

Denmark

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SECURITY AND PRIORITIES

1. What are the most common forms of security granted in relation to immovable and movable property? Are any specific formalities required for their creation and perfection (that is, made valid and enforceable)?

Immovable property

A mortgage creates security over real property. Danish mortgages must be granted for a specific amount, which will be the maximum amount secured by the relevant mortgage.

A mortgage over real property that is used and furnished for commercial purposes automatically grants the mortgagee (creditor) a charge over operating machinery, equipment, fixtures and fittings, provided that the mortgagor owns these items.

There are three types of Danish mortgage:

- **Ordinary mortgage.** A debtor issues a mortgage to the creditor, names the creditor in the mortgage and the mortgage is registered with the Land Registry (*Tingbogen*). An ordinary mortgage details the actual terms of the loan. The secured amount is reduced in accordance with the scheduled repayments. An ordinary mortgage may be a negotiable document. In this context, “negotiable document” means that a bona fide assignee (that is, an assignee acting in good faith) has a special preservation against objections from the debtor.
- **Letter of indemnity.** A letter of indemnity is also issued to a specific secured creditor named in the letter, and is registered with the Land Registry. A letter of indemnity is granted for a specific amount. The secured amount cannot be reduced and the letter can be used as security over obligations contained in a credit agreement which is not specified in the letter. A letter of indemnity is not a negotiable document.
- **Owner’s mortgage.** An owner’s mortgage is issued by the owner of immovable property to the owner himself. Subsequently the owner (debtor) can pledge the owner’s mortgage to the secured creditor under a separate pledge agreement. Therefore, the name of the secured creditor will not necessarily appear directly in the applicable register. However, the name of the secured creditor or its representative will often appear for notice purposes. An owner’s mortgage is granted for a specific amount, which is not reduced and may be used as security over obligations in a credit agreement which is not specified in the owner’s mortgage. An owner’s mortgage is a negotiable document.

It is possible to register a negative pledge against real property in the Land Registry. This prevents other creditors and the debtor from registering a mortgage against the property without the approval of the beneficiary of the negative pledge. A negative pledge will not prevent attachments being registered against the property.

A mortgage (whether an ordinary mortgage, a letter of indemnity or an owner’s mortgage) over real property is perfected by registration in the Land Registry. In addition, if the mortgage is a negotiable document, the mortgagee (creditor) must take possession of the original mortgage document for it to be duly perfected.

Registration of mortgages over real property is subject to a registration fee of 1.5% of the secured amount plus a filing fee of DKK1,400 (about US\$188).

The registration process of mortgages and other rights over real property has been electronic since September 2009, but the system has been subject to various problems, due to manual handling of registrations which the system could not process. It is expected that the electronic registration system will be up and running at its expected capacity during the course of 2010, but until then mortgagees should anticipate some timing issues with respect to perfecting security over real property if their registrations are subject to manual handling.

Movable property

The form of security available depends on the specific type of asset:

- **Stock and inventory.** The following security is possible over stock and inventory:
 - **Floating charge.** Floating charges were introduced into Danish law on 1 January 2006. A floating charge is created by way of mortgage.

Floating charges can be granted as:

- general floating charges that cover company assets (for example, stock, inventory and operation equipment) from time to time; or
- receivables floating charges that only cover the company’s trade receivables (*see below, Receivables*).

As a general rule, floating charges include the mortgagor’s (debtor’s) future possessions. They do not cover obtainments which arise after:

- the date of a bankruptcy order;
- notification of suspension of payments to the Bankruptcy Court (*Skifteretten*); or
- the start of compulsory composition.

See *Question 6, Bankruptcy and Compulsory composition proceedings*.

Floating charges are perfected by registration of a mortgage in the Personal Registry (*Personbogen*). There is a registration fee of 1.5% of the secured amount plus a filing fee of DKK 1,400 (about US\$188);

- **Mortgage.** A mortgage cannot cover collections of uniform assets and each asset must thus be identified in the mortgage. Therefore, a mortgage over stock or inventory is often impractical and rarely used;
- **Pledge.** Security over inventory or changing stock by way of pledge is not commonly used in Denmark, because perfection of this type of pledge requires that the pledgor (debtor) is prevented from freely disposing of the assets.
- **Shares.** Shares can be pledged. The share pledge agreement should regulate whether voting and dividend rights are included under the pledge.

To perfect a pledge over shares, the pledgee (creditor) must notify to the company in which the pledgor (debtor) holds the shares, and the company will then register the pledge in the company's shareholders' register.

If the shares are registered with the Danish Securities Centre, the pledge must be notified and registered with this body.

If the shares are represented by share certificates, the original certificates must be delivered to the pledgee (creditor) or its representative.

- **Receivables.** The following security is possible over receivables:
 - **Floating charge.** Receivables can be subject to a floating charge (see above, *Movable property: Stock and Inventory, Floating charge*);
 - **Assignment.** A debtor (assignee) can assign receivables separately. An assignment is perfected by notification to the person or company which is the debtor under the assigned receivables. There are no formal requirements in connection with the notification, but it should:
 - be in writing;
 - clearly identify the receivables that are assigned; and
 - be confirmed by the debtor in writing.

Security assignments are not subject to registration fees or stamp duty.

- **Bank accounts.** A debtor can pledge bank accounts. To perfect a pledge over a bank account, the pledgee must notify the account bank of the pledge. An effective pledge of bank deposits requires that the pledgor be deprived of control over the bank account. There are no registration fees or stamp duty.

- **Intellectual property rights and goodwill.** Security over intellectual property rights and goodwill is created by way of a mortgage, and, in the case of an owner's mortgage, a pledge agreement pledging the mortgage in favour of the pledgee (creditor) (see above, *Immovable property: Owner's mortgage*).

Each pledged intellectual property right must be identified in the mortgage. To perfect the mortgage, the mortgagee (creditor) must register the mortgage in the Personal Registry. The registration must be renewed every ten years. Registration is subject to a registration fee of 1.5% of the secured amount and a filing fee of DKK1,400.

If the mortgage is an owner's mortgage, the mortgage must be removed from the mortgagor's control.

In addition, if the pledged intellectual property rights are registered with the Danish Patent and Trade Mark Office, the mortgagee must notify this body of the mortgage.

Some intellectual property rights (for example, goodwill, domain names, patents, copyrights, trade marks and designs, but not EU designs and EU trade marks) are automatically included in a general floating charge (see above, *Movable property: Stock and Inventory, Floating charge*), unless they are specified as excluded from the floating charge.

- **Vessels.** Security interests in commercial vessels above five tonnes are created by way of a mortgage. Vessel mortgages are perfected by:
 - registration of the mortgage in the Danish Ship Register or the Danish International Register of Shipping; and
 - if the mortgage is an owner's mortgage, removal of the mortgage from the mortgagor's control.

There is a registration fee in the amount of 0.1% of the secured amount.

The types of security listed above are not exhaustive.

2. Where do creditors and shareholders rank on the insolvency of a company?

Unsecured creditors

Ranking of the unsecured creditors is governed by sections 93 to 98 of the Danish Bankruptcy Act (*Konkursloven*). Unsecured creditors rank as follows:

- **Pre-preferential creditors.** Before any debts are paid, pre-preferential claims, for example the cost and expenses of the administration of the estate, are paid in equal proportions.
- **Preferential creditors.** After payment of pre-preferential claims, preferential claims are paid in equal proportions. Preferential claims include reasonable costs and expenses incurred to provide a collective arrangement of the debtor's financial affairs by a reorganisation, dissolution process, composition or similar schemes.

- **Privileged creditors.** Privileged claims (for example, employees' salaries) rank after preferential claims.
- **Ordinary creditors.** Ordinary claims are, for example, unsecured loans and value added tax. These claims are subordinated to privileged claims.

Secured creditors

Secured creditors that have valid and enforceable security for their claims do not form part of the statutory ranking, as they are secured. If the security does not cover their claims, they rank as ordinary creditors with respect to the unsecured part of their claim.

Shareholders

Shareholders rank last and will only receive dividends if all other creditors are paid in full.

3. Are there any mechanisms used by trade creditors to secure unpaid debts?

Trade creditors can consider using the following mechanisms to secure unpaid debts:

- **Retention of title.** Trade creditors can secure unpaid debts by retention of title (ownership). This way, the creditor maintains ownership of the secured asset until the debtor has paid the purchase price. The buyer is not entitled to resell goods that are subject to retention of title. Retention of title has no effect if the delivered goods are sold to a debtor for the purpose of resale.

A retention of title is valid if:

- the parties have entered into a retention of title agreement before or (at the latest) on delivery of the goods; and
- the goods in question can be adequately identified.

If the buyer is a consumer and the purchase is a consumer purchase, special rules apply according to the Danish Credit Agreement Act (*Kredittafaleloven*).

- **Consignment.** The purpose of credit consignment, as opposed to retention of title, is to entitle the buyer to resell the goods without tying funds into the stock. The trade creditor has retention of title to the goods.

Consignment is valid if:

- the parties have entered into a consignment agreement before or (at the latest) on delivery of the goods;
- the consignee (debtor) keeps accounts of the stock;
- the settlement and sale of the goods occur concurrently; and
- the consignor (creditor) controls the stock and settlement.

The control and accounting requirements imply a requirement to keep the consigned goods separate from other goods.

4. Are there any procedures (other than the formal rescue or insolvency procedures described in Question 6) that can be invoked by creditors to recover their debt?

To recover a debt, a creditor can take enforcement action.

To initiate an enforcement action, a creditor must normally obtain a court judgment. Therefore, it must start legal proceedings against the debtor. Once the creditor has obtained a court judgment which confirms the creditor's claim, it can initiate enforcement proceedings by sending an application to the local enforcement authority (*fogedretten*) together with the court judgment.

This process can take considerable time depending on the nature of the case and the workload of both the local court and the local enforcement authority.

A creditor is not required to obtain a court judgment to initiate enforcement proceedings if it possesses other enforcement grounds, for example:

- A settlement between the creditor and the debtor, which is entered into under legal proceedings.
- An out-of-court settlement between the creditor and the debtor which explicitly states that the settlement can serve as the grounds of enforcement.
- A debt instrument which explicitly states that it can serve as the grounds of enforcement.
- A letter of indemnity.
- An owner's mortgage.

During enforcement proceedings the creditor can take security over the debtor's assets and enter into a payment settlement with the debtor. Afterwards, the secured creditor can initiate a forced sale of these assets by sending a demand to the enforcement authority.

STATE SUPPORT

5. Please give brief details of the availability of state support for distressed businesses (if any).

Due to the financial crisis, the frozen money market and the collapse of several Danish banks, the Danish Parliament has passed the following rescue packages for the financial sector:

- **Bank package I.** This package, created in October 2008, contains a guarantee scheme and establishes a state owned "winding-up company" (known as *Finansiel Stabilitet A/S*) with the purpose of winding up activities of distressed financial institutions.
- **Bank Package II.** This package, created in January 2009, contains a credit facility whereby solvent Danish banks and mortgage credit institutions can consolidate their capital through loans from the Danish central government.

RESCUE AND INSOLVENCY PROCEDURES

6. Please briefly describe rescue and insolvency procedures available in your jurisdiction. In each case, please state:

- The objective of the procedure and, where relevant, prospects for recovery.
- How it is initiated, when, by whom and the companies it can be applied to.
- Substantive tests that apply (where relevant).
- How long it takes.
- The consents and approvals required.
- The effect on the company, shareholders and creditors.
- How the procedure is formally concluded.

Bankruptcy

- **Objective.** The aim of bankruptcy proceedings is to liquidate the debtor's assets and distribute the proceeds to the creditors in accordance with the ranking of the creditors stipulated in the Bankruptcy Act (see *Question 2*).
- **How, when, by whom and to which companies.** A creditor or the debtor can initiate bankruptcy proceedings by filing a bankruptcy petition with the Bankruptcy Court.

The petitioner must provide security for the costs associated with handling the bankruptcy estate, unless the petitioner is an employee, in which case the central government pays any costs which the debtor's assets do not cover. The Bankruptcy Court will decide on the exact amount of security on a case-by-case basis. If the estate has no assets, the petitioner will have to pay the costs. Normally, it must provide DKK30,000 (about US\$5,583) as security.

Bankruptcy proceedings can apply to natural persons and legal entities if they are domiciled in Denmark, or carry out business from a location in Denmark.

- **Substantive tests.** The debtor must be insolvent. A debtor is insolvent if it cannot fulfil its obligations as they become due, unless this inability to pay is temporary.
- **How long.** There is no set time limit. Usually, bankruptcy proceedings end within one or two years after the date of the bankruptcy order, or after several years in the case of larger bankrupt estates. If the estate has no assets, the proceedings are concluded faster, typically within six months.
- **Consents and approvals.** The Bankruptcy Court decides whether a bankruptcy order is issued. The consent of the creditors or the debtor is not required.
- **Effect.** Once bankruptcy proceedings begin, a bankruptcy trustee is:
 - appointed by the Bankruptcy Court; or
 - elected by the unsecured creditors that are likely to receive dividends. Secured creditors and creditors that are unlikely to receive dividends are allowed to recommend a trustee.

In practice, a bankruptcy trustee is always an attorney-at-law. He:

- acts on behalf of the bankrupt estate, in the interest of all creditors;
- replaces the debtor's management, who no longer have authority to act on behalf of the debtor;
- liquidates the debtor's assets; and
- distributes the resulting dividends to the creditors in accordance with the ranking of the creditors (see *Question 2*).

The trustee can take claw-back actions (see *Question 9*).

There is a stay on individual enforcement actions during the bankruptcy proceedings.

- **Conclusion.** The bankruptcy proceedings end when:
 - the estate's assets have been liquidated;
 - the trustee has drafted the estate's final accounts;
 - the Bankruptcy Court has confirmed the final accounts at a court meeting; and
 - the proceeds have been distributed to the creditors.

Suspension of payments

- **Objective.** A suspension of payments is aimed at supporting attempts to avoid a debtor's bankruptcy, in favour of a collective agreement with its creditors or investigating options for restructuring the business, or both.
- **How, when, by whom and to which companies.** As the name of the procedure indicates, it is a suspension of the debtor company's payments, and is not in itself an administration of the company's estate.

A suspension of payments can only be initiated by the debtor filing a suspension of payment notice with the Bankruptcy Court.

Natural persons and legal entities that are domiciled in Denmark, or carry out business from a location in Denmark, can initiate suspension of payments.

- **Substantive tests.** There are no substantive tests. It is the debtor's decision to file the notification with the Bankruptcy Court.
- **How long.** The Bankruptcy Court decides whether to maintain a suspension of payments. If payments are suspended, the term will be three months. If the creditors do not reach an agreement before expiry of the three-month period, the period may be extended for up to three months at a time. Such extensions are possible if the Bankruptcy Court finds, to its satisfaction, that an agreement has been actively pursued and that due to particular circumstances, the previous period was not long enough to complete all necessary arrangements. However, the total period of suspension of payments cannot exceed one year.
- **Consents and approvals.** The consent of the creditors is not required. It is only the debtor who can file notification of suspension of payments.

- **Effect.** There is no administration of the debtor's estate, and the debtor remains in possession of its assets. The effects are as follows:
 - immediately on receipt of a notice of suspension of payments, the Bankruptcy Court appoints a supervisor (usually an attorney-at-law) to safeguard the interest of the creditors;
 - the supervisor must:
 - approve all material decisions made by the debtor, including any decision to keep the business running during the suspension of payments; and
 - attempt to obtain a joint agreement with the creditors regarding the restructuring of the debtor's business.
 - the debtor's payments are suspended;
 - the suspension of payment prevents (unsecured) creditors from taking individual enforcement actions against the debtor;
 - the suspension of payments does not prevent the enforcement of mortgages or other security rights which have been duly perfected, but the Bankruptcy Court may, at the request of the debtor and supervisor, impose a ban on enforcement of mortgaged assets if it deems such a ban necessary to fulfil the purpose of the suspension of payments; and
 - if the debtor becomes bankrupt, all debts which the supervisor approved (either explicitly or indirectly following his decision to keep the business running during the suspension of payments) are treated as preferential claims (see *Question 2*).
- **Conclusion.** The procedure formally ends when the suspension of payments expires. If an agreement with the creditors and/or a restructuring of the debtor company has not taken place and the suspension of payments expires, the debtor will not automatically be subject to bankruptcy proceedings. Creditors will have to actively file for bankruptcy after the expiry of the suspension of payments (see above, *Bankruptcy: How, when, by whom and to which companies*).

Out-of-court suspension of payments

- **Objective.** An alternative to a suspension of payments (in court) is an out-of-court suspension of payments. The aim is the same as that of an in-court suspension of payments, that is, to ensure a joint agreement with the creditors to avoid bankruptcy, or sell the business before bankruptcy occurs (see above, *Suspension of payments: Objective*).
- **How, when, by whom and to which companies.** The debtor suspends its payments without involving the Bankruptcy Court. Any natural person or legal entity can carry out an out-of-court suspension of payments.

Usually, the reason for choosing an out-of-court suspension of payments is to avoid the negative public attention that usually follows after filing a notification of suspension of payments with the Bankruptcy Court, and which can sometimes reinforce the poor financial situation of the debtor.

- **Substantive tests.** The debtor decides at its own discretion to suspend payments out of court. Therefore, there are no conditions or requirements.
- **How long.** An out-of-court suspension of payments is not covered by the Bankruptcy Act or other regulations, so there is no limit with respect to its duration. However, a creditor can file a bankruptcy petition during the debtor's out-of-court suspension of payments at any time.
- **Consents and approvals.** The debtor makes the decision to suspend payments out of court. If the debtor is a company, it will be the relevant management members who decide to do so.
- **Effect.** As the procedure is informal and does not involve the court, there are as such no effects. The following key points should be noted:
 - the debtor company carries on its business as usual;
 - no supervisor is appointed;
 - due to the responsibility connected with the procedure, directors in charge of a company that opts to suspend its payments out of court must thoroughly consider the decision and involve advisers to ensure that the procedure is handled properly;
 - in judicial proceedings which involve an out-of-court suspension of payments, the debtor's advisers, board members and management will be judged according to a stricter standard with respect to liability for damages. For the same reason, in practice, the directors and advisers will follow the rules for court-run suspension of payments to the fullest extent possible. This is also to avoid transactions which unduly prefer one creditor at the expense of others. See *Question 8*.
- **Conclusion.** This procedure is often concluded by the debtor giving notice of suspension of payments to the Bankruptcy Court, or filing a petition for bankruptcy, if an agreement with the creditors has not been reached within a reasonable time frame.

Compulsory composition proceedings

- **Objective.** The aim of compulsory proceedings is to find a solution to a debtor's poor financial situation by:
 - a percentage reduction of the ordinary debt (ordinary composition);
 - the distribution of the proceeds from liquidation of debtor's assets to the creditors, to discharge the debt that remains uncovered (liquidation composition);
 - a interest-free postponement of payments (moratorium); or
 - a combination of an ordinary composition, a liquidation composition and a moratorium.
- **How, when, by whom and to which companies.** Compulsory composition proceedings can only be initiated by the debtor. The debtor does so by filing with the Bankruptcy Court:
 - a written petition;
 - details of the proposed compulsory composition;

- statements of accession from at least 40% of the creditors (by number of creditors and the value of their claim);
- a statement of assets and liabilities and so on, drafted by official experts; and
- a statement from the debtor in which it declares that it has given up all of its assets.

To obtain the official experts' statement, the debtor must contact the official experts, who are appointed by the National Court Administration (*Domstolsstyrelsen*).

Compulsory composition proceedings can apply to natural persons and legal entities if they are domiciled in Denmark, or carry out business from a location in Denmark. However, legal entities that have owners with personal liability for the entity's obligations (for example a general partnership (*interessentselskab*)) cannot be subject to compulsory composition proceedings.

- **Substantive tests.** The Bankruptcy Court can refuse to start compulsory composition proceedings if:
 - the debtor does not file the requisite information; or
 - it considers that there is no reasonable expectation that the compulsory composition will be approved by the majority of the creditors (see below, *Consents and approvals*).
- **How long.** There is no time limit for compulsory composition proceedings. Usually, the process is very time-consuming. For this reason, the debtor often suspends its payments during the period before filing a petition for opening a compulsory composition.
- **Consents and approvals.** To initiate compulsory composition proceedings, the debtor must obtain accession statements to the initial proposed composition from 40% of the creditors (see above, *How, when, by whom and to which companies*).

A statutory majority of the creditors must approve the final compulsory composition at a court hearing. The required majority varies between 60% and 75% (by the number of creditors and the value of their claims) depending on the specific composition terms:

- composition by moratorium requires a majority of 60%;
- liquidation composition requires a majority of 75% (however, under certain circumstances, depending on the proposed composition terms, a majority of 60% is sufficient);
- ordinary composition requires a majority of 60% to 75% depending on the content of the proposed composition terms.

The affected creditors are bound by the compulsory composition if it has been adopted by the required majority of creditors and approved by the Bankruptcy Court.

The Bankruptcy Court cannot approve the compulsory composition if:

- it pays less than 10% of the creditors' original claims, unless the creditors affected by the composition consent to a lesser amount; or
- its content is unlawful.

- **Effect.** The Bankruptcy Court's opening of compulsory composition proceedings can be subject to appointment of a supervisor who then supervises the proceedings handled by the debtor.

If the compulsory composition is adopted by the relevant majority of the creditors and confirmed by the Bankruptcy Court, the composition affects the debtor's debt to unsecured creditors. It will not affect:

- secured claims; or
- any debt that would have priority in bankruptcy (see *Question 2*).

All the affected creditors are bound by the adopted composition. This means that, for example, a creditor must accept that his claim is reduced.

- **Conclusion.** The proceedings end once the proposal for compulsory composition has been adopted by the relevant majority of the creditors and approved by the Bankruptcy Court, or if the compulsory composition is not adopted and approved.

The Bankruptcy Court's decision can be appealed to the High Court (*Landsretten*). The time limit for appeal is two weeks.

The proceedings are considered as finally closed when the deadline for appealing the Bankruptcy Court's decision is exceeded or, in the event of an appeal, when the High Court has ruled on the subject.

Voluntary composition

- **Objective.** As the name suggests, the process is a voluntary composition made in agreement with creditors. The aim of voluntary composition can be the same as that of compulsory composition (see above, *Compulsory composition proceedings: Objective*).
- **How, when, by whom and to which companies.** The debtor agrees with its creditors to carry out a voluntary composition. Negotiations concerning a voluntary composition usually take place during suspension of payments (in or out of court), and these arrangements can often be agreed on a faster and more informal basis than compulsory compositions.
- **Substantive tests.** As the procedure takes place on a voluntary basis, there are no substantive tests. The process is unregulated and informal.
- **How long.** The duration of the informal procedure depends on how fast an agreement is reached, if any.
- **Consents and approvals.** Obviously, all the creditors must approve the composition if all are to be bound by it.
- **Effect.** Only creditors that have accepted the voluntary composition are bound by it.
- **Conclusion.** The informal procedure ends either by signing an agreement concerning the composition or by accepting that it was not possible to enter into a voluntary composition.

7. What type of stakeholder has the most significant role in the outcome of the restructuring?

Generally, the financial creditors (for example banks) have the most significant role in restructurings, whether completed in or out of court.

Most of the larger restructurings recently completed in Denmark have been within the real estate sector and on an out-of-court basis. The majority of these restructurings have involved a large number of banks and a balance sheet mostly consisting of financial debt.

Shareholders of distressed companies have only had limited influence over restructuring processes which have been directed by the banks. Only when new equity has been injected (from existing shareholders, junior banks or the like) have the roles of the senior financing banks in the restructurings been moderated. The availability of such new equity has been limited.

LIABILITY AND TRANSACTIONS

8. Are there any circumstances in which a director, parent company (domestic or foreign) or other party can be held liable for the debts of an insolvent company?

If a company is unable to fulfil all of its obligations, its directors and advisers, in particular, are at risk of incurring personal liability. This liability can include both civil and criminal liability under Danish law. The latter is usually restricted to cases of gross misconduct.

According to the Companies Act (governing limited liability companies), management must take action if the company's equity is less than 50% of the its nominal share capital, or less than DKK62,500 (about US\$11,631). The required action depends on the company's particular situation. In some cases, management may determine that the equity will be restored concurrently with the company's activities and earnings and therefore, they will not propose an increase of the company's nominal share capital or its liquidation. This decision rests in the management's discretion and must be carried out in a good manner given the circumstances of the company at that point in time.

In addition, at all times, the directors must know whether the company's capital resources are sound, taking into account the operation of the company, and if not, take action as required.

If the directors cause a person or company to grant credit to a company where the directors know (or should have known) that the company will not be able to fulfil its obligations, the directors can, as a general rule, be held personally liable. Whether personal liability will be incurred depends on the specific situation and circumstances. The liability can be joint or individual.

In the restructuring process it is important that creditors are not given preferential treatment at the expense of other creditors (the principle of equal treatment). Such transactions can result in legal liability. This explains why many parties apply the principles of the Bankruptcy Act to cases involving out-of-court suspension of payments or other informal methods of restructuring.

9. Can transactions that are effected by a company that subsequently becomes insolvent be set aside?

Claw-back actions are governed by the Bankruptcy Act. The primary aim is to set aside certain transactions carried out during a specific time period leading up to the bankruptcy.

The rules regarding claw-back actions are applicable in cases of:

- Bankruptcy proceedings.
- Compulsory composition proceedings approved by the Bankruptcy Court.

The rules are not applicable in cases involving a suspension of payments.

The calculation of the relevant period is based on the reference date. The reference date is one of the following dates:

- The date on which the petition for bankruptcy was filed.
- The date on which the petition for compulsory composition was filed.
- The date on which the petition for suspension of payments was filed, if the petition for bankruptcy is filed within three weeks after the suspension of payments has ceased.

Regardless of fraudulent intent or knowledge of insolvency, any of the following transactions will be set aside as null and void:

- Dubious payments made within three months before the reference date (for example, payments which have materially damaged the debtor's ability to meet its payments).
- Granting of security in respect of old debt if the security is not duly perfected within three months before the reference date.
- Execution levied against the debtor's assets within three months before the reference date (for example, if the creditor, through enforcement actions, obtains seizure of property in the debtor's real property or car).
- Unreasonable remuneration to closely related parties (for example, an affiliate) within six months before the reference date.
- Gifts made within six months before the reference date.

The list is not exhaustive, and other claw-back actions are possible.

In addition to the "objective" claw-back action rules listed above, there is also a general "subjective" claw-back action rule. Under this subjective rule, a transaction can be null and void if it unduly prefers one creditor at the expense of the other creditors, provided that the debtor was insolvent at the time of the transaction and that the third party did not act in good faith concerning these circumstances.

No time limit applies to transactions caught by the subjective claw-back rule. However, normally the rule does not apply to transactions carried out more than 18 to 24 months before the reference date.

As a general rule, the bankruptcy estate must initiate legal proceedings for claw-back actions within 12 months after the date of the bankruptcy order.

10. Please set out any conditions in which a company can continue to carry on business during insolvency or rescue proceedings. In particular:

- Who has the authority to supervise or carry on the company's business?
- What restrictions apply?

Bankruptcy

Simultaneously with the appointment of a bankruptcy trustee, the trustee takes over the business of the debtor company. The trustee then decides how to proceed (for example, the trustee decides whether to continue the business of the debtor (in whole or in part) or close the business entirely). As such, there are no restrictions.

The trustee must:

- Act in the interest of the estate's creditors.
- Assess how the assets of the debtor can be liquidated in the best possible way to maximise dividends.
- On a regular basis provide information to the creditors and the Bankruptcy Court regarding the status of the estate, its assets and the administration.

Suspension of payments

A debtor company in suspension of payments will remain in possession of its assets and its directors continue to run the business.

The supervisor is only obliged to supervise. The management of the debtor's business remains the responsibility of its directors. Suspension of payments is not in itself an administration of the debtor company, but the supervisor must approve all material decisions made by the debtor, including the decision to keep the business running during the period of the suspension of payments.

Out-of-court suspension of payments

No restrictions apply and no supervisor or administrator is appointed, as this is an out-of-court procedure.

Of course, management must be aware of the potential liability attached to an out-of-court procedure and will often seek legal advice which has a similar effect to the supervision of an in-court suspension of payments (*see above, Suspension of payments*).

Where possible, the management and advisers involved comply with the rules of the Bankruptcy Act which govern in-court suspensions of payments, in order to avoid liability (*see Question 6, Out-of-court suspension of payments: Effect and Question 8*).

Compulsory composition

The Bankruptcy Court can appoint a supervisor who will then supervise the proceedings. The debtor remains in possession of its assets and handles the negotiations with its creditors, including the preparation of the composition.

INTERNATIONAL CASES

11. Please state whether:

- Courts in your jurisdiction recognise insolvency and rescue procedures in other jurisdictions.
- Courts co-operate where there are concurrent proceedings in other jurisdictions.
- There are any international treaties relating to insolvency to which your jurisdiction is a signatory.
- There are any special procedures that apply to foreign creditors.

- **Recognition.** A foreign insolvency order will not be recognised in Denmark, unless it is from Finland, Sweden, Norway or Iceland.

Judgments from a foreign court made in accordance with the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*OJ L 299/62 16.11.2005*) (EU Denmark Agreement), or the Nordic Judgment Convention 1934, are directly enforceable in Denmark. Other judgments are sometimes recognised in Denmark; the court assesses each case individually to determine whether or not the judgment should be recognised.

- **Concurrent proceedings.** There are no specific rules governing the courts' co-operation where concurrent proceedings take place in other jurisdictions.
- **International treaties.** Denmark participates in:
 - the Nordic Bankruptcy Convention 1933 with Iceland, Finland, Norway and Sweden; and
 - the EU Denmark Agreement (*see above, Recognition*).

As the only member state of the European Union that does not participate in judicial co-operation, Denmark is not subject to Regulation (EC) No. 1346/2000 on insolvency proceedings, or Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Denmark has not adopted the UNCITRAL Model Law on Cross-Border Insolvency.

- **Procedures for foreign creditors.** Foreign creditors are treated the same way as domestic creditors.

PROPOSED REFORMS

12. Please summarise any proposals for reform and state whether they are likely to come into force and, if so, when.

In December 2009, the Bankruptcy Council (*Konkursrådet*) published its report regarding new rules for the restructuring of insolvent, but viable, companies. The Bankruptcy Council is appointed by the Danish Ministry of Justice and its object is to publish proposals for reformation of the Bankruptcy Act on an ongoing basis.

The proposed new rules imply that the current rules concerning suspension of payments and compulsory composition proceedings should be repealed and replaced by a new chapter on restructuring in the Bankruptcy Act.

The most significant proposed changes will be as follows:

- Both the debtor company and a creditor will be able to file a petition for restructuring with the Bankruptcy Court (currently, a debtor and a creditor can file petition for bankruptcy proceedings, but only debtors can file notification of suspension of payment and compulsory composition proceedings).
- An attorney-at-law and an accountant will be appointed as formal supervisors of a restructuring process.
- Within four weeks of start of restructuring proceedings, a restructuring plan will be required to be proposed.
- As a general rule, a restructuring plan will be required to be adopted within six months, and only if the creditors support postponement within 11 months.
- A restructuring will consist of a composition, a moratorium (interest-free postponement of payments) or a business transfer (sale of the debtor's business to a third party), or a combination of these.

- There will be no way back once (in-court) restructuring proceedings have been initiated. The outcome will be that:
 - the restructuring will be successfully concluded; or
 - the debtor will be subject to bankruptcy proceedings.

The hearing phase is still ongoing. At the moment, it is expected that Parliament will pass a bill implementing the changes before the summer of 2010 and that the new rules will enter into force on 1 January 2011.

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