
THE RESTRUCTURING REVIEW

THIRD EDITION

EDITOR
CHRISTOPHER MALLON

LAW BUSINESS RESEARCH

THE RESTRUCTURING REVIEW

THIRD EDITION

Reproduced with permission from Law Business Research Ltd.

This article was first published in The Restructuring Review - Third Edition,
(published in September 2010 – editor Christopher Mallon).

For further information please email
Adam.Sargent@lbresearch.com

THE
RESTRUCTURING
REVIEW

THIRD EDITION

Editor

CHRISTOPHER MALLON

LAW BUSINESS RESEARCH LTD

PUBLISHER
Gideon Robertson

BUSINESS DEVELOPMENT MANAGER
Adam Sargent

MARKETING MANAGERS
Hannah Thwaites
Nick Barette

EDITORIAL ASSISTANT
Nina Nowak

PRODUCTION MANAGER
Adam Myers

PRODUCTION EDITOR
Joanne Morley

SUBEDITOR
Charlotte Stretch

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2010 Law Business Research Ltd

© Copyright in individual chapters vests with the contributors
No photocopying; copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of August 2010, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-907606-08-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 870 897 3239

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ACHOUR & HÁJEK, SRO

ADVOKATFIRMAET HAAVIND AS

AFRIDI & ANGELL

ANDREAS NEOCLEOUS & CO LLC

ATTRIDE-STIRLING & WOLONIECKI

BAIÃO, CASTRO & ASSOCIADOS – SOCIEDADE DE ADVOGADOS, RL

BAKER & MCKENZIE

CHARLES ADAMS RITCHIE & DUCKWORTH

CHIOMENTI STUDIO LEGALE

COLLAS DAY

CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ, SC

DREW & NAPIER LLC

DUNDAS & WILSON

ENGARDE ATTORNEYS AT LAW

ESCRITÓRIO DE ADVOCACIA SERGIO BERMUDEZ

GARRIGUES

GÖRG

GÜR LAW FIRM

HAMILTON ADVOKATBYRÅ

JISUNG HORIZON ATTORNEYS AT LAW

KROMANN REUMERT

LORENZ

MARVAL, O'FARRELL & MAIRAL

OOSTVOGELS PFISTER FEYTEN

OPPENHEIM

REBAZA, ALCÁZAR & DE LAS CASAS ABOGADOS FINANCIEROS

SHELLENBERG WITTMER

SCHÖNHERR RECHTSANWÄLTE GMBH

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

SKADDEN, ARPS, SLATE, MEAGHER & FLOM (UK) LLP

SONIER & ASSOCIÉS

WILLIAM FRY

CONTENTS

| | |
|-------------------------|--|
| Editor's Preface |vii |
| | <i>Christopher Mallon</i> |
| Chapter 1 | ARGENTINA..... 1 |
| | <i>Ricardo W Beller and Martín Campbell</i> |
| Chapter 2 | AUSTRIA..... 17 |
| | <i>Wolfgang Höller</i> |
| Chapter 3 | BELGIUM..... 26 |
| | <i>Steven De Schrijver and Thomas Daenens</i> |
| Chapter 4 | BERMUDA..... 37 |
| | <i>Kehinde A L George</i> |
| Chapter 5 | BRAZIL..... 49 |
| | <i>Alfredo D B Migliore and Kedma Moraes</i> |
| Chapter 6 | CAYMAN ISLANDS..... 60 |
| | <i>Graham F Ritchie QC, Rebecca Hume and David W Collier</i> |
| Chapter 7 | CYPRUS 69 |
| | <i>Maria Kyriacou</i> |
| Chapter 8 | CZECH REPUBLIC 80 |
| | <i>Daniel Hájek</i> |
| Chapter 9 | DENMARK..... 89 |
| | <i>Teis Gullitz-Wormslev and Maria Høyer Levin</i> |
| Chapter 10 | ENGLAND & WALES 105 |
| | <i>Christopher Mallon and Alex van der Zwaan</i> |
| Chapter 11 | FRANCE 127 |
| | <i>Caroline Texier and Gabriel Sonier</i> |
| Chapter 12 | GERMANY 137 |
| | <i>Christian Bärenz and Carsten Müller-Seils</i> |
| Chapter 13 | GUERNSEY..... 150 |
| | <i>Jason Romer</i> |

| | | |
|-------------------|--|-----|
| Chapter 14 | HUNGARY | 161 |
| | <i>Mihaly Barcza</i> | |
| Chapter 15 | IRELAND | 170 |
| | <i>Michael Quinn</i> | |
| Chapter 16 | ITALY..... | 179 |
| | <i>Andrea Bernava, Giulia Battaglia and Antonio Tavella</i> | |
| Chapter 17 | JAPAN..... | 197 |
| | <i>Shinichiro Abe</i> | |
| Chapter 18 | KOREA | 214 |
| | <i>Sung Jun Hong</i> | |
| Chapter 19 | LUXEMBOURG..... | 226 |
| | <i>Martine Gerber-Lemaire</i> | |
| Chapter 20 | MEXICO | 238 |
| | <i>Pedro Velasco de la Peña and Rodrigo Castelazo de la Fuente</i> | |
| Chapter 21 | NORWAY | 248 |
| | <i>Ylva Cornelia Daniëls</i> | |
| Chapter 22 | PERU..... | 263 |
| | <i>José Jiménez Chocano</i> | |
| Chapter 23 | PORTUGAL..... | 275 |
| | <i>Ana Paula Matos Martins and Maria José Andrade Campos</i> | |
| Chapter 24 | SCOTLAND | 288 |
| | <i>David Gibson and Ainslie Mackenzie</i> | |
| Chapter 25 | SINGAPORE..... | 307 |
| | <i>Sushil Nair</i> | |
| Chapter 26 | SPAIN..... | 323 |
| | <i>Antonio Fernández, Borja García-Alamán, Adrián Thery and Juan Verdugo</i> | |
| Chapter 27 | SWEDEN | 334 |
| | <i>Lars Eric Gustafsson, Dag di Meo and Tomas Johansson</i> | |
| Chapter 28 | SWITZERLAND | 349 |
| | <i>Vincent Jeanneret, Olivier Hari and Elena Sampetro</i> | |
| Chapter 29 | TURKEY | 364 |
| | <i>Oytun Şemakı</i> | |

| | | |
|-------------------|--|-----|
| Chapter 30 | UKRAINE..... | 374 |
| | <i>Olga Gurgula and Roman Ognevnyuk</i> | |
| Chapter 31 | UNITED ARAB EMIRATES..... | 383 |
| | <i>Bashir Ahmed and Aly Shah</i> | |
| Chapter 32 | UNITED STATES..... | 394 |
| | <i>Sally McDonald Henry</i> | |
| Appendix 1 | ABOUT THE AUTHORS..... | 411 |
| Appendix 2 | CONTRIBUTING LAW FIRMS' CONTACT DETAILS | 430 |

EDITOR'S PREFACE

We are very pleased to present this third edition of *The Restructuring Review*. As with the first and second editions, 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 2009/2010 and to highlight some of the more significant legal and commercial developments and trends during that period.

The global economy is still struggling to emerge from the worst financial crisis since the Great Depression. The past year has seen credit conditions improve in many areas and global asset prices generally start to stabilise. Government support for the banking system and the economy generally, however, continues to be a key factor in maintaining the relative stability. The effects of the global recession, however, continue to be felt. Unemployment figures are still following an upwards trend and economic growth is still, despite some bright spots, generally uninspiring. Considerable uncertainty remains as to how best to remedy the current weaknesses in our economic system that has made the downturn so severe.

The main stock markets have continued their rally but there still remain no consensus as to how long this surge can continue and the risk of a double dip recession is still there. Banks have generally made a good recovery, but with national economies continuing to face fiscal tightening, talk of a full recovery in the short to medium term remains premature.

I would again 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 (UK) LLP

London

September 2010

Chapter 9

DENMARK

*Teis Gullitz-Wormslev and Maria Høyer Levin**

I OVERVIEW OF RECENT RESTRUCTURING AND INSOLVENCY ACTIVITY

Denmark continues to struggle with the aftermath of the global financial crisis, although the economy and businesses are slowly beginning to recover.

The credit crunch that led to increased instability in the international money markets in 2008 caused a general slowdown in 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 and this was followed eight months later by the collapse of Roskilde Bank. The number of bankruptcies also increased significantly during that period.

As the financial crisis developed in the autumn of 2008, the Danish Parliament passed its first ‘helping package’ for 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 contained a guarantee scheme and established a state-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 participating banks and bonds issued under the bank package until 30 September 2010.² 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

* Teis Gullitz-Wormslev is a senior associate and Maria Høyer Levin is an associate at Kromann Reumert.

1 Bank Trelleborg.

2 www.finanstilsynet.dk (the website of the Danish Financial Supervisory Authority).

to pay out dividends or create new redemption programmes while the arrangement is in force.

In January 2009 the Danish Parliament introduced another bank package ('Bank Package II') to secure stability for the banks' access to liquidity and to extend the options for issuing state guaranteed bonds. Therefore, it is possible to extend the state guarantee for unsecured loans until 31 December 2013.³ 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 on individual application and on individual terms reflecting the risk for the individual loan.

Today, Finansiell Stabilitet AS has eight subsidiaries carrying out winding-up activities relating to Danish banks such as Roskilde Bank, Løkken Sparebank (now merged with EBH Bank), Fionia Bank, Nova Bank Fyn, Pantebrevsselskabet af 2. juni 2009 AS (activities of Gudme Raaschou) and Finansieringsselskabet af 11/2 2010 AS (activities of Capinordic Bank).⁴

The general slowdown in the economy is still causing some turmoil and it is expected that some of the Danish banks will merge to consolidate. Recently, Max Bank and Skælskør Bank, which are both listed companies, announced that their respective boards of directors had agreed upon terms for a merger to be adopted in the near future. The Danish central government holds approximately 53.5 per cent of the shares in Skælskør Bank and is therefore a majority shareholder.⁵ It became a shareholder when Skælskør Bank converted hybrid core capital into share capital.

The guarantee scheme covered by Bank Package I will lapse soon. To ensure continuing stability within the financial markets, the Danish Parliament has recently passed a third bank package ('Bank Package III'). Bank Package III contains a depositor guarantee scheme that is to be financed by the Danish banks.⁶ The depositor's guarantee is limited to 750,000 Danish kroner per customer. The state-owned winding-up company, Finansiell Stabilitet AS, will continue to carry out the winding-up activities of distressed financial institutions.⁷ Since Bank Package II, many banks have issued state-guaranteed bonds under the bank package (e.g., Danske Bank⁸). Moody's has given such state-guaranteed bonds an AAA rating.⁹

The frozen international funds markets and the general slowdown in the economy caused difficulties for the banks and as an initial result, they rapidly began to file bankruptcy petitions to try to control and reduce their exposure on low-grade customers. This trend has, however, changed since the autumn of 2009. Now, financial creditors

3 www.danskebank.com/da-dk/ir/koncernen/Pages/DenDanskeStatsgaranti.aspx.

4 www.finansiellstabilitet.dk.

5 www.maxbank.dk (stock announcement no. 19/2010 dated 27 May 2010).

6 Article by Jakob Sheikh printed in *Politiken* on 24 March 2010.

7 Article printed in *borsen.dk* on 1 June 2010.

8 www.danskebank.com/da-dk/ir/obligationer/Pages/obligationer.aspx.

9 Article available at www.epn.dk/investor/article1734625.ece.

are more willing to explore restructuring solutions before bankruptcy proceedings are initiated.

The restructuring procedures and techniques employed vary from selling the activities of the distressed company to renegotiation of financial agreements with the financial creditors. Restructurings are carried out both in and out of court, although most of the larger restructurings completed within the past year have been based on an out-of-court standstill platform supported by the financial creditors of the distressed company. Generally, the Danish banks have so far been reluctant to write off debt when participating in restructurings. The banks have opted for less onerous solutions and many of the completed restructurings are based on 'amend and pretend' principles, such as postponement of interest services. Most of the arrangements lapse within two to three years. Very few restructurings have involved injections of new capital.

The number of bankruptcies increased significantly during 2008 and the trend has continued. The total number of bankruptcies was 3,709 in 2008 and 5,913 in 2009. In the first five months of 2010 there were 2,682¹⁰ bankruptcies.

The rate of unemployment was 3.4 per cent 2009¹¹ compared with 1.8 per cent in 2008,¹² which, however, marked an all-time low. In April 2010 the rate of unemployment was 4.1 per cent.¹³ Danske Bank takes the view that unemployment has already peaked, and it expects the unemployment rate to decrease.¹⁴ The Chairman of the Council of Economic Advisers expects growth to be approximately 1.7 per cent in 2010.¹⁵

Due to the large public deficits (which, however, in comparison with the rest of the EU are not alarming), Denmark is in breach of the Stability and Growth Pact which states that public deficits must not exceed 3 per cent of GDP. Therefore, like most other EU countries, the Danish central government has presented a plan for economic recovery. The main content of the plan is, among other things, (1) to avoid an increase in public spending, (2) to decrease Ministers' wages by 5 per cent and (3) to suspend annual increase in tax margins and transfer income. The purpose is to consolidate 24 billion Danish kroner by 2013.¹⁶

The distressed sectors are many; however, the sectors with the most significant increase in the number of bankruptcies are construction, finance, retail and real estate.¹⁷ During 2009 in particular, many smaller businesses were subject to bankruptcy proceedings. The agricultural sector is also in severe crisis due to the decrease in the

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

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

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

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

14 Article by Jens Nymark dated 10 June 2010 available at www.borsen.dk.

15 Discussion paper (Danish Economy Spring 2010) from the Chairmen of the Council of Economic Advisers (their English summary of the discussion paper).

16 Article by Marie Hjortdal published by *Politiken* on 21 May 2010 at www.politiken.dk.

17 Information gathered from Danmarks Statistik (www.dts.dk).

value of real estate and price of agricultural products¹⁸ and the fact that farmers have historically financed expansions by using secured loans (mortgages over real estate).

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: (1) suspension of payments; (2) compulsory composition proceedings; and (3) bankruptcy proceedings. 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 to restructure the business. 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.

A 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 Court's receipt of the notice of suspension of payments. 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. Furthermore, 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 a further period of up to three months at a time. Such extensions are possible if the 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 which 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.

18 Article dated 22 April 2010, available at www.borsen.dk.

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:

- a* a percentage reduction of the ordinary debt ('ordinary composition');
- b* a distribution of the debtor's property between the creditors against the discharge of the debt that remains uncovered ('liquidation composition'); and
- c* 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 and 75 per cent (by number of creditors and the value of their claims) depending on the content of the specific compulsory composition.

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 it 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 in the period before the filing of a petition for 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 Danish 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.

The *fristdag* (which translates to 'reference date') is a very important date with respect to possible claw-back 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 to 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 (e.g., claims for wages) rank next, together with the ordinary claims (e.g., 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 *supra* 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, 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 advisors 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 *supra*, 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 *supra*.

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 that 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.

Security over real property is created by way of a mortgage that is perfected by registration of the mortgage in the Land Registry.

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.

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 a 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 advisors, 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 Companies Act, the management of a limited liability company must ensure that a general meeting is held within six months of it being established that the company's equity represents less than half of the subscribed capital, however, in all cases if the company's equity amounts to less than 62,500 Danish kroner. The required action depends on the specific situation of the company.

Furthermore, at all times, the management 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 establish personal liability and have stressed the creditors' duty of care.

In cases involving restructuring out of court 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.¹⁹ 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 4 p.m., 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 2005²⁰ 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 restructuring that involved a sale of the company’s activities to a new entity.

v Claw-back actions

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

The rules regarding claw-back 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.

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

- a* dubious payments made within three months before the reference date;
- b* security in respect of old debt if the security is not duly perfected within three months before the reference date;
- c* execution levied against the debtor’s assets within three months before the reference date;
- d* unreasonable remuneration to closely related parties within six months before the reference date; and
- e* 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 *supra*, there is also a general ‘subjective’ claw-back action rule. A transaction may be null and void if the

19 u.1977.274H.

20 u.2005.2323Ø.

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 18-24 months prior to 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.

III RECENT LEGAL DEVELOPMENTS

The most recent and interesting developments in Danish insolvency law and related framework are highlighted *infra*.

i Floating charges

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

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: (1) general floating charge that covers certain of the company assets (for example, inventory and operating equipment) from time to time; or (2) 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.

With today's difficult market conditions, advisers and companies are now facing the practical challenges of handling floating charges in cases involving insolvency proceedings and restructuring. A best practice is developing.

The common models of restructuring often imply that the debtor company's healthy activities are transferred to (1) a subsidiary, (2) an affiliated company or (3) a third party. Models (2) and (3) presume that the transfer is made on an arm's-length basis, and model (1) requires steps to be taken with respect to the parent company and a subsequent sale of the shares in the subsidiary.

The listed restructuring models imply transfer of assets that are now often comprised by valid floating charges. This was not the case previously. As a result, the mortgage creditor has a significant role in such restructurings. The transfer of assets requires consent from the mortgage creditor who will usually require that the debt is paid or transferred together with the assets. The latter can, depending on the specific case, put the mortgage creditor in a better position than the creditors who are 'left behind' in the insolvent debtor company. Therefore, companies and advisors are experiencing new challenges in such restructurings (and in some cases, obstacles that are very difficult to negotiate) due to this relatively new security instrument.

ii Electronic registration in the Land Registry

The registration of mortgages and other rights over real property has been an electronic process since September 2009, but various problems with the system created a significant build-up of registrations that required manual handling. 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 estate if their registrations are subject to manual handling. Furthermore, such delays are also resulting in increased costs of intermediate financing because the surplus from a sale of real estate is not released until the buyer has obtained unconditional registration in the Land Registry.

iii 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. The Danish Parliament passed the bill on 29 May 2009. A material part of the legislation entered into force on 1 March 2010.

With the new Companies Act, the legislation governing public and private limited companies, respectively, has been codified in a single Act. The distinction between the two types of companies will, however, remain.

Among other things, the new provisions mean that share capital requirements have been liberalised; for example a private limited liability company is now only required to have a subscribed share capital of 80,000 Danish kroner instead of 125,000 Danish kroner.

Also, with the new Act, the discussion regarding whether a company is bound by a shareholders' agreement between its shareholders is no longer of relevance. The company is not bound by such an agreement. Therefore, shareholders must consider whether some of the provisions in the shareholders' agreement should be included in the company's articles of association to ensure that third parties are made aware of such conditions. Shareholders' agreements are, of course, still binding for the parties who have entered into the agreement.

With the introduction of the new Act, all limited liability companies should review and amend their articles of association accordingly.

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. The trend has continued in 2009. However, larger businesses, especially within the real estate sector, have during 2009 been able to carry out restructuring arrangements with creditors – whether in or out of court. It seems that it is primarily smaller businesses that continue to be subject to bankruptcy proceedings and are the reason for the significant increase in the number of bankruptcies.

Some of the more significant cases since the summer of 2009 are highlighted *infra*.

*i The financial sector**Capinordic Bank*²¹

In February 2010, Finansieringsselskabet af 11/2 2010 AS, the subsidiary of Finansielt Stabilitet AS, took over the assets and employees of Capinordic Bank AS in bankruptcy.²² Capinordic Bank was a bank established by a few wealthy and publicly known individuals known as the 'Millionaires' Club'. Apparently, the bank only had approximately 35 to 40 customers (the majority of the customers were also part of the circle of owners). The bank's loan portfolio had a book value of 662 million Danish kroner before the collapse. Now, after write downs, the value is considered to be 255 million Danish kroner.

*Amagerbanken*²³

Amagerbanken is a publicly listed bank and the 11th-largest bank in Denmark with a balance of 35,696 million Danish kroner and working capital of 20,715 million Danish kroner.²⁴

During the fourth quarter of 2009, Amagerbanken found itself in some turmoil due to the Danish Financial Supervisory Authority's review of the bank's solvency requirements. Within two months, the bank managed to increase its share capital and apply for hybrid core capital under Bank Package II. The latter required fulfilment of specific solvency and capital requirements.

The bank managed to find an investor willing to guarantee subscription of 500 million Danish kroner. The capital increase resulted in revenue of 962 million Danish kroner and the bank fulfilled its solvency and capital requirements. Afterwards, the bank entered into an agreement with the Danish central government regarding hybrid core capital.

However, in June 2010, Amagerbanken was again presented with new requirements from the Danish Financial Supervisory Authority following new losses on, *inter alia*, certain currency positions. This time, Amagerbanken must raise 750 million Danish kroner before 15 September 2010²⁵ in order to obtain the individual state guarantee of 13.5 billion Danish kroner that will ensure the bank's future when the guarantee under Bank Package I expires.²⁶ Another condition is that the state-owned company (Finansielt Stabilitet AS) must be entitled to elect members of the board of directors in Amagerbanken.²⁷ The bank is still struggling for survival.

21 Article by Morten Jeppesen in *Børsen* on 6 July 2010 and article dated 6 April 2010 available at www.borsen.dk.

22 www.finansieltstabilitet.dk.

23 Stock market announcements No. 16 dated 28 October 2009, No. 42 dated 14 December 2009 and No. 45 dated 18 December 2009 (www.amagerbanken.dk).

24 www.finansraadet.dk/tal--fakta/statistik-og-tal/de-stoerste-pengeinstitutter.aspx (the numbers are based on annual reports regarding 2008).

25 Article published on www.borsen.dk on 30 June 2010.

26 Article by Sille Wulff Mortensen printed in *Børsen* on 30 June 2010.

27 Article by Christian Sehested printed in *Børsen* on 6 July 2010.

ii *The real estate sector*

*Tækker Group*²⁸

Tækker Group is a group carrying out activities within the real estate sector, mainly in Denmark and Germany. Tækker Group filed a notice of suspension of payments with the Bankruptcy Court in June 2009. The suspension of payments has now been replaced with a moratorium by compulsory composition accepted by more than 90 per cent of the creditors, with the result that German properties with a value of approximately 2 billion Danish kroner and Danish properties with a value of around 1.5 billion Danish kroner have been restructured within the group.

*Nordicom*²⁹

Nordicom is a publicly listed company. The company carries out business within the real estate sector. The company has been a publicly listed company since 1990. It has negotiated with its material financial creditors and entered into a three-year period agreement whereby, among other things, the company's loans are extended and interest rates decreased. Further, by 30 September 2010, Nordicom is obligated to carry out an increase of its share capital to raise at least 100 million Danish kroner in revenue.

Olicom

Olicom was a publicly listed company in Denmark that carried out activities within the real estate sector, including development activities. The company started bankruptcy proceedings in June 2010 and was consequently delisted.

As of 31 March 2010, Olicom had assets with a value of 446,158,000 Danish kroner and its short-term liabilities were a total of 191,149,000 Danish kroner. The company generated a loss of 22,577 billion Danish kroner in the first quarter of 2010.³⁰

*Essex*³¹

Essex is another company that carries out business within the real estate sector by investment in and lease of apartments and non-residential properties.³² Essex had a deficit of 1.876 billion Danish kroner before tax in the 2009/2010 financial year and its write-downs on real estate were 1.26 billion Danish kroner. Despite the huge losses, Essex has been restructured under a three-year agreement with its approximately 30 Danish and foreign financial creditors.

In the future, Essex will not carry out real estate development activities and its portfolio of real estate is to be downscaled significantly.

28 Article by Peter B Rasmussen printed in *Børsen*, page 17, on 11 June 2010.

29 Stock market announcement dated 5 March 2010 (www.nordicom.dk).

30 Stock announcement No. 10 dated 31 May 2010 (www.olicom.com).

31 Article printed in *borsen.dk* on 10 March 2010.

32 www.essex.dk.

Others

Other notable companies and investors within the real estate sector who have been the subject of informal or formal restructurings or insolvency proceedings include Heine Delbing/HD Ejendomme (activities within the real estate market)³³ and Frydkjær (activities within the packaged homes market).³⁴

*iii Other sectors**Cimber Sterling*

Cimber Air, now Cimber Sterling (an airline company), acquired the activities of Sterling, an airline company that went into bankruptcy in the autumn of 2008. Cimber Sterling experienced financial difficulties in 2009 and set up an initial public offering ('IPO') in November 2009 to raise funds.³⁵ The IPO was completed and Cimber Sterling is now a publicly listed company. However, the company still struggles due to a large deficit and limited liquidity.³⁶

*Parken Sport & Entertainment*³⁷

Another company in financial difficulty that has also raised funds on the stock exchange is Parken Sport & Entertainment. However, Parken was already a publicly listed company. The company owns a football club (FC Copenhagen), a holiday centre (Lalandia), a chain of fitness centres (Fitness.dk) and also carries out entertainment and real estate activities. Due to its financial situation, the company announced an issue of new shares. This was completed in March 2010 with a net revenue of approximately 468 million Danish kroner. At the same time, the company managed to reach an agreement with its main financial creditor. These actions were important parts of the company's turnaround plan.

*Biva and Flexa*³⁸

Biva is a company doing business within the discount furniture sector and owns a chain of stores. The general slowdown in the economy and the large amount of debt accumulated by Biva's parent companies have had a significant impact on the company's financial situation. The result was a suspension of payments more than a year ago. The operating company was taken over in January 2009 by the investment bank Straumur during the suspension of payments. Straumur was one of the Biva group's financial creditors.³⁹

33 Article at www.fyens.dk (undated).

34 Article by Lasse Friis printed in *Børsen* on 11 September 2009.

35 Announcement dated 12 November 2010 published at www.investor.cimber.dk.

36 Article by Sille Wulff Mortensen dated 6 July 2010 published at www.borsen.dk.

37 Stock announcement No. 16 dated 19 November 2009 and stock announcement no. 11 dated 31 March 2010.

38 Article by Bjarne Bang printed in *Børsen* on 4 February 2010 and article by Oskar Lund dated 1 March 2010 (also printed in *Børsen*).

39 Article by Jakob Risom printed in *Børsen* on 13 January 2009.

Flexa is a company that also sells furniture. Flexa suspended its payments due to large deficits within the Flexa group. The healthy activities of Flexa have been sold to a company within the Flexa group named Flexa4Dreams. The purpose is to sell Flexa4Dreams within the next one or two years. At the same time, the other companies in the Flexa group are negotiating with the group's financial creditors to reach a solution.

Aarhusegnens Andel

A company that sells seed and fertilisers, Aarhusegnens Andel suspended its payments in February 2010. At the same time it was announced that the company and its subsidiaries were to be acquired by a consortium in order to prevent shareholders and creditors from suffering losses.⁴⁰ Later on, the acquisition was approved under certain conditions by the competition authorities.⁴¹

V INTERNATIONAL

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 November 2005) (EU Denmark Agreement), or the Nordic Judgment Convention, 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.

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

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.

VI FUTURE DEVELOPMENTS

i New rules for the restructuring of insolvent, but viable, companies

In December 2009, the Bankruptcy Council 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 Danish Bankruptcy Act on an ongoing basis.

40 Article by Lea Nielsen published at www.stiften.dk.

41 www.konkurrencestyrelsen.dk/index.php?id=28990.

In March 2010 the Danish central government introduced a bill regarding the new restructuring rules. The Danish Parliament passed the bill on 4 June 2010. The new restructuring rules are expected to enter into force on 1 March 2011.

The new legislation will repeal and replace the current rules concerning suspension of payments and compulsory composition proceedings. A new chapter on restructuring will form part of the Danish Bankruptcy Act.

The most significant changes will be:

- a* 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 a petition for bankruptcy proceedings, but only debtors can file a notification of suspension of payments and compulsory composition proceedings);
- b* an attorney-at-law and an accountant will be appointed as formal supervisors of the restructuring process;
- c* within four weeks of commencement of the restructuring proceedings, a restructuring plan will be required to be proposed;
- d* as a main rule, a restructuring proposal will be required to be adopted within six months, and only if the creditors support postponement within 11 months;
- e* a restructuring must consist of a composition, a moratorium (an interest-free postponement of payments) or a business transfer (sale of the debtor's business (or parts thereof) to a third party), or a combination of these; and
- f* there will be no way back once the (in-court) restructuring proceedings have been initiated: either the restructuring will be successfully concluded or the debtor will be subject to bankruptcy proceedings.

ii Forecast

The Danish central government expects growth to be 1.3 per cent in 2010 and 1.6 per cent in 2011.⁴² The level of unemployment is projected to rise throughout 2010. It is, however, expected that this trend will change in 2011.⁴³

Although the Danish economy as a whole is improving, the general assumption is that it will take some time before the financial markets fully recover, which will have a flow-on effect for the general market and business conditions. Furthermore, consumer spending is slowly recovering but is still far below the level recorded before the financial crisis.

Danish businesses continue to struggle to obtain new finance from and extend existing financing arrangements with the Danish banks. As a result, many businesses remain exposed, particularly with regard to their immediate liquidity positions. As a direct result, and unless this trend is reversed, more companies are expected to be subject to bankruptcy proceedings and restructuring activity will remain high.

Capital markets have picked up during the past year and several IPOs are scheduled – both in terms of fundraising and as an exit strategy for private equity-owned businesses in particular. More activity is expected within this area in the coming year.

42 www.fm.dk/nyheder ('Ny vækst i 2010').

43 www.fm.dk/nyheder ('Ny vækst i 2010').

TEIS GULLITZ-WORMSLEV

Kromann Reumert

Teis Gullitz-Wormslev is an attorney-at-law with Danish law firm Kromann Reumert and works primarily with banking and finance law and insolvency law, focusing in particular on restructurings and reorganisations. From 2005 to 2008, Mr Gullitz-Wormslev headed Kromann Reumert's London office and consequently has an extensive international network and detailed experience in cross-border transactions. Mr Gullitz-Wormslev regularly contributes to various business publications.

MARIA HØYER LEVIN

Kromann Reumert

Maria Høyer Levin is an attorney-at-law with the Danish law firm Kromann Reumert and specialises in corporate, commercial and insolvency law. Ms Levin is an external lecturer at Copenhagen University's Faculty of Law where she teaches company law and accounting principles. She regularly contributes to various business publications.

KROMANN REUMERT

Sundkrogsgade 5

Copenhagen OE

Denmark

Tel: +45 70 12 12 11

Fax: +45 70 12 13 11

two@kromannreumert.com

mln@kromannreumert.com

www.kromannreumert.com