

SCHEDULE 2

SWEDEN

COUNTRY ANALYSIS

Draft – September 2000

1. General

1.1 Pledge – General Characteristics

- Substitution is possible under Swedish law, however in order to ensure a valid pledge, the pledgee should not be able to substitute securities without permission from the pledgor.
- Under Swedish law a pledgee shall keep the collateral separate and must not use it; however it may re-pledge it to a third party but then always subject to the rights of the pledgor.
- There are no stamp duty or any equivalent documentary tax on pledges.
- Type of investments which can be validly pledged:
 - for physical non-negotiable notes a valid pledge is established by notifying the issuer of the pledge agreement.
 - for dematerialised securities there are specific provisions in the Financial Instrument Registration Act.
 - for securities registered in the investor's owner account a valid pledge is established when the lien of the pledgee is registered. The pledged assets are transferred to a sub-account, named pledge account.
 - in the case of securities owned by an investor that are registered in the name of a bank or securities firm on a nominee's account, a valid pledge is established at the moment the nominee is notified of the pledge agreement between the pledgor and pledgee.
- If securities assets are held by a third party bank or custodian the security interest must be notified to the third party.
- No official registration with any state agency is necessary.
- Formal procedures apply to enforcement of a security interest but may be varied by agreement.

Enforcement may not be delayed except that it may be stayed on insolvency by at least one and up to ten weeks.

- As regards the validity of future collateral, the security interest would be valid inter partes but would only be perfected upon delivery or registration. (See Insolvency Aspects).
- Under Swedish law, the pool of assets over which a security interest is purportedly created must be identified – designating all securities from time to time standing to the credit of a named or otherwise designated account or deposit would be sufficient to identify the relevant pool of assets.

1.2 Transfer of Title – General Characteristics

- Transfer of title arrangements are possible but not very common under Swedish law. A transferee will be able to use transferred assets as its own property. Possession of the assets must therefore be transferred so that the transferee is deprived of any power to dispose of the assets.
- As regards collateral arrangements based on absolute transfer of title and expressed to be governed by a law other than Swedish law it is likely that the arrangements would be upheld and would not be subject to any stay in bankruptcy provided the parties have not actually kept the collateral separate as though subject to a traditional pledge. So there is no significant risk of recharacterisation.
- When it comes to voidable preferences and the like, it is likely that a Swedish court would view a collateral arrangement based on transfer of title in the same way as a pledge.
- Contractual set-off and insolvency set-off : are generally enforceable as regards mutual claims between the two parties in all types of Swedish insolvency proceedings subject to certain general equitable considerations. There are no additional stays or freezes when it comes to benefiting from rights of set-off.

A party can only assign rights to which it is entitled, so that if the rights of an insolvent party to redelivery of equivalent collateral are subject to any netting or set-off and assignment would only take place subject to this limitation. The same principles apply mutatis mutandis to attachments. Only the actual rights of the insolvent party could be attached. A right to set off may be qualified however if the obligations to be set off are not connected.

Following an assignment by the insolvent of a claim, its counterparty would still have a right of set-off if:

- the counterparty's rights against assignor were acquired before the counterparty was made aware of, or ought to have known about, the assignment; and
- the claims of the counterparty were due and payable either (I) at the time of the assignment or (b) no later than the assigned claim.

In respect of creditors seeking an order for attachment, the prevailing view is that the counterparty's right of set-off would prevail against any creditors and the counterparty would be able to set off mutual obligations existing at the time the counterparty received notice of the attachment proceedings.

- Deliveries of top-up collateral will not be vulnerable to avoidance in any insolvency proceedings if made in accordance with binding obligations agreed in connection with the trading of financial instruments, other similar rights or obligations or currencies. Any such agreement should be in accordance with terms generally used in such markets. There are exceptions to this rule if the top-up collateral was not

transferred at the times set out in the agreement or if transferred in circumstances which make the provision of security unusual.

- Substitution effects would be the same as in case of a pledge arrangement; provided that the substituted assets are of no greater value, there is no significant risk that the substitution would invalidate the transfer.
- Transfer of title arrangements for security purposes would normally not lead to any tax implications, for example in case of “ordinary” repurchase transaction, however depending on the terms of the agreement between the seller and the buyer a transfer might be viewed as an acquisition or disposal.

2. Private International Law and Domestic Law Aspects of Collateral

Validity of the Contract/Attachment

Swedish private international law:

- The system of “lex contractus” applies according to the Rome Convention (1980). The “lex rei sitae” applies with reference to issues regarding the establishment of pledge
- Swedish Law would accept the law determined by the parties, at least as long as there is some connection (e.g. location of the parties or the assets) to the governing law.
- Conflicts of law rules would probably apply the “lex loci” for the creation of a security interest in fungible securities. Perfection will be governed by “lex rei sitae”.
- It appears likely that the laws applicable to the clearing system would govern the perfection of a security interest in fungible securities, at least when the security interest is capable of being registered or otherwise noted by the clearing system.

Swedish domestic law:

- The pledgor must be deprived of the power to dispose of the collateral which is achieved either by physically handing the collateral to the pledgee or by notifying the pledge to any third party in possession of the collateral. For example when a bank account is pledged the pledgor must not be allowed to make any withdrawals therefrom without the consent in each specific case of the pledgee. The consequence of not duly perfecting is loss of protection against the pledgor’s other creditors.
- Under Swedish law there are no legal requirements as to the form (written or otherwise), for collateral or pledge agreements. However the normal procedure is that the pledgor signs a pledge agreement. Pledge agreements are not required to be publicly notarised.

- The pledgor must give up control over the collateral and shall not be entitled to dispose of the pledged property without permission from the pledgee. Hence, as a general rule a valid pledge effective against third parties is established when the assets (collateral) are delivered to the pledgee.
- As a general rule a pledge agreement is valid only if the pledged assets are specified. However, the concept of pooling is also deemed to be valid under Swedish law. Among legal experts it is advisable that, in the case of pooling, the pledgee only can make disposals after permission by the pledgor.
- There are no further actions or requirements necessary to perfect or register security in order to obtain protection.

Priority:

Swedish private international law:

- Normally the law governing the securities will determine priorities. In case of bankruptcy lex concursus might have effects on priority.

Swedish domestic law:

- The fundamental provisions regarding the relations between the creditors are found in the Right of Priority Act which states that specific preferential claims have priority over general preferential claims. The rules of specific preferential claims are applicable in bankruptcy proceedings as well as in proceedings of individual enforcement.
- In case of registration of pledge in the book-entry system, the timing of registration measures determines the order of priority.

Enforcement:

Swedish private international law:

- “Lex rei sitae” governs enforcement procedures.

Swedish domestic law:

- In principle sale of collateral can be carried out in auction procedures, on a Stock Exchange or other markets, by auction under a writ of execution or by private sale. However, these procedures are in practice excluded regarding securities approved eligible as collateral by the Riksbank. The sale is normally carried out as a private sale on a telephone market.
- A pledgee would not be required to obtain a court order or other official document to enforce the pledge against the collateral. We would be obliged to sell the collateral at public auction, unless otherwise agreed between the parties and although there is no statute nor authoritative case-law, he would

be allowed to sell the collateral to himself in situations where he had ascertained that no better offers were available, which could be difficult to prove in respect of unlisted securities without having conducted a public auction or some other bidding procedures. In respect of listed securities the pledgee would be permitted to sell collateral at the quoted market price.

Note: For enforcement of rights after commencement of an insolvency proceedings see Insolvency.

Insolvency:

Swedish private international law:

- “lex concursus” generally states that Swedish law is applicable on insolvency proceedings in Sweden, however in the event of insolvency, conflicts of law may lead to the application of foreign law, “lex loci delicti”, “lex rei sitae” etc.
- If the debtor is a Swedish entity, Swedish bankruptcy law will always apply.
- Swedish courts have jurisdiction to wind-up natural persons or companies with residence in Sweden. Such insolvency relates to assets wherever located.

Swedish domestic law:

- Swedish law provides for two types of insolvency proceedings: bankruptcy proceedings (dissolution of the debtor and liquidation) and judicial composition proceedings (reconstruction for financial reorganisations through reduction of the financial obligations of the debtor). The former are governed by the Bankruptcy Act, whilst the latter are subject to the Act on Reconstruction of Corporations.
- In January the Parliament amended the Swedish Bankruptcy Code to allow a secured party to enforce its security interest immediately in any bankruptcy proceedings, provided the collateral consists of either foreign exchange or financial instruments quoted on a Swedish or foreign stock exchange or in an authorised or otherwise recognised market and that the assets are sold at the price quoted on the exchange or in the market as the case may be.
- The pledgee would be:
 - entitled, in the case of listed securities or cash, to sell the collateral through an investment firm at the then current market price or
 - required, in the case of unlisted securities, to sell the collateral public auction after having given the administrator –in-bankruptcy notice of the projected sale of securities, offering the administrator to redeem the collateral. This sale at auction would be subject to a stay up to 12 weeks.

The stays in company reconstruction proceedings do not apply to collateral security.

- Under general rules, a claw-back action in respect of collateral posted after the incidence of the debt secured would lie in the hands of an administrator-in-bankruptcy or a reconstructor in the context of a company reconstruction. However, if the security interest has been:
 - (a) contracted for in the context of securities or currency trading or transactions pertaining to similar rights and obligations and;
 - (b) posted in accordance to contractual provisions and;
 - (c) the collateral has been delivered or registered pursuant to that contractual provision.

then the security interest would be protected against a claw-back action on the basis that the collateral had been posted after the occurrence of the debt.

- Swedish law also permits the administrator-in-bankruptcy and reconstructor to attack fraudulent conveyances (including posting of collateral) and similar practices.
- The “suspect period” will begin three months before insolvency in respect of delayed posting of collateral (irrespective of whether such delayed posting was fraudulent) or, five years in the case of fraudulent conveyances and similar practices (or, for affiliates, perpetuity).
- Substituted collateral in amounts equal or less than the original collateral would not be susceptible to claw-back. However, if the value exceeds, the excess may be clawed-back as a delayed posting of collateral.
- There are no additional stays or freezes when it comes to enforcing a security interest, apart from the above administrative delays in relation to the enforcement of pledges.

3. Miscellaneous

3.1 Cross-border transactions in multi-tiered holding systems

Swedish law deals clearly with the nature of a participant's interest in a holding of fungible securities only as regards holdings in a Swedish clearing system. Until the beginning of 1999, only the Swedish Securities Register Center ("VPC") could legally be a clearing system in Sweden and VPC is still the only clearing system in practice.

Swedish securities held in VPC are not represented by any physical instrument and the law does not expressly deal with the question of location. However the recent legislative changes permit an instrument issued outside Sweden and represented by a global note or similar to be held in a Swedish clearing system. The statute regarding the registration of financial instruments includes provisions on how an owner may dispose of securities registered to his account, including the notation of pledges and seems to assume that Swedish law applies. Regarding fungible securities held in a clearing system outside Sweden, Swedish law is not clear. These could be seen as being located where the global note is or, perhaps more likely, where the clearing system is located.

3.2. Implementation of the Settlement Finality Directive

The Ministry of Finance was responsible for the implementation of the Directive and clearly committed itself to the broad view early in 1999; the PRIMA approach was already the law under existing Swedish conflict of laws principles; the participants of financial markets have seen with the implementation of Art. 9 (2) an opportunity to clarify statutorily the current legal position.

The Ministry benefited from the participation and help of financial, academic and legal opinions on the implementation of the Directive and has moved towards an explicit statutory implementation of Art. 9 (2).

The cabinet put the Ministry's proposal to Parliament on October 28 1999 and the new law came into force on January 2000.

The implementation of Art.9 (2) will apply PRIMA in all situations.