

TITLE 1. INTRODUCTION

1.1. Bankruptcy legislation

1.1.1. Historical outline of the Danish bankruptcy legislation

The Danish bankruptcy act, Act no. 298 of 8 June 1977 (now consolidated act no. 588 of 1 September 1986), is the result of many years of reform work. This Act replaced the original Danish bankruptcy act¹ with final effect. In 1958 the Ministry of Justice appointed a committee, which was charged with considering and submitting proposals for a revision of the current rules on bankruptcy/winding-up and creditor composition and the related questions in consultation with similar committees in the other Nordic countries – the reform work was in progress.

In 1966, the bankruptcy act committee submitted an interim report on the ranking of creditors². The draft report gave rise to Act no. 332 of 18 June 1969, which essentially abolished the old bankruptcy privileges with the exception of the remuneration privilege, and Act no. 333 of the same date, which repealed the old statutory security rights for public claims.

In 1971, the bankruptcy act committee submitted a final report³, which included a draft act on bankruptcy and composition. As a result of the economic development at the time, the provisions on suspension of payments contained in the draft had become particularly relevant, and these provisions were therefore included in the Bankruptcy Act of 1872 by Act no. 266 of 26 June 1975. The prolonged and extensive work by the bankruptcy act committee was completed by the Bankruptcy Act of 1977, which implemented the committee's draft with a number of minor adjustments.

By Act no. 187 of 9 May 1984, a new version of the suspension of payments procedure was implemented and brand new rules on debt rescheduling were included. The Act carries the subtitle "Suspension of payments, debt rescheduling etc." and is based on Report on suspensions of payments⁴ and Report on debt rescheduling⁵.

In 1986, the Ministry of Justice appointed a committee, which was charged with considering possible amendments to the bankruptcy legislation and, if so, preparing a draft for new provisions in the bankruptcy act. In 1986, the committee submitted an interim report no. 1086 on trustee fees etc.⁶, and Act no. 384 of 10 June 1987 was thus implemented. This Act also in-

¹ Act no. 51 of 25 March 1872.

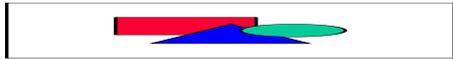
² Report I – 423/1966).

³ Report II – 606/1971.

⁴ Report no. 983/1983.

⁵ Report no. 957/1982.

⁶ Report no. 1086/1986.



cludes other amendments to the bankruptcy act which pertain to procedural law and which are also based on the report.

After questions had been raised in the Danish parliament (Folketinget) as to whether a statutory basis existed for effecting redirection of letters against the debtor, proposals were submitted during the parliamentary session of 1990-91 for special rules on this subject. These were implemented by Act no. 215 of 10 April 1991.

In 1994, the 1986 committee submitted a report with the title "Rationalization and modernization of bankruptcy proceedings"⁷. The draft contained a new system for estate administration as well as minor amendments to other provisions in the bankruptcy act, and the draft was implemented by Act no. 382 of 22 May 1996. The general opinion was that this Act had created a modernized act, the special aim of which was to streamline bankruptcy and winding-up proceedings.

In the past years, minor amendments have been made to the bankruptcy legislation on several occasions and in January 2001 the Ministry of Justice set up a bankruptcy board, which was, inter alia, charged with submitting recommendations for amendments to the act with a view to reforming this legislation, acting as advisory board for the Ministry of Justice with respect to insolvency law provisions in the private legislation and for submitting recommendations on requirements and possibilities for strengthening the fight against economic crime in connection with insolvency proceedings, inter alia by improving cooperation between the public authorities involved and the prosecution. The work of the bankruptcy board has not yet resulted in the submission of any recommendations.

1.1.2. Structure of the Bankruptcy Act

The Danish bankruptcy act, most recently Act no. 118 of 4 February 1997, as amended by Act no. 402 of 26 June 1998, is divided into 5 titles. Title I includes the introductory provisions while title II⁸ is the main title of the act dealing with bankruptcy. Title III⁹ and title IV¹⁰ include provisions on compulsory composition and debt rescheduling. The final title V is called "Common Provisions" and it includes provisions on competence requirements for the professional players within the system of insolvency proceedings and provisions on the hearing of disputes by the bankruptcy court¹¹.

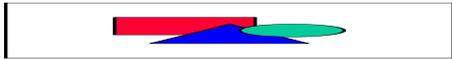
⁷ Report no. 1273/1994.

⁸ Parts 3-18 - sections 17-156.

⁹ Parts 19-24 - sections 157-196.

¹⁰ Parts 25-29 - sections 197-237.

¹¹ "Insolvensret" (insolvency law), Lars Lindecrone Petersen and Niels Ørgaard, p. 17.



1. 2. System of insolvency proceedings

The basic element in the Danish system of insolvency proceedings for both natural and legal persons is bankruptcy/winding-up¹². In case of bankruptcy/winding-up, the debtor's property is liquidated and any proceeds are distributed among his creditors according to the ranking stated in sections 92-99 in part 10 on ranking of creditors in the Bankruptcy Act.

The purpose of the system for suspension of payments is to support an attempt to prevent subsequent bankruptcy/winding-up in favour of an arrangement with the debtor's creditors¹³. Suspension of payments may be regarded as a platform, a process or an aid that may be used in order to obtain a result that is better than bankruptcy/winding-up, both for the debtor and his creditors. Suspension of payments is not in itself a form of estate administration¹⁴.

The debt rescheduling alternative to bankruptcy/winding-up is liquidation composition. There is no functional difference between bankruptcy/winding-up and liquidation composition – the debtor's property is liquidated and the proceeds are distributed to his creditors according to almost the same system as bankruptcy/winding-up. However, the difference is that, in case of liquidation composition as opposed to bankruptcy/winding-up, the debtor is released of all debt. The liquidation composition may be carried out voluntarily by agreement or as a compulsory composition according to the relevant provisions of the bankruptcy legislation. However, compulsory composition is in general to be preferred.¹⁵

Ordinary compulsory composition according to section 157 (iii) of the Bankruptcy Act involves a percentage reduction of the debtor's debt and may be combined with an extension of payment according to section 157 (iii) of the Bankruptcy Act. A reconstructive alternative to bankruptcy is thus obtained. This kind of composition may also be effected voluntarily but also in this case compulsory composition is in general to be preferred.

The Danish debt rescheduling system is intended for hopelessly indebted personal debtors. This instrument is thus of no interest to business enterprises.

1.2.1. Suspension of payments

The rules on suspension of payments may be found in part 2, sections 10-16e, of the Bankruptcy Act. The current rules were implemented by Act no. 187 of 9 May 1984 on amendment of the Bankruptcy Act and other appurtenant legislation with effect from 1 July 1984¹⁶.

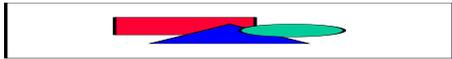
¹² See paragraph 2.2 on bankruptcy.

¹³ See paragraph 2.1 on suspension of payments.

¹⁴ "Insolvensret" (insolvency law), Lars Lindecrone Petersen and Niels Ørgaard, p. 18.

¹⁵ "Insolvensret" (insolvency law), Lars Lindecrone Petersen and Niels Ørgaard, p. 17.

¹⁶ "Insolvensret" (insolvency law), Jens Paulsen, p. 51.



As it appears from the above, suspension of payments does not in any way solve a debtor's financial problems but will only act as a forerunner of either compulsory or voluntary composition, debt rescheduling or bankruptcy/winding-up. In the event of suspension of payments, the debtor obtains exemption from his creditors, who may continue with individual proceedings through the sheriff's court. In this way, the debtor and his advisers – lawyer, accountant, bank and external consultants – are given a respite to prepare/change budgets and to submit proposals for implementation and financing of a general credit arrangement.

There are two forms of suspension of payments within Danish insolvency practice:

- i. suspension of payments filed with the bankruptcy court, and
- ii. unannounced suspension of payments.

The conditions for establishing suspension of payments are in fact the same in the two situations since suspension of payments in fact only expresses that the debtor omits to pay his creditors from a given date¹⁷.

The rules are different depending on whether the suspension of payments is filed with the locally competent bankruptcy court in accordance with section 3 of the Bankruptcy Act or whether it is an unannounced (non-filed) suspension of payments.

In case of the former type of suspension of payments, a relevant date will be fixed at the time when the suspension of payments is filed with the bankruptcy court whereas, in the case of an unannounced suspension of payments, the debtor will, as a main rule, merely cease to pay his creditors, in some cases without the creditors being informed about this¹⁸. No relevant date is fixed in connection with an unannounced suspension of payments.

1.2.2. Bankruptcy/winding-up

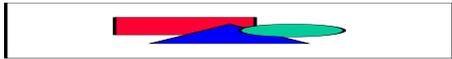
Part 3 (sections 17-28) of the Bankruptcy Act concerns the commencement of bankruptcy/winding-up. Of the provisions in this part, sections 17-20 deal with the substantive conditions for declaring a debtor bankrupt/in liquidation. Insolvency is one of the basic conditions of bankruptcy/winding-up.

Faced with a solvent debtor who is, however, unwilling to effect payment, the creditors will have to settle for using the system of individual proceedings by creditors. As a condition for bankruptcy, insolvency is defined as illiquidity

Bankruptcy/winding up may be adjudged upon petition from the debtor himself or from a creditor. If the initiative is taken by a creditor, the creditor's claim must fulfil a number of requirements, in addition to the condition of insolvency.

¹⁷ "Insolvensret" (insolvency law), Jens Paulsen, p. 52.

¹⁸ "Insolvensret" (insolvency law), Jens Paulsen, p. 56



The immediate effects of bankruptcy/winding-up in the context of property law is that the debtor loses the right to dispose of his property with effect on the estate and that it is no longer possible to levy execution or attachment against the property comprised by the bankruptcy/winding-up.¹⁹

When it has been ascertained that the conditions for issuing a bankruptcy/winding-up order have been fulfilled the local bankruptcy court issues a bankruptcy/winding-up order. The debtor loses the right to transfer or surrender his possessions already when the order is issued by the bankruptcy court, cf. section 29 of the Bankruptcy Act, but see section 30. In other words, the bankruptcy/winding-up order creates a new legal person where the decision-maker is no longer the bankrupt or the board/management of the company being wound up but the estate management, which, immediately following the bankruptcy/winding-up order, is the trustee, who is accountable to the bankruptcy court.²⁰

1.2.2.1. Insolvent companies

If a company is insolvent, which means that the administration of the estate will not provide full payment of the creditors' claims, the company can only be dissolved through winding-up in pursuance of section 96(2 and 3), of the Private Limited Companies Act and section 127(2 and 3) of the Companies Act. The bankruptcy court issues a winding-up order relating to the company and the usual procedure for insolvent estates is then followed.

1.2.2.1.1. Compulsory dissolution (upon petition from the Danish Commerce and Companies Agency)

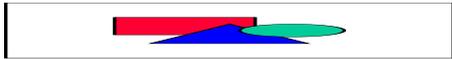
The estate administration costs are paid by the government to the extent that the assets of the estate are not adequate. However, most bankruptcy courts follow the practice of dissolving the company informally without winding-up if the persons representing the company declare, under criminal liability, that there are no assets in the company but only debts.

If the bankruptcy court uses the informal method the creditors will not be further notified of the fate of the company until it is published in the Danish Official Gazette that the company is dissolved.

If the company is without assets and if there is no information about or suspicion of voidable transactions and if the case has been discussed with the customs and tax authorities there is in most cases justification for dissolving the company immediately without any winding-up procedure. However, if assets exist and/or information exists about voidable transactions the company should go through winding-up proceedings.

¹⁹ "Insolvensret", Lars Lindecrone Petersen & Niels Ørgaard, p. 43.

²⁰ "Insolvensret" (insolvency law), Jens Paulsen, p. 89.



If the bankruptcy court immediately dissolves "an empty company" the bankruptcy court must naturally inform the Commerce and Companies Agency, which will then announce that the company has been dissolved.²¹

1.2.2.2. Solvent companies

If the company is solvent, the bankruptcy court's only responsibility is to appoint a liquidator in pursuance of the Private Limited Companies Act or the Companies Act. The liquidator must, on behalf of the bankruptcy court, dissolve the company and the bankruptcy court will usually appoint a lawyer to carry out this work. The liquidator must notify the Commerce and Companies Agency of his appointment.

The bankruptcy court is not obligated to supervise the liquidator but the court should enquire about the case to ensure an effective procedure and to expedite the estate administration.

TITLE 2. DEFINITIONS AND TERMINOLOGY

Alternative to bankruptcy (konkurssurrogat):

Term for a scheme used instead of bankruptcy/winding-up, such as composition, liquidation or moratorium.

Assets available for distribution (konkursmassen):

Anything that may be included in the bankruptcy/winding-up proceedings.

Bankrupt (fallent):

Debtor in respect of whom a bankruptcy order has been made.

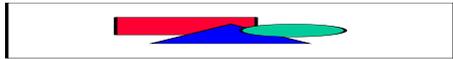
Bankruptcy/winding-up (konkurs):

Legal proceedings against an insolvent debtor whereby all the debtor's property is used to satisfy all the creditors so that the debtor loses the right to dispose of the property, the creditors are ranked equally (but see the ranking of creditors) and individual proceedings by creditors are not possible.

Bankruptcy court (skifteret):

The Danish bankruptcy court carries out estate administration, including especially the administration of estates of deceased persons and insolvent estates etc., cf. section 14 and part 58 of the Danish Administration of Justice Act. Bankruptcy courts are found in the district courts and the Maritime and Commercial Court, which only deals with insolvent estates etc., cf. section 9(3), of the Administration of Justice Act.

²¹ "Konkursbehandling i praksis" (Bankruptcy proceedings in practice), 2nd edition Tove Horsager, Peter Schiøtz and Ole Madsen, p. 47.

**Bankruptcy order/winding-up order (konkursdekret):**

Order that bankruptcy/winding-up has commenced.

Commencement of bankruptcy/winding-up (konkursens begyndelse):

According to section 29 of the Bankruptcy Act, it commences at the time when the bankruptcy order/winding-up order is issued, but see relevant date.

Composition (akkord):

An agreement between the parties regulating payment of an outstanding balance. Composition is especially used in connection with a debtor's agreement with his creditors under which the creditors forgive or grant a respite for part of the debt according to agreement or special provisions in the Bankruptcy Act (voluntary composition and compulsory composition).

Compulsory composition (tvangsakkord):

The situation where a certain qualified majority of a person's creditors force the rest of the these to accept a scheme according to which the debtor is granted a reduction of the debt or extension of payment so that commenced bankruptcy/winding-up proceedings are completed or so that bankruptcy/winding-up may be avoided entirely. Composition negotiations without bankruptcy/winding-up may be conditional upon the appointment of expert nominees for the debtor. Compulsory composition must be affirmed by the bankruptcy court. The effect of both compulsory composition during bankruptcy/winding-up and compulsory composition without bankruptcy/winding-up is that the debtor is released from the part of the debt that is not included in the composition.

Creditors' committee (kreditorudvalg):

Three persons chosen among the creditors of an insolvent estate who are responsible for supervising the administration by the trustee/liquidator of the estate, cf. sections 114, 117 of the Bankruptcy Act, cf. sections 238 and 239.

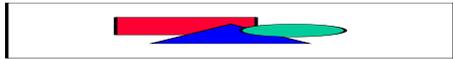
Debt rescheduling (gældssanering):

Scheme according to which a debtor obtains reduction – or cancellation – and possibly a respite in respect of his entire debt or parts thereof, cf. title IV of the Bankruptcy Act. The bankruptcy court may then accept debt rescheduling for debtors in hopeless debt who have a creditable interest in this.

Deferred claims (efterstillede fordringer):

Claims against an insolvent estate which are not paid until all other claims, including unsecured claims, have been fully paid, cf. section 98 of the Bankruptcy Act, which also states the ranking of deferred claims.

Disclaimer (konkursregulering):



Term indicating the change that occurs, especially in open-ended contractual relationships, in connection with bankruptcy/winding-up of the debtor, cf. part 7 of the Bankruptcy Act.

Fallisement:

Danish term previously used about bankruptcy.

Fallit:

Danish term for bankrupt.

Illiquidity (illikviditet):

Means that the debtor cannot pay his obligations as they fall due. According to section 17(2) of the Bankruptcy Act, a debtor is regarded as insolvent if he cannot meet his obligations as they fall due unless the inability to pay must be assumed to be merely temporary.

Insolvency (insolvens):

Inability to satisfy ones creditors. Sometimes insolvency is used to describe the situation where a person's liabilities are greater than his assets and sometimes it means that he cannot be assumed to be able to meet his obligations as they fall due. The possibility of realisation of the values and the debtor's earning capacity are thus also taken into consideration, cf. section 18(2) of the Bankruptcy Act.

Insufficiency (insufficiens):

Insolvency in the sense that a person's liabilities are greater than his assets.

Liquidation (likvidation):

Settlement; settlement of opposite claims through set-off; discontinuation and dissolution of a trading company without winding-up taking place.

Liquidation composition (likvidationsakkord):

Composition according to which the debtor's property or parts hereof is distributed among the creditors so that the debtor is released from the entire debt or parts thereof, cf. section 157 (ii).

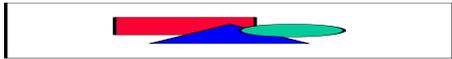
List of proved debts (fordringsliste):

List prepared by the trustee/liquidator of an insolvent estate showing proved claims as well as known and specially secured claims with recommendations as to whether they should be admitted, cf. section 131 of the Bankruptcy Act.

Petitioning creditor (konkursrevirent):

The person petitioning for bankruptcy/winding-up proceedings. Both the debtor and a creditor may petition for bankruptcy/winding-up proceedings when the debtor is insolvent.

Phoenix syndrome (konkursrytteri):



Term for abuse of the winding-up system, particularly by establishing companies with limited liability that are wound up and then emerges as a new corporate entity with the same activities etc. carried on by the old company.

Prepreferential claims (massekraft):

Claims in an insolvent estate that are paid before the competing creditors, both preferential, unsecured and deferred claims. The actual prepreferential claims of the estate comprise various costs and debts incurred during the bankruptcy/winding-up proceedings, cf. section 93 of the Bankruptcy Act.

Preferential claims (Privilegerede (fortrinsvis berettigede) fordringer):

Claims against an insolvent estate that are paid before unsecured claims, cf. section 95 of the Bankruptcy Act – claims for salary and other payment for work in the debtor's service that have fallen due in the period from 6 months before the relevant date until the bankruptcy/winding-up order is issued as well as certain other claims from the employment.

Ranking of creditors (konkursordenen):

Division into classes, creditor classes, of the claims made against the insolvent estate so that no claim in a subordinate class is met as long as all claims in the preceding class have not been fully satisfied, cf. part 10 of the Bankruptcy Act.

Registration of bankruptcy/winding-up in the Land Charges Register (konkursnotering):

Registration in the Land Charges Register that the owner of real property has gone into liquidation.

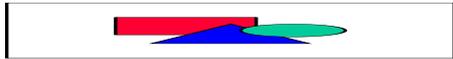
Relevant date (fristdag):

The date on which the bankruptcy court receives a notification of suspension of payments or petition for composition negotiations or bankruptcy/winding-up, and similar other dates, cf. section 1 of the Bankruptcy Act. Provisions enabling certain transactions to be set aside require that the transaction took place a specified period before the commencement of bankruptcy/winding-up.

"Second class" prepreferential claims (massekraft "af anden klasse"):

Rank after the actual prepreferential claims and comprise costs and debts incurred during the preliminary stages where attempts are made to prevent bankruptcy/winding-up, for example by liquidation, suspension of payments etc., cf. section 94 of the Bankruptcy Act.

Secured creditor (separatist):



A person entitled to take an individual object from an insolvent estate, for example as owner, pledgee, lessor etc. without considering the other holders of rights in the estate.

Subsequent distribution (efterudlodning):

Distribution of assets forming part of the assets available for distribution after the winding up of the estate in accordance with the previous distribution, cf. section 154 of the Bankruptcy Act.

Suspension of payments (betalingsstandsning):

General discontinuation of payment of debts as a result of current or expected inability to pay. Certain items of debt are, however, excluded, cf. part 2 of the Bankruptcy Act. A debtor who believes that he will not be able to fulfil his obligations may file for suspension of payments. No publication is effected but notification must be forwarded to all known creditors. Immediately upon receipt of a petition for suspension of payments, the bankruptcy court must appoint a supervisor for the debtor and, upon request, a creditors' committee may be established and expert assistance may be engaged. The debtor may not carry out transactions without the supervisor's consent and a creditors' committee must be notified in advance by the supervisor of any planned, particularly important transactions.

Unsecured claims (simple (usikrede) fordringer):

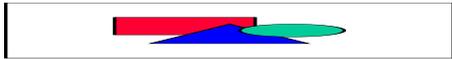
Claims against an insolvent estate that are paid after the preferential claims have been paid in full but before payment of deferred claims.

TITLE 3. WARNING LIGHTS AND PREVENTION OF INSOLVENCY

3.1. Introduction

The dampening of economic activity in Denmark in the 1980s resulted in a serious deterioration of the general conditions for carrying on commercial enterprise. Suspension of payments and winding-up were the order of the day. The unfavourable development for business was clearly reflected in the annual accounts of banking institutions in the period 1980-1982, from which it appears that both confirmed losses and provisions for losses on debtors constitute significant amounts in those years.

Many corporate executives in Denmark feel that winding-up is connected with shame – whereas in the United States winding-up is seen as a learning experience. This attitude not only constitutes a hindrance to saving loss-making companies in time but it also acts as a deterrent for those who want to make a fresh start.



Avoidance of compulsory insolvency proceedings is not only in the interest of society and the owners but also of the creditors. The forced sale by an insolvent estate of a company's assets will rarely produce the highest possible price and the costs of the winding-up proceedings rank as prepreferential claims prior to all other claims, which reduces the dividend for the creditors. The result is that the unsecured creditors rarely receive any dividend and, if they do, it is, on an average, very low.

3.1.2. Possible causes of insolvency – warning lights

One of the characteristics of companies that do not practice sound financial management by means of interim accounts, budget control etc. is that an unfortunate development is often not recognized until after the time has passed for proper intervention with avoidance measures. If, at the same time, the company's capital base is not adequate to withstand the effect of the unfortunate development, the company faces a serious survival problem. If the situation is not remedied the result will inevitably be a closing down of the company – possibly through winding-up proceedings – resulting in loss of jobs and values.²²

Why do companies end up in financial breakdown – What should companies watch out for?:

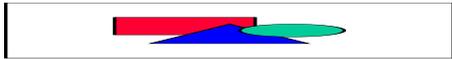
- Economic decline.
- Big investments.
- Declining production.
- Increased competition.
- Declining inflow of orders.
- Large administrative costs.
- Poor investments.
- Nonpayment of wages and salaries.
- Nonpayment of rent.
- Increase of overdraft facility.
- Creation of mortgages.
- Etc....

3.1.3. What to do when discovering financial difficulty

When it is discovered/recognized that a company is in financial difficulty the company often summons one or several advisers – often the company's auditor – in order to solve the financial problems of the company. The first step to be taken is a basic assessment of whether the company can be regarded as viable when disregarding the immediate problems.

One should keep in mind that, in the last few decades, technology has developed so quickly that companies that are financially and technologically well-founded may suddenly lag be-

²² ”Revisors position i konkurstruede virksomheder” (The auditor's role in companies facing winding-up) by Poul Erik Grüning, p. 33.



hind. It is also important to be aware that this fast technology development may result in the death of the relevant business sector.

Before different rescue attempts are initiated, advisers should therefore seek to obtain reasonable assurance that a capital contribution, which will typically be part of the rescue attempt, will produce a commercially viable result either because the company belongs in a business that has a future or because the company may be classified as being in a business that is declining but where some companies can still be expected to survive.

It is thus often seen that an economic crisis within a certain business has at the same time been an indicator of necessary economic renovation of the business (economic Darwinism).

3.1.4. Reconstruction

An attempt at reconstruction of a company that does not fulfil the above requirements will, in reality, merely postpone the inevitable closing down of the company resulting in further losses for both creditors and owners.

It is a known fact that everyone involved in the company, including especially the management or owners, usually displays great optimism with respect to the possibilities of successfully implementing a reconstruction. The adviser's role is to ignore this understandable optimism and to try to shed light on the relevant problems in their evaluation in order to determine the objectives and means necessary to implement a reconstruction.²³

To be able to assess whether a reconstruction can be expected to have a positive result, it is necessary to prepare reasonably adequate accounting material regarding the company. However, financially troubled companies can rarely present updated and audited accounting material and the advisers therefore, to a great extent, have to rely on their own feelings about the company's possibilities for survival rather than specific accounting material.

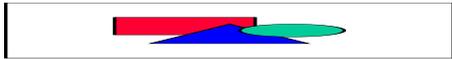
It is very important that the advisers are able to form a general idea about the important aspects of the situation while at the same time acknowledging that they lack knowledge of a number of details. It is also important that the advisers can give the participants in a reconstruction the impression that the matters which have been brought to light are of vital importance for the troubled company.²⁴

3.1.5. Procurement of capital

The interest groups that may be relevant as potential investors in the company in connection with a capital contribution will be the company's management/employees, creditors and espe-

²³ "Rekonstruktion af virksomheder med økonomiske problemer" (Reconstruction of financially troubled companies) by lawyers Jørgen Kjældgaard, Ole Finn Nielsen and Jacob Nørager-Nielsen, p. 13-14.

²⁴ "Rekonstruktion af virksomheder med økonomiske problemer" (Reconstruction of financially troubled companies) by lawyers Jørgen Kjældgaard, Ole Finn Nielsen og Jacob Nørager-Nielsen, p. 15.



cially the company's suppliers, customer groups and parties that are independent of the company.

In the latter case, the business community in the 1990s benefited from the presence of several very financially strong investors with respect to both an entirely passive investment and an investment combined with a requirement for active participation.

In the last few decades, it has been common in certain types of companies for the employees, in an emergency situation, to try to organise a collection for the purpose of procurement of new capital to the company. However, such attempts at reconstruction, which rely on contributions from the employees, have, admittedly, rarely been successful in the long term – primarily because the amounts required for capital contributions to financially troubled companies are too large for the company's employees to procure.

If the financially troubled company is a limited liability company of a certain size, the natural form of capital contribution would, all other things being equal, be an attempt at a stock exchange introduction – provided, of course, that the company has serious business potential when disregarding the immediate problems. Since it is a precondition for obtaining a stock exchange listing that the company can present accounting material that describes the company's latest financial year, this is, however, rarely a realistic option.²⁵

3.1.6. Forms of contributions

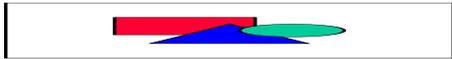
The decisive question in connection with reconstruction by capital contribution is whether such capital should be procured purely as loan capital or as participating capital in the form of share capital in the case of a public or private limited company in distress?

The advisers will usually aim at a solution where the new capital is tied to the financially troubled company as, for example, share capital. However, there may be situations where the economic crisis is expected to be so short that an attempt is made to establish the capital contribution as loan capital out of regard for the company's owners.

From the point of view of the investors, these will typically prefer the role of lender with the resulting possibility of having their capital repaid with addition of agreed interest etc.

It is not uncommon for these conflicting interests regarding the extent to which the investors' money should remain tied in the financially troubled company to be reconciled by establishing a financial arrangement according to which the investors provide subordinated loans that rank after the company's other creditors.

²⁵ "Rekonstruktion af virksomheder med økonomiske problemer" (Reconstruction of financially troubled companies) by lawyers Jørgen Kjældgaard, Ole Finn Nielsen and Jacob Nørager-Nielsen, p. 16-17



If the company's financial situation is more serious, but without any immediate danger of closing-down, the negotiations on, for example, contribution of new share capital will often be influenced by this. The potential investors will typically demand special terms for their contribution. The investors will thus usually demand that the existing share capital is reduced to avoid that the existing share capital nominally obtains too large a majority in relation to the new share capital. Such limited nominal status of the original share capital will – in addition to the effect on transactions regarding the company that follows from the voting rights of the shares – affect the relation between the share groups with respect to addition of value and possible subsequent dividend payments and issue of bonus shares.

3.1.7. Creditor arrangement

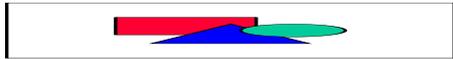
If the company's financial situation is so serious that the financial problems are obvious to everyone – even if there is still some faith in the future operation of the company – the only option will often be to have the company suspend its payments – either unannounced or filed with the court – in order to avoid disturbing creditor relations.

In this situation, the possibilities for reconstruction consist in an attempt at a moratorium, possibly combined with a composition arrangement.

It is typically companies with a positive liquidity flow, which may originate from long supplier credits and short-term debtor payments possibly supported by factoring schemes, that discover the financial problems at a very late time. In the meantime, these problems have grown so big that a rescue attempt must be based on a moratorium, and possibly composition.

The question of whether the creditors wish to participate in a moratorium and composition depends on the adviser's ability to convince the participants in the arrangement that this measure will help bring the company back in a position where earnings will be able to cover the obligations maintained in the creditor arrangement. However, such arrangements are usually established in the light of the fact that non-participation in a financial arrangement as suggested will result in the total financial breakdown of the company. It is a well-known fact that the dividend obtained by the creditors from winding-up proceedings in most estates is usually very modest, cf. the introduction.

When attempting to establish a moratorium or composition, the advisers are often met by demands from individual creditors for preferential treatment. It is common knowledge to lawyers that especially unprofessional creditors often lack an understanding of the necessary principle of equality on which the winding-up procedure is based and which should therefore also characterize the establishment of voluntary arrangements in the form of moratorium and composition. The granting of preferential treatment to a creditor will typically bring down an established creditor arrangement if it becomes known that an individual creditor has obtained a financial position that was not known and approved by the other creditors. It is therefore often a time-consuming task for an adviser in a financial reconstruction to explain to the par-



ticipants in the creditor arrangement that any kind of preferential treatment will sabotage the planned rescue attempt – and to defend preferential treatment that is necessary for the implementation of the arrangement.²⁶

3.2. Possible future solutions?

3.2.1. Prevention

Prevention is the best method but in case of financial crisis, rescue is better than liquidation if the relevant company is viable. Informal solutions are preferred to formal procedures before the courts and it is therefore necessary to improve the possibilities for assistance for financially troubled companies (early warning, solutions without intervention by the court).²⁷

TITLE 4. LEGAL POSSIBILITIES TO CONTINUE ECONOMIC ACTIVITIES

Both within and outside the framework of the Bankruptcy Act, there are various possibilities for a company in crisis to go through a procedure to evaluate whether the company can continue its activities. These possibilities are:

1. SUSPENSION OF PAYMENTS (chapter 4.1.)
2. COMPULSORY COMPOSITION (chapter 4.2.)
3. WINDING-UP (chapter 4.3.)
4. UNANNOUNCED SUSPENSION OF PAYMENTS (chapter 4.4.)

4.1. Suspension of payments

§1. Comprehensive description of the regime as well as its underlying philosophy.

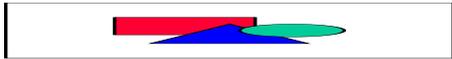
1.1. Description.

Rules on this subject were introduced as a schedule to the Bankruptcy Act in 1975, and after the committee stage in 1981 they were amended by Bankruptcy Act no. 187 of 9 May 1984. Only the debtor may petition for suspension of payments.

The purpose of suspension of payments is to examine whether there is any possibility of continuing operation and to establish an arrangement with the creditors, possibly in connection with a reconstruction of the company.

²⁶ ”Rekonstruktion af virksomheder med økonomiske problemer” (Reconstruction of financially troubled companies) by lawyers Jørgen Kjældgaard, Ole Finn Nielsen and Jacob Nørager-Nielsen, p. 19-20.

²⁷ Erhvervslivets Europa nr. 4 – July-September 2001 – ny vurdering af konkurs (new evaluation of bankruptcy). http://europa.eu.int/comm/enterprise/library/enterprise-europe/issue4/articles/da/enterprise18_da.htm



Suspension of payments is filed with the bankruptcy court and in this connection the debtor must at the same time appoint a supervisor who is not legally incompetent. The suspension of payments may last up to 3 months. The 3-month period may be extended three times, which means that a suspension of payments can last for a total of 12 months.

The continued operation of the company is in practice the responsibility of the supervisor, which means that creditors cannot institute individual legal proceedings against the debtor.

1.2. Critical analysis.

Experience shows that suspension of payments is often established so late that the company's possibilities of survival are very limited. In many cases, the reason for this is that the company's management does not acknowledge until very late that the company's financial crisis is lasting and that it has not taken or is not able to take the necessary measures with a view to an adjustment of the company.

§2. Classification of the procedure among branches of law, competent jurisdictions, overview of the procedure followed before these jurisdictions, implications of international private law.

2.1. Description

The rules are now laid down in part 2 of the Bankruptcy Act. The rules describe the conditions for suspension of payments, including the condition that suspension of payments must be filed by the debtor and that the bankruptcy court must appoint a supervisor, and the specific rules regarding the supervisor's duties and the supervisor's obligation to notify the bankruptcy court when the suspension of payments is no longer regarded as serving a purpose.

2.2. Critical analysis.

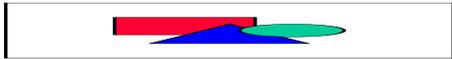
Previous experience has shown that the debtor often appoints his own lawyer as supervisor and that this person has typically not been critical enough when evaluating whether the suspension of payments actually serves a purpose. In recent years, there has been a tendency towards fewer suspensions of payments being filed, but more of these actually have a purpose.

§3. Criteria to benefit for the regime (the origin of the criteria (legal, case-law, practice) must be specified)

3.1. Description.

It appears from section 10 of the Bankruptcy Act that a debtor who does not believe that he is able to fulfil his obligations may file for suspension of payments with the bankruptcy court.

3.2. Critical analysis.



The filing of suspension of payments has rarely given rise to problems. However, there are, once in a while, cases where no particularly purpose of the suspension of payments can be stated, such as the existence of a basis for establishing an arrangement with the debtor's creditors.

§4. Specification of the possible initiators of the procedure.

4.1. Description.

Only the debtor can file for suspension of payments.

4.2. Critical analysis.

There seems to be no special need for a creditor to be able to file for suspension of payments. A creditor may file a petition for winding-up. If there is a basis for establishing an arrangement with the creditors, the bankruptcy court may, upon request from the debtor, decide that the petition for winding-up may be postponed, which has the same effect as suspension of payments, or that the creditor withdraws his petition for winding-up if the debtor files for suspension of payments instead.

§5. Administration of the procedure (who manages the assets of the individual or the company, the role of the different actors in the proceedings (creditors, debtor, State, appointed manager, court, etc.)

5.1. Description.

The assets included in the suspension of payments are, in principle, administered by the company's management under the supervision of the supervisor appointed by the bankruptcy court, who must give his consent to all important transactions and who must, in some cases, submit such transactions to the creditors. Sale of assets etc. may thus be effected to a limited extent whereas sale of the company or important parts thereof cannot be effected without the creditors' consent.

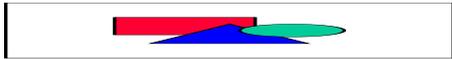
5.2. Critical analysis.

The daily administration of the company's assets rarely gives rise to problems. There may, however, be certain problems in connection with negotiations on the sale of companies in whole or in part since the deadlines for such transactions are often short, which, in practice, makes it difficult or impossible to submit such transactions to the creditors.

Transactions may be submitted subsequently but in such case the relevant agreement must be conditional upon subsequent consent from the creditors, which is rarely practical.

§6. Restructuring plan (if applicable, who must file it, how, where, must it be voted by creditors, is there a court intervention, etc.)

6.1. Description.



A plan for possible reconstruction must, in principle, be submitted within the 3-month time limit, which is the general statutory time limit for postponement of suspension of payments. In practice, a longer postponement will often be granted – in certain cases up to 12 months.

A reconstruction plan is, in practice, elaborated by the supervisor together with the company's management and possibly a creditors' committee, if such has been established. Presentation of the reconstruction plan will typically take place in connection with a creditors' meeting at the bankruptcy court, where the supervisor explains the reconstruction plan and its contents as well as the conditions for its adoption.

The bankruptcy court has no influence on the adoption of the plan but may, if necessary, decide on further postponement with a view to adjustment of the plan etc.

6.2. Critical analysis.

The creditors may, at any time, maintain or file a new petition for winding-up and – provided that the other conditions for winding-up are fulfilled (which they often are) – demand that the bankruptcy court issues a winding-up order, irrespective of whether the bankruptcy court believes that there might be a basis for implementing an arrangement with the creditors either in the short or the long term.

§7. The degree of protection of the actors involved in the procedure: public investors, creditors (secured and unsecured, preferential or not), shareholders, ...), as well as the way to carry out this protection.

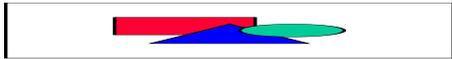
7.1. Description.

One of the results of a suspension of payments is that the debtor's assets cannot become the subject of individual proceedings by creditors and any attachment and enforcement proceedings become inoperative. Claims arising during the suspension of payments are preferential claims in a possible subsequent winding-up if these have arisen with the supervisor's consent.

The management's and the owners' right of disposal is, in principle, the same as before the suspension of payments but it should be taken into account that all important transactions must have been carried out with the supervisor's consent. Suspension of payments does not affect the interests of the secured creditors. They still enjoy the same protection and are not under an obligation to respect a possible sale of the relevant assets unless they obtain full settlement on this occasion. Since the equity capital has usually been lost or is very limited the interests of the shareholders are without practical relevance.

7.2. Critical analysis.

The Bankruptcy Act does not give the supervisor any real authority to make decisions on behalf of a company in crisis. The formal role of the supervisor is merely to approve or reject possible transactions but he cannot make such decisions on his own. However, in practice, the supervisor makes the general decisions for companies in suspension of payments but one cannot preclude the possibility that a grey zone exists in the relationship



between the registered management and the company which has not been examined in further detail.

§8. *Termination of the procedure.*

8.1. Description.

According to the Bankruptcy Act, the suspension of payments is terminated when

- 1) the debtor withdraws the notification of suspension of payments,
- 2) negotiations on compulsory composition are initiated,
- 3) a debt rescheduling case is initiated,
- 4) a winding-up order is made or 3 months have passed since the relevant date.

In practice, the suspension of payments is also terminated if an arrangement with the creditors is established during this period without any of the above situations having occurred.

As mentioned earlier, a suspension of payments may be extended for additionally 3 x 3 months.

8.2. Critical analysis.

This does not give rise to any comments.

§9. *Degree of information on the development of the procedure towards creditors (e.g. access to (court) files, etc.)*

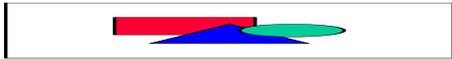
9.1. Description.

In connection with the suspension of payments, a notification of the suspension of payments must be forwarded, not later than 1 week after appointment of supervisor, to all known creditors with a copy of the latest accounts or excerpts thereof. This notification must also comprise information about the debtor's most important assets and liabilities and, if possible, a list of creditors with indication of security provided, information about the debtor's bookkeeping, an account of the reasons for and purpose of the suspension of payments and information about the time of the meeting with the creditors to be held at the bankruptcy court.

If, after this meeting, the suspension of payments is extended, the supervisor must notify the creditors of this extension. If the suspension of payments is extended beyond this time, notification must also be given and an account will usually have to be made of the course of the suspension of payments and the prospects of arriving at an arrangement with the creditors.

9.2. Critical analysis.

The notification obligations, as they are described in the Act, are considered adequate. In practice, much less information is accepted, without this being an expression of recognition of this lower level.



§10. Costs related to the procedure, if applicable (e.g. fees trustee, receiver etc.)

10.1. Description.

During a suspension of payments the purpose of which is to reconstruct the company, there will typically be costs in connection with the supervisor(s), accounting and auditing assistance, consultants etc. The costs of such an arrangement, if it is followed by winding-up, must be approved by the bankruptcy court, cf. section 239 of the Bankruptcy Act. Such cost claims will be preferential claims according to section 94 of the Bankruptcy Act but with a lower priority than the costs of the winding-up itself.

If the suspension of payments is replaced by an arrangement with the creditors without winding-up there are no special provisions that the bankruptcy court must approve costs and fees. In such cases, it is assumed that costs and fees have been approved by the company's management or the creditors in connection with the presentation of the creditor arrangement to these.

10.2. Critical analysis.

In practice, the procedure does not give rise to any problems.

§11. Competence, knowledge and functioning of insolvency (bankruptcy) courts.

11.1. Description.

The duty of the bankruptcy court in connection with a suspension of payments is to register the notification of suspension of payments and to evaluate the declaration of legal capacity submitted by the supervisor. In addition, the bankruptcy court must also ensure that notification of the suspension of payments is forwarded to the creditors with the information mentioned above and that a meeting is held within 3 weeks for the purpose of deciding if the suspension of payments is to continue for up to 3 months and possibly also in connection with an extension of the suspension of payments beyond this period. It is not up to the bankruptcy court itself to evaluate whether the suspension of payments serves any purpose but if objections are raised by creditors or others the bankruptcy court must evaluate whether such purpose exists.

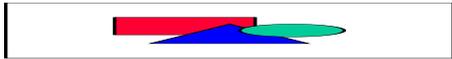
11.2. Critical analysis.

The procedure does not give rise to any problems.

§12. Publicity conditions, if applicable (e.g. newspaper, official gazette).

12.1. Description.

The filing of suspension of payments is not announced. As it appears from the above, notification only has to be forwarded to known creditors. In practice, this means that most creditors etc. are informed about the relevant situation but it cannot be precluded that, for example,



business connections that are not currently creditors do not receive notification of the suspension of payments.

12.2. Critical analysis.

The result of the last point may be that, in connection with ongoing business relations, no evaluation is made of whether a transaction requires approval by the supervisor and in a few cases the result of this may be that transactions are carried out during the suspension of payments that are not preferential claims in a subsequent winding-up because they have not been approved by the supervisor.

4.2. Compulsory composition

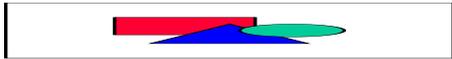
§1. Comprehensive description of the regime as well as its underlying philosophy.

1.1. Description

Compulsory composition means that a specific share of the creditors decides either on a percentage reduction of the non-preferential debt, a distribution of the debtor's property or part hereof between his creditors in exchange for the release of the debtor from the part of the debt that is not settled, or an extension of payment (moratorium). The purpose of a compulsory composition may be either to make it possible to continue the company after it has been released from part of its debt or to enable a debtor who must give up continuation of the company to start a new company without being encumbered by insurmountable debts from the old company.

The Bankruptcy Act comprises special provisions for the procedure for initiation of compulsory composition, including provisions on the exact share of creditors that must vote in favour of the initiation itself and provisions on voting, the compulsory composition percentage, including the number of creditors and the size of the claims that must vote in favour in order for the compulsory composition to be finally adopted. The minimum dividend in a compulsory composition is 25% and, as a main rule, 60% of the creditors according to number and the size of their claims must vote in favour of the compulsory composition. The percentage increases the lower the composition percentage, so that creditors corresponding to 75% according to number and size of claims must vote in favour of a 25% compulsory composition.

In order for compulsory composition to be obtained, the bankruptcy court must appoint two nominees, one of whom must be an expert within accounting and the other must be an expert within the debtor's line of business. Depending on the circumstances, it will be possible to effect compulsory composition with only a nominee. The nominees must effect registration of all assets and liabilities and elaborate a status report on the debtor as well as an account of the most important reasons that the debtor has filed for suspension of payments with a detailed review of the debtor's bookkeeping etc. The nominees must also issue a declaration as to whether, in their opinion, the submitted proposal is reasonable and



provides adequate security for the performance of the composition and the distribution which may be assumed to result from a winding-up of the company.

1.2. Critical analysis.

Compulsory composition is not used very often, which is probably due to the fact that the costs incurred and time spent on establishing compulsory composition, including issue of declarations etc. from the expert accountants, are quite considerable. Furthermore, the necessary steps in connection with the establishment of compulsory composition are in many cases taken at a time when the company is in such a serious crisis that its liquidity status precludes a continuation of its operation. Compulsory composition may be combined with a suspension of payments, cf. above, which should, in principle, result in improved possibilities for establishing compulsory composition.

§2. Classification of the procedure among branches of law, competent jurisdictions, overview of the procedure followed before these jurisdictions, implications of international private law.

2.1. Description.

The rules are laid down in part 19 of the Bankruptcy Act, and the rules describe the conditions for compulsory composition. Section 157 states which form a compulsory composition may take:

1. a percentage reduction of the ordinary debts (ordinary compulsory composition)
2. a distribution of the debtor's property or part of it among his creditors against discharging the debtor in respect of the part of the debt which remains uncovered (liquidation composition),
3. postponement of payment (moratorium).

2.2. Critical analysis.

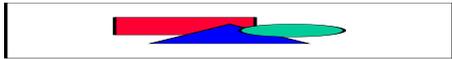
No comments.

§3. Criteria to benefit from the regime (the origin of the criteria (legal, case-law, practice) must be specified.

3.1. Description

Compulsory composition is initiated at the debtor's request. It often takes place on the basis of pressure from creditors, possibly through a winding-up petition filed by one or several creditors. Compulsory composition may also take place after the commencement of winding-up proceedings when the relevant conditions have been fulfilled.

As mentioned earlier, it is a precondition that the bankruptcy court appoints one or several nominees and that, in their account of the compulsory composition proposal, they can issue a declaration as to whether, in their opinion, the proposal is reasonable and offers adequate security for the performance of the composition. It is also a condition that the necessary qualified majority votes in favour of the adoption of the composition.



3.2. Critical analysis.

As already mentioned, compulsory composition is used quite rarely in connection with companies. One of the reasons for this is that current tax rules involve limited use of loss carry-forward.

§4. Specification of the possible initiators of the procedure.

4.1. Description.

According to the legislation, petition for commencement of negotiations on compulsory composition is filed by the debtor. As mentioned above, this often takes place after pressure from the creditors. If it takes place in connection with winding-up it will typically be at the request of the liquidator.

4.2. Critical analysis.

There is hardly any need for expanding the group of initiators. It should be noted that the bankruptcy court is not entitled to present proposals for compulsory composition.

§5. Administration of the procedure (who manages the assets of the individual or the company, the role of the different actors in the proceedings (creditors, debtor, State, appointed manager, court, etc.))

5.1. Description.

During compulsory composition negotiations, the company's management has full control of and is responsible for the company's continued operations if suspension of payments or winding-up has not been initiated at the same time. The management will typically seek advice from nominees, whose only formal role is to elaborate the account stated in the legislation. The Bankruptcy Act stipulates that the bankruptcy court may demand as a condition for composition negotiations and the performance of the composition that a supervisor is appointed for the debtor, who will have the same function as during a suspension of payments.

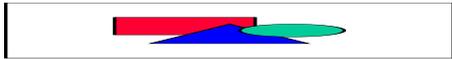
5.2. Critical analysis.

Since the creditors will usually feel uncomfortable with the management maintaining control over the company's assets, compulsory composition negotiations will often be combined with suspension of payments with an appointed supervisor or take place during winding-up where the liquidator is responsible for the continued operation of the company.

§6. Restructuring plan (if applicable, who must file it, how, where, must it be voted by creditors, is there a court intervention, etc.)

6.1. Description.

A restructuring plan will typically be comprised by the account elaborated by the nominees, which is an integral part of the composition proposal itself. The Bankruptcy Act prescribes a



detailed procedure for consideration of the proposal, which must be submitted to the bankruptcy court, and the bankruptcy court will also conduct the subsequent negotiations on compulsory composition and be responsible for votes taking place during the composition and make decisions with respect to contingent claims, claims that have not been finally computed etc.

6.2. Critical Analysis.

In connection with the bankruptcy court's decision as to whether composition negotiations may be initiated, approval must be given by at least 40% of the creditors according to both number and the size of the claims. The composition vote itself requires approval from at least 60% of the creditors according to the size of the claims. It may be considered whether there is a special basis for demanding approval from the creditors according to their number, which especially causes problems in situations with a considerable number of small creditors and few very large creditors.

§7. The degree of protection of the actors implied in the procedure: public investors, creditors (secured and unsecured, preferential or not), shareholders, stakeholders, ...) as well as the way to carry out this protection.

7.1. Description.

In connection with a petition for composition negotiations, a so-called relevant date is fixed, which means that claims arising after this date will have preferential status during subsequent winding-up proceedings (after winding-up costs) and that the provisions in the Bankruptcy Act on avoidance will apply if the composition is adopted.

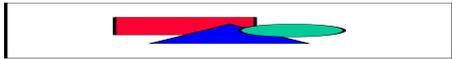
7.2. Critical analysis.

The modest number of compulsory compositions for companies does not provide a basis for evaluating the effectiveness of the rules.

§8. Termination of the procedure.

8.1. Description.

The bankruptcy court may refuse to initiate negotiations on compulsory composition if the necessary basis (account etc.) cannot be provided or if there are no reasonable prospects of the composition being adopted, affirmed and performed. In addition, the bankruptcy court may refuse affirmation if procedural errors are made during the consideration of the composition proposal, if the information procured is incomplete and this must be assumed to be of significant importance to the result of the vote, if the composition is not compatible with the statutory rules on preference etc. or if the debtor, in order to influence the vote, has promised advantages to certain creditors outside the composition. The bankruptcy court may postpone the decision until the proposal has been put to a new vote.



The bankruptcy court may furthermore refuse affirmation if a third party, in order to influence the vote, has promised advantages to any creditor, if there is an imbalance between the dividend and the debtor's financial position, if the debtor has improperly reduced his assets to the detriment of the creditors, if there are no reasonable prospects of performance of the composition or if the composition is otherwise detrimental to the creditors or some of these.

Finally, composition negotiations are regarded as having been completed when the bankruptcy court has made its decision on affirmation of these and the deadline for appealing this decision has expired without any appeal having been lodged. Announcement of the result of the composition negotiations is made in the Danish Official Gazette.

8.2. Critical Analysis.

As it appears from the above, the bankruptcy court has been charged with a number of different duties in order to ensure that an adequate composition basis is provided and that the statutory rules on preference, equal distribution etc. are observed. It should be added that the composition also applies to creditors who do not participate in it and to creditors who have not participated in the composition negotiations or who were not known at the relevant time. If agreements have been concluded outside the composition according to which certain creditors receive larger benefits than under the composition, such agreements are void. An adopted composition may be cancelled at a later time if it turns out that the debtor has been involved in fraudulent transactions or has otherwise given preferential treatment to a creditor or if he has grossly neglected his duties according to the composition.

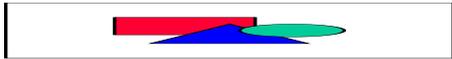
§9. *Degree of information on the development of the procedure towards creditors (e.g. access to (court) files, etc.)*

9.1. Description.

The nominees' status report and account in connection with the initiation of negotiations on compulsory composition are normally forwarded to all creditors who are expected to be comprised by the composition. In addition, the Bankruptcy Act stipulates that if the composition negotiations are completed without the composition being affirmed all creditors should be notified of this. The normal procedure – especially if a supervisor has been appointed - will be for information regarding the status of the composition negotiations to be forwarded to known creditors on a regular basis.

9.2. Critical analysis.

In recent years, the notification obligations during insolvency proceedings, and especially winding-up proceedings, have been significantly expanded. The fact that, for many years, no amendments have been made to the part of the Bankruptcy Act that deals with compulsory composition is probably part of the reason that the notification obligations that apply to winding-up do not apply to this area. When a supervisor has been appointed it is natural for



the supervisor to forward information on a regular basis about the status of the composition negotiations but no special obligation exists.

§10. Costs related to the procedure, if applicable (e.g. fees trustee, receiver etc.)

10.1. Description.

Fees for an appointed supervisor and nominees are fixed by the bankruptcy court according to recommendation. Upon recommendation from the liquidator of an insolvent estate, the bankruptcy court grants fees to the members of the creditors' committee and a similar rule probably also applies if a creditors' committee has been appointed in connection with a compulsory composition during suspension of payments. The fees are paid by the company.

10.2. Critical analysis.

If a composition is affirmed there is no special need for the bankruptcy court to make a decision on the fees paid in connection with the affirmation of the composition. The relevant costs will typically appear from the composition material and the creditors are thus able to determine whether the fees charged are reasonable. If a dispute should arise subsequently on account of the fees, this will probably not be decided by the bankruptcy court but by the respective professional systems (lawyers' associations, accountants' associations etc.).

§11. Competence, knowledge and functioning of insolvency (bankruptcy) court.

11.1. Description.

As it appears from the above, the bankruptcy court has an important duty of inspection in connection with the consideration of a petition for initiation of compulsory composition and the course of the compulsory composition negotiations.

11.2. Critical analysis.

Since compulsory composition negotiations for companies are quite rare, as mentioned above, the experience of the bankruptcy court in connection with consideration of problems and disputes arising from compulsory composition cases will often be limited.

§12. Publicity conditions, if applicable (e.g. newspaper, official gazette).

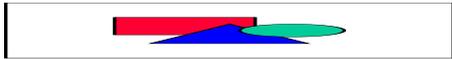
12.1. Description.

As soon as composition negotiations have been initiated the bankruptcy court must make an announcement in the Danish Official Gazette summoning the creditors to a meeting for consideration of and voting on the debtor's composition proposal.

In addition, the legislation prescribes that the result of the composition negotiations must be inserted in the Official Gazette.

12.2. Critical analysis.

Since it is a part of the composition negotiations to obtain approval from a majority or from a large number of creditors these will usually on this occasion have been notified about the petition for composition and subsequently the composition proposal. It cannot be precluded that there are creditors who, for some reason, have not been notified about the proposal or have



not made themselves acquainted with it. For these creditors, including foreign creditors, who, for some reason, have not received notification about the composition, announcements in the Danish Official Gazette have the same effect as if the creditors had been notified directly about the composition. Although there are no rules on the subject, announcements will often be made in official gazettes in the relevant foreign country in cases where a supervisor has been appointed and where there are a large number of foreign creditors in order to observe the formalities.

4.3. Winding-up

3.1. Comprehensive description of the regime as well as its underlying philosophy.

1.1. Description.

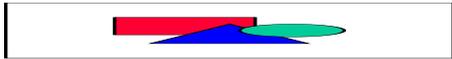
Winding-up is of course typically used to dispose of a company's assets and obligations and the provisions of the Bankruptcy Act on the administration of insolvent estates do not include provisions on reconstruction. However, it happens that a company in the process of being wound up is reconstructed. According to the legislation, this may be effected by establishing compulsory composition during winding-up. On this subject, reference is made to the above description of the rules on compulsory composition etc. However, it should be noted that, in connection with compulsory composition during winding-up, it is the liquidator who manages the company and its assets and makes the necessary decisions regarding the continued operation of the company.

Another frequently used reconstruction model in connection with winding-up is when the insolvent estate establishes a new company and includes the viable parts of the company in this new company with a view to continuation of these in a new ownership in connection with sale of shares etc.

In connection with winding-up, the debtor loses the right of disposal of the assets of the estate and the right of disposal is transferred to a liquidator appointed by the bankruptcy court/creditors. In rare cases, the liquidator decides to continue the company carried on by the debtor and during the ongoing winding-up proceedings an arrangement is established with the creditors according to which the company may be continued in whole or in part – possibly by establishing a new legal person (company) – owned by the insolvent estate with a view to a possible sale to a third party of the relevant company. In addition, the Bankruptcy Act makes it possible during winding-up to obtain compulsory composition with the creditors. In this case, the procedure essentially follows the rules described above in clause 2.

1.2. Critical analysis.

The problem of reconstructions and winding-up is that the company's assets are usually significantly reduced at the commencement of the winding-up, and the winding-up often triggers a number of obligations as a result of the non-fulfilment occurring in connection with wind-



ing-up in relation to employees, other contracting parties etc. Another result of winding-up is often that other contracting parties and employees of the company in crises demand guarantee for future payment of salaries, fees etc., which will often significantly undermine the available liquidity.

§.2. Classification of the procedure among branches of law, competent jurisdictions, overview of the procedure followed before these jurisdictions, implications of international private law.

2.1. Description.

The rules are laid down in part II - part 3-18 – of the Bankruptcy Act. Part II is the main section of the Bankruptcy Act, and it only describes bankruptcy. The rules describe the commencement of bankruptcy, the effect of bankruptcy, claims of the estate, synallagmatic agreements, satisfaction of special rights, priority of debts in bankruptcy, the debtor's legal position, the administration etc. of the estate, election of estate management and removals from office, meetings of creditors, creditor information and supervision, scrutiny of claims lodged for proving, legal actions before the ordinary courts of law, and finalisation and distribution.

2.2. Critical analysis.

No comments.

§3. Criteria to benefit for the regime (the origin of the criteria (legal, case-law, practice) must be specified)

3.1. Description.

There are no special requirements with respect to the conditions under which a reconstruction during winding-up must be initiated.

3.2. Critical analysis.

It depends entirely on the circumstances and management (liquidator) of the estate whether a basis is found to exist for reconstruction during winding-up.

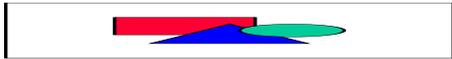
§4. Specification of the possible initiators of the procedure.

4.1. Description.

The initiative for investigating the possibilities of reconstruction during winding-up may be taken by the liquidator, an appointed creditors' committee, a group of creditors, the company's former management, shareholders etc.

4.2. Critical analysis.

No comments.



§5. *Administration of the procedure (who manages the assets of the individual or the company, the role of the different actors in the proceedings (creditors, debtor, State, appointed manager, court, etc.))*

5.1. Description.

It is still the liquidator who manages the company's assets. The liquidator is entitled to appoint a daily management for the company, who will act at his responsibility.

5.2. Critical analysis.

It will be natural for the liquidator to include an appointed creditors' committee or groups of major creditors or creditors representing different creditor groups in the negotiations on reconstruction. There are no specific rules on this subject and the development of a reconstruction plan will depend on the agreements concluded between the creditors.

§6. *Restructuring plan (if applicable, who must file it, how, where, must it be voted by creditors, is there a court intervention, etc.)*

6.1. Description.

A possible reconstruction plan is, in principle, prepared by the liquidator together with a creditors' committee and possibly the company's former auditor or an auditor appointed especially for this purpose or other experts.

6.2. Critical analysis.

No comments.

§7. *The degree of protection of the actors implied in the procedure: public investors, creditors (secured and unsecured, preferential or not), shareholders, stakeholders,...), as well as the way to carry out this protection.*

7.1. Description.

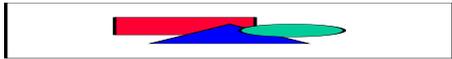
Costs and obligations incurred in connection with such negotiations during winding-up will be preferential claims and rank equally with ordinary winding-up costs. This also applies to any loans established in connection with negotiations on reconstruction during winding-up, obligations regarding supplies etc.

7.2. Critical analysis.

If an attempt at reconstruction fails the costs incurred in this connection will have to be paid in advance, which means that they reduce the assets that should have been used for payment of the creditors. If the liquidator has made errors or omissions in the attempt at reconstruction of the company, he may, depending on the circumstances, be liable for losses incurred in this connection.

§8. *Termination of the procedure.*

8.1. Description.



Reconstruction during winding-up may be completed in several ways:

1. If the reconstruction means that the company's activities or parts hereof are transferred to e.g. a new company, the "old" company will still be dissolved during the winding-up proceedings and, at the completion of these, unpaid claims will be paid to a smaller or larger extent. The advantage for these creditors is that, all other things being equal, the reconstruction will, through realisation of assets, generate more income for the estate, which will benefit the creditors. A number of employee obligations will typically be transferred and the value of transferred assets will, all other things being equal, be higher in connection with a company transfer and at the same time it will be possible to maintain a number of ongoing business relationships between the company in crisis and its former business connections.
2. The creditors may waive the part of their claim that is not settled through reconstruction. The liquidator surrenders the estate to the debtor. This requires that all creditors consent to this or that the debtor proves that the relevant creditors will receive settlement.

8.2. Critical analysis.

The form of completion described in paragraph 2. above is very rare.

§9. Degree of information on the development of the procedure towards creditors (e.g. access to (court) files, etc.)

9.1. Description.

In connection with winding-up, all known creditors must receive notification of this. The Bankruptcy Act comprises detailed rules on notification of creditors within maximum every 6 months. The natural procedure will be for the liquidator to forward notification to the creditors in connection with an attempt at reconstruction during winding-up and during the course of any negotiations on this subject.

9.2. Critical analysis.

The extent of the obligation of notification must be adjusted to the arrangement.

§10. Costs related to the procedure, if applicable (e.g. fees trustee, receiver etc.)

10.1. Description.

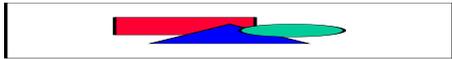
The costs of reconstruction during winding-up are paid by the insolvent estate.

The fees payable to the liquidator, an appointed creditors' committee etc. are fixed by the bankruptcy court.

10.2. Critical analysis.

No comments.

§11. Competence, knowledge and functioning of insolvency (bankruptcy) courts.



11.1. Description.

The role of the bankruptcy court in connection with reconstruction during winding-up is very limited. The bankruptcy court's only task in this connection is to ensure that the creditors are informed of the course of the winding-up proceedings. In cases where negotiations on reconstructions etc. are conducted, the bankruptcy court must also ensure that the creditors are notified at the intervals stipulated in the legislation.

11.2. Critical analysis.

There does not seem to be any special need for the bankruptcy court to be involved in the actual reconstruction negotiations.

§12. Publicity conditions, if applicable (e.g. newspaper, official gazette).

12.1. Description.

The winding-up itself and the completion of the winding-up proceedings must be announced in the Danish Official Gazette.

To the extent that adjudication of claims is effected in connection with the winding-up proceedings, such adjudication of claims must be announced in the Danish Official Gazette.

12.2. Critical analysis.

No comments.

4.4 Unannounced suspension of payments

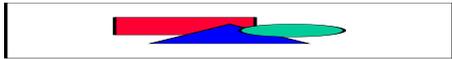
§1. Comprehensive description of the regime as well as its underlying philosophy.

1.1. Description.

In addition to the rules prescribed by the legislation, which may form the basis of a reconstruction, a practice has developed over the years for "unannounced suspension of payments".

An "unannounced suspension of payments" comprises a number of situations relating to the attempt by a financially troubled company to establish an arrangement with its creditors on the basis for the continuation of the company. It is usually an illiquid or loss-making company, which has realized at a relatively early stage that the company cannot continue unless a number of measures are taken to adapt the company to financial sustainability. There are no special rules of procedure for "unannounced suspension of payments", where the actors are usually the company's management, major creditors as well as the advisers to the company and the major creditors. In most cases, the principles laid down in the Bankruptcy Act regarding creditor protection, ranking of creditor claims and preferential treatment will be followed whereas the provisions on avoidance, invalidity etc. recede into the background.

1.2. Critical analysis.



An "unannounced suspension of payments" makes heavy demands on the company's management and advisers with respect to ensuring that the creditors receive equal treatment and that no transactions are carried out in contravention of the principles of the Bankruptcy Act. Depending on the circumstances, the participating actors may become liable if the initiative fails and one or several creditors suffer losses.

§§2-12 does not give rise to any comments.

TITLE 5. LEGAL CONSEQUENCES OF BANKRUPTCY AND POSSIBILITIES FOR A FRESH START

Chapter 5.1. Bankruptcy/winding-up procedure

5.1.1. Introduction

The purpose of bankruptcy/winding-up is to distribute the debtor's assets among the creditors according to the rules that appear from sections 93-98 of the Bankruptcy Act and, by means of the rules on avoidance of the Bankruptcy Act, to ensure that the debtor's creditors receive equal treatment.

Anyone – including legal persons – may become subject to bankruptcy/winding-up proceedings. According to section 17 of the Bankruptcy Act, a debtor must be declared bankrupt/in liquidation if he is insolvent and the debtor himself, cf. section 22 of the Bankruptcy Act, or a creditor, cf. section 23 of the Bankruptcy Act, files a petition.

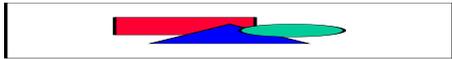
The term insolvency is defined in section 17(2), of the Bankruptcy Act as illiquidity – the debtor is not able to meet his obligations as they fall due.

5.1.2. Petition by the debtor

The formal requirements regarding a bankruptcy/winding-up petition filed by a debtor appear from sections 7 and 22 of the Bankruptcy Act.

The petition must include the following:

1. The debtor's full name, address and personal registration number and, if he carries on a business enterprise, the name and address of this.
2. The debtor's branch of business.
3. In the case of private and public limited companies, the company registration number must be stated and the bankruptcy court should unconditionally demand a current transcript of the Register of Companies since it is otherwise impossible for the court to en-



sure that the person(s) filing the petition on behalf of the company is competent to do so.

According to section 127 of the Companies Act and section 96 of the Private Companies Act, the winding-up petition must be filed by the board of directors on behalf of the company. With respect to private limited companies, which do not have an elected board of directors, the winding-up petition is filed by the management, cf. section 31(2) of the Private Companies Act. For reasons pertaining to company law, the board or management should obtain approval by the general meeting of the filing of a winding-up petition, but the bankruptcy court cannot demand this. If the company is in liquidation, the winding-up petition is filed by the liquidator.

4. In order for the bankruptcy court to be able to assess whether the bankruptcy/winding-up petition has been filed with reasonable cause the debtor must enclose a statement of assets and liabilities and a list of creditors with the bankruptcy/winding-up petition.

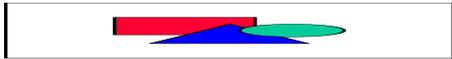
5.1.3. Petition by the creditor

The formal requirements regarding a bankruptcy/winding-up petition filed by a creditor appear from sections 7 and 23 of the Bankruptcy Act. The petition must be filed in two copies. Appendices enclosed with the petition must be submitted in the same number of copies.

Although section 76 of the Bankruptcy Act lays down only the most necessary formal requirements regarding bankruptcy/winding-up petitions, the following information should be requested:

1. Name and address of the person filing the petition (petitioning creditor).
2. Name and address of the person against whom the petition is filed. In case of business enterprises, the name under which the business is carried on and the address from which it is carried on must be stated.
3. The debtor's branch of business.
4. If the debtor is a public or private limited company, the company's registration number must be stated. The bankruptcy court demands that a transcript of the Register of Companies be enclosed with the petition so that the proper identity of the debtor may be ascertained.

The external information system, PubliCom, established by the Commerce and Companies Agency grants users access to online search in the Register of Companies through an EDP system.



5. The petition must state the circumstances on which the petition is based. The size and basis of the claim must be stated and it may be demanded that documentation be enclosed, for example in the form of an invoice or the like. It should be stated whether the claim has been acknowledged. If the claim is contested, this should be stated. The creditor's basis for assuming insolvency must be stated.

In connection with filing of a bankruptcy/winding-up petition by the debtor or a creditor, an amount of DKK 750 must be paid in court fees for the administration of a bankruptcy/winding-up petition, cf. section 37(1)(i) of the Act on Court Fees. The fee is paid at the filing of the petition and the court fee will not be cancelled, even if the petition does not result in a bankruptcy/winding-up order since the obligation to pay the court fee arises at the filing of the petition.

5.1.4. Where should the bankruptcy/winding-up petition be filed?

Section 3 of the Bankruptcy Act stipulates that a notification of suspension of payments or petition for bankruptcy/winding-up, composition negotiations or debt rescheduling must be filed with the bankruptcy court at the location from which the debtor's business enterprise is carried on. If the debtor does not carry on business activities in Denmark, the notification or petition must be filed with the bankruptcy court in the jurisdiction of the debtor's home court – i.e. typically his residential address.

5.1.5. Relevant date

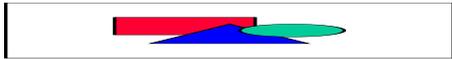
When the bankruptcy court has received a bankruptcy/winding-up petition, the date of receipt is stamped on the petition, cf. section 7(2) of the Bankruptcy Act. The date must be stamped on the petition itself and not on a cover letter. According to section 1 of the Bankruptcy Act, the relevant date is:

1. The date on which the bankruptcy court received the notification of suspension of payments or the petition for composition negotiations, debt rescheduling or bankruptcy/winding-up.
2. The date of the death of the debtor if the estate is administered in accordance with the provisions in the Bankruptcy Act.
3. The date on which it was decided to liquidate a public or private limited company if the bankruptcy court receives a notification of suspension of payments or petition for composition negotiations or bankruptcy/winding-up within 3 months after such decision,

or whichever of the above date is the earliest.

5.1.6. Summoning of the debtor

5.1.6.1. Petition by the debtor



When the debtor has filed a petition for bankruptcy/winding-up the debtor is summoned to a meeting by the bankruptcy court. Failure to appear without due cause will result in the debtor's petition being regarded as void, cf. section 22(3) of the Bankruptcy Act.

5.1.6.2. Petition by the creditor

According to section 23(3) of the Bankruptcy Act, the bankruptcy court must immediately arrange for a creditor's petition for bankruptcy/winding-up to be served on the debtor. The debtor is summoned to a meeting at the bankruptcy court, which must, if possible, be held not later than 3 days after receipt by the bankruptcy court of the petition.

5.1.7. Meeting at the bankruptcy court

First, the bankruptcy court briefly explains the bankruptcy/winding-up petition to the debtor and asks if it is correct that the debtor owes the amount mentioned in the petition to the creditor and whether the debtor is insolvent. The burden of proof with respect to the debtor's insolvency lies with the creditor.

When the bankruptcy court finds that the conditions for bankruptcy/winding-up have been fulfilled, the bankruptcy court makes its decision. It is then emphasized to the debtor that from this time the debtor has lost the right to dispose of his estate, cf. section 29 of the Bankruptcy Act.

Chapter 5.2. Legal effects of the initiation of bankruptcy/winding-up procedures

5.2.1. After issue of bankruptcy/winding-up order

The first step taken by the bankruptcy court after the issue of a bankruptcy/winding-up order is to appoint one or several trustees/liquidators after discussions with the creditors present. When a decision has been made on this subject the bankruptcy court makes sure that the relevant person is summoned at once, if possible.

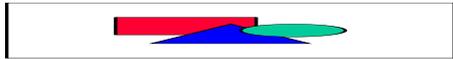
5.2.2. Registration of assets etc.

The trustee/liquidator then starts the registration of assets. In this connection, information must be obtained about existing liquid assets and the location of these. Cheques, giro withdrawal cards and credit cards must be collected immediately. In short, all the debtor's assets must be registered, and for all types of assets information must be obtained as to whether these are encumbered with charges or ownership reservation or whether they are leased.

The debtor's leaseholds and employees, if any, must be listed and it must also be stated whether there are ongoing activities. If there are ongoing activities, it must be decided if these are to be continued.

5.2.3. Continuation of the company

The liquidator must examine to which extent it is possible to use the necessary staff, whether there are contracts to which the estate may be subrogated, such as delivery contracts etc.,



whether the necessary raw materials and semi-finished goods to be used in production exist and whether the company's production facilities and organisation are generally intact. The organisation will often have started to crumble in the period up to the winding-up, which may render a continuation impossible.²⁸

5.2.3.1. Employees

Irrespective of whether the estate wishes to continue the debtor's business it must decide whether the estate will be subrogated to service contracts for employees with the debtor's business, cf. section 63(1) of the Bankruptcy Act.

If the estate wishes to continue the debtor's business with a view to sale as a going concern it is of course of utmost important that the employees continue their employment. In this connection, attention is drawn to act on the legal rights of employees in connection with company transfers (Act no. 111 of 21 March 1979), according to which employees, as a main rule, retain the legal rights relating to their employment vis-à-vis a subsequent transferee, which means that the estate only has to pay salaries for the period from the commencement of the bankruptcy/winding-up until the sale has been effected.

5.2.3.2. Mutually onerous contracts and open-end contract

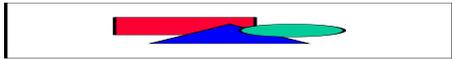
According to section 55(1) of the Bankruptcy Act, the estate has an unconditional right to be subrogated to mutually onerous contracts concluded by the debtor. It is, of course, a precondition for subrogation that the debtor had not breached the contract prior to the bankruptcy/winding-up, in which case the other party to the contract is entitled to terminate this without notice. Subrogation may be express or implied but it should always take place with direct notification to the other party in order to avoid any doubt as to whether subrogation has taken place.

A consequence of subrogation by the estate to mutually onerous contracts is that the estate takes over the debtor's obligations and rights under the contract, cf. section 56(1) of the Bankruptcy Act. This means that claims relating to the period prior to the commencement of the bankruptcy/winding-up rank as prepreferential claims in the estate.

5.3.3. Ongoing services

Prior to the bankruptcy/winding-up, most debtors will have received ongoing services such as water, electricity, telephone subscription etc., and the trustee/liquidator must therefore decide whether these services are to continue. Unpaid deliveries prior to the bankruptcy/winding-up are only unsecured claims in the estate whereas subsequent deliveries rank as prepreferential claims if the estate is subrogated to the agreement, cf. section 56(2) of the Bankruptcy Act.

²⁸ "Konkursbehandling i praksis" (Bankruptcy proceedings in practice), 2nd edition Tove Horsager and others, p. 62.



5.3.4. Insurance

The trustee/liquidator must also review the debtor's insurance policies and decide which policies should be continued unless this decision can await the election of the estate management. If the debtor's business is continued by the estate, the estate is, of course, responsible for ensuring that all necessary and statutory insurance policies are continued, perhaps only during the period of notice, and the interim receiver/provisional liquidator must examine the need for new policies to be taken out. Short-term policies may be taken out against an increased premium.

Chapter 5.3. Legal effects of bankruptcy/winding-up as such

As described in chapter 2 above, the immediate effect of bankruptcy/winding-up is that the debtor loses the right to dispose of his property and that it is not possible to levy execution or attachment. The effects of bankruptcy/winding-up commence at the time when the bankruptcy/winding-up order is issued.

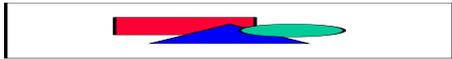
When a bankruptcy/winding-up order is issued the debtor loses the right to transfer or surrender his possessions, receive payments and other services, receive notices of termination, complaints and similar declarations, enter into obligations and otherwise dispose of his property with effect for the estate.

According to the provision in section 29 of the Bankruptcy Act on the debtor's loss of right to dispose of his property, the normal corporate bodies in a company, such as the general meeting, board of directors and management, are suspended when a winding-up order is issued. The same applies to the auditor elected by the general meeting.

This does not mean that a natural person in bankruptcy is incapacitated. The debtor is personally liable for an obligation created after the issue of the bankruptcy order but such an obligation cannot be enforced against the estate in bankruptcy, except for obligations comprised by the identification rule in section 30 of the Bankruptcy Act. The debtor may dispose of assets not included in the assets available for distribution.

The provisions on completion and distribution of the estate appear from section 18 of the Bankruptcy Act. When the assets of the estate have been realised, outstanding debts collected and possible disputes settled with final effect the trustee/liquidator prepares a draft of accounts and, either at the same time or as soon as the accounts have been affirmed, a draft of the final distribution. When the bankruptcy court has affirmed the draft accounts and draft distribution, dividend is paid, cf. section 152 of the Bankruptcy Act.

A creditor retains his right against the debtor with respect to the part of the claim that is not paid through distribution, cf. section 156 of the Bankruptcy Act. A creditor who has a busi-



ness claim against the debtor can normally, at the completion of the bankruptcy/winding-up, deduct the unpaid part of the claim as a loss for tax purposes or make adjustment in relation to fiscal depreciation on the basis of a dividend estimate notified by the trustee/liquidator, cf. section 125 of the Bankruptcy Act.

Creditors may waive their claims, cf. section 144(2) of the Bankruptcy Act. Consent to distribution of the estate according to section 144(1) or completion according to section 143 does not affect the debtor's liability. Following compulsory composition, the debtor is only liable for the part of the debt that has been taken over, cf. section 190.

A company without personal liability is usually dissolved through winding-up and, after the completion of this, there is no one against whom a creditor may raise his claims.

Chapter 5.4. "Excusability" following bankruptcy/winding-up

5.4.1. Release from debt (Excusability)

When bankruptcy proceedings are completed the personal debtor is still liable for the debt not paid through the bankruptcy proceedings. The debt is not extinguished until it is statute-barred after 5 and 20 years respectively depending on the type of debt and whether special legal steps have been taken to secure it. The bankruptcy proceedings suspend the period of limitation.

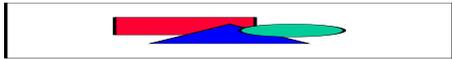
The personal debtor may obtain debt rescheduling if he can prove that he is not able to and is not expected to be able to fulfil his debt obligations in the next few years and that his situation and circumstances otherwise speak in favour hereof. The procedure for handling debt rescheduling cases is described in part 25 of in the Bankruptcy Act on debt rescheduling outside bankruptcy and part 29 on debt rescheduling in connection with bankruptcy. Over the years, a practice has developed as to when debt rescheduling may be obtained depending on the size and type of the debt, the age and income of the debtor, breadwinner status etc.

Debt rescheduling has no practical relevance for business enterprises with respect to making a fresh start.

There are no similar rules for companies and it is of no practical relevance since the company is dissolved at the completion of winding-up.

For natural persons and for companies, it is possible to obtain compulsory composition according to the Bankruptcy Act, which exists in three different forms:

1. A percentage reduction of the non-preferential debts.
2. Distribution of the debtor's property or part hereof among his creditors in exchange for which the debtor is released from the part of the debt that is not settled, and
3. moratorium.



The Bankruptcy Act includes special provisions on the procedure for establishing compulsory composition according to which the composition proposal, which must be prepared by two nominees appointed by the bankruptcy court, one of whom is often an accountant, must be accepted by at least 40% of the creditors according to number and size of the debts, and in order for the composition to be adopted at least 60% of the votes held by the claims must be in favour (at least 75% in case of liquidation composition).

The composition percentage must be at least 25%. It may, however, be reduced in special cases.

The composition may have a number of fiscal consequences regarding limitation of the tax loss confirmed prior to the composition.

Chapter 5.5. Responsibility of the company's management in case of winding-up of a limited liability company

According to section 64(2) of the Companies Act, there is a special risk that members of the board and management have to repay up to five years' of bonuses (but not other types of remuneration) provided that the company was insolvent when the bonus was fixed. The burden of proof of insolvency lies with the estate. However, it does not affect the repayment obligation that the recipient was in good faith.

As long as the company's bodies retain control over company matters, it is up to the general meeting to decide that the company will bring an action for damages against board members, managers, auditors etc., cf. section 144(1-3) of the Companies Act. However, if the company is in the process of being wound up, this competence is transferred to the insolvent estate, which normally means the liquidator, cf. section 110 of the Bankruptcy Act.

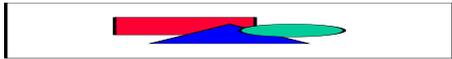
Even though the general meeting has decided on discharge the insolvent estate may bring an action for damages against the board and management if the relevant date lies within 2 years after the date of discharge, cf. section 144(4) of the Companies Act.²⁹

A manager or board member who foresaw the company's impending liquidation is liable, under the circumstances, vis-à-vis a supplier of the company that does not receive payment, irrespective of whether a specific provision in the Companies Act or the Articles of Association has been violated. However, the manager is not liable as a guarantor for the performance of the contract but must reimburse the supplier for his loss.³⁰

5.5.1. Avoidance

²⁹ "Selskabsret" (Company law), Werlauff, p. 584.

³⁰ "Aktie- og anpartsselskaber" (Public and private limited companies), Bernhard Gomard, p. 430



There is a specific risk for creditors of financially troubled companies that some creditors are satisfied immediately before the winding-up of the company so that the insolvent company's assets are not distributed equally among the creditors, as they should be. The company's management may become liable if it carries out or approves planned or obvious unfair treatment of the creditors.

If the owner of several companies enriches one company at the expense of another of the companies so that this other company becomes insolvent and its creditors suffer a loss, the aggrieved creditors may cover their losses either through winding-up and avoidance or by bringing an action for damages against the enriched company if the relevant conditions for this have been fulfilled.

The creditor(s) who has been treated unfairly may, at his own option, make a claim for damages directly against a board member or a manager who is personally liable and able to pay, for example because the dividend from the estate will be modest. The preference amount will go to the estate in an avoidance case and to the aggrieved creditor in an action for damages. The time limit for avoidance according to section 81 of the Bankruptcy Act does not comprise an action for damages according to the principle of fault.

5.5.2. Economic crime

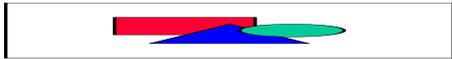
It happens that the limited corporate liability is misused when the owner of a company unlawfully removes (all) assets, either real assets such as goods and operating equipment or liquid assets from a "profit company", from a company (corporate raiding) that has been bought for the purpose of being raided and then abandoned so that it becomes subject to compulsory dissolution or winding-up. It is obvious that the person who has acted in this way or contributed is liable for damages in cases where such a course of action or other economic crime is cleared up. Comprehensive case law exists on this subject.

5.5.3 Liability towards the shareholders

Claims for damages in connection with losses are usually raised by individual creditors or by the insolvent estate of the company. However, the principle of fault applies to any person who has suffered a loss and demands compensation but the status of shareholders as company members may affect the assessment according to the general liability standard.

TITLE 6. PROSPECTS AND RECOMMENDATIONS

The Danish insolvency system is mainly creditor-oriented. Experience shows that insolvency proceedings are initiated at a very late time in relation to the circumstances that gave rise to the company's financial crisis and that only few companies are reconstructed as part of the insolvency proceedings. The main reasons for this are poor management, poor guidance, inadequate capital base etc. but one cannot preclude the possibility that the very fact that the insol-



olvency system is creditor-friendly is a contributory factor when many companies choose to "go on to the bitter end" before surrendering control to the creditors.

Another important aspect in connection with the continued operation of the company during insolvency proceedings, which may be either suspension of payments, compulsory composition or winding-up, is that employees and suppliers will demand guarantees for supplies that will undermine the liquidity basis necessary for the continued operation of the company during such proceedings.

Experience shows that, in connection with reconstruction of companies in crisis, the best results are obtained if the necessary measures with respect to restructuring of the company, including discontinuation of loss-making activities etc., are initiated at an earlier time, possibly so that the activities etc. that are to stop are discontinued subsequently during possible winding-up proceedings. It is normal, but not necessary, that major and/or strategic creditors become involved in such planning and perhaps grant a respite while other creditors are paid continuously during the course of the arrangement.

One of the most important problems in this connection is that the management and advisers assume a great responsibility if the creditors suffer further losses or are treated unfairly in the event of failure of the plan. On the other hand, it must be taken into account that the bankruptcy legislation contributes to liquidating companies that either do not have or have lost their business foundation, especially small companies where there is often a financial relation between the company and its management/owners.

In order to improve start-ups of new enterprises, the Danish Government considers to introduce a legal scheme, according to which debt incurred in the cause of a business failure, is to be discharged. The Danish Bankruptcy Act already contains certain provisions related to the discharge of debt for personal debtors. These provisions and the way the provisions are interpreted and used by the courts do serve the purpose partly. In order to enhance the possibility of "a fresh start" on a more broad scale, these provisions may need to be reviewed.

TITLE 7. "STATE OF KNOWLEDGE"

Literature, legislation etc. used in the report:

Reports:

Report I – 423/1966.

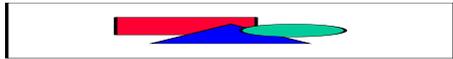
Report II – 606/1971.

Report no. 983/1983.

Report no. 967/1982.

Report no. 1086/1986.

Report no. 1273/1994.

**Literature:**

- Eyben, W. E von: "Juridisk ordbog" (legal dictionary). 10th edition GadJura – 1996.
- Gomard, Bernhard: "Aktie- og anpartsselskaber" (Public and private limited companies). 4th revised edition. Jurist- og Økonomforbundets forlag – 2000.
- Horsager, Tove, Peter Schiøtz and Ole Madsen: "Konkursbehandling i praksis" (Bankruptcy proceedings in practice). 2nd edition. Jurist- og Økonomforbundets forlag – 1992.
- Lindencrone, Lars and Anders Ørgaard: "Konkursloven med kommentarer" (The Bankruptcy Act with comments). 9th edition. Forlaget Thompson – 2001.
- Paulsen, Jens: "Insolvensret" (Insolvency law). 2nd edition. GadJura – 1995.
- Petersen, Lars Lindencrone and Niels Ørgaard: "Insolvensret" (Insolvency law). 1st edition. Jurist- og Økonomforbundets forlag – 1996.
- Werlauff, Erik: "Selskabsret" (Company law). 4th edition. GadJura – 2000.
- Ørgaard, Niels: "Konkursret" (Bankruptcy law). 6th edition. Jurist- og Økonomforbundets forlag – 1997.
- Ørgaard, Niels: "Artikler om konkurs og tvangsakkord" (Articles on bankruptcy and compulsory composition). FSRs forlag – 1984:
- "Rekonstruktion af virksomheder med økonomiske problemer" (Reconstruction of financially troubled companies). Advokaterne Jørgen Kjældgaard, Ole Finn Nielsen and Jacob Nørager-Nielsen.
 - "Revisors position i konkurstruede virksomheder" (The auditor's role in companies facing winding-up). Poul Erik Grüning.

Legislation:

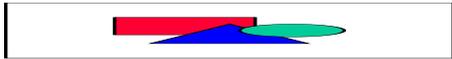
- Act no. 51 of 25 March 1872 (The original Danish Bankruptcy Act).
- Act no. 118 of 4 February 1997 – most recently amended by Act no. 402 of 26 June 1998 (The Danish Bankruptcy Act).

Websites:

- "Ny vurdering af konkurs" (New evaluation of bankruptcy) – <http://europa.eu.int> - Erhvervslivets Europa no. 4, July-September 2001

Other relevant literature:

- Bostrup, Poul, Susanne Dahl and Hans Henrik Bonde Nielsen: "Skattestyrelsesloven med kommentarer" (Tax administration act with comments). Jurist- og Økonomforbundets forlag – 2000.
- Eyben, Bo von: "Kreditorfølgning – materiel foged og konkursret" (Debt recovery proceedings – substantive enforcement law and bankruptcy law). GadJura – 1998.
- Hansen, Allan Borch og Jakob Smith: "Skat ved konkurs og akkord mv." (Tax in connection with bankruptcy and composition etc.) Jurist- og Økonomforbundets forlag – 1992.
- Heiberg, Henry, Lars Lindencrone Petersen and Niels Ørgaard: "Tvangsakkord" (Compulsory composition). 4th edition. Jurist- og Økonomforbundets forlag – 1998.



Illum, Knud: "Modregning i konkurs" (Set-off in bankruptcy). Ejnar Munksgaards forlag – 1934.

Jensen, Gert Drews: "Gældssanering" (Debt rescheduling). 2nd edition. Jurist- og Økonomforbundets forlag – 1998.

Jensen, Kim Sommer: "Konkursregulering" (Disclaimer). 1st edition. GadJura – 2000.

Petersen, Lars Lindencrone and Niels Ørgaard: "Betalingstandsning" (Suspension of payments legislation). 3rd edition. Jurist- og Økonomforbundets forlag – 1998.

Petersen, Lars Lindencrone and Erik Werlauff: "Dansk retspleje" (Administration of justice in Denmark). 2nd edition. GadJura – 2000.

Ørgaard, Niels: "Betalingstandsning" (Suspension of payments). 1st edition. Jurist- og Økonomforbundets forlag – 1979.

Ørgaard, Niels: "Udtalelse om konkurs og betalingstandsning" (Legal opinion on bankruptcy and suspension of payments). 1992.

Ørgaard, Niels: "Konkursret – Materiel konkursret" (Bankruptcy law – substantive bankruptcy law). 3rd edition. Jurist- og Økonomforbundets forlag – 1988.

Answers to questions raised in fax dated 24 April 2002 – Stigma on failure.

Title 3

Re.: 1

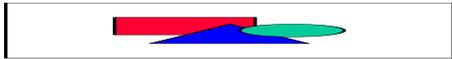
The warning lights pointed out in our report mainly specify warning lights for the particular business/company.

The warning lights are often only available to the management and to the company's auditor – provided the auditor conducts a continuing survey of the financial situation of the particular business.

Even though part of the warning lights mentioned, gives a third party the possibility to react (employees, landlords and banks) these third parties are - besides the bank - normally not in a position to initiate common solutions without the intervention by the court.

As it is often the case, these third parties will upon nonpayment or breach try to save their own position and thus try to recover at the expense of other creditors and interested parties.

Even though the management of the business is thus the entity with the knowledge of early warning lights, the management will - all other things being equal - try to "restructure" their business on a case by case basis.



Only upon one or more warning lights known to a third party with an interest to try to initiate and complete an out-of-court solution to the benefit of all creditors, these warning lights are effective.

We believe, that a system whereupon the management, with or without advisers, has the obligation to evaluate the financial status of their particular business, is to be preferred, contrary to a system where the warning lights pointed out is subject to a more formalistic system with reporting requirements, which will require an ongoing verification if parties other than the management shall initiate rescue attempts.

Re.: 2 a

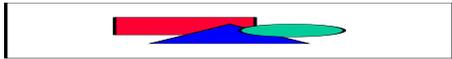
As a vast majority of companies in Denmark are small business, as opposed to business listed on the Stock Exchange, the majority of the companies are only obliged to file an annual account once a year. As the deadline for filing such annual account is five months after the accounting year has ended the obligation to publish financial statements is thus present but without real merit to indicate whether a particular business is about to fail.

Re.: 2 b

The Danish Commerce and Companies Agency is a public institution that is accessible. The easy and cheap way to access this register is via the Internet. To our knowledge the majority of law firms, accounting firms, banks and other financial institutions have online access to the information stored. All companies with limited liabilities are obliged to file their annual accounts to this register, and if the company is listed on the Stock Exchange not only is the company obliged to file the annual accounts with the Danish Commerce and Companies Agency but also obliged to disclose their financial status on a continuing basis by filing quarterly accounts to the Stock Exchange combined with a press release.

Upon the Danish Commerce and Companies Agency's receipt of the annual account, principal figures from these accounts are published on the information system. Annual accounts received are open for inspection to the public as directed in the 4th and 7th Company Directive.

Re.: 2 c



Third parties having obtained mortgage or lien by way of either agreement or via intervention by the court, is obliged to file such mortgage or lien with one or more public registers in order to obtain protection against other creditors and third parties. Specific public registers are established for cars, movable properties and real property and securities.

If a company owes tax and/or VAT, only the Tax Authorities are aware of this. No public database is available.

The registers related to mortgage and liens in the assets mentioned above are accessible to the public but requires the payment of a fee.

Re.: 2 d

Only in companies with limited liability having a management in two levels – a board of directors and a managing director – an internal company check is available. The board of directors has by law the obligation to establish a system that is able to monitor and control the continuing financial status of the company.

Re.: 2 e

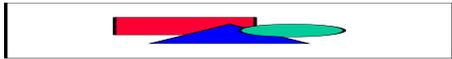
The external tools used for the monitoring of a particular business is twofold :

- a) The Tax and VAT Authorities.
- b) The Danish Commerce and Companies Agency.

As for the Tax and VAT Authorities the checking of the business is only present and thus giving the authorities the possibility to intervene if a business shows either a continuing growth in the debt to the Tax and VAT Authorities or large or frequent movements in either debt to or claims against the Tax and VAT Authorities.

The Danish Commerce and Companies Agency does only intervene if the annual account filed shows that more than 50% of the share capital has been lost when the annual accounts are not duly filed or if officers leave the company without being replaced.

Upon a company's failure to restore the share capital judicial intervention will happen, but it is our experience that this intervention happens far too late in order to restructure or save the business.

**Re.: 2 f**

Certain private businesses collect information – including financial information – about companies with limited liability. However, these private companies have to rely on information made public, mainly via The Danish Commerce and Companies Agency. These services are thus not a tool to be used in order to initiate restructuring of companies in financial distress. This is mainly a tool to warn potential business partners to engage with the company/business.

Re.: 2 g

Although the Danish Commerce and Companies Agency on a continuing basis makes random checks of annual accounts, group accounts, auditor's certificate and alike in order to find any obvious breaches of provisions in the law, the time between the filing of the annual account and the time which the annual account is expected to describe does not ensure that this check detects financial difficulties.

For the external auditing, the accountant does need to establish whether the company has the lawful share capital. The external auditor also has to establish whether he believes that the company is to be evaluated as a company in “going-concern”. Experience shows that the external auditing is not always sufficient to detect financial difficulties.

Re.: 5 a

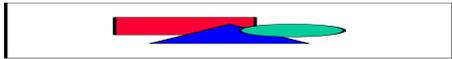
When a company is adjudicated bankrupt (*konkurs*) the court will make this public by inserting this information in the Danish Official Gazette (Statstidende). Furthermore, the Danish Commerce and Companies Agency is notified about the bankruptcy and this information is added to the information stored about the specific company.

Finally the trustee has an obligation to inform all known creditors about the bankruptcy.

Re.: 5 b

Although bankruptcy proceedings are directed towards the equal payment/treatment of all creditors, Denmark has also established a certain order of payment to the creditors.

What belongs to third parties (either money or moveable properties and the like) will have to be surrendered to the owner.



A creditor with a secured claim will benefit from the value of the asset securing the claim.

The order of payment of the proceeds in a bankruptcy is hereafter the following :

Claims pursuant to Sec. 93 of the Bankruptcy Act (administration costs)

Claims pursuant to Sec. 94 of the Bankruptcy Act (claims related to a preceding suspension of payments etc.)

Claims pursuant to Sec. 95 of the Bankruptcy Act (claims for wages/salaries etc.)

Claims pursuant to Sec. 96 of the Bankruptcy Act (certain claims of duties etc.)

Claims pursuant to Sec. 97 of the Bankruptcy Act (unsecured claims trade creditors and expenses)

Claims pursuant to Sec. 98 of the Bankruptcy Act (Fines, deferred interest etc.)

Re.: 5 c

In answering this question we have anticipated that the entrepreneur represents either the board of directors or the managing director.

The most “common” sanction is a possible claim based on “director’s liability”. However, this sanction is very seldom used in Denmark as the court does apply a standard that is close to the US standard “good business judgment”.

Although mismanagement related to the bookkeeping of the company, the making of and filing of the annual account and the obligations of the board of directors/the managing director described in the company legislation does contain certain provisions that have criminal sanctions, these are also very seldom used following a bankruptcy/winding-up. Although we understand that trustees are aware of these issues and does fulfill their obligations to report such matters to the authorities/the police. The experience is that the authorities/the police very seldom initiates investigations on the purpose of having the matter tried in court. We understand that this lack of investigation is related to the resources available to the police rather than an opinion on whether criminal contact is present or not.

Certain businesses require the issuance of a public license. If a person wishes to conduct business which requires such license may be rejected if the person has debt to the public authorities for more than DKK 50,000.00.

