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Debtor's Liability under Bankruptcy

1. Types of debtor's liability

The liability of a debtor who has been declared bankrupt may consist of:

1) liability for insolvency, as the bankruptcy is caused by the debtor's permanent insolvency;
2) liability for violation of the obligations arising in the bankruptcy proceedings.

Liability may come in the form of criminal or civil liability, but also in other legal remedies that do not fall under criminal or civil liability. Criminal liability is provided for by §§ 384 and 385 of the Penal Code[*1] (PC) as liability for causing insolvency and for concealing assets and debts in bankruptcy proceedings. Civil liability implies the obligation to compensate for damage if the constant insolvency that caused bankruptcy was caused by a grave error in management or if a member of a directing body of the legal person otherwise violated his or her obligations and caused damage to the legal person. The concept of a grave error in management has been defined in § 28 (2) of the new Bankruptcy Act[*2] (NBA). Other legal remedies include detention of the debtor, which may be applied if the debtor fails to perform his or her obligations in the bankruptcy proceedings (NBA § 89). Prohibition of business (NBA § 91), which may also be called liability under bankruptcy law, also belongs to the same subtype of liability and it may be applied during the bankruptcy proceedings after bankruptcy has been declared, as well as within three years after the end of the proceedings.

The aforementioned three types of liability — criminal liability, civil liability, and liability under bankruptcy law, are discussed below in view of their different implications depending on whether the liability pertains to causing insolvency or failure to perform the obligations arising in the bankruptcy proceedings. It is important to note that the application of one type of liability does not exclude the application of others; the types of liability may be applied severally, jointly, or all collectively.

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[1] Karistusseadustik. Passed on 6 June 2001, in force since 1 September 2002. – Riigi Teataja (the State Gazette) I 2001, 61, 364 (in Estonian).

[2] Pankrotiseadus. Passed on 22 January 2003, will enter into force as from 1 January 2004. – Riigi Teataja (the State Gazette) I 2003, 17, 95 (in Estonian). The Bankruptcy Act (BA) passed in 1992 is currently in force; it was largely amended in 1996 and entered info force together with these amendments on 1 February 1997. – Riigi Teataja (the State Gazette) I 1997, 5, 32 (in Estonian). This article mainly focuses on the new Bankruptcy Act.

2. Criminal liability of debtor

The reasons for the debtor's insolvency may vary to a great extent. It is important to identify the reason for insolvency particularly from the viewpoint of application of liability. According to NBA § 163 (5), the court shall set out in the ruling terminating the bankruptcy proceeding whether the cause of the debtor's bankruptcy was an act with criminal elements, error in management, or other fact. A great variety of conditions may serve as other circumstances; to decide on the application of liability, it should be identified whether the insolvency was caused by a criminal offence or by a grave error in management.

Where insolvency is caused by a criminal offence, the debtor is at fault in causing insolvency. One should distinguish between bankruptcy offences and offences that are committed by the debtor, but are not wilfully aimed at materially reducing the debtor's solvency or causing insolvency.[*3] According to NBA § 28 (1), the court must notify the prosecutor or police to decide on the institution of criminal proceedings if it appears in the bankruptcy proceedings that the debtor has performed an act with criminal elements in relation to the insolvency. There is thus an obligation to report bankruptcy offences and other insolvency-related offences. When speaking about the debtor's criminal liability for causing insolvency, we are speaking about bankruptcy offences only; in the case of other criminal offences, the bankruptcy of the debtor is not decisive, while the mandatory condition for conviction of a bankruptcy offence is the prior declaration of bankruptcy and intentional causing of insolvency.

Section 384 of the PC specifies causing insolvency as a bankruptcy offence. Causing of insolvency is understood as material reduction of solvency or causing oneself's insolvency through destroying, damaging, squandering or unjustified grant or assignment of assets or investment thereof in a foreign state or assumption of unjustified obligations or grant of unjustified benefits, or preferring one creditor to another while being aware that due to the existing or expected economic difficulties the acts of the debtor may violate the interests of the creditor. Such an act is punishable only if the court has declared the bankruptcy or established the insolvency of the offender or terminated the bankruptcy proceedings by abatement since the assets of the debtor are insufficient to cover the costs of the bankruptcy proceeding and it is impossible to recover or reclaim the assets (BA § 15 (1) 2); NBA § 29 (1)), let alone to satisfy the creditors' claims. This restriction is justified — otherwise, the court should decide on insolvency in a criminal proceeding, and this would be rather difficult to do when no bankruptcy proceedings have been instituted before and no interim trustee in bankruptcy has been nominated.[*4] The aforementioned offence presumes that the debtor has intentionally reduced their solvency or caused insolvency by such acts. At least indirect intent is presumed.[*5] The PC does not distinguish between whether these acts are performed before the bankruptcy proceedings or not; declaration of bankruptcy is the decisive criterion. Once bankruptcy has been declared, the debtor may incur criminal liability for acts performed both before and after the declaration of bankruptcy. Of course, it should be kept in mind that after bankruptcy has been declared, the debtor may no longer dispose of and administer the assets of the bankruptcy estate — this right transfers to the trustee in bankruptcy (NBA § 35) and thus, the possibilities of committing a criminal offence described in PC § 384 are much more limited.

The question of the subject of liability is an important problem. It has been noted in the commentaries on the Penal Code that only a natural person may serve as a subject of the criminal offence described in PC § 384.[*6] If we are to agree to such a conclusion, we would have to admit that the members of the management board of a legal person do not incur criminal liability for causing the legal person's insolvency. This is not justified at all, as the intentional causing of the insolvency of legal persons is, in reality, a much more serious problem than the insolvency of natural persons. The Estonian Penal Code should be supplemented in this respect by providing for the liability of the management board members of a legal person for causing the insolvency of the legal person. A good example is the regulation of the liability of the company officers in British law in sections 206–211 of the Insolvency Act (1986). The criminal offences of company officers are: fraud in anticipation of winding up, transactions in fraud for creditors, misconduct in course of winding up, falsifica-

[3] For example, disclosure of business secret (§ 377), unjustified use of business secrets (§ 378), failure to submit or incorrect submission of results of audit or special audit (§ 379), incorrect presentation of financial status (§ 381), submission of incorrect information to auditor or person conducting special audit (§ 382), *etc.* are criminal offences pursuant to the PC. These are offences that may be related to insolvency, but they are not bankruptcy offences.

[4] According to BA and NBA, the court institutes bankruptcy proceedings on the basis of a bankruptcy petition by the debtor or a creditor, and appoints an interim trustee in bankruptcy. One of the main tasks of the interim trustee in bankruptcy is to identify the financial status of the debtor and submit a respective report to the court. The court decides on the insolvency of the debtor primarily on the basis of the interim trustee's report.

[5] According to PC § 16 (4), a person is deemed to have committed an act with indirect intent if the person foresees the occurrence of circumstances which constitute the necessary elements of an offence and tacitly accepts that such circumstance may occur. The law distinguishes between indirect intent, deliberate intent, and direct intent.

[6] J. Sootak, P. Pikamäe (compilers). Karistusseadustik: Kommenteeritud väljaanne (Penal Code: Commented Edition). Tallinn, 2002, § 384, comm. 2.3 (in Estonian).

tion of company's books, material omissions from statements relating to the company's affairs, false representations to creditors.[*7] There is no need to provide in the Estonian Bankruptcy Act for the criminal liability of debtors who are natural persons or the management board members of debtors which are legal persons; however, PC § 384 should be amended so as to provide for the criminal liability of management board members of a debtor which is a legal person for acts aimed at material reduction of the solvency of the legal person or causing its insolvency, or a new section should be inserted in the PC, analogous to § 384, for management board members of debtors that are legal persons.

An important change in Estonian law is the obligation of management board members of legal persons to file a bankruptcy petition if it is obvious that the legal person is permanently insolvent, set out in § 36 of the General Part of the Civil Code Act[*8] (GPCCA). The provision was effected after the adoption of the PC. Criminal liability should be provided for the intentional violation of this obligation.

Besides supplementing the PC by the management board members' liability for causing the insolvency of a legal person, there is the possibility of interpreting PC § 384 so that the liability of management board members is incorporated into the liability of the debtor. Such an interpretation is made possible by the GPCCA, in which the approach to a legal person and its management board is based on the "organic theory", implying that the acts of management board members are also understood as the acts of the legal person.[*9] One could claim that if management board members perform the acts listed in PC § 384, their acts can be regarded as the acts of a debtor within the meaning of PC § 384, and they would be the subjects of criminal liability. This interpretation would be contrary to the aforementioned explanations of the commentaries on the PC, but would enable the application of criminal liability for intentional causing of the insolvency of a legal person to the management board members without amending the present wording of the law.

Another bankruptcy offence as provided in PC § 385 (1) is concealment of the assets or debts of the debtor or submission of incorrect information concerning the assets or debts or other facts which are significant for a creditor by a debtor in bankruptcy or enforcement proceedings. According to PC § 385 (2) perjury concerning the facts and information specified in subsection 1 is an additional offence. The need to set out these acts as bankruptcy offences and the related criminal liability arise from one of the main obligations of the debtor as provided in the Bankruptcy Act — the duty to provide information (BA § 36; NBA § 85). A debtor must give to the court, trustee, and bankruptcy committee the information they need in relation to the bankruptcy proceedings, particularly concerning the debtor's property, including debts, and business professional activities. Receiving information from the debtor is essential to successful and quick bankruptcy proceedings, as some information may be obtained only from the debtor. The court may require the debtor to swear in court that the information concerning property, debts and business activities is correct to the debtor's knowledge (BA § 37; NBA § 86). This requirement of the Bankruptcy Act has meaning only if backed by criminal law. However, the shortcoming of PC § 385 (2) is that it does not provide for liability for refusal to take an oath. There is no justification for the fact that perjury is a criminal offence, but refusal to take an oath is not; also, PC § 385 (1) provides for liability for submitting false data, but not for refusal to submit any data at all. A debtor who does not wish to submit truthful data yet wants to avoid criminal liability may refuse to submit any data and to take an oath, and he or she cannot be punished under PC § 385 (1) or (2).[*10] Appropriate additions should be made to PC § 385. A debtor can be punished under § 385 (1) if the debtor refuses to give information on their assets and debts, but NBA § 85 also requires the debtor to give information on their business activities, as well as other information not relating to assets and debts.

PC § 385 (1) was formalised at a time when the principal aim of criminal liability in this respect was to secure performance of the debtor's liability to give information under BA § 36 (1). After the PC, the new Bankruptcy Act was passed that provides for not only the debtor's liability but for the duty to give information on the debtor's assets to third parties who are in possession of the debtor's assets or have proprietary obligations to the debtor (NBA § 85 (2). Employees of the debtor, as well as former employees who has resigned within the previous two years before filing of the bankruptcy petition, have the same duty (NBA § 85 (3). No criminal liability has been provided for the failure of a third party or employee of the debtor to give information. In this respect, the PC needs to be taken into accordance with the new Bankruptcy Act and PC § 385 has to be supplemented.

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7 I. Fletcher. The Law of Insolvency. 3rd ed. London, 2002, pp. 699–703.

8 Tsiviilseadustiku üldosa seadus. Passed on 27 March 2002, entered into force on 1 July 2002. – Riigi Teataja (the State Gazette) I 2002, 35, 214 (in Estonian).

9 The organic theory behind the definition of a legal person's nature is particularly referred to by GPCCA § 31 (5), according to which the activities of a body of a legal person are deemed to be the activities of the legal person, and GPCCA § 34 (1), which states that the management board or a body substituting for the management board of a legal person is deemed to be the legal representative of the legal person in relations with other persons unless otherwise provided by law.

10 In such case, only a specific remedy pertaining to liability can be applied, namely detention (NBA § 89 (1) 1) and 3)), which can be insufficient and cannot substitute for criminal liability. Detention as a remedy pertaining to liability under bankruptcy law is discussed further below.

The question of the subject of liability is a problem also in the case of PC § 385. According to the commentaries on the PC[*11], only a debtor who is a natural person can be the subject of PC § 385. Such a conclusion is incorrect. According to NBA § 90, when the debtor is a legal person, the specific obligated person is determined from the circle of persons listed in NBA § 19 (1).[*12] This subsection defines the following persons to be the obliged persons in the case of a debtor which is a legal person: member of management board and supervisory board, liquidator, partner in a general partnership, general partner in a limited partnership, shareholder holding at least one-tenth of the shares, procurator, and person responsible for accounting. Therefore, all these listed are obligated pursuant to NBA § 85 (1) to inform the court, trustee, and bankruptcy committee at their request, or to take an oath in court if ordered by the court. Upon failure to perform these obligations under the circumstances listed in PC § 385, all the persons listed in NBA § 19 (1) can be the subjects of criminal liability as provided by PC § 385. Besides, one has to keep in mind the rule provided in NBA § 19 (3), according to which management and supervisory board members, liquidators, procurators and persons responsible for the accounting of a debtor which is a legal person may serve as the performers of the debtor's obligations in bankruptcy proceedings, and hence, as subjects of the liability provided by PC § 385 even if they have been released from their duties within one year prior to the commencement of bankruptcy proceedings.

3. Civil liability of debtor

The civil liability of a debtor is expressed in the obligation to compensate for damage. When speaking of this kind of liability, we can only speak about liability for causing insolvency; no civil liability is provided for violation of the debtor's obligations after the declaration of bankruptcy. Members of a directing body of a legal person have the obligation to compensate for damage pursuant to GPCCA § 37 (1): members of a directing body of a legal person[*13], who cause damage to the legal person by violation of their duties, shall be jointly and severally liable to the legal person. The liability of members of a directing body does not depend on whether the legal person has been declared bankrupt or not. However, the declaration of bankruptcy is an indicator suggesting that insolvency may have been caused by violation by the members of the directing body of their duties. According to NBA § 163 (5), the cause of bankruptcy has to be identified in the bankruptcy proceedings and if the cause lies in a grave error in management, the trustee must file a claim for compensation against the person at fault in the grave error. According to NBA § 28 (2), a grave error in management is understood as the violation by a debtor, whether a natural person or a member of the directing body of a legal person, of their obligations intentionally or due to gross negligence.[*14] Thus, the NBA provides for a narrower basis for the liability of the directing body of a legal person via a grave error in management than the GPCCA. But this does not mean that after bankruptcy has been declared, claims for compensation of damage can be filed against the directing bodies of a legal person only if their obligations were violated intentionally or due to gross negligence. A claim for compensation may also be filed after the declaration of bankruptcy on the basis of GPCCA § 37 (1), which does not presume intention or gross negligence. According to GPCCA § 35, the members of a directing body of a legal person shall perform their obligations arising from law or the articles of association with the diligence normally expected from a member of a directing body and shall be loyal to the legal person. Failure to exercise "the diligence normally expected" does not necessarily imply intention or gross negligence.

If we conclude that besides the grave error in management as provided by NBA § 28 (2), a claim for compensation of damage may be filed on general bases under the GPCCA, the question may arise of the need to define a grave error in management as the basis for civil liability in the Bankruptcy Act at all, as the general bases for a legal person's liability set out in GPCCA §§ 35 and 37 (1) already include a grave error in management. The need to define the concept of a grave error in management in NBA § 28 (2) mainly

[11] Karistuseadustik: Kommenteeritud väljaanne (Note 6), § 385, comm. 4.

[12] The currently applicable Bankruptcy Act relies on the same principles, see BA §§ 12 (4) and 40.

[13] According to GPCCA § 31 (2), the directing bodies of a legal person are: management board, and if the legal person has a supervisory board, then the supervisory board is also its directing body.

[14] The new Bankruptcy Act no longer provides a list of possible grave errors in management, but has replaced it by the general clause contained in NBA § 28 (2). Subsection 60 (3) of the currently applicable BA provides a sample list of grave errors in management, such as use of the property of the legal person in one's own interests, entry into transactions on behalf of the legal person in one's own interests, concealment of property of the legal person, an incorrect indication of the value of property on the balance sheet, unreasonable increase in the obligations of the legal person, etc. The bases for the civil liability of persons responsible for a legal person are likewise stipulated in fairly great detail in the British 1986 Insolvency Act and the Scottish 1985 Bankruptcy Act (see *e.g.* J. Fletcher (Note 7), pp. 703–715 and D. W. McKenzie Svene. Insolvency Law in Scotland. Edinburgh, 1999, pp. 321–332). By providing only the concept of a grave error in management in the new BA as the basis for the civil liability of members of directing bodies of a legal person, the legislator has wished to be more flexible in defining the bases for liability, without limiting it to a list of specific cases. It is up to judicial practice to determine what consititutes a grave error in management in each case.

arises from the fact that in the case of identification of a grave error in management, the trustee in bankruptcy must, under NBA § 163 (5), file a claim for compensation of damage against the members of the directing body of the legal person who are at fault in the error. The trustee may do likewise, but is not directly obliged to do so, under GPCCA §§ 35 and 37 (1). As in the case of a grave error in management, the trustee is required to file a claim for compensation of damage against a member of the directing body of the legal person but it is questionable whether omission of the list of situations typical of grave errors in management, which has been provided in § 60 (3) of the currently applicable BA and in the laws of many other countries, was justified.*[15] The trustee is liable for failure to perform their own duties; hence the trustee must have a clear possibility to decide when a claim for compensation of damage should be filed. It is therefore advisable that the law provide a sample list of circumstances that would be understood as grave errors in management; the list should be non-exhaustive for purposes of flexibility of regulation. Such a list would also have a preventive effect on the members of directing bodies of legal persons, for whom it would serve as a list of prohibited acts.

The problem concerns giving substance to the grave error in management of a debtor who is a natural person as provided in NBA § 28 (2) and finding its legal meaning in the bankruptcy proceeding. A grave error in management made by a natural person may, for example, lie in the wrongful violation of accounting obligations, *etc*. The grave errors of a natural person are particularly related to the management of a company owned by such natural person. If a debtor who is a natural person has made grave errors in management, however, the trustee cannot file a claim for compensation of damage against the debtor like the trustee must do in the case of a member of the directing body of a legal person. The main difference is that the members of a directing body of a legal person are independent persons in respect of the debtor; they are subjects of independent liability, their assets are separate of those of the debtor, and the bankruptcy estate can be increased by filing a claim for compensation of damage against their assets. Where the debtor is a natural person, all the assets owned by that natural person which can be the subject of the claim are already a part of the bankruptcy estate by virtue of the bankruptcy order, and so are the assets acquired by the debtor after the declaration of bankruptcy (NBA § 108). Also, the natural person is liable with his or her own assets for any claims still unsatisfied after the bankruptcy proceedings. Therefore, it would be meaningless to file a claim for compensation of damage against a debtor who is a natural person on the grounds of grave errors in management, as the natural person is already liable to the creditors with all of the debtor's assets, and is also liable for his or her own insolvency regardless of the reason. Neither would the Bankruptcy Act allow for such claims, as only the claims that existed before the bankruptcy (NBA § 93 (1)) or which arose after the declaration of bankruptcy, but can be regarded as mass liability under NBA § 148 (1) can be filed against the debtor. In the case observed, the claim would not belong to either of these groups. Having reached the conclusion that a claim for compensation of damage arising from a grave error in management cannot be filed against a debtor who is a natural person, the question arises of the legal implication of defining a grave error in management made by a debtor who is a natural person in NBA § 28 (2) — is it necessary or not?

A grave error in management made by a debtor who is a natural person has a different legal implication than the errors made by members of directing bodies of legal persons. The new feature in Estonian bankruptcy law is the regulation of exempting a debtor who is a natural person from obligations (NBA Chapter 11)*[16], according to which a debtor can be exempted of debts within three years after the end of the bankruptcy proceedings if the debtor has met his or her obligations to the creditors during this time as provided in the Bankruptcy Act. The court decides on the institution of proceedings to exempt a debtor who is a natural person from debts. Subsection 171 (2) of the NBA provides for the circumstances under which the court will not institute such proceedings. Several of these circumstances may be understood as grave errors in management. For example, the court does not institute proceedings for exemption of the debtor from obligations under NBA § 171 (2) 2) when the debtor has, within the three years before the bankruptcy proceedings or after that, intentionally or due to gross negligence, submitted incorrect or incomplete data on his or her economic situation for obtaining support or other benefits from the state, local government or foundation, or to evade taxes.

The grave errors in management of a debtor who is a natural person may also have another meaning in the bankruptcy proceedings. For example, a debtor who is a legal person must not engage in enterprise, be a member of a directing body of a legal person, or a liquidator or procurator of a legal person as from the declaration of bankruptcy until the end of bankruptcy proceedings without the permission of the court (NBA § 91 (1)). Upon granting permission, the court may take considerable account of the debtor's former acts; if the debtor has made grave errors in management, the court will probably not trust the debtor and will not allow him or her to engage in enterprise or be a member of the directing body of a legal person.

Thus, the grave errors in management of a debtor who is a natural person do not serve as the basis for his or her civil liability for insolvency, but may have a legal implication under the Bankruptcy Act during and after the bankruptcy proceedings.

[15] *Ibid.*

[16] The main example was the German Insolvency Statute of 5 October 1994. – Bundesgesetzblatt 1994 I 2866, §§ 286–303.

4. Debtor's liability under bankruptcy law

Liability under bankruptcy law can be understood as the application of the legal remedies set out in the Bankruptcy Act that can be applied only in bankruptcy proceedings. Particularly, the legal remedies in which liability under bankruptcy law is expressed are detention and prohibition on business. Both remedies can be applied only after the declaration of bankruptcy and their substance arises from the Bankruptcy Act.*[17] The aim of detention as a legal remedy and a means of imposing liability is to ensure the performance of the debtor's obligations in bankruptcy proceedings; the bases and procedure for application of detention are set out in NBA § 89.*[18] Detention may be applied particularly when the debtor fails to perform the duty to give information, to participate in the bankruptcy proceedings, or to take an oath, as well as if the debtor violates the prohibition on leaving his or her residence or disposal of the bankruptcy estate. The detention period may last up to three months. Detention is mainly aimed at compulsory performance of obligations; the debtor must be released if he or she performs the debtor's obligations during detention, *e.g.* gives the required information and takes an oath. Where detention is applied for violation of prohibitions, the court may release the debtor from detention before the end of the three-month term, if there is reason to believe that the debtor will not continue the violations and his or her release does not impede further bankruptcy proceedings. Where the debtor is a legal person, the court decides which one of the persons specified in NBA § 19 (1) and (3) is to be detained; the person must have violated the obligations or prohibitions imposed on him or her before that.

Prohibition on business is the remedy pertaining to liability for insolvency under bankruptcy law. The prohibition on business as provided in NBA § 91 (1) applies automatically to a natural person after he or she has been declared bankrupt — the person may not engage in enterprise, be a member of a directing body, liquidator, or procurator of a legal person without the permission of the court. Automatic application of the prohibition on business presumes that the debtor must be liable for his or her bankruptcy. If the court finds that the debtor need not be liable for causing his or her own insolvency, as the insolvency was due to other reasons or there are other weighty arguments, the court may release the debtor from the prohibition on business in full or in part.

In the case of a debtor which is a legal person, the court may decide to which ones of the persons listed in NBA § 19 (1) and (3) to apply the prohibition on business. It would be imaginable that the prohibition on business should apply to the management board members of a legal person automatically upon declaration of bankruptcy as in the case of natural persons, and the court could decide on whom to release from such liability. The management board members or former management board members should be liable for the insolvency of a legal person in the first place.

Prohibition on business can be applied to a debtor by a decision of the court within three months after the end of bankruptcy proceedings, if the debtor has been convicted of a criminal offence relating to bankruptcy or execution procedure, a tax offence, or an offence relating to a company as provided by law (NBA § 91 (3)). A natural person can be the subject of all these offences. A legal person can be the subject of certain offences*[19], particularly tax offences, such as fraudulent miscalculation of tax (PC § 386) and failure to withhold tax (PC § 389). If a debtor which is a legal person has been convicted of any of these criminal offences, the court may apply prohibition on business after the end of the bankruptcy proceedings to the persons listed in NBA § 19 (1) and (3). If any of these persons has been convicted of any of the aforementioned offences, but the legal person has not, the prohibition on business cannot be applied to the person. This fact is a shortcoming of the wording of NBA § 91 (3); the provision should be amended to the effect that the prohibition on business could be applied to the persons listed in NBA § 19 (1) and (3) after the end of the bankruptcy proceedings if the debtor which is a legal person and the person specified in BNA § 19 (1) and (3) have been convicted of the offence referred to in this provision.

[17] The compliance of detention and prohibition on business as a means of imposing liability under bankruptcy law has been discussed in: P. Varul. On Effect of Constitution on Bankruptcy Law. – Juridica International, 2002, vol. 7, pp. 153–156.

[18] Bankruptcy laws of many other countries also provide for the application of detention. See *e.g.* the Swedish Bankruptcy Act (1987: 672), chapter 6, §§ 9–12.

[19] According to PC § 14 (2), prosecution of a legal person does not preclude prosecution of the natural person who committed the offence.