

Restructuring across borders
Denmark

CORPORATE RESTRUCTURING AND INSOLVENCY PROCEDURES | FEBRUARY 2024



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1. Introduction

Three different types of in-court insolvency proceedings are available under Danish law.

1. Preventive restructuring (“*forebyggende rekonstruktion*”);
2. Restructuring (“*rekonstruktion*”); and
3. Bankruptcy (“*konkurs*”).

The proceedings are all governed by the Danish Bankruptcy Act.

The preventive restructuring-framework was introduced in mid-2022 and is seldom used for larger enterprises. The restructuring-framework, however, is highly relevant if the business of the company is financially viable (wholly or in part) but unable to continue its business, eg due to the current debt structure etc. These procedures are described in section 2 below, however, with limited focus on preventive restructuring.

The bankruptcy-framework is a classic insolvent liquidation procedure with the appointment of a trustee, and proceeds from liquidated assets, claw-back etc are distributed among the creditors in a set order prescribed in the Danish Bankruptcy Act.



2. Restructuring proceedings under Danish law

2.1 COMMENCEMENT OF RESTRUCTURING PROCEEDINGS

Under Danish law a company is regarded as insolvent if the company is unable to pay its debts as they fall due, except where such inability to pay is merely temporary (*liquidity test*).

If a company has a *likelihood* of being insolvent, the company may file for a **preventive restructuring** proceeding to be initiated. A petition for such proceeding may only be filed by the company. The company may elect to have a stay on enforcement established. If such stay is elected, appointment of a restructuring administrator (*rekonstruktør*) is mandatory, but if such stay is not elected, the appointment of a restructuring administrator is optional. As mentioned above, preventive restructuring proceedings are rarely used for larger enterprises. The restructuring administrator is often a lawyer.

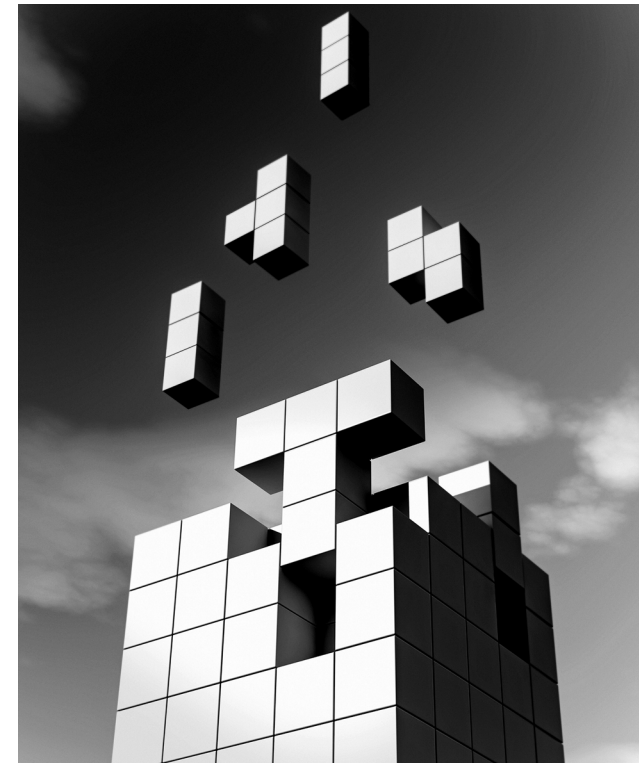
If a company is insolvent, a **restructuring proceeding** may be initiated at the request of the company itself or a creditor.

The petition to the bankruptcy court to initiate a restructuring proceeding must include a proposal for the appointment of a restructuring administrator who then is appointed by the bankruptcy court. More than one restructuring administrator may be appointed in larger complex restructurings. The company may also elect to have an accountant (“*regnskabskyndig tillidsmand*”) appointed by the bankruptcy court to handle eg certain reporting on financials during the restructuring proceeding, and this is often elected in restructurings of larger enterprises.

The maximum duration for both a preventive restructuring proceeding and a restructuring proceeding is one year. If a restructuring proceeding is initiated during (or immediately after) a preventive restructuring proceeding where a stay on enforcement has been established, the maximum combined duration of such proceedings is also one year. During a restructuring proceeding, a stay on enforcement is established automatically and it is not possible for the creditors to petition for bankruptcy proceedings to be initiated for the company.

Creditors secured by perfected mortgages and pledges are in a favourable position during restructuring proceedings. A stay on enforcement is to some extent effective against enforcement of mortgages, but not against enforcement of pledges, which can be enforced irrespective of the ongoing proceedings.

Generally, the company and an appointed restructuring administrator will seek to discuss the steps to be taken during a restructuring proceeding with the secured creditors. Almost all types of assets may be subject to mortgages, pledges and other third-party security rights. The company’s assets may be comprised by a general floating charge (*virksomhedspant*), which can comprise inter alia operating equipment, inventory, receivables, IP-rights etc; but not real estate, shares and or intergroup loans, which need to be comprised by individual security instruments.



2. Restructuring proceedings under Danish law (cont.)

2.2 THE ROLE OF THE RESTRUCTURING ADMINISTRATOR

The restructuring administrator will assess whether the company's business can be continued as a viable entity.

As a main rule, the management and directors of the company will maintain their positions and authority. However, significant transactions are subject to approval by the restructuring administrator and, in practice will/should align most business decisions with the restructuring administrator. It is for the restructuring administrator to provide information to the creditors, to approve continuation of bilateral contracts, and to draw up a restructuring plan and final proposal, cf. below.

If approved by the restructuring administrator, debt incurred during the restructuring proceedings will receive priority compared to debt incurred without such approval and/or prior to the initiation of the proceedings. In case of a preventive restructuring without a restructuring administrator appointed by the court, such priority cannot be given.

2.3 PHASE 1 – RESTRUCTURING PLAN AND “FAST TRACK”-BUSINESS TRANSFER

2.3.1 ADOPTION OF A RESTRUCTURING PLAN

The court must convene all known creditors to a meeting in the bankruptcy court, at which meeting the proposed restructuring plan is to be presented and voted upon. The meeting must, as a starting point, be held no later than four weeks after commencement of the restructuring procedure; but may be postponed by a further four weeks subject to a vote among the creditors

The restructuring plan must specify which type of restructuring is proposed, ie whether it is intended to include a compulsory composition, a business transfer or other measures to mitigate insolvency (or the likelihood thereof), cf. below.

A restructuring plan is adopted at the meeting unless a majority (by amount) of the voting creditors vote against the plan and such majority constitute more than 25% (by amount) of the known creditors. During preventive restructuring proceedings, the plan is not voted upon but merely presented and discussed. If the restructuring plan is adopted, the company and the appointed restructuring administrator will continue to work towards a successful restructuring. If the plan is not adopted, the restructuring proceeding will end.

2.3.2 “FAST TRACK”-BUSINESS TRANSFER

During a restructuring proceeding the company may – only prior to the creditor meeting mentioned above and subject to the approval from the restructuring administrator – enter into a “fast track”-business transfer agreement. Under a “fast-track” process, the business can be transferred to a third party, subject to no majority of creditors (by amount) objecting to the transfer within five business days of having received notification of the key terms of the intended transfer from the administrator. Under a “fast-track” process, the business can be transferred to a third party, subject to no majority of creditors (by amount) objecting to the transfer within five business days of having received notification of the key terms of the intended transfer from the restructuring administrator. No court meeting will be held to discuss such transfer, and the above objections must be directed to the restructuring administrator directly.



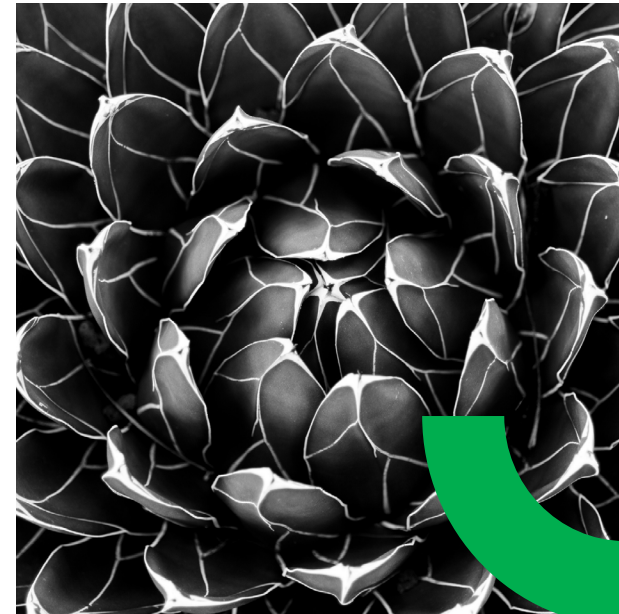
2. Restructuring proceedings under Danish law (cont.)

A notable and effective consequence of a “fast track”-business transfer is that the company’s bilateral agreements may be assigned as part of the business transfer without the consent from the contractor (irrespective of contrary contractual clauses), meaning that the contractor is forced to accept the buyer of the company as a new counterparty if the agreement is a part of the business transfer. A “fast track”-business transfer cannot be executed once a restructuring plan has been adopted.

2.4 PHASE 2 – FINAL RESTRUCTURING PROPOSAL

The final restructuring proposal must be considered at a meeting in the bankruptcy court within six months (often extended to max. 10 months) after the creditor meeting mentioned above. The proposal must include either a proposal for a business transfer to a third party (if the company has not been transferred already through the “fast track”-model, see section 2.3.2 above), a proposal for a compulsory composition (percentage reduction, write-off or extension of the claims filed) relieving the company from the obligations reduced/written off in connection with the compulsory composition, and/or other measures to mitigate the insolvency or likelihood thereof (and any combination of the above).

Such proposal is adopted if a majority (by owed amount) of the voting creditors votes in favour of the proposal. Such proposal may also be presented during preventive restructuring proceedings with adoption being subject to the same majority-vote. If the debtor is a large enterprise¹ or if the debtor requests this, voting classes may be established. Each voting class is assigned one vote. Within each voting class a vote by amount is held to determine such voting class’ vote. Adoption of a proposal is subject to a majority of voting classes by numbers voting in favour of adoption of the proposal. Once adopted and upon approval from the bankruptcy court, the proposal is effective and can be executed according to its terms.

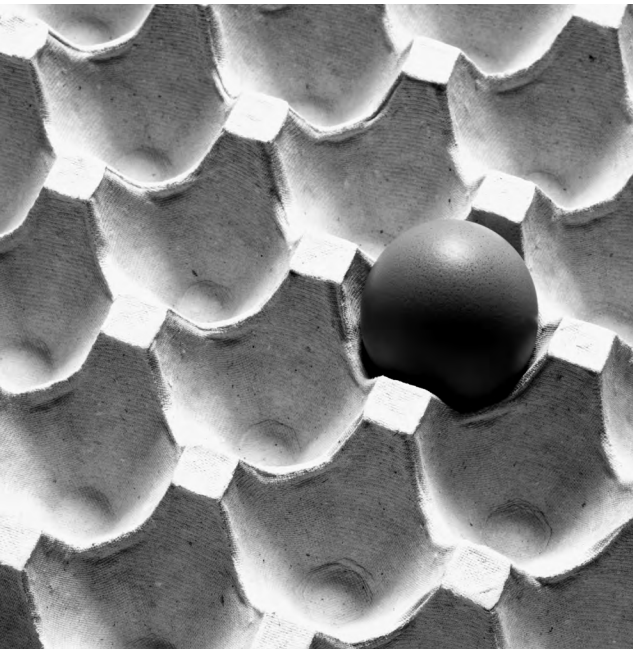


¹ Large enterprise must in two consecutive financial years exceed any two of the following thresholds at the restructuring proposal date: I. a balance sheet total of DKK156 million, II: a revenue of DKK313 million and III. an average of 250 full-time employees during the financial year.

3. Bankruptcy proceedings under Danish law

3.1 COMMENCEMENT OF BANKRUPTCY PROCEEDINGS

Bankruptcy proceedings can be initiated against a company by petition from the company and/or a creditor if the company is insolvent, cf. section 2.1 above.



3.2 ROLE OF THE TRUSTEE

Once a bankruptcy order is given, the bankruptcy court will appoint a trustee (kurator) to act on behalf of the estate. The trustee is often a lawyer.

In larger complex bankruptcy estates, more than one trustee may be appointed. Creditors may suggest one or more trustees, and generally the main creditors' suggestions are followed by the court (and can ultimately be forced through via an election process).

The trustee will take control of the management of the company and will represent the estate in every respect. The company's existing management and directors will step down and will no longer be entitled to dispose of the company's assets or incur liabilities on behalf of the company etc.

Debt incurred by the estate/trustee under the bankruptcy proceedings will receive priority in line with the trustee's fee, cf. section 3.4 below.

3.3 LIQUIDATION OF ASSETS OF THE BANKRUPTCY ESTATE

During a bankruptcy proceeding the appointed trustee must liquidate the assets of the company in any way the trustee deems most beneficial for the creditors as a group. The trustee will typically aim to sell all assets in the open market. If possible, the trustee will attempt to sell the business of the bankrupt

company as a going concern in order to obtain the best possible dividend to secured and unsecured creditors. If the company's assets are comprised by a general floating charge or other forms of security (cf. above), the trustee must discuss the liquidation of such assets with the mortgagee.

An automatic stay on enforcement against the company comes into effect after commencement of the bankruptcy proceedings. The liquidation of mortgaged assets will be administered by the trustee, and the mortgagee cannot initiate enforcement proceedings against the mortgaged assets, unless the assets have not been sold within six months of the bankruptcy order at which time the mortgagee can demand that a forced auction sale (tvangsauktion) is conducted. The liquidation of mortgaged assets will be administered by the trustee, and the mortgagee cannot initiate enforcement proceedings against the mortgaged assets, unless the assets have not been sold within six months of the bankruptcy order at which time the mortgagee can demand that a forced auction sale (tvangsauktion) is conducted. Enforcement of pledged assets can be conducted; but in practice most pledged assets are also administered by the trustee.

Proceeds from non-mortgaged/pledged assets (and equity from liquidation of mortgaged/pledged assets) will be distributed to the unsecured creditors as prescribed in the ranking of claims, cf. section 3.4 below.

3. Bankruptcy proceedings under Danish law (cont.)

3.4 RANKING OF CLAIMS (PRIORITY CLASSES)

No hard deadline exists for creditors to file their claims, which can be filed until the bankruptcy proceedings are closed (cf. below). However, a hard deadline before closure of the proceedings can be set by the trustee and will be announced in the Official Gazette.

The trustee will examine the filed claims and recommend whether a claim is to be admitted or not. Any creditor can initiate legal proceedings if a creditor disagrees with the trustee's recommendation during the examination of a claim, irrespective of who has filed the claim and whether the claim was recommended to be accepted or rejected. Such proceedings must be initiated within four weeks of the trustee's recommendation, which will also be announced in the Official Gazette.

Once the secured claims have been dealt with, the ranking of the unsecured claims will be governed by sections 93-98 in the Danish Bankruptcy Act. All creditors within each section starting with section 93 and ending with section 98 must be paid in full before creditors within the next section are paid. Creditors comprised by sections 93-96 are generally referred to as preferential creditors, including eg claims for debts incurred by the estate during its administration, including the trustee's fee section 93, certain claims incurring during restructuring proceedings section 94, employee claims section 95 and certain excise duties section 96. Thereafter, all remaining claims ("ordinary claims") are covered by section 97. Section 98 covers subordinated claims such as interest

rates accrued after the bankruptcy order. Creditors with claims comprised by the latter section, rarely receives dividends.

Irrespective of the above, the trustee will not adjudicate claims, which will not receive dividends, cf. the ranking of the unsecured claims.

3.5 CREDITOR REPRESENTATION IN BANKRUPTCY PROCEEDINGS

The trustee represents the bankruptcy estate, and the creditors have very limited options to direct the trustee's actions. However, in certain circumstances, the creditors may demand that the bankruptcy court either orders the trustee to take certain action (or abstain from taking action) or even demand that the bankruptcy court replaces the trustee. If the trustee acts negligently and the creditors suffer a loss as a result of this, the trustee can be held liable for such loss.

3.6 VOIDABLE TRANSACTIONS/CLAW BACK

There are various rules on recovery in the Danish Bankruptcy Act which aim at rendering null and void (claw back) certain transactions carried out prior to the bankruptcy order.

The result of a transaction being deemed invalid or annulled is that both the debtor and creditor are placed in a position as if the transaction had never taken place, ie often a creditor

benefitting from such transaction is ordered to compensate the bankruptcy estate's loss and/or the creditor's benefit from such transaction. Transactions subject to claw back include inter alia non-arm's length transactions, wrongful/fraudulent trading, extraordinary payment to creditors, security granted for pre-existing debt or security that is not perfected without undue delay.

3.7 CLOSURE OF PROCEEDINGS

Bankruptcy proceedings are closed when the trustee submits the final report, including a financial statement and the dividend proposal (if any), to the bankruptcy court and the bankruptcy court has approved the final report at a creditors' meeting. If a creditor disagrees with the trustee's report etc, the creditor can appeal the closure of the proceedings. The debtor company will be dissolved at the end of the process.

Generally, bankruptcy proceedings last from a few months to a couple of years but, in particularly complex cases, proceedings can last longer.



4. Recognition in Denmark of foreign insolvency proceedings



Denmark is not covered by EU Regulation No. 2015/848 on insolvency, which contains rules on mutual recognition of EU-member states' insolvency proceedings.

Under Danish bankruptcy law, foreign insolvency proceedings are not automatically recognized, as the authorization granted to the Danish Minister of Justice to establish rules on the recognition of foreign insolvency proceedings has not generally been utilized (cf. section 6 of the Danish Bankruptcy Act). However, insolvency proceedings in Finland, Iceland, Norway, and Sweden are recognized to a considerable extent due to the Nordic Bankruptcy Convention.

Despite the lack of recognition of foreign insolvency proceedings, several Danish companies have been subject to foreign insolvency processes in recent years, including U.S. Chapter 11 proceedings supervised by American courts. Decisions by American courts, which are otherwise not formally recognized and do not have legal effect in Denmark, have inter alia resulted in changes to the ownership and debt structure of such companies. The fact that Danish companies are subject to Chapter 11 processes or other non-recognized foreign processes does not prevent individual and/or collective proceedings from creditors against the companies or their assets, including secured assets, as a stay on enforcement in such processes are not automatically recognized under Danish law. Nevertheless, such processes are often effective in Denmark as a result of the potential consequences for creditors not observing the terms of the foreign processes.

Key contacts

If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at A&O Shearman, or email rab@aoshearman.com. This factsheet has been prepared with the assistance of Kromann Reumert. Any queries under Danish law may be addressed to the key contacts from Kromann Reumert listed below:

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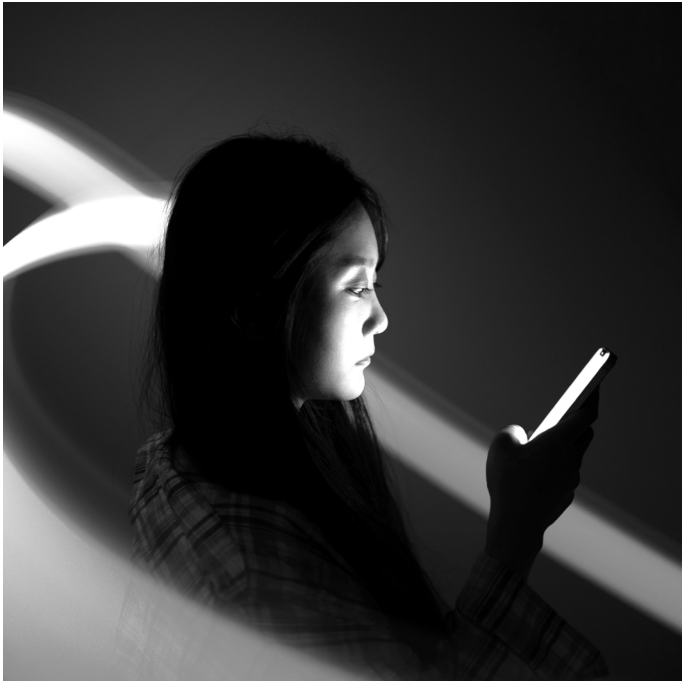
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Further information

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To access this resource, please [click here](#).



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