
THE RESTRUCTURING REVIEW

SECOND EDITION

EDITOR
CHRISTOPHER MALLON

LAW BUSINESS RESEARCH

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PREFACE

We are very pleased to present this second edition of *The Restructuring Review*. As with the first edition, our intention is to help general counsel, government agencies and private practice lawyers understand the conditions that have been prevailing in the global restructuring market in 2008/2009 and to highlight some of the more significant legal and commercial developments and trends during that period.

It is widely acknowledged that the global economy is now in the midst of the worst financial crisis since the Great Depression. As readers will have experienced, the past year has seen credit conditions deteriorate further, global asset prices continue to fall and distressed banks reach out for government support. The effects of the current global recession have been enormous: unemployment figures have risen sharply worldwide and economic growth has stagnated. Considerable uncertainty remains as to how best to remedy the current weaknesses in our economic system that have made the downturn so severe.

Although the main stock markets have shown some signs of recovery recently, there is no consensus as to how long this surge will continue and therefore how long this recession will be with us. As banks face the dual obstacles of revenue pressures and rising credit impairments, together with national economies facing fiscal tightening, talk of ‘green shoots of recovery’ in the short to medium term appears premature. In the meantime, it is nevertheless clear that the hostile environment businesses still confront will produce further technical and commercial issues that companies, legislators and practitioners will, of necessity, have to tackle together.

I would like to extend my gratitude to all the contributors for the support and cooperation they have provided in the preparation of this work, and to our publishers, without whom this would not have been possible.

Christopher Mallon

Skadden, Arps, Slate, Meagher & Flom LLP

London

October 2009

Chapter 5

DENMARK

*Teis Gullitz-Wormslev and Maria Høyer Levin**

I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

After years of rising prices, high growth rates and decreasing unemployment, Denmark is now – together with most of the world – in the middle of an economic and financial crisis.

The ‘credit crunch’ that led to increased instability in the international money markets in 2008 caused a general slowdown of the Danish economy, and in the summer of 2008 the financial crisis became a reality in Denmark. The first Danish bank collapse occurred in January 2008,¹ followed eight months later by the collapse of Roskilde Bank (the largest Danish bank to collapse to date). Also, the number of bankruptcies increased significantly, in particular within the real estate sector.

Before its collapse, Roskilde Bank was among the 15 largest banks in Denmark.² However, the bank’s exposure on the real estate market was significant. Consequently, due to the general slowdown and declining prices for real estate, Roskilde Bank had to make considerable write-downs. With its creditworthiness and solvency badly compromised, the bank eventually collapsed.

The collapse of Roskilde Bank led to, among other things, the bankruptcy of Centerplan AS – a company with its primary activities in real estate. Two smaller banks, EBH Bank and Bonusbanken, collapsed in September 2008.

As the financial crisis developed in the autumn of 2008, the Danish Parliament passed its first ‘helping package’ to the financial sector in October 2008 (‘Bank Package I’). The purpose of the legislation was to moderate the instability in the financial sector caused by the financial crisis (the frozen money market and limited access to liquidity for many banks). Bank Package I contains a guarantee scheme and establishes a state-

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1 BankTrelleborg.

2 www.finansraadet.dk (the webpage of the Danish Bankers’ Association).

owned 'winding-up company' (known as 'Finansiel Stabilitet AS') with the purpose of winding up activities in distressed financial institutions. With its guarantee scheme, the Danish state guarantees without limitation all deposits in the 133 participating banks until 30 October 2010.³ Deposits in non-participating banks are covered by the Statutory Deposit Scheme (a guarantee of 300,000 kroner per depositor). Bank Package I only covers participating banks, but that includes all major banks in Denmark. Bank Package I also imposes restrictions; among other things, the participating banks are not allowed to pay out dividends or create new redemption programmes while the arrangement is in force.

The frozen international funds markets and the general slowdown of the economy caused difficulties for the banks and as a result, they rapidly began to file bankruptcy petitions to try to control and reduce their exposure on low-grade customers. At the same time, lending was heavily restricted and therefore the number of bankruptcies increased significantly. Until recently, there was no notable trend of restructuring by informal procedure with a long-term solution in mind. However, this trend may be changing now as the banks and other financial institutions slowly recover from the turmoil on the financial markets. Over the past six months it seems that an increasing number of insolvencies are being addressed by the banks with the primary aim of restructuring the businesses and not (just) winding up.

During the autumn of 2008 the number of bankruptcies increased significantly,⁴ 1,425 bankruptcies in the fourth quarter of 2008 as opposed to 735 bankruptcies in the same quarter of 2007. The trend has continued and in the first six months of 2009 there have been 2,878 bankruptcies compared with 1,442 bankruptcies in the same period in 2008. The total number of bankruptcies was 3,709 in 2008 and 2,401 in 2007.

In January 2009 the Danish Parliament introduced another bank package ('Bank Package II') with the purpose of securing stability with respect to the banks' access to liquidity. Bank Package II is a credit facility whereby the solvent Danish banks and mortgage credit institutions can consolidate their capital through loans from the Danish Central Government. The loans are granted as hybrid core capital by individual application and on individual terms reflecting the risk for the individual loan. By the deadline for application, 50 banks and mortgage credit institutions had applied for a total supply of hybrid core capital of approximately 63 billion kroner.⁵

Further, Bank Package II means that the guarantee scheme (Bank Package I) will lapse over a three-year period, and the Statutory Guarantee Scheme will be increased to 750,000 kroner per depositor as of 1 October 2010.

In February 2009 the Danish Parliament introduced another financial aid package. This time the focus was on providing general assistance to businesses by postponing the deadline for payment of VAT and taxes on regular income. The effect was to grant them an extra line of credit.

Another measure to stimulate private consumption in the time of crisis is a release of savings in the Special Pension fund. Surveys show that approximately 80 per

3 www.finanstilsynet.dk (the webpage of the Danish Financial Supervisory Authority).

4 Information gathered from Danmarks Statistik (www.statistikbanken.dk).

5 Press release from the Danish Ministry of Economic and Business Affairs dated 1 July 2009.

cent of the holders of funds in the Special Pension fund will cash their savings. 55 per cent of the holders (approximately equal to 12 billion kroner) will use their savings on consumption.⁶

Despite the many measures to stabilise the financial markets and the easing of fiscal policy, unemployment in Denmark continues to increase, the real estate prices remain low (and continue to fall in many areas) and growth is negative.

The rate of unemployment was 3.5 per cent in May 2009 compared with 1.8 per cent in 2008,⁷ which, however, marked an all-time low. GDP decreased by 1.1 per cent in 2008 and is expected to decrease by 2.9 per cent in 2009.⁸

Today, Finansielt Stabilitet AS has a portfolio of bank activities.⁹ The state-owned company has activities from Roskilde Bank, Gudme Raaschou Bank, EBH Bank, Fionia Bank, Løkken Sparebank and Straumur Burduras Investment Bank hf.

The distressed sectors are many; however, the sectors with the most significant increases in bankruptcies from 2007 to 2008 are construction, finance, insurance and real estate.¹⁰

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

i Formal procedures

In Denmark there are three types of formal insolvency proceedings, all governed by the Danish Bankruptcy Act: suspension of payments; compulsory composition proceedings; and bankruptcy. All formal insolvency proceedings take place under the supervision of the Bankruptcy Court.

Suspension of payments

The system of suspension of payments is aimed at supporting attempts to avoid bankruptcy in favour of a collective arrangement with the creditors or investigating options for restructuring the business, or both. 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 debtor company's estate.

Suspension of payments governed by the Danish Bankruptcy Act can only be initiated by the debtor by filing a suspension of payments notice with the Bankruptcy Court.

The debtor company will remain in possession of its assets. However, to safeguard the interest of the creditors, a supervisor, usually an attorney-at-law, will be appointed immediately upon the Bankruptcy Court's receipt of the notice of suspension of payments. The supervisor must approve all material decisions made by the debtor,

6 Article by Troels Pedersen printed in *Børsen* on 9 July 2009 (www.borsen.dk).

7 Information gathered from Danmarks Statistik (www.dts.dk) and its Statistic Year Book 2009.

8 Discussion paper (Danish Economy Spring 2009) from the Chairmen of the Council of Economic Advisers (their English summary of the discussion paper).

9 www.finansieltstabilitet.dk.

10 Insolvency Outlook 2009.

including the decision to keep the business running during the period of the suspension of payments. Further, the supervisor must attempt to obtain a joint agreement with the creditors regarding the reorganisation of the debtor's business.

The decision as to whether to maintain the suspension of payments is made by the Bankruptcy Court. If payments are suspended, it will be for 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 the particular circumstances, the previous period was not long enough to complete all of the necessary arrangements. However, the total period of suspension of payments cannot exceed one year.

The suspension of payments does not prevent the enforcement of mortgages or other security rights that have been duly perfected. The Bankruptcy Court may, however, at the request of the debtor and supervisor, impose a ban on enforcement of mortgaged assets if the Court deems such a ban necessary to fulfil the purpose of the suspension of payments.

All debts incurred with the supervisor's approval (either explicit or indirect following a decision to keep the business running during the suspension of payments) will be preferential claims in the bankruptcy estate if the debtor is later declared bankrupt.

Compulsory composition proceedings

There are three possible compulsory composition proceedings:

- i* a percentage reduction of the ordinary debt ('ordinary composition');
- ii* a distribution of the debtor's property between the creditors against the discharge of the debt that remains uncovered ('liquidation composition'); and
- iii* a postponement of payment that is interest free ('moratorium').

It is also possible to combine these proceedings.

The debts affected by a compulsory composition will be the unsecured debt. This excludes secured claims and any debt that would have priority in the bankruptcy proceedings.

A statutory majority of the creditors must approve the compulsory composition at a court hearing. The required majority of the creditors varies between 60 to 75 per cent (by number of creditors and the value of their claims).

All 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 Court cannot approve the compulsory composition if the composition pays less than 10 per cent of the creditors' original claim, unless the creditors consent to such further reduction.

Negotiations with creditors can be very time consuming. Therefore, the debtor will often suspend its payments during the period before the filing of a petition for opening compulsory composition.

Bankruptcy

In bankruptcy proceedings the debtor company's assets are liquidated and the proceeds distributed to the creditors in accordance with the ranking of creditors stipulated in the Danish Bankruptcy Act.

Bankruptcy proceedings can be commenced by the debtor or by a creditor who holds a valid claim against the debtor. The process is to file a petition for bankruptcy to the Bankruptcy Court. The Court will issue a bankruptcy order if the debtor is insolvent.

A debtor is insolvent if it cannot fulfil its obligations as they become due, unless the inability to pay is temporary.

The creditor or debtor filing the petition for bankruptcy must provide security (typically 30,000 kroner) covering the costs associated with handling the bankruptcy estate. The Bankruptcy Court will decide on the exact amount of security to be provided on a case-by-case basis. If the estate is without assets, the entity providing the security will have to pay the costs (limited to the provided security). As an exception, employees can file a petition for bankruptcy without providing security. The Danish Central Government will then pay the costs not covered by the estate's own assets.

The Court will appoint a trustee (in practice always an attorney-at-law) to act on behalf of the estate. Instead of appointment by the Court, the trustee can be elected by the unsecured creditors likely to receive dividends. Secured creditors or creditors unlikely to receive dividends are allowed to recommend a trustee.

The bankruptcy order is published in Denmark's Official Gazette (in Danish, 'Statstidende').

The '*fristdag*' (reference date) is a very important date with respect to possible clawback actions (see *infra*). The reference date is the day on which the petition for bankruptcy was filed or the day 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.

Mortgages

The assets of the estate (including any mortgaged assets) will be administered by the trustee, and the rights of the creditors to enforce their claims individually against the debtor – secured or unsecured – will cease after the bankruptcy order has been issued against the debtor.

The bankruptcy imposes a general ban on enforcement of mortgages such as mortgages on real estate, moveable property, IP rights and floating charges.

The trustee may sell the mortgaged assets at a compulsory sale or, subject to the approval of any mortgagees that are not fully covered, at a private sale. If the trustee has not disposed of mortgaged assets within six months of the issuance of the bankruptcy order, the representative of the mortgagees may demand that a public auction be conducted immediately by the trustee in respect of the mortgaged assets.

The relevant mortgagees will be entitled to receive the net income accruing on mortgaged assets from the date of the bankruptcy order until a sale occurs. Any losses accruing in respect of mortgaged assets during that period and any reasonable costs incurred by the trustee in connection with the administration and sale (including attempted sales) will be covered by the sale proceeds.

Pledge and assignment

The bankruptcy proceeding will not affect the rights of the creditors to enforce any pledge agreements or assignment agreements such as share pledges, account pledges and assignments of trade receivables.

Creditor ranking

Ranking of the unsecured creditors is governed by Sections 93-98 of the Danish Bankruptcy Act. Prior to any debts, pre-preferential claims are paid in equal proportions. Pre-preferential claims are, for example, the costs and expenses of the administration of the estate. Thereafter, the 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 claims (for example, claims for wages or salaries) rank next, together with the ordinary claims (for example, unsecured loans and VAT) which are subordinate to privileged claims.

ii Informal procedures

Suspension of payments out of court

An alternative to the suspension of payments procedure described above is suspension of payments out of court, which means that the debtor suspends its payments without involving the Bankruptcy Court. As a result, there is no formal supervisor appointed to safeguard the interests of the creditors.

This procedure has the same aim as a suspension of payments (in court): to ensure a joint agreement with the creditors to avoid bankruptcy, or to sell the business before a bankruptcy becomes a reality. Usually, the reason for choosing the informal suspension of payment process is to avoid the negative public attention that usually follows from filing a petition for suspension of payments with the Bankruptcy Court, and which can sometimes reinforce the (poor) financial situation of the debtor.

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 cases involving a suspension of payments out of court, advisers, board members or management will be judged according to a stricter standard with respect to liability for damages.

For the same reason, in practice the rules for suspension of payments in the Danish Bankruptcy Act are often complied with to the fullest extent possible. This is to avoid transactions that unduly prefer one creditor at the expense of other creditors.

Voluntary composition

Schemes of voluntary composition are not specifically regulated in Denmark. As the name suggests, the process is a voluntary composition made in agreement with the creditors.

Negotiations concerning voluntary composition usually take place during suspension of payments (in or out of court), and such arrangements can often be agreed on a faster and more informal basis than in cases of compulsory composition.

As stated above, the content of such compositions is not regulated by specific legislation. The involved parties can – within the legal framework – agree to the content of the composition between themselves. The most commonly used schemes of voluntary composition are the types of schemes also used in the compulsory composition described above.

iii Taking and enforcement of security

There are various types of security available under Danish law, and the regulation and perfection requirements depend on the asset which is subject to the security, and the form of security provided.

Security over specific types of assets

Some of the more common types of assets and security are listed *infra*.

Receivables may be subject to a floating charge (as described *infra*) but may also be separately assigned. Perfection of a separate assignment of receivables requires notifying the third-party debtor.

Bank accounts can be pledged. Perfection requires notification to the bank. An effective pledge of bank deposits requires that the pledgor is deprived of control over the bank account.

A pledge over property is created by way of a mortgage, which is perfected by registration of the mortgage in the Land Registry and (if the mortgage is a negotiable document) by the secured creditor taking possession of the mortgage document.

Shares can be pledged. The pledge is perfected by notification to the company whose shares are pledged and registration of the pledge in the company's shareholders' register (if the shares are represented by certificates, the certificates must be delivered to the pledgee). Perfection of a pledge over shares registered with the Danish Securities Centre requires notification to, and registration with, the Danish Securities Centre.

The above-mentioned types of security are not exhaustive. In addition, floating charges were introduced into Danish law on 1 January 2006. Floating charges are described in more detail in Section III, *infra*.

Enforcement

As described *supra*, the trustee of the bankrupt estate has the discretion to sell the secured assets in the possession of the bankrupt debtor. However, secured creditors may enforce their interests against, or administer, assets pledged in their favour and assets that are not in the possession of the security provider (e.g., pledged shares) in accordance with the terms of the applicable security agreement.

As stated *supra*, suspension of payments does not prevent the enforcement of mortgages or other security rights that have been duly perfected. The Bankruptcy Court may, however, at the request of the debtor and supervisor, impose a ban on enforcement of mortgaged assets if the Court deems such ban necessary to fulfil the purpose of the suspension of payments.

iv Duties of directors of companies in financial difficulty

A company unable to fulfil all of its obligations operates in an area where directors and advisers, in particular, are at risk of incurring personal liability. Such liability can include

both civil and criminal liability under Danish law. The latter is usually restricted to cases of gross misconduct.

According to the Danish Public Companies Act (governing limited liability companies abbreviated 'AS'), the board of directors is obligated to take action in situations where the equity is less than 50 per cent of the company's nominal share capital. The required action depends on the specific situation of the company.

Further, 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 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 credit 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.

In several cases the Danish courts have been reluctant to find personal liability and have stressed the creditors' duty of care.

In cases involving out-of-court restructuring there is generally a wide margin before the directors will be held liable, as long as the reasons for pursuing a restructuring are serious and reasonable. In a 1977 judgment, the Supreme Court ruled in favour of the board of the directors.¹¹ In that case, a company in financial difficulty went into insolvent liquidation (the same procedure today would be called 'bankruptcy proceedings') on 18 February 1975 at 4pm, directly after the completion of a general meeting and a board meeting. Earlier the same day a supplier had delivered goods on credit. The court was of the opinion that the directors were not liable to the creditor as the negotiations about a solution on 17 February 1975 and the following day were serious and reasonable in that specific situation.

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 – which explains why many parties apply the principles of the Danish Bankruptcy Act to cases involving a suspension of payments out of court or other informal methods of restructuring. In a 2005¹² judgment, the High Court found directors and the company's attorney liable because they had not ensured an equal distribution of assets among the creditors in connection with a restructure that involved a sale of the company's activities to a new entity.

v Clawback actions

There are rules regarding clawback actions in the Danish Bankruptcy Act. The primary aim is to set aside certain transactions carried out during a specific period leading up to the bankruptcy. The calculation of the relevant period is based on the reference date described above.

The rules regarding clawback actions are applicable in cases of bankruptcy proceedings and compulsory composition proceedings approved by the Bankruptcy Court. The rules are not applicable in cases involving a suspension of payments.

11 u.1977.274H.

12 u.2005.2323Ø.

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

- i* dubious payments made within three months before the reference date;
- ii* security in respect of old debt if the security is not duly perfected within three months before the reference date;
- iii* execution levied against the debtor's assets within three months before the reference date;
- iv* unreasonable remuneration to closely related parties within six months before the reference date; and
- v* gifts made within six months before the reference date.

The list is not exhaustive, and other clawback actions are possible.

In addition to the 'objective' clawback action rules listed above, there is also a general 'subjective' clawback action rule. A transaction may be null and void if the transaction 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 such transactions. Normally the rule does not apply to transactions carried out more than 18 to 24 months prior to the reference date.

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

III RECENT LEGAL DEVELOPMENTS

i Floating charges

Floating charges were introduced into Danish law on 1 January 2006 when the economy was still strong and growing. It is still a fairly new security instrument in Denmark.

As a new security instrument, the floating charge has not yet featured in many legal decisions. With today's difficult market conditions, advisers and companies are now facing the practical challenges of handling floating charges in cases involving insolvency proceedings. A best practice is developing.

A floating charge is created by way of mortgage and perfected by registration of the mortgage in the Personal Registry.

Floating charges can be granted as a: general floating charge that covers certain of the company assets (for example, inventory and operating equipment) from time to time; or receivables floating charge that only covers the company's trade receivables from time to time.

A general floating charge does not include assets such as shares, real estate, cash, bank accounts, vessels and aircraft.

As a general rule, floating charges include the mortgagor's future obtainments. However, according to Section 47f of the Land Registration Act, floating charges do not cover the mortgagor's obtainments after the date of a bankruptcy order, notification of suspension of payments to the Bankruptcy Court, or commencement of compulsory composition.

Statistics

In 2008, the Danish Parliament compiled information on the use of floating charges:¹³ 10,214 general floating charges were registered from 2006 until mid-2008, and 1,710 receivables floating charges were registered from 2006 until mid-2008 – an approximate dissemination of 4 per cent as opposed to the expected 30 per cent when the floating charge was first introduced.

Dansk Erhverv (the interest group for Danish commerce) surveyed its members regarding the use of floating charges.¹⁴ One in every 10 of its participating members has granted a general floating charge. 58 per cent of the general floating charges have been granted after 1 October 2008, during the financial crisis. In 96 per cent of cases, the charge has been granted to financial institutions.

ii Strict interpretation of clawback action rule

According to section 70 of the Danish Bankruptcy Act, security must be granted at the time of incurring debt, and the security right must be perfected without undue delay. If perfection is not observed without undue delay within three months before the reference date in a bankruptcy, the security can be set aside (clawed back) and the security holder will be left with an unsecured (ordinary) claim.

The Supreme Court has recently¹⁵ interpreted the meaning of ‘without undue delay’ in Section 70 of the Danish Bankruptcy Act. In that case, a finance company received a signed mortgage on a Friday and paid out the loan on the same day. The mortgage was sent for registration with the Car Register the next working day, the following Monday, and the Car Register received it the day after. The Supreme Court ruled (with a narrow 3-2 majority) that the mortgage was not perfected without undue delay (as stipulated in Section 70) and the mortgage was set aside. It could be argued, and this is reflected in the dissenting opinion, that such a strict interpretation is not in accordance with the purpose and wording of Section 70.

iii Leasing

Leasing has been used as a financing resource in Denmark on a considerable scale and in various types of industries, particularly during the last decade or so. This has created new challenges in cases of bankruptcy.

In a bankrupt estate, there can be assets free of third-party rights (the estate’s assets), mortgaged assets, and assets owned by third parties. The latter has been the subject of some discussion between the trustees and lessors. Assets belonging to a third party must, according to Section 82 of the Danish Bankruptcy Act, be handed over to the owner. The Act does not, however, state who should pay for costs connected with identifying the rightful owner, or storage and handling costs.

13 Statement on supervision of Act No. 560 dated 24 June 2005 regarding amendment to the Danish Registration Act, the Danish Bankruptcy Act and other acts (floating charges).

14 Dansk Erhverv’s memo on a survey regarding general floating charges dated 13 May 2009.

15 On 3 June 2009.

It can be extremely time consuming to assess whether or not a leasing agreement is legally valid (is it leasing or purchase on credit?) and, thereafter, to find and identify the leased assets, particularly where there is a mix of the same types of assets leased from different lessors. Further, the latest practice shows a trend towards leasing assets that are unsuitable for leasing, such as cleaning materials, software licences, nails and screws.

The above-mentioned discussions between trustees and lessors have focused on the costs connected with the handling of leased assets. For now, the practice is to treat leased assets as mortgaged assets,¹⁶ where the lessors must pay the costs. The estate issues an estate invoice and the income is paid into the estate. Therefore, the other creditors are not affected by the time the trustee spends on the leased assets. It should be stressed that the Act does not provide an answer to this question and that it has not yet been tested in the courts. However, it is likely that the issue will be considered soon.

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

Since the summer of 2008 there has been a significant increase in the number and size of insolvency proceedings in Denmark. The financial and real estate sectors, in particular, have experienced a very significant increase in the number of bankruptcies because of the international financial crisis. The financial and real estate sector's share of total bankruptcies in 2008 was 6.9 per cent – approximately twice the number of the previous year.¹⁷

Some of the more significant cases are highlighted below.

i The financial sector

Roskilde Bank

As stated *supra*, the collapse of Roskilde Bank was one of the major insolvencies in 2008. After the bank's own unsuccessful attempts to sell its activities, the state took over the bank's activities in August 2008. Afterwards, the 'healthy' activities (mainly private banking) were sold to three other banks in a rapid process involving little due diligence. However, the terms of the agreement allowed the buyers the opportunity to return low-grade customers after the acquisition and in the event of such return, a reduction in the purchase price. Unfortunately, the buyers returned an unexpectedly large number of customers which led to a reduction of the purchase price and left the State with a sizeable private banking business. Therefore, the state-owned winding up company (Finansiel Stabilitet AS) is now running what is left of Roskilde Bank, and the customers are to a large extent categorised as 'bad customers' within the financial sector. The winding-up company has recently prolonged its discontinuation agreements with the customers by up to 10 years.

16 Section 87 of the Danish Bankruptcy Act.

17 Insolvency Outlook No. 1 2009.

The collapse of Roskilde Bank affected approximately 600 employees, and as one of the 15 largest banks in Denmark in 2007 the bank had – at the time – a balance sheet of 41.983 billion kroner.¹⁸

Fionia Bank

Fionia Bank entered into a framework agreement with Finansielt Stabilitet AS in February 2009. The purpose of the agreement was not winding up. Instead, the banking activities of Fionia Bank were transferred to a new company incorporated and owned by Fionia Bank. Finansielt Stabilitet AS received one share in the new company and was granted control over it by way of a share pledge in the new company, including voting rights, as consideration for its capital contribution under the agreement. The plan was to continue the activities and reduce the bank's exposure to the real estate market.

Fionia Bank had a balance sheet of 32.767 billion kroner on 1 January 2009.¹⁹

Due to a continuance in write-downs, Fionia Bank announced on 18 June 2009 that it had lost its equity and that the plan for restructuring was no longer realistic. A process of selling the 'healthy' activities of Fionia Bank has therefore been initiated.

Gudme Raaschou Bank

Gudme Raaschou Bank was a niche bank with investment banking as one of its main activities. The state-owned winding up company, Finansielt Stabilitet AS, took over in April 2009 and managed to sell the bank's activities – except for its mortgages division, which is now held in a separate subsidiary controlled by Finansielt Stabilitet AS.

ii The real estate sector

There have been several large bankruptcies within the real estate sector. The construction sector has also been hit hard. The crises in these sectors are caused by, among other things, the declining prices in real estate, bad liquidity and limited financing options.

Centerplan

The Centerplan property group went bankrupt shortly after the collapse of Roskilde Bank. The bank filed a petition for bankruptcy against Centerplan in October 2008. Centerplan was a large group with a majority of its activities in Denmark and Sweden within real estate and development. According to the former managing director, Centerplan went bankrupt due to the general slowdown in the economy and the collapse of Roskilde Bank. Centerplan primarily owned real estate in Sweden and Denmark with a value of approximately 10-12 billion kroner.²⁰

18 Insolvency Outlook No. 1 2009 and www.finansraadet.dk (the webpage of the Danish Bankers' Association).

19 Takeover balance 1 January 2009 (published on www.foniabank.dk).

20 Article by Børsen published in *Børsen* on 29 October 2008 (www.borsen.dk).

Landic

Landic is an Icelandic-owned, large real estate group. Landic was formed from the former Keops, Stodir and Atlas Ejendomme. The Danish subsidiaries of Landic went into suspension of payments in April 2009 and some group companies were put into bankruptcy proceedings.

Among its large property portfolio in Scandinavia, Landic owns the estates leased by department stores Illum and Magasinm – well-known high street properties in the center of Copenhagen.

Landic had a balance sheet of €4.951 billion in 2007.²¹

Others

Other notable bankruptcies include the Griffin property group, Vejlsø property group, and Bryde Gruppen. They were all involved in real estate activities.

iii Other sectors

Other sectors are also experiencing an increase in the number of bankruptcies. Wholesaling and retailing have shown an increase of 34.3 per cent and 46.6 per cent, respectively, from 2007 to 2008.²² The transport sector showed an increase of 92.8 per cent from 2007 to 2008.

Sterling Airlines went bankrupt in October 2008. Up until the bankruptcy, efforts were made to sell the company by negotiating with potential buyers. When the negotiation failed to result in a solution, the company filed its own bankruptcy petition. The trustees of the estate continued the process of selling Sterling Airlines and succeeded in part: some of Sterling Airlines was sold to Cimber Air. Sterling Airlines had 1,600 employees and a turnover of €523 million.²³

Totempo Biler AS (with activities within the motor vehicle sector) filed for suspension of payments in 2009 with the purpose of restructuring the business. However, the restructuring process was unsuccessful and the company went bankrupt. The type of leasing challenges mentioned in Section III *supra* created significant problems for the estate. Totempo Biler AS had 550 employees and a turnover of €64 million.²⁴

V INTERNATIONAL

Denmark participates in the Nordic Bankruptcy Convention together with Iceland, Finland, Norway and Sweden.

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

As the only Member State of the European Union that does not participate in judicial cooperation, Denmark is not subject to the EU Insolvency Regulation.

21 Landic Property's financial results 2007 (www.landicproperty.com).

22 Insolvency Outlook No. 1 2009.

23 Ibid.

24 Ibid.

Consequently, a foreign insolvency order – except from Finland, Sweden, Norway and Iceland – will not be recognised in Denmark. However, judgments from a foreign court in accordance with the EC Convention or the Nordic Judgment Convention are directly enforceable. Also, other judgments are sometimes recognised in Denmark; the court assesses each case individually to determine whether or not the judgment should be recognised. The Minister of Justice is authorised to give more specific rules concerning the recognition of foreign insolvency proceedings.²⁵

VI FUTURE DEVELOPMENTS

i New Danish Companies Act

In November 2008 the Committee on Modernisation of Company Laws published its highly anticipated report. The politically stated purpose for the thorough review and update of Danish company law was to ensure a modern and competitive corporate-law framework for companies based in Denmark. The government introduced a bill on the basis of the report, which was adopted by the Danish Parliament on 29 May 2009. It is expected that a material part of the act will enter into force as of 1 January 2010 (but the exact implementation date for the legislation will be decided by the Minister of Trade and Industry).

The acts on public and private limited companies, respectively, will be codified in a single new act. The distinction between the two types of companies will, however, remain. Among other things, the new provisions mean that share capital requirements will be liberalised, self-financing will be allowed under certain conditions, and there will be a public shareholders' register (only for shareholders holding 5 per cent or more of the share capital or voting rights) administered by the Danish Commerce and Companies Agency.

ii Forecast

Denmark's financial institutions are likely to be more engaged in restructuring efforts throughout the second part of 2009 and onwards as they recover from their own turmoil and financial difficulties. Over the past year, Danish banks have experienced huge losses in asset value through bankruptcy proceedings, and they are expected to be more reluctant to subject a business to bankruptcy proceedings before all other reasonable restructuring options have been explored. Although the number of bankruptcies is likely to increase further, larger businesses in particular will probably receive more support from their financial creditors throughout a period of financial distress or even in an insolvency scenario.

Danske Bank expects growth in Denmark to decrease by 3.5 per cent in 2009 and increase by 0.8 per cent in 2010, while the Danish government has predicted that growth will decrease by 2.5 per cent in 2009 and increase by 1 per cent in 2010. Both Danske Bank and the Danish government expect the level of unemployment to rise in both 2009 and 2010.²⁶

25 Section 6 of the Danish Bankruptcy Act.

26 Article by Troels Pedersen published in *Børsen* on 8 July 2009 (www.borsen.dk).

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