Knowledge of counterparty's insolvency in claw-back case

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In bankruptcy proceedings under Swedish law, the bankruptcy estate may take action for the claw back of transactions that have been carried out in relation to a certain creditor before the initiation of bankruptcy proceedings, if such transactions have been adverse to the interests of other creditors. Under a general rule (Chapter 4, Section 5 of the Bankruptcy Act), certain transactions can be reversed during a five-year hardening period if the relevant creditor knew, or should have known, that the debtor was insolvent when the transactions were undertaken.

In the case at hand (T 5435-16), a long-time supplier to the company Intercontainer had received payments of a number for overdue invoices during the months preceding it entering into formal bankruptcy proceedings. Since payment of supplier invoices is an ordinary form of transaction, none of the specific claw-back rules (eg, rules that target new security for old debts or prepayment of debts) of the Bankruptcy Act applied. This meant that, to reclaim the funds from payment of the invoices to the bankruptcy estate, the bankruptcy estate had to prove that the supplier was aware, or should have been aware, that Intercontainer was insolvent at the time of payment.

The Supreme Court established that the evidence did not support the claim that the supplier had actual knowledge of the insolvency of the debtor. The court therefore went on to determine the limits of the duty of investigation of a creditor (eg, a supplier) in concluding what they should have been aware of.

'Insolvency' under Swedish law is defined as the inability to pay debts as they fall due, and that such inability to pay is not merely temporary. The court concluded that, based on the increasingly late payments and certain conversations with representatives of Intercontainer, the supplier should have been aware of the debtor's inability to pay its debts as they fell due. However, it was not established that the supplier should have been aware that such inability was not temporary. The court provided certain guidance on the limits of a counterparty's duty of investigation in respect of the financial forecasts of a debtor. It seems clear that companies are not expected to undertake investigations of counterparties' financial prospects that go further than putting relevant questions to management and obtaining publicly available information.

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