New report on bankruptcy proceedings and environmental liabilities

July 06 2018 | Contributed by HPP Attorneys Ltd

AUTHORS

Sami Uoti

Jasmin Villanen

Introduction

There are separate processes and legislations concerning bankruptcy (the Bankruptcy Act 120/2004) and restructuring (the Restructuring of Enterprises Act 47/1993) in Finland. There is also a separate law stipulating private individuals' insolvency (the Act on the Adjustment of the Debts of a Private Individual 57/1993).

Generally, insolvency legislation has been stable and proven effective over the past decade. However, owing to technological advancements and recent bankruptcies involving businesses affecting the environment, there is a growing need to fine-tune bankruptcy proceedings and environmental liabilities in bankruptcies.

To this end, the Ministry of Justice established an expert group comprising specialists in insolvency law that aimed to:

- solve insolvency-related environmental and efficiency problems; and
- propose necessary legislative changes.

The task was challenging and the group worked for nearly two years to determine:

- whether bankruptcy estates are liable for cleaning and abolishing environmental pollution; and
- how to streamline and simplify bankruptcy proceedings.

The group's report was published on 4 April 2018 (12/2018) and invites comments from stakeholders and professionals. Presumably, the government will submit its proposition – based on the expert report – to Parliament before the parliamentary elections in Spring 2019. Legislative changes could therefore come into force as early as 2019.

Propositions concerning environmental liabilities

While the current Bankruptcy Act contains no provisions concerning environmental liabilities, Finnish environmental legislation contains many provisions which specifically address the responsibility of handling and cleaning dangerous waste and removing other environmental risks.

The conflict between environmental and bankruptcy legislation is particularly apparent in bankruptcies involving mining companies and this is proving difficult (and sometimes impossible) to resolve.

The legislative differences are as follows:

- The environmental legislation provides that the possessor of the waste is responsible for handling and removing the existing environmental risk. In bankruptcy, the bankruptcy estate receives control of all debtor's assets and the bankruptcy estate therefore becomes liable for handling the waste with the expense and assets of the bankruptcy estate.
- The bankruptcy legislation provides that all liabilities accruing from the actions or omissions of the debtor must be secured by filing a claim in the bankruptcy. None of the claims have a preference and they are all entitled to the same *pro rata* dividend at the end of the bankruptcy proceeding.

Evidently, these two approaches are inherently different and therefore difficult to combine. Despite considerable scholarly debate on the merits of these approaches, opinion remains divided.

The Supreme Court recently ruled that the bankruptcy estate is responsible for handling dangerous waste even if the debtors' operations ended before the bankruptcy (KHO 2017:53). The court held that environmental liability is not a debt as such, but rather an obligation set by the public administrative legislation.

The judgment attracted criticism, with some arguing that all debtor liabilities should have equal weighting, regardless of their nature. Critics highlighted the fact that the priority rights in bankruptcy were abolished nearly two decades ago and therefore the environmental risks should be prioritised over other debtor liabilities. Others have argued that the Supreme Court's preliminary ruling may lead to bankruptcy estates going bankrupt unnecessarily. Further, questions relating to liabilities arising from bankruptcies are dealt with in the general courts.

The Supreme Court has not given any precedence on the question of the status of the bankruptcy's environmental liabilities.

To solve the aforementioned issues, the expert group suggested that a new chapter stipulating environmental liabilities should be added to the Bankruptcy Act. The group's key proposition was that if a bankruptcy estate receives a hazardous substance or a substance that may cause a threat of severe environmental liability, the bankruptcy estate will then be obliged to act in order to remove the risk. If the waste substance does not cause a severe risk to the environment or a threat as such, the liability will be considered normal bankruptcy liability and secured in the usual manner (ie, by lodging a claim during the bankruptcy proceedings).

Propositions concerning bankruptcy proceedings

The Bankruptcy Act entered into force on 1 September 2004. Since then, the technology used by courts and insolvency practitioners has evolved considerably. In 2015 an electronic system (KOSTI) was launched to assist insolvency practitioners and creditors during bankruptcy proceedings. KOSTI is also used by the Bankruptcy Ombudsman for controlling bankruptcy estate administrators.

As a result, insolvency proceedings are considered rather heavy and costly. Almost 75% of bankruptcies lapse due to lack of funds. Further, the sum required to finance a full bankruptcy proceeding is between approximately €20,000 and €25,000, while the total length of full proceeding (from the opening of the proceedings to the distribution of the assets) is rarely less than a year.

Therefore, in order to simplify and streamline bankruptcy proceedings, the expert group suggested changes to their basic structure. Most importantly, the group suggested that after bankruptcy proceedings have commenced, it should be possible to make claims at any time and creditors should not have to declare their claims twice. Shorter timeframes were also recommended to reduce the total length of bankruptcy proceedings.

Comment

Generally, the Bankruptcy Act and bankruptcy proceedings function well. Besides the above-mentioned propositions, no further changes are expected – unless new EU legislation is passed. Given that the Restructuring of Enterprises Act entered into force in 1993, legislative changes

relateing to restructuring may be in order; however, no affirmative decisions on the matter have been made.

For further information on this topic please contact Sami Uoti or Jasmin Villanen at HPP Attorneys Ltd by telephone (+358 9 474 21) or email (sami.uoti@hpp.fi or jasmin.villanen@hpp.fi). The HPP Attorneys Ltd website can be accessed at www.hpp.fi.
