

Acquisition Finance

in Denmark

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GENERAL STRUCTURING OF FINANCING

Choice of law

What territory's law typically governs the transaction agreements? Will courts in your jurisdiction recognise a choice of foreign law or a judgment from a foreign jurisdiction?

In terms of purely domestic transactions, the documentation will be governed entirely by Danish law. Certain exceptions may apply to overseas territories, such as Greenland, due to devolved legislation. For cross-border acquisition finance transactions, the main finance documentation is predominantly governed by the laws of England and Wales or increasingly by German law. The local implementing documentation will always be governed by the laws of the Kingdom of Denmark. As an EU member state, Denmark recognises both the choice of foreign law as well as judgments from foreign jurisdictions within the parameters of the ordinary conventions. It should be noted that Denmark has opted out of some of the EU legal framework, which includes the EU Insolvency Regulation. Pursuant to the European Council's Edinburgh Decision of 12 December 1992 and the Protocol to the Treaty of Amsterdam on the position of Denmark, Denmark does not participate in judicial cooperation within the European Union. From an acquisition finance perspective, this entails that neither Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations nor Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) are applicable in Denmark. Therefore, the choice of a governing law other than Danish law to govern the non-contractual obligations of, for example, a loan agreement may not be upheld by Danish courts. Similarly, an uncertainty exists as to what extent Danish courts will enforce a foreign bankruptcy order in respect of the debtor's Danish assets.

Law stated - 25 January 2021

Restrictions on cross-border acquisitions and lending

Does the legal and regulatory regime in your jurisdiction restrict acquisitions by foreign entities? Are there any restrictions on cross-border lending?

As a general rule, there are no restrictions on cross-border acquisitions and lending. Private M&A acquisitions are largely unregulated under Danish law. However, with regard to merger control, certain exceptions may apply when it comes to EU and Danish competition law and certain industries that fall within the ambit of the applicable export controls for dual-use or anti-proliferation restrictions. The restrictions will only apply to certain specific regulated sectors, such as financial businesses, certain residential real estate and energy businesses, and are not of general application. The acquisition of more than 10 per cent of the capital or voting rights in a financial undertaking will, for example, require the consent of the Danish FSA. The consent is generally granted within 60 business days if the purchaser meets the statutory requirements to be an owner of a Danish financial undertaking.

Law stated - 25 January 2021

Types of debt

What are the typical debt components of acquisition financing in your jurisdiction? Does acquisition financing typically include subordinated debt or just senior debt?

For purely domestic acquisition finance transactions, the debt is generally provided via a senior acquisition facility provided by a domestic bank and to a lesser extent by a very small number of banks in a club deal. Traditionally, Danish banks tend to hold on to corporate debt and there is no real secondary debt market in Denmark compared to the

London secondary debt market. This is viewed as an incidental part of the overall banking relationship with the corporate borrower. For large-scale transactions originating in Denmark, a Danish domestic bank will often decide to act as a co-arranger in cooperation with a larger international bank. In general, the larger the transaction the more sophisticated the types of debt in the financing offering will be. It all depends on the scale and the parties involved. For large-scale transactions originating outside of Denmark, Danish banks will mostly just be a participant in the syndicate without having any influence on the documentation. This usually results in a mere binary decision whether to participate or not. Mezzanine lenders have generally not played a significant role in the Danish market and there have been relatively few market participants. In recent years, however, there has been a noticeable growth in the number of alternative debt providers, mostly in the lower to mid-market segment. Noticeably, the Danish Government Growth Fund has played an active and dominant role as a liquidity provider in that particular market segment.

Law stated - 25 January 2021

Certain funds

Are there rules requiring certainty of financing for acquisitions of public companies? Have 'certain funds' provisions become market practice in other transactions where not required?

The acquisition of a publicly listed company falls within the ambit of the Executive Order on Take-Over Offers (Order No. 636 of 15 May 2020). If a purchaser makes a voluntary offer or triggers a mandatory offer obligation, the offer must be published and registered with the Danish FSA. The offer must set out the financing and cannot be conditional. The offeror is therefore required to have certain funds available to meet the requirement, even if there is no explicit statutory requirement for certain funds. There is no corresponding statutory or voluntary framework requiring certain funds provisions for private companies. However, a seller may insist on certain funds provisions, depending on the market conditions. In the majority of mid-market transactions this is not usually found and is predominantly a feature of large-scale cross-border transactions. Certain funds therefore remain subject to the commercial negotiations between the parties to the transaction.

Law stated - 25 January 2021

Restrictions on use of proceeds

Are there any restrictions on the borrower's use of proceeds from loans or debt securities?

In principle, provided that there is corporate and commercial benefit, a borrower is free to apply the proceeds as the borrower sees fit, unless contractually restricted in the finance documentation or limited by the borrower's articles of association. As a general rule, financial assistance from the target is prohibited. Pursuant to the general prohibition against financial assistance set out in the Danish Companies Act section 210(1), a Danish company may neither directly nor indirectly make funds available, or grant loans or security for its shareholders or management, including the management of its parent company. The term 'parent company' includes any company that exercises dominant control over the company and applies to public limited companies, partnerships, private limited companies and companies with an equivalent corporate form. While the Danish Companies Act only applies to Danish companies, the Danish Business Authority has taken the unusual position that the provision of financial assistance by foreign subsidiaries of a Danish target company to finance the acquisition of shares in the Danish target company constitutes a circumvention of the Danish prohibition on unlawful financial assistance. This position tends to be more strictly applied than in other EU jurisdictions. The management is therefore obliged to ensure that the foreign subsidiary of a Danish company complies with the Danish financial assistance regulations, irrespective of whether this would be permissible in the foreign subsidiary's jurisdiction. It is a matter of legal debate as to whether the extraterritorial reach of unlawful financial assistance extends to foreign parent companies. Notwithstanding the general prohibition on financial

assistance, the Danish Companies Act does permit a target company to provide financial assistance in connection with its own takeover in certain limited circumstances. In practice, lawful financial assistance within the meaning of the Danish Companies Act is rarely used. Instead, market participants prefer a debt pushdown whereby funds are made available to the target company to finance an extraordinary dividend distribution post-acquisition, which in turn is used to repay the acquisition debt on the BidCo level.

Law stated - 25 January 2021

Licensing requirements for financing

What are the licensing requirements for financial institutions to provide financing to a company organised in your jurisdiction?

For the purposes of providing acquisition financing, both individually and as a syndicate, no Danish banking licence is required. A Danish banking licence will only be required to provide traditional banking services (ie, deposit taking and lending), pursuant to section 7 of the Danish Financial Business Act.

Law stated - 25 January 2021

Withholding tax on debt repayments

Are principal or interest payments or other fees related to indebtedness subject to withholding tax? Is the borrower responsible for withholding tax? Must the borrower indemnify the lenders for such taxes?

There are no withholding taxes on principal or interest payments from a Danish borrower. It is only dividend distribution from a Danish company that attracts withholding tax, subject to the application of double taxation treaties. The loan documentation will generally include customary tax gross-up clauses to insulate the lenders from future changes in line with the standard Loan Market Association provisions.

Law stated - 25 January 2021

Restrictions on interest

Are there usury laws or other rules limiting the amount of interest that can be charged?

Denmark is a creditor-friendly jurisdiction that emphasises freedom of contract, especially in a commercial context. While usury is regulated in the Danish Penal Code section 282 as a criminal offence, this would only apply in the most egregious circumstances and not in a commercial context between professional parties with professional advisers on an acquisition finance transaction. The necessary elements would require exploiting another person's significant financial or personal difficulties, lack of insight, lack of prudence or an existing dependency to obtain a contractual benefit that is significantly disproportionate to the consideration offered, if any. It goes without saying that the customary limits on interest charged will apply in relation to consumers or potentially to persons acting outside their main area of business expertise. However, in a commercial context it is extremely rarely invoked by a borrower and unlikely to be a successful argument.

Law stated - 25 January 2021

Indemnities

What kind of indemnities would customarily be provided by the borrower to lenders in connection with a financing?

The indemnities generally follow the prevailing cross-border market standard. However, Danish documentation has generally been shorter, with a tendency to fall back on the underlying law rather than setting out a full roadmap for the finance parties in the documentation, as is the generally accepted market standard for finance documentation in cross-border markets. With the influx of international lenders and the increased internationalisation, Danish market documentation has increasingly adopted a more detailed format for the benefit of the market participants and to accommodate increased internationalisation. The extent of the indemnities varies according to the ticket size in question. Big ticket transactions are generally on market terms whereas smaller and more localised transactions tend to contain fewer indemnities in the financing.

Law stated - 25 January 2021

Assigning debt interests among lenders

Can interests in debt be freely assigned among lenders?

Debt can be freely assigned among lenders. Denmark is a creditor-friendly jurisdiction and the liquidity provided by permitting lenders to assign debt is firmly entrenched in Danish law. The unilateral assignment is perfected by giving mere notice to the borrower and is customarily confirmed by an acknowledgement. Finance documentation will often contain an agreed form of notice and acknowledgement. However, this is not required. The assignment of the underlying security may be more or less complicated, depending on the original structure applied. While concepts such as parallel debt are considered valid under Danish law, they have hitherto not been tested before the Danish courts. The general consensus among the leading banking and finance law firms is, however, that a parallel debt structure should withstand judicial scrutiny. Likewise, the concept of a trust is generally not recognised under Danish law. However, pursuant to recent legislative changes, the concept of a security trustee has been introduced in the Danish capital market. It has not, however, found general applicability in all transactions. To the extent that the debt is secured by security in real estate or another registered asset, it will entail a change in the register of security maintained by the Danish government. To avoid losing priority to subordinated creditors, borrowers will often take out an 'owner's mortgage', which is then pledged as security to a senior creditor. A subsequent transfer of the pledge will maintain the position of the secured lender upon assignment. It should be noted that there is no organised secondary debt market in Denmark for participations in acquisition finance facilities, as one would see in markets like London. Danish banks tend not to avail themselves of the opportunity to assign or to grant sub-participations and Danish borrowers are generally not accustomed to having their debt traded by their relationship bank.

Law stated - 25 January 2021

Requirements to act as agent or trustee

Do rules in your jurisdiction govern whether an entity can act as an administrative agent, trustee or collateral agent?

There are no registration requirements for security agents in relation to syndicated loans. While Danish law does not as such recognise the concept of a trust and consequently the concept of a security trustee, security agents are commonly used in secured syndicated transactions. Following the amendment of the Danish Securities Trading Act in

2013, since replaced by the Capital Markets Act in 2018, the security can be granted directly to the security agent as such for and in favour of the existing lenders or bondholders from time to time. Thus, the old practice of granting the security directly to the individual lenders or bondholders has been abolished to a certain extent. In relation to bond issues, the security agent needs to be registered with the Danish Financial Supervisory Authority to benefit from the amended agency rules in the Danish Capital Markets Act, Chapter 4. If no registration has been made, it will depend on general principles of agency law whether the security agent can represent the bondholders, and if so to what extent. The Scandinavian market has generally adopted Nordic Trustee, a specialist service provider, as the market standard for Nordic transactions.

Law stated - 25 January 2021

Debt buy-backs

May a borrower or financial sponsor conduct a debt buy-back?

The first debt buy-back pursuant to an acquisition financing transaction was initiated by a Danish company, when TDC, a Danish telecom owned by a private equity consortium bought €200 million of its senior debt at a discount. This caused a certain upset in the finance market and prompted the banks to review the wording of the loan agreements going forward, as TDC did not seek permission nor offer to buy debt from all the lenders on a pro-rata basis. Whatever the merits of the legal analysis, TDC itself regarded the participations as having been 'cancelled by early prepayment' outside the framework of the financing at the time of the buy-back and did not seek to utilise voting rights within the syndicate. Subject to the contractual provisions set out in the financing documentation, there is no statutory hindrance for a Danish borrower or financial sponsor conducting a debt buy-back. The restrictions in the finance documentation will usually restrict a transfer of debt to a bank, a financial institution or a similar entity that is ordinarily engaged in investing in loans. To the extent that buy-back is permitted, the finance documentation will usually expressly preclude the borrower from becoming eligible to participate in votes within the syndicate. For publicly listed debt, the customary restrictions will apply, as this falls within the purview of the Danish Capital Markets Act and the Executive Order on Take-Over Offers.

Law stated - 25 January 2021

Exit consents

Is it permissible in a buy-back to solicit a majority of lenders to agree to amend covenants in the outstanding debt agreements?

Subject to the contractual provisions set out in the financing documentation, there is no statutory hindrance for a Danish borrower or financial sponsor to solicit a majority of lenders to agree to amend covenants in the outstanding debt agreements.

Law stated - 25 January 2021

GUARANTEES AND COLLATERAL

Related company guarantees

Are there restrictions on the provision of related company guarantees? Are there any limitations on the ability of foreign-registered related companies to provide guarantees?

The provision of upstream guarantees in the form of guarantees for obligations of direct or indirect shareholders of the

guarantor, cross-stream guarantees in the form of guarantees for obligations of sister companies of the guarantor, and downstream guarantees is subject to the existence of appropriate corporate benefit, usually in the form of a plausible and reasonable benefit to the group of companies of which the Danish guarantor forms a part. Guarantees form a common element of cross-border transactions and the conditions precedent will usually include a board resolution where the corporate benefit is discussed and approved in connection with the approval of the transaction and the finance documents. It should be noted that the general prohibition against financial assistance from the target applies. A Danish company may neither directly nor indirectly make funds available, or grant loans or security, including guarantees, for its shareholders or management, including the management of its parent company. The term 'parent company' includes any company that exercises dominant control over the company and applies to public limited companies, partnerships, private limited companies and companies with an equivalent corporate form. While the Danish Companies Act only applies to Danish companies, the Danish Business Authority has taken the unusual position that the provision of financial assistance by foreign subsidiaries of a Danish target company to finance the acquisition of shares in the Danish target company constitutes a circumvention of the Danish prohibition on unlawful financial assistance. This position tends to be more strictly applied than in other EU jurisdictions. The management is therefore obliged to ensure that the foreign subsidiary of a Danish company complies with the Danish financial assistance regulations, irrespective of whether this would be permissible in the foreign subsidiary's jurisdiction. It is a matter of legal debate as to whether the extraterritorial reach of unlawful financial assistance extends to foreign parent companies. Notwithstanding the general prohibition on financial assistance, the Danish Companies Act does allow a target company to provide financial assistance in connection with its own takeover in certain limited circumstances. In practice, lawful financial assistance within the meaning of the Danish Companies Act is rarely used. Instead, market participants prefer a debt pushdown, whereby funds are made available to the target company to finance an extraordinary dividend distribution post-acquisition, which in turn is used to repay the acquisition debt on the BidCo level.

Law stated - 25 January 2021

Assistance by the target

Are there specific restrictions on the target's provision of guarantees or collateral or financial assistance in an acquisition of its shares? What steps may be taken to permit such actions?

The Danish Companies Act operates with a strict financial assistance regime, which in general prevents a company from providing financial assistance in connection with the acquisition of itself or its parent company. In essence, a Danish company is not permitted to advance loans or otherwise make funds available to a potential buyer in connection with an acquisition of itself or its parent, or guarantee or provide any security for any loans used to acquire itself or its parent company (an acquisition debt). The restriction prevents a target company from providing any form of upstream security or guarantee. Any security or guarantee provided in breach of the restriction will be void if the beneficiary (ie, typically the financing banks) was or should have been aware that the relevant security or guarantee constituted unlawful financial assistance. To avoid this, it is customary to insert limitation language in the relevant facilities agreement specifying that any security or guarantee granted shall not secure or guarantee any acquisition debt and will be deemed not to have been granted or issued if this would otherwise constitute unlawful financial assistance. Unlike a number of other jurisdictions, Danish law does not provide for any kind of subsequent 'whitewash' procedure and acquisition debt will continue to be characterised as acquisition debt irrespective of when it was incurred and irrespective of any intermediate refinancing. Notwithstanding the general prohibition on financial assistance, the Danish Companies Act does allow a target company to provide financial assistance in connection with its own takeover in certain limited circumstances if the target company presents a written report at a general meeting on the reason for the proposed financial assistance; the company's interest in providing financial assistance; the conditions on which the financial assistance is provided; the consequences of the financial assistance for the

company's liquidity and solvency; and the price to be paid by the third party for the shares in connection with the acquisition of the company. The general meeting must resolve to provide the financial assistance with a qualified majority. The financial assistance must not exceed what is reasonable, taking into account the company's financial position, and such financial assistance is in any circumstance limited to that part of the company's funds that would otherwise be available for dividend distribution. In addition, the report prepared by the target company's central governing body must be published through the filing system of the Danish Business Authority. In practice, lawful financial assistance within the meaning of the Danish Companies Act is rarely used. Instead, market participants prefer a debt pushdown.

Law stated - 25 January 2021

Types of security

What kinds of security are available? Are floating and fixed charges permitted? Can a blanket lien be granted on all assets of a company? What are the typical exceptions to an all-assets grant?

The ordinary forms of security available include share pledges, guarantees, fixed and floating charges (including intellectual property rights), mortgages over real estate, account pledges, and assignment over receivables (including insurance proceeds). Danish law generally recognises two different forms of security interests: mortgages and pledges. A mortgage is a non-possessory security, which comes in the form of either a fixed mortgage over a specific asset or a floating mortgage (a charge) over a number of non-specified assets within a certain group of assets. Fixed mortgages will often be taken over the following assets: real estate, vehicles, chattels, intellectual property rights, and certain electronic, registered securities (dematerialised securities). Floating mortgages/charges can only be granted in respect of certain business inventory (eg, inventory, operating machinery, tools, vehicles) and receivables originating from the mortgagor's business. The floating charge will encompass future acquired assets, as it only crystallises upon an event of default. A pledge is a possessory form of security where the pledgee (or the pledgee's representative) either takes possession of the asset (chattels, negotiable securities, etc) or notifies the debtor of the security (receivables, non-negotiable shares). The pledge is granted on the basis of a pledge agreement between the pledgor and the pledgee specifying the asset being subject to the pledge and the additional terms of the pledge. The following assets will often be pledged: chattels, receivables and physical securities (shares, promissory notes, etc).

Law stated - 25 January 2021

Requirements for perfecting a security interest

Are there specific bodies of law governing the perfection of certain types of collateral? What kinds of notification or other steps must be taken to perfect a security interest against collateral?

Unless the security is a registered security, security is usually perfected by giving notice or by taking possession of the asset. For security in the form of a pledge, there is neither a registration requirement nor an applicable registration fee. The security in the form of a mortgage is granted by way of an electronically filed mortgage, which may either specify the loan being secured and the terms of the loan (an ordinary mortgage) or just specify the amount that is being secured, in which case the terms of the loan follow from an underlying loan agreement (an owner's mortgage or an indemnity mortgage). The mortgage itself must be registered with a central register for the security to be perfected. Depending on the asset used as security, the mortgage will have to be registered with one of: the Land Register (real estate); the Car Register (certain vehicles); the Chattels Register, sometimes referred to as the Persons Register (chattels, intellectual property rights, business inventory and receivables in relation to a floating mortgage, etc); or the VP Securities services (electronic registered securities). In general, an official registration fee of 1,660 Danish krone plus 1.5 per cent of the nominal value of the mortgage is payable upon registration.

Renewing a security interest

Once a security interest is perfected, are there renewal procedures to keep the lien valid and recorded?

Once a security has been registered and paid, there is no renewal procedure. The registration remains in place and is publicly filed in the register. For share pledges, the pledge is noted in the share register maintained by the company. It should be noted that where the security is granted to a syndicate, it would be prudent to update the list of the syndicate members on a regular basis when there are changes. In practice this usually happens in connection with a refinancing and the parties tend to rely on the parallel debt mechanism in combination with equitable assignments.

Law stated - 25 January 2021

Stakeholder consent for guarantees

Are there 'works council' or other similar consents required to approve the provision of guarantees or security by a company?

No. If a company has employed an average of 35 or more employees over a three-year period, the employees may elect to seek representation in the supervisory board. This means that half of the supervisory board members may be elected by the employees. The representatives will function as ordinary members of the supervisory board and no special consents are required over and above the consent of the supervisory board in general.

Law stated - 25 January 2021

Granting collateral through an agent

Can security be granted to an agent for the benefit of all lenders or must collateral be granted to lenders individually and then amendments executed upon any assignment?

While concepts such as parallel debt are considered valid but formally unregulated under Danish law, they have hitherto not been tested before the Danish courts. The general consensus among the leading banking and finance law firms, however, is that a parallel debt structure should withstand judicial scrutiny. Likewise, the concept of a trust is generally not recognised under Danish law. However, pursuant to recent legislative changes, the concept of a security trustee has been introduced in the Danish capital market with the 2018 Capital Markets Act. The registration with the Danish FSA applies only in the context of bond issues. The Scandinavian market tends to rely on Nordic Trustee, a specialist provider, as the prevailing market standard, unless a bank has been appointed as security agent.

Law stated - 25 January 2021

Creditor protection before collateral release

What protection is typically afforded to creditors before collateral can be released? Are there ways to structure around such protection?

The Capital Markets Act, Chapter 4 covers the obligations and the duties of the security representative. The terms and conditions are usually set out in the bonds or in an associated agreement. The parties, including the security

representative, are bound by these terms and individual bondholders cannot independently exercise the rights assigned to the security representative. The security representative is statutorily obliged to represent the collective interests of the bondholders. The relationship is governed by the finance documentation in place, together with the statutory provisions, and is supervised by the Danish FSA as the regulator.

Law stated - 25 January 2021

Fraudulent transfer

Describe the fraudulent transfer laws in your jurisdiction.

Denmark is a very creditor-friendly jurisdiction. Fraudulent transfer is regulated in section 283 of the Danish Penal Code. It predominantly arises in insolvency cases in relation to the sale of secured assets without consent of the secured party or acts that reduce the creditors' ability to seek adequate redress in the assets of the company. This may include the unlawful distribution of assets at an undervalue, unusual transactions before the insolvency decree, undue preference granted to certain creditors and early prepayments of claims before their due date. It does however require the commensurate mens rea within the meaning of the penal code (ie, there needs to be a clear intention to commit fraudulent transfer to incur criminal liability). More often, the insolvency trustee will identify unusual transactions within the hardening period, which may or may not be challenged for the benefit of the insolvent estate. In recent developments, artificial intelligence is applied to assist detecting unusual transactions in addition to the investigation by the insolvency trustee. Fraudulent transfer is therefore rarely invoked in large-scale transactions, as this is usually handled within a civil law context by the insolvency trustee pursuant to the clawback rules in the Danish Insolvency Act.

Law stated - 25 January 2021

DEBT COMMITMENT LETTERS AND ACQUISITION AGREEMENTS

Types of documentation

What documentation is typically used in your jurisdiction for acquisition financing? Are short-form or long-form debt commitment letters used and when is full documentation required?

The purchaser will rarely commit to an acquisition before the financing is in place. At the same time, lenders tend to favour being uncommitted or retaining various opt-outs. The commitment will usually be in the form of a short-form commitment letter and may be accompanied by a short-form term sheet. Where multiple purchasers are involved, best practice includes an agreed form of facilities agreement or at the very least a negotiated long-form term sheet subject to documentation. If the target is a publicly listed company, the Danish Executive Order on Take-Over Offers will for all practical purposes require the purchaser to have certain funds available and thus full documentation in place at the time the offer is made. The reason for this is that the offer to be registered with the Danish FSA will include a description of the financing, which cannot be conditional.

Law stated - 25 January 2021

Level of commitment

What levels of commitment are given by parties in debt commitment letters and acquisition agreements in your jurisdiction? Fully underwritten, best efforts or other types of commitments?

The level of commitment is a commercial matter and will depend on the relative bargaining positions of the parties and the ticket size of the transaction. As a rule of thumb, the larger and the more complex an acquisition, the higher the

level of commitment. For small to mid-sized ticket transactions, the commitment will usually hinge on a single lender, sometimes a two-bank club deal, with a lower level of commitment. In practice, this will often depend on the internal procedures of the credit committee of the lender or the lenders and the attractiveness of both the borrower and the acquisition in question.

Law stated - 25 January 2021

Conditions precedent for funding

What are the typical conditions precedent to funding contained in the commitment letter in your jurisdiction?

The conditions precedent usually mirror those found in cross-border transactions in general. They will usually include the constitutional documents in the form of the articles of association, a transcript from the Danish Business Authority and the shareholder register, together with an officer's certificate and the more transaction-specific conditions precedent, such as the group structure chart, the cash flow diagram, corporate resolutions, legal opinions, etc. Denmark benefits from a publicly available companies register that provides a highly transparent and updated source of corporate documentation. The prudent legal practitioner will usually also perform a bankruptcy search in the state gazette and at the local court, although this is normally merely kept on file and not included in the conditions precedent.

Law stated - 25 January 2021

Flex provisions

Are flex provisions used in commitment letters in your jurisdiction? Which provisions are usually subject to such flex?

Flex provisions in commitment letters are not widely used in the domestic Danish market but market flex provisions are entirely appropriate for large-scale cross-border acquisitions financings. The extent will depend on the ticket size and remains a matter for negotiations on a case-by-case basis depending on the syndication needs. For purely domestic bilateral acquisition finance facilities or club deals, market flex would not be considered market standard.

Law stated - 25 January 2021

Securities demands

Are securities demands a key feature in acquisition financing in your jurisdiction? Give details of the notable features of securities demands in your jurisdiction.

Securities demands are not generally a key feature of Danish acquisition financings. This feature is more likely to arise in transactions involving alternative debt providers in connection with bridge finance loans. There is no general market standard, and it remains a commercially negotiated feature. It should however be noted, that more sophisticated US West Coast structures are increasingly being adopted in the Danish market, which leads to more variation in the market solutions depending on the industry sector, the investment cycle and the sophistication of the investors.

Law stated - 25 January 2021

Key terms for lenders

What are the key elements in the acquisition agreement that are relevant to the lenders in your jurisdiction? What liability protections are typically afforded to lenders in the acquisition agreement?

The key elements in the acquisition agreement will usually be the same as for any other cross-border acquisition agreement in the international markets. There are no significant local variations. However, purely domestic finance documents tend to be shorter than standard Loan Market Association documentation and there is no agreed market standard. To the extent that the lenders are drafting the finance documents in-house, each lender tends to use a different precedent and adapt it to the transaction at hand.

Law stated - 25 January 2021

Public filing of commitment papers

Are commitment letters and acquisition agreements publicly filed in your jurisdiction? At what point in the process are the commitment papers made public?

Commitment letters and acquisition agreements are not publicly filed for private acquisitions. For public acquisitions the offer and the description of the financing is filed with the Danish FSA at the time the offer is made to the public. However, the more detailed finance documentation is not made publicly available.

Law stated - 25 January 2021

ENFORCEMENT OF CLAIMS AND INSOLVENCY

Restrictions on lenders' enforcement

What restrictions are there on the ability of lenders to enforce against collateral?

Denmark is a creditor-friendly jurisdiction. As such, for purely bilateral acquisition facilities, the events of default will govern the lender's enforcement. For large-scale acquisition facilities, the lenders' ability to enforce against collateral will be governed by the terms of the intercreditor agreement and the structural subordination in place. In addition, a company may enter into a financial restructuring procedure. This may be initiated by the company or by creditors to salvage the company. The court-appointed reconstructor may seek a reduction of the debt, a moratorium or a sale of the business. The restructuring will lead to insolvency if unsuccessful or if not approved by the majority of the unsecured creditors within no more than seven months, or up to 11 months if the court grants a two-months' extension twice. The secured creditors are not affected, as their claims are separate from the unsecured estate.

Law stated - 25 January 2021

Debtor-in-possession financing

Does your jurisdiction allow for debtor-in-possession (DIP) financing?

No, there is no DIP financing market in Denmark. There is no statutory grounding for granting preferential treatment for DIP financing. DIP financing would fall within the purview of the court-appointed reconstructor. It would therefore require the consent of the majority of the unsecured creditors as an out-of-court arrangement.

Law stated - 25 January 2021

Stays and adequate protection against creditors

During an insolvency proceeding is there a general stay enforceable against creditors? Is there a concept of adequate protection for existing lien holders who become subject to superior claims?

Once insolvency proceedings have commenced, there is a general stay enforceable against creditors. Provided an attempted reorganisation has been declared unsuccessful or not attempted at all, an insolvent company or its creditors may file for bankruptcy with the bankruptcy court. The insolvent estate will be transferred to a court-appointed trustee. The trustee will take over the management of the company and seek to assess the assets and liabilities of the insolvent estate. The aim is to monetise the available assets for the benefit of the creditors as a whole. The trustee is entitled to dispose of assets and may also seek to set aside claims where appropriate. The trustee will distribute the available to the creditors. Secured creditors will have their claims met first out of the secured assets. Excess claims will be relegated to the pool of unsecured creditors. This process is governed by the Danish Insolvency Act and is supervised and approved by the court. The trustee will conclude the bankruptcy proceedings with a statement of affairs, final account statement, and a proposal for dividend distribution to the creditors. The statement will be submitted for approval by the bankruptcy court, following which the creditors will receive dividends of their claims, if any. To the extent that an existing lien holder disputes a superior claim, it would be a matter for the court to decide. It should be noted that dividends from secured assets are kept separate from the insolvent estate for the benefit of the secured creditors.

Law stated - 25 January 2021

Clawbacks

In the course of an insolvency, describe preference periods or other reasons for which a court or other authority could claw back previous payments to lenders? What are the rules for such clawbacks and what period is covered?

The Danish Insolvency Act sets out the hardening and clawback periods. The general hardening period is three months. Charges and other security granted but not perfected less than three months before the date of the insolvency decree are subject to be set aside. For related persons, the hardening period is up to two years. If the company was insolvent at the time of the execution of the transaction in question, and provided that the beneficiary was aware or ought to have been aware thereof, the limitation period may be further extended. Clawback may also encompass early prepayments, undue preference payments or payments by unusual means conducted further back than the general three-months' hardening period.

Law stated - 25 January 2021

Ranking of creditors and voting on reorganisation

In an insolvency, are creditors ranked? What votes are required to approve a plan of reorganisation?

The Danish Insolvency Act governs the ranking of the creditor's claims. The claims of the secured creditors secured by mortgage or other types of securities will be fully covered provided that there is sufficient security available, and any excess claims will fall within the pool of unsecured creditors. Firstly, costs incurred in connection with the administration of the insolvent estate will be preferential claims. Secondly, costs incurred while attempting to reconstruct the company will be met, followed by claims from employees and finally certain suppliers' excise duty

claims. Following that, the claims of the unsecured creditors will be applied pro rata from the remainder of the available assets.

In restructuring proceedings, the proposed reorganisation plan must be presented to the creditors for their approval. If the proposed reorganisation plan is not adopted by a simple majority of the creditors, insolvency proceedings will be commenced against the debtor. Voting is based on the recognised claim amount. Moreover, if the court-appointed reconstructor considers a restructuring unlikely to succeed, the reconstructor may inform the court and insolvency proceedings will be initiated.

Law stated - 25 January 2021

Intercreditor agreements on liens

Will courts recognise contractual agreements between creditors providing for lien subordination or otherwise addressing lien priorities?

The contractual obligations set out in an intercreditor agreement will usually be upheld and enforced by Danish courts in accordance with the general principles of Danish contract law. The intercreditor agreement will usually be the most complex and negotiated document in a Danish acquisition finance transaction. While generally shorter than equivalent cross-border documentation, it will only be effective between the parties and will not have effect on the operation of the Danish Insolvency Act nor with regard to third parties. Claims emanating from the intercreditor agreement and any other form of contractual subordination will be a matter for the parties thereto to enforce.

Law stated - 25 January 2021

Discounted securities in insolvencies

How is the claim of an original issue discount (OID) or discount debt instrument treated in an insolvency proceeding in your jurisdiction?

Securities issued with a discount are predominantly US tax-driven securities and less common in the Danish market. As a starting point, OID would be considered at face value by a Danish court in accordance with the terms.

Law stated - 25 January 2021

Liability of secured creditors after enforcement

Discuss potential liabilities for a secured creditor that enforces against collateral.

Liabilities for secured creditors rarely arise in practice. Liability may potentially arise in an enforcement scenario. If secured assets are sold to a third party at an undervalue, the borrower may potentially have a claim against the secured creditor for failing to adequately minimise losses. The claim would rest on the proper valuation of the asset in question. While the fair market value of some assets such as real estate may be properly established, more illiquid assets such as shares may be more difficult to evaluate from a pricing perspective. As for environmental liabilities, Denmark generally employs a polluter pays principle, pursuant to the principles of the Environmental Liability Act.

Law stated - 25 January 2021

UPDATE AND TRENDS

Proposals and developments

Are there any proposals for new legislation or regulation, or to revise existing legislation or regulation? If so, please give a reference to any written material, whether official or press reports. Are there any other current developments or trends that should be noted?

There are currently no new developments within acquisition finance in Denmark.

Law stated - 25 January 2021

Coronavirus

What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programs, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Danish government has quickly implemented a number of relief programmes to address the covid-19 pandemic. The relief programmes for Danish businesses are largely in line with the relief programmes implemented in other EU member states. As Denmark is well developed in terms of digitalisation in the public sector, the business sector has been able to adapt quickly. From a transactional and corporate perspective, the Danish government has extended reporting deadlines and granted reliefs in respect of annual general meetings and filings, which can be conducted entirely online. The Danish government has proactively implemented a number of initiatives to address the pandemic's effects on Danish businesses.

Law stated - 25 January 2021

LAW STATED DATE

Correct on:

Please state the date on which the law stated here is accurate.

25 January 2021

Law stated - 25 January 2021