard for creditors, that the debtor may not dispose of its assets after the decision on bankruptcy. The debtor must not be allowed to alienate any assets in the estate to the detriment of creditors. Third, the provisions relating to recovery in Chapter 4 of the Bankruptcy Act are designed to protect creditors from the debtor concealing assets that rightfully belong to the estate. The purpose of recycling include that of bringing about a reversal of such acts committed by the debtor at any time prior to bankruptcy and detrimental to the creditors.

### **2.1.2 The creditor-oriented perspective in the Business Reorganisation Act**

There are several provisions of a creditor-oriented nature in the Business Reorganisation Act. First, for example, there is Chapter 2, Section 12. When the administrator draws up the reorganisation plan, he should recognise the purpose of the Business Reorganisation Act. The administrator must decide how the operation should be continued and how the debtor's business is going to be organised. It is particularly important from a creditor's perspective that the administrator should consider the individual creditors' position. Another example of a creditor-oriented provision is Chapter 2, Section 16 (meeting of creditors). The creditors have a great influence on this meeting. The creditor should particularly examine the debtor's financial situation and have the

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21 See SOU 2010:2, pp. 76-78.

22 See Persson, A., Tuula-Karlsson, M. *Lagen om företagsrekonstruktion i teori och praktik*. 2 ed. Sthlm, 2012.

23 The Swedish Konkurslag, hereinafter called the Bankruptcy Act.

opportunity to state their position on how the enterprise reorganisation shall continue. Furthermore, when a creditors' committee is appointed at the request of an individual creditor, the administrator is also duty bound to consult the committee on substantive issues. A third creditor-oriented provision is Chapter 4, Section 7, which lays down that a creditor can apply for a procedure to be terminated, if the creditor's interests would be jeopardised by the reconstruction continuing. A creditor may, fourthly, object to an application for a three-month extension of the process, Chapter 4, Section 8, cf. Chapter 4, Section 9. Fifth, the creditors also enjoy special protection, Under Chap. 2, Section 18 of the Business Reorganisation Act, against the debtor putting their rights in danger. There are still other provisions of the Act which are creditor-oriented in content, such as Chapter 3, Section 26 of the Business Reorganisation Act, concerning the possibility for the creditor to request that the administrator or some other suitable person be appointed to supervise the debtor's fulfilment its obligations in accordance with an approved arrangement with creditors.

### **2.1.3 The debtor-oriented perspective in general**

The debtor-oriented perspective is an orientation that is primarily characterised by debtor-friendly provisions. This approach has long existed in Anglo-American law. Debtor-oriented provisions include, for example, those supporting the debtor's initiative in launching a reconstruction procedure, as well as provisions to facilitate the creditors' and other stakeholders' confidence in the operation. In order for a law to be deemed debtor-oriented, it must provide for the moratorium, and rules on how future activities will be funded and are limited in the debtor's contractual relations must be handled so as to ensure the greatest possible benefit to the debtor. Such legislation, however, also characterised by the standards to improve creditors' incentives for helping to facilitate the accomplishment of a reconstruction, provisions providing protection for creditors against their assets as collateral declining in value during the procedure, and provisions assuring them of a minimum dividend rate.

### **2.1.4 The debtor-oriented perspective of bankruptcy law**

The debtor-oriented perspective, as mentioned above, has hitherto had a more modest role in Swedish insolvency legislation. Bankruptcy law can essentially be described as creditor-oriented. There are no provisions putting the debtor's interests before those of the creditors.

### **2.1.5 The debtor-oriented perspective in the Business Reorganisation Act**

In the case of corporate restructuring, the Business Reorganisation Act is primarily creditor-oriented, but in comparison to bankruptcy law it can be said that many provisions of the Business Reorganisation Act are focused on the debtor's interests. One such example is that an application by a creditor of the company reorganisation proceeding against the debtor must be accepted by the latter. Furthermore, the debtor may retain physical control over the activities to be reconstructed. Finally, the debtor, with the consent of the administrator, conducts legal transactions. A debtor perspective was also present in the old,

now repealed, Ackordslagen.<sup>24</sup> The debtor could, after completing an arrangement with creditors, start his business again with the reduction of old debt that had been reduced by agreement.

### **2.1.6 The community-oriented perspective in general**

If the legislator also takes into account interests other than those of the individual creditors in the design of an insolvency legal team, the legislation can be said to have a more community-oriented content. In the community-oriented perspective is namely the fiscal interests, employment, interest and enterprise in the centre. It is important firstly to rescue the enterprise and jobs. In recent decades, the community-oriented perspective has played a major role, given that bankruptcy is likely to lead to labour problems and regional problems, which require a different balancing of interests than with the creditors' interest, which is primarily in collection.

### **2.1.7 The community-oriented perspective in bankruptcy law**

With one exception, bankruptcy law does not have any profoundly social perspective. The trustee is to act on the creditors' common law and for the best, and must take all measures conducive to a favourable and prompt settlement of the estate, Chapter 7, Section 8 (1) of the Bankruptcy Act.

On one hand, the administrator must take into consideration the interest of creditors in a rapid settlement of the estate with as good a financial performance as possible. On the other hand, there are the interests of employees and local interest in the maintenance of security of employment. There is also a general interest in the business being seriously conducted in future. In this regard, Chap. 7, Section 8 (2) provides – as an expression of the community-oriented perspective – that the trustee in such a situation at the settlement of the estate shall take into account what is likely to promote long-term employment, if this can be done without significant prejudice to the creditors' rights. This perspective should be able to play a role in SAAB's bankruptcy when many jobs are liable to be lost.

Regarding the community-oriented perspective, it has also been expressed in the doctrine that an effective bankruptcy institution is an "important component of what is called business dynamics." In a functioning market, one

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24 The Business Reorganisation Act, as mentioned earlier, came into force on 1st September 1996. Chap. 3 of the new Act incorporated the whole of the former 1970 Composition Act, making it an integral part of a company's reconstruction. Thus the procedure for achieving a public composition with creditors now constitutes a component of the reconstruction procedure under the Business Reconstruction Act. The fact of no major alterations having been made and of experience from implementation of the old Act not having been utilised leaves courts in 2012 reduced to implementing legislation enacted in 1970, which is likely to entail practical difficulties from an implementation viewpoint. The court has to decide on the merits of each case how the provisions of Chap. 3 of the Business Reorganisation Act are to be applied.

can expect that the worst companies will disappear and that the most profitable companies survive. Through this process, changes occur in business structure." The bankruptcy institute is an expression of this screening and renewal process and serves to redistribute assets and liabilities."

### **2.1.8 The community-oriented perspective in the Business Reorganisation Act**

The community-oriented perspective is taken into account for the introduction of the Business Reorganisation Act. The *travaux préparatoires* make clear that from both the macroeconomic and the corporate viewpoint, it is economically important for a company in crisis to be enabled, through restructuring in the early stages, to regain its vitality, as such a reconstruction is favourable not only to the debtor company's owners but also to employees, creditors, and the community at large.

The provision of an efficient form of bankruptcy reorganisation then is justified, in that when a company can be reconstructed instead of being declared bankrupt, this means an economic gain – Profit due to the fact that the loss to state as tax creditor can be reduced by reorganisation. Secondly, reorganisation rather than liquidation has saving effects in different areas and reduces capital destruction. Whether the values lost in a bankruptcy could be saved if another system were to be provided is a moot point. SIND,<sup>25</sup> however, has revealed in a study that values have been saved and the company could be reconstructed, with no composition or bankruptcy, provided that the operator received the requisite help in time.

## **3 The Start of Business Reorganisation**

Reorganisation of a business starts with a debtor applying to open the proceedings.<sup>26</sup> A creditor can also apply, but then the debtor must consent to the application. Business reorganisation aimed at enabling a debtor company to regain profitability. It is a *sine qua non* of reconstruction procedure that those involved are professionals and that they are illiquid. It is not necessary for the trader to be insolvent. A decision for a company may not be issued by the court if there are no reasonable grounds for believing that the purpose of reorganisation can be achieved. A decision to initiate a corporate restructuring may not be taken if there are no reasonable grounds for believing that the purpose of reorganisation can be achieved.

A court granting an application for reorganisation has to appoint an administrator to run the business together with the debtor. An administrator should have the specific knowledge and experience required for the task. In addition, the administrator should have the creditors' confidence. The administrator will investigate the debtor's financial situation and, in consultation with the debtor, establish a reorganisation plan showing how the

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25 See SIND 1985:7, pp. 153 f.

26 See Business Reorganisation Act, Chap. 2, Section 1.



purpose of the reorganisation will be achieved. The reorganisation plan must be submitted to the court and creditors. After the decision for a company, the debtor shall provide the administrator with any information about their financial circumstances that is relevant to the reconstruction of the business. The debtor is required to follow the administrator's guidance on how operations are to be conducted. The procedure is based on the debtor together with the administrator investigating the possibilities of reconstructing the business.

During the ongoing reconstruction, debtors are subject to certain restrictions. The debtor may not, without the consent of the administrator, pay debts incurred prior to the reorganisation. The debtor may not assume new obligations or transfer, pledge or create other property rights essential to the debtor. If the debtor fails to discharge these obligations, the act is not invalid. If the debtor does not comply with Chapter 2, Section 15 or fails to comply with the administrator's instructions, the administrator may request that the reconstruction process be discontinued.

When granting an application for reorganisation, the court must fix a time when creditors should be given the opportunity to hold a meeting to decide whether the reorganisation is to continue. At this meeting the creditors may appoint a creditor committee that the administrator should work with. During the period of reorganisation, execution or other enforcement under the Enforcement Code is precluded by Chap. 2, Section 17 of the Business Reorganisation Act. If a creditor files bankruptcy proceedings against the debtor, the application may be held in abeyance at the request of the debtor under Chap. 2, Section 19 of the Business Reorganisation Act.<sup>27</sup>

A reconstruction in Sweden takes place either in substance or financially. Reorganisation in substance means the debtor together with the administrator modifying his activities in a positive direction, so that the business can be made profitable. There may be changes in operations, marketing, production or the number of employees. Financial reorganisation means that the debtor's liabilities being written down by a certain percentage, i.e. arrangement with creditors.

#### **4 The Debtor's Agreement during the Reorganisation Process**

A debtor's contract is usually one of the main assets of a reconstruction debtor. The debtor needs to pursue his operations during the reorganisation process, with several different types of contracts, such as water, electricity, telephone, rental of premises, leasing and other important agreements. There is a special provision for the debtor's agreement to be handled during a company reorganisation. Chapter 2, Section 20 of the Business Reorganisation Act indicates how the debtor can manage contracts concluded prior to the reorganisation. Contracts entered into during the reorganisation are not covered by this provision. The provision in Chap. 2, Section 20 of the Business

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<sup>27</sup> See also Chap. 2, Section 10 a of the Bankruptcy Act.

Reorganisation Act is party-neutral. It is of no consequence whether the party is a buyer or seller, customer or supplier. The provision applies to all contract types other than contracts of employment and trade in financial instruments. You cannot contract out of points 1 and 2. These are mandatory, to protect the defendant against loss.

If the debtor's counterparty prior to the reorganisation is entitled to terminate a contract because of an expected or already default on payment or performance, the counterparty cannot terminate the agreement if the debtor, together with the administrator, requests within a reasonable time that it be completed.

If an agreement should be completed during the reorganisation, the counterparty is protected against further loss. Therefore, Chap. 2, Section 20 p. 1 requires that the debtor, if the period of performance is contained, provide security or performance of his corresponding services. There has been discussion as to how much the advance or the amount of security must be. In practice a debtor is required to furnish security for several months. However, in my opinion, one month's deposit would be enough. If the time of the counterparty's performance is not included, the counterparty is entitled to obtain security for the debtor's future performance if, for some special reason, this is necessary in order to protect the defendant against loss. This could be the case, for example, if the debtor has ordered a special machine from the counterparty and the seller can easily dispose of it on the market.

In Sweden there has been discussion on the substance of the rule on the debtor's contracts during reorganisation.<sup>28</sup> Swedish law affords no possibility for the debtor to work with the administrator and opt out of onerous agreements which are detrimental to the reconstruction process. In the U.S. there is such a right pursuant, under Section 365 Bankruptcy Code.<sup>29</sup> This, however, requires the court to consider and grant such a motion. In my opinion it would be desirable for the debtor to be able to terminate onerous contracts entered into prior to the reorganisation. This would in my view to facilitate the implementation of the reconstruction.

## **5 Business Reconstruction of SAAB**

Perhaps the most famous corporate reconstruction in Sweden is the reconstruction of SAAB.<sup>30</sup> The company applied for a second time within a two year period to initiate corporate restructuring. Applications to the District Court alleged that the companies had financial difficulties and were therefore affected by a number of stoppages in early March 2011. The business was taken up and was hit again by an outage on June 9 of that year, which later became definitive as of that date. The corporate application was prevented by

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28 See SOU 2010:2, pp. 367-437.

29 See 11. U.S.C. 365 §.

30 This section on SAAB's reconstruction is entirely based on the content of Persson, A., Tuula-Karlsson, M. *Company Reorganization in Theory and Practice*, 2nd ed. Stockholm.

an examination by the District Court of the reconstruction petitions, which found the company bankrupt. In addition, SAAB was the subject of foreclosures before reorganisation was filed for with the District Court. At the same time, SAAB's owners were conducting negotiations with several Chinese business partners in order to secure future financing of the companies. In the application SAAB argued, *inter alia*:

"Given that the Company has limited financial resources available, it is the Company's belief that a reorganisation would establish the best position for giving the company the opportunity to make optimal use of its time and resources. A reconstruction would also give the company a breathing space to focus on negotiations for future funding and to enable them to obtain permission from the Chinese authorities for investment in the Company, and the Company might then be able to sort out its financial situation. This would also create an orderly procedure to handle the company's outstanding debts and stop the separate lawsuits and subsequent execution commenced by various creditors. The company would thus have the opportunity to secure new financing solutions and the strategic partnerships that are described below. "

SAAB thus sought to initiate reorganisation because such a decision would afford protection from enforcement measures such as foreclosure (Chap. 2, Section 17 of the Business Reconstruction Act). With reorganisation is pending, a petition can be stayed if the debtor so requests (Chap. 2, Section 10 a of the Bankruptcy Act). SAAB's order with the application for reorganisation would probably – as evidenced by the quoted text – thus have been to avoid bankruptcy as well as execution.

The District Court made its decision in the case of SAAB on 8th September 2011. The District Court found that the first requirement in Chapter 2. § 6 Reorganisation Act was fulfilled. The District Court also found that the second element of the legal scope was fulfilled, namely if there were no reasonable grounds to believe that the purpose of reorganisation could be achieved. The District Court pointed out that the reorganisation implemented in 2009 had been very extensive. It was now clear that ever since Reconstruction ended it has been a number of measures and it had been aimed that the companies need capital. Despite this, however, was there financial problems in the companies. The District Court therefore found that the previously executed reorganisation could not be deemed to have been successful. The application also showed how the company had planned to solve the liquidity crisis. The main financing solution claimed SAAB would be agreements with two Chinese companies. The District Court stated specifically that it was unclear whether, and if so, when the Chinese authorities would approve the agreements by the companies and their owners had entered into with the Chinese companies Youngman and Pang Da. The District Court also noted that it seemed doubtful whether the planned funding was sufficient to resolve the company's financial problems. Overall, the District Court found that it was unclear how the SAAB could solve the liquidity crisis. It was also unclear how the business would continue to operate. The District Court therefore felt that the economic problems remained. The Court found that the company's production had been unable to keep going since late March 2011 and had ceased, coming to a complete standstill on 9th June 2011. The District Court made an overall assessment and gave priority to

those circumstances. This led the District Court to find that there were no reasonable grounds for believing that the purpose of the reorganisation could be achieved. The Court dismissed SAAB's application for reorganisation.

### **5.1 *Comments on SAAB's Application for Reorganisation***

SAAB's application for reorganisation is a good example of how such an application should not be formulated. SAAB had stated that they wanted protection from execution and bankruptcy petitions. When the application for reorganisation was filed, the Enforcement Authority had taken enforcement action on requests for orders for payment by creditors which had claims on the companies. SAAB had failed to voluntarily pay their creditors. There were also creditors who requested that the companies be declared bankrupt under Chap. 2, Section 9 of the Bankruptcy Act. SAAB had requested to pay dues and liabilities but failed to do so within a week, and the creditors could then sue for the debtor, SAAB, to be declared bankrupt within three weeks if the debt had still not been paid. Thus, in addition to the ongoing foreclosures, there was an imminent threat of bankruptcy.

An application for reorganisation is not primarily intended to give the debtor protection from enforcement measures. The protection which arises when the decision on reorganisation has been taken is aimed, *inter alia*, at enabling the debtor, together with the administrator, to carry out a corporate restructuring undisturbed. It therefore focuses on giving the debtor a moratorium that gives him a respite during the procedure and excuses him for discharging earlier commitments. In my opinion, it is surprising how the application could be written to this effect.

It is noted that the district court's decision was entirely correct. In my opinion, no corporate restructuring should be initiated if in his application the debtor explicitly state that the main reason for applying for reorganisation is to avoid the ongoing execution. There are several reasons for this position. In the first place, a comprehensive corporate restructuring had been undertaken in 2009, but had failed. What steps were now supposed to be taken to make production more profitable? Secondly, SAAB at the time of application was not only illiquid but insolvent.

While there is no lower limit as to how serious payment problems must be for the reconstruction not to be granted, the probability of its success decreases the more serious the economic crisis becomes. Thirdly, where was the future funding to come from? The agreements that SAAB had concluded with Youngman and Pang Da were conditional on approval by the Chinese authorities of funding being paid to the companies. Fourth, the companies lacked any ongoing production and they did not know when it might resume. All these factors inevitably ruled out the commencement of reorganisation.

## 5.2 *SAAB's Appeal to the Court of Appeal for Western Sweden*

SAAB appealed to the Appeal for Western Sweden against the District Court's decision dismissing reconstruction. The appeal noted that there were no formal obstacles to a company like SAAB, which had received a corporate grant, filing for restructuring again.

The appeal also stated that a SAAB reconstruction should not be undertaken if there were no reasonable grounds for assuming that the purpose of the reorganisation could be attained. In order to determine whether that condition was met, the court of appeal was to judge the prospects of a reorganisation of SAAB being successful. Could the business been changed in a positive direction? Was the forecast only intended to prevent abuse of the process? According to the legislative history of Chap. 2, Section 6 of the Business Reconstruction Act, this was crucial in determining whether a reorganisation should begin.

The possibility of a corporate restructuring must not seem impossible. This was highlighted as an example of cases where an application for reorganisation should be rejected, namely, when a debtor submitted a totally unrealistic proposal for a financial settlement. In order for a decision to be returned in favour of reorganisation, the debtor must show that the conditions for a successful reorganisation existed. It was further claimed that the court's assessment would almost immediately be followed by further assessment if more reliable data became available.

SAAB said in its appeal to the Court of Appeal that the District Court had gone too far in its analysis. SAAB also argued on appeal that the District Court improperly made an operational review of the financial solutions and the reorganisation's plans for the business. The company argued therefore that the District Court in its review had gone beyond what the legislature had intended. According to SAAB, the District Court had not to consider whether there were conditions for a successful reorganisation, but only whether there was no possibility of a corporate restructuring enabling the activity to be reconstructed.

According to SAAB, the whole idea was for the administrator to examine for the viability of a corporate existence. The district court's initial hearing was held in order to appoint the administrator to deal with the debtor and the creditors. This is particularly true in cases such as SAAB, where application is made by a company with about 3,800 employees, total assets of approximately SEK 10 billion and operations in fifty countries.

In its petition to the Court of Appeal, SAAB gave a description of the company's financing solution. It was stated that they would be allowed stronger ownership by the agreements concluded with Youngman and Pang Da. SAAB argued that the two Chinese companies were well aware of the companies' liquidity problems. The companies were active in the international automotive market and therefore understood the need for funding in the future. The Chinese companies had seen fit to invest EUR 245 million and in a shareholders' agreement undertaken, if necessary, to contribute additional capital. It had been presumed that the Chinese authorities would approve the investment in SAAB. The district court declared in its decision that it was highly uncertain when such approval could come from the Chinese authorities.

In the appeal, SAAB emphasised that approval from the authorities in China was more or less practised when a Chinese company would do a larger investment. SAAB also emphasised that the former reorganisation had laid the groundwork for a change of the companies in a positive direction. SAAB also argued that the settlement gave the companies the necessary conditions for creating an independent company in the automotive industry. SAAB also pointed out that it was premature to say that the reorganisation had been unsuccessful.

### 5.3 *The Appeal in the Court of Appeal*

The Court of Appeal handed down its decision on 21st September 2011, amending the District Court's refusal. The Court of Appeal ruled that SAAB was to initiate a corporate restructuring. The Court of Appeal's decision was not unanimous, one of the judges expressing a dissenting opinion.

The Court of Appeal's rationale stated the content of the *travaux préparatoires* of the Act in a manner similar to SAAB's exposition in its appeal petition. The court began by noting that the preamble to the Act was an obvious starting point that, in the interests of creditors, one should seek to avoid a decision if there were not indeed good reasons for the reorganization. A closer assessment should relate to whether there were objective conditions for a reorganisation leading to a reorganisation of the company and whether the debtor actually had the ability to complete a reconstruction. It was through this assessment that it could prevent debtors who only wanted to obtain respite filing for reorganisation.

The Court of Appeal also stated that the action proposed under the procedure did not lack realism. It pointed out, however, that the grant or refusal of a reorganisation hinged on the Court's assessment of the prospects of the reconstruction succeeding.

The companies had stated that Chinese companies Youngman and Pang Da had decided to invest SEK 245 million in the company and that this contribution was enough to restart production. Youngman had also pledged itself to provide short-term financing, known as bridge financing, to the tune of EUR 70 million within two weeks. The Court of Appeal stated that it appeared, as the district court had pointed out, uncertain whether the proposed funding would be sufficient to resolve the companies' financial problems in a sustainable manner.

The Court of Appeal ruled that the so-called bridge financing of 70 million did not change that finding. The Court of Appeal noted, as had the district court, that the earlier reorganisation had not been successful. No detailed analysis of reasons for this was possible on the material at the Court of Appeal's disposal. The Court of Appeal stated:

“The Court of Appeal finds cause to question whether conditions exist for a successful reconstruction of the companies. In the light of the statements made in the legislative history, it is clear that judicial assessment of an application for reorganisation should be relatively brief. The trial will focus on whether there

are objective conditions for a corporate restructuring to succeed. Moreover, it will almost immediately be followed by further assessment if a more reliable basis exists. In this case, the Court of Appeal considered that a more thorough investigation might show that the conditions for a successful reconstruction existed. Accordingly, there is no reasonable ground for believing that the purpose of reorganisation cannot be achieved. Because of this, and since other conditions for reorganisation are satisfied, the reorganisation shall be initiated.”

The Court of Appeal thus concluded that SAAB would once again be subjected to reorganisation.

#### 5.4 *The Differences of Verdict*

The rules of procedure require four members to decide the case in the Court of Appeal if the district court application has been heard by three judges. One of the members of the Court of Appeal was President Gunnel Wennberg, who expressed a dissenting opinion regarding the outcome of the case and wanted the Vänersborg District Court's decision upheld. Wennberg agreed with the other members' assessment that there was reason to question whether there were conditions for a successful reconstruction of the companies. The question that Wennberg asked was whether the requirements that could be imposed on companies for a reorganisation would be satisfied. Wennberg said that the current text of the law was somewhat difficult, especially Chapter 2, Section 6 of the Business Reconstruction Act, which lays down that the decision for a company may not be made if there are no reasonable grounds for believing that the purpose of reconstruction can be achieved. Wennberg argued that the preamble to the Act set a fairly low standard of proof that the application would satisfy the stated factor. There was also a summary trial that the court would conduct. Wennberg argued, however, that an obvious starting point was to avoid a corporate decision for which there were no good reasons. What had to be judged was whether the debtor actually had the intention and ability to pursue a reorganisation. According to Wennberg, one should avoid granting reorganisation to debtors whose real purpose was only to seek a moratorium. Wennberg stated:

“I believe that the economic and other conditions which the companies have described in the application for reorganisation and the appeal do not meet the requirements that should be posed in order for the reorganisation to be granted. I also take into account the depressed financial state which the companies have been in for a long time now. The fact that the previous reconstruction has not been successful is in my opinion also pertinent to an assessment of the companies' ability to complete the reconstruction.”

### **5.5 Comments on the Court of Appeal's Decision and the Dissenting Verdict**

The Court of Appeal upheld SAAB's application for reorganisation. That decision is, in my view, surprising. Although it had only been less than two years since the last reconstruction began and the costs of reconstruction procedure exceeded SEK 50 million, a new reorganisation was granted. But the most relevant fact was, after all, that the companies had no production, no cash in the bank, no clear and sufficient financing. Are there any operations in companies, how can companies succeed with its corporate restructuring? In addition, the Enforcement Agency continued to seize SAAB's remaining assets in the companies. A corporate restructuring requires, as mentioned above, that the possibility of the reconstruction succeeding. Was there ever any prospect in this case of a successful reconstruction? Since the initial reconstruction mainly focused on a financial restructuring, insufficiently strong action had been taken to reverse the company's negative performance. It has been demonstrated in Karlsson-Tuula's study that a company that only carries out financial restructuring relapses into its economic problems within three to nine months. This agrees well with SAAB and its activities. The company returned after a financial reorganisation and asked again for such a reorganization without radical change of the company. After another unsuccessful reorganisation, bankruptcy of the companies was a fact. It is very tempting to wonder whether it would not been better for the creditors if bankruptcy proceedings had begun in September 2011. On the other hand, the lack of a more radical reorganisation of the business in the first corporate reconstruction was very unfortunate for the debtor. After its introduction, however, a number of operational improvements were made and additional ones planned, such as a further reduction of the company's structural costs, expansion of the company's product portfolio, purchasing partnership with Youngman with reduced purchasing costs as a result, and volume and revenue growth in existing and new markets. The measures taken came too late. Had the debtor acted earlier, the companies might have been saved. SAAB is unfortunately an example of what can happen when the debtor fails to act forcefully enough in time.

SAAB was declared bankrupt on 19th December 2011. The court adopted the bankruptcy decision the same day. It is regrettable that this matter was handled in the ways that have now been presented. SAAB is currently the largest company in liquidation in Sweden. There are three trustees in the bankruptcy.

#### **Bankruptcy**

In Sweden a case may be commenced by the filing of a petition by the debtor or by a creditor.<sup>31</sup> The debtor or the creditor must show that the debtor is insolvent. Insolvency means that the debtor cannot pay his debts as they fall due, and that this is only temporary. A permanent trustee is appointed by the

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31 *See* Chap. 1, Section 2 of the Swedish Bankruptcy Act.



court to marshal the assets of the debtor immediately on the commencement of the bankruptcy proceedings. Before the court appoints a trustee in bankruptcy, the supervisory authority, the enforcement Agency, should be heard under Chap. 7, Section 3 of the Bankruptcy Act. The debtor is not allowed to operate his business. Instead it is the trustee that is authorised to run things and to investigate how assets can be sold in the most appropriate way. The trustee is also the one to decide what to do with contracts where performance has not been completed. The trustee examines the contracts that the debtor must complete in the event of further operation. Nowadays it is not common for operations to continue for any great length of time in a bankruptcy. A provision has been added to Chap.12, Section 31 of the Land Code whereby the estate must place the premises at the landlord's disposal within a month if the landlord so requests. If the premises are not made available to the landlord, the estate in bankruptcy is liable for rents from the bankruptcy order date.

## 6 Concluding Remarks

In Sweden we have a body of reconstruction legislation which is still applied to no more than a slight extent, and then mainly by firms with only a few employees.<sup>32</sup>

Our business reconstruction legislation mainly focuses on the creditors and has less of a debtor-oriented perspective than other business reconstruction laws. Like other countries, we have the problem of debtors applying so late in the day for business reconstruction that they are already insolvent.

In the majority of cases, then, business reconstruction serves only to postpone an inevitable bankruptcy. The question is whether the introduction of more debtor-oriented provisions might induce debtors to apply for business reconstruction in time, but this article shows that, despite Chap. 11 Business Reorganization being mainly debtor-oriented, the USA still shares partly the same problem as ourselves, namely that of the debtor applying too late. As has already been made clear, a business reconstruction can be purely financial, i.e. confined to reducing the creditors' claims by a certain percentage according to size, by means of public composition proceedings. A financial reconstruction of this kind is retrospective and usually results in the debtor relapsing into financial difficulties within a short time – say between three and nine months. The purpose of financial reconstruction is to write down old debts and in this way lighten the debtor's debt burden. In order, however, for a business reconstruction to succeed, it must also be substantial. This, as explained earlier, implies changes to the very structure of the business, e.g. a change of production, a change in marketing practices and a review of the management.<sup>33</sup> A substantial restructuring is proactive, focusing on the way in which the business is to be run in future.

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32 See Tuula-Karlsson, M. *Lagen om företagsrekonstruktion. En papperstiger II*, Sthlm 2006, p. 79.

33 See Tuula-Karlsson, M. *Lagen om företagsrekonstruktion. En papperstiger II*, Sthlm 2006, p. 79.

There are some countries where substantial reconstruction entails the replacement of the management as being responsible for the financial problems occurring in the first place. Sweden's legislature, as noted earlier, has explored the extent to which an integrated insolvency procedure can be introduced<sup>34</sup>, but so far this has not resulted in the enactment of any legislation. Sweden, therefore, is likely to retain the Business Reconstruction Act in its present form for some considerable time to come. A new parliamentary commission on the subject of insolvency law is unlikely to materialise within the near future.

In 2009, as has already been described, Sweden experienced one of the biggest corporate reconstructions in modern times, namely that of the SAAB companies. Those companies applied for business reconstruction in order to carry out a financial reconstruction, namely a 25 per cent write-down of creditors' demands for the payment of old debts. There was no substantial reconstruction with an assessment of ways and means of restoring the profitability of the operation, which probably explains why SAAB was later declared bankrupt. On the first occasion there good prospects of a successful business reconstruction. SAAB's production was up and running, the company had cash in hand, plus the financial possibilities of carrying out an adequate reconstruction, both substantially and purely financially. By contrast, when, in 2011, SAAB filed their second application for business reconstruction, their production had come to a standstill and they had no cash in hand, with the result that their assets were attached by the Enforcement Authority. Moreover, SAAB had no financial solution either. The loans promised by the Chinese companies could not be disbursed until they had been approved by the Chinese authorities. Even so, SAAB was given the go-ahead for a business reconstruction, which greatly surprised me. There were absolutely no legal prospects of such a procedure having a successful outcome. The company was unavoidably declared bankrupt in December 2011. With production at a standstill, the employees were left idle. The chances of SAAB, now bankrupted, finding a buyer and of its operations being resumed remain uncertain.

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34 See SOU 2010:2, *Ett samlat insolvensförfarande – förslag till ny lag*.