HOW TO BECOME AN INSOLVENCY PRACTITIONER IN DENMARK

HORTEN

1. LEGISLATION

In-court insolvency proceedings are governed by the Danish Bankruptcy Act (herafter "the Bankruptcy Act") which was enacted in 1977 and which has been subsequently amended on several occasions.

2. GETTING INTO THE PROFESSION

2.1 Qualification requirements?

In Denmark there are the following "roles" for insolvency practitioners in in-court insolvency proceedings:

- Administrator (trustee) of a bankruptcy estate (comprising both individual and corporate bankruptcies), hereafter "Trustee".

- Supervisor (in Danish "rekonstruktør") in a formal restructuring process, hereafter "Supervisor".

- Liquidator of companies that are under compulsory liquidation, hereafter "Liquidator".

In Denmark it is not required to have any special qualifications to take up these appointments.

Accordingly, the insolvency practitioner is not required to hold a legal or other academic education or to have passed a specific exam.

In practice however it is always an attorney who is appointed in formal insolvency proceedings.

2.2 Can firms be appointed?

Only individuals can be appointed. Law firms, other firms or groups of persons cannot be appointed.

2.3 Impartiality requirement

The Bankruptcy Act requires that the Trustee and the Supervisor appointed satisfy the impartiality requirements in section 238. A Trustee and a Supervisor must thus not be a connected person or dependent on the debtor, and there must be no doubt as to the Trustee and the Supervisor's interest in the outcome of the case or any other doubt as to the Trustee and the Supervisor's impartiality. Further, the Trustee must safeguard the interests of the bankruptcy estate, and likewise the Supervisor must safeguard the interests of the debtor under a restructuring process.

In addition hereto, the interpretative notes to the Bankruptcy Act state that the Trustee and the Supervisor must be reliable and financially responsible.

The Danish Companies Act requires that the appointed Liquidator must fulfil the same impartiality requirement as those which are required of the management of the company in accordance with section 131 of the Danish Companies Act. Thus, a liquidator must not have any interests which can interfere with the interests of the company.

2.4 Liability insurance

On being appointed as Trustee, the Trustee must declare to the Bankruptcy Court that he/she is covered by a liability insurance covering the bankruptcy estate's loss as a result of errors and omissions by the Trustee in administering the estate as well as an insurance covering the bankruptcy estate's loss as a result of the Trustee's unlawful transactions with regard to the assets of the estate.

On being appointed as Supervisor or as Liquidator, there is no requirement of insurance. However it should be noted that all practising attorneys in Denmark are required to have a liability insurance covering losses due to errors and omissions.

*****

The following article will only focus on an insolvency practitioner in the "role" as a Trustee and as a Supervisor.

3. FINDING A POSITION AS A TRUSTEE AND AS A SUPERVISOR IN DENMARK

3.1 Appointment of Trustee

Appointments are made by the individual Bankruptcy Court, a division of the Danish District Courts. The Bankruptcy Court is generally free to appoint any person. However, regard must be had to the scope and nature of the bankruptcy estate, and the Bankruptcy Court must appoint a Trustee

in whom the creditors have confidence as the administration of the estate is primarily conducted in the interest of the creditors.

Before appointing a Trustee, the Bankruptcy Court may consult the creditors of the bankruptcy estate, but the creditors' recommendations are not binding on the Bankruptcy Court.

The Trustee is appointed immediately upon the issuing of the bankruptcy order. If the bankruptcy order is issued on the basis of a bankruptcy petition filed by a creditor, only the creditor and the debtor are typically present. The Bankruptcy Court will usually appoint the Trustee recommended by the creditor.

If the bankruptcy order is issued on the basis of a bankruptcy petition filed by the debtor, no creditors are typically present to recommend a Trustee. The Bankruptcy Court will often appoint the lawyer recommended by the debtor as Trustee. The debtor's own lawyer will typically not be appointed as Trustee as he/she will not satisfy the impartiality requirement in section 238 of the Bankruptcy Act.

If the Bankruptcy Court considers it necessary, it may appoint two Trustees. This may be the case for large and complicated estates. In such case, the two Trustees will bind the estate separately.

Several Bankruptcy Courts in Denmark have a number of permanent trustees attached. These are attorneys specialised in insolvency law who have been admitted to the "list" by the individual Bankruptcy Court. In cases where the state treasury guarantees the costs of administering the bankruptcy estate, the Bankruptcy Court will often appoint one of the permanent trustees. A permanent trustee may also be appointed where a creditor or debtor has petitioned for bankruptcy and no suitable attorney has been recommended as Trustee.

In all events the Trustee is required to declare prior to the appointment that he/she fulfils the impartiality requirements in sections 238 of the Bankruptcy Act.

3.2 Election of Trustee

The appointed Trustee or a creditor of the estate can request the Bankruptcy Court to convene a meeting of creditors to elect a Trustee. If such request is made, the Bankruptcy Court is obligated to convene a meeting.

The Bankruptcy Court can also convene a meeting of creditors of its own motion to elect a Trustee. For example, in the cases where the Bankruptcy Court expects that a creditor will submit a request or if the Bankruptcy Court finds it necessary due to the size of the estate.

The debtor cannot request the Bankruptcy Court to convene a meeting of creditors to elect a Trustee. However, the Bankruptcy Court may take the debtor's wish into account when exercising the Bankruptcy Court's own right to convene a meeting.

A request for a meeting of creditors to elect a Trustee must in any case be made in writing within three weeks of the bankruptcy order and be held within three weeks of the receipt of the request.

Vote for a Trustee requires that at least one third of the known creditors are represented at the meeting. It is the size of the creditor's claim that is decisive for the calculation of whether one third of the known creditors are represented. Therefore, the number of creditors represented at the meeting is irrelevant.

However, not all creditors are entitled to vote at the meeting. If a creditor's claim obtains full or no coverage, the claim does not bear any right to vote.

If it appears that the meeting of creditors is not quorate, the appointment made by the Bankruptcy Court when issuing the bankruptcy order is final as the Bankruptcy Court cannot reverse the appointment.

The removal of a Trustee is treated in section 4.2.

3.3 Appointment of Supervisor

A petition for restructuring a company must contain a suggestion for one or more Supervisors. This is the case in a petition filed by a debtor as well as a petition filed by a creditor. Furthermore, the petition must be accompanied by a declaration from the suggested Supervisor stating his/her willingness to be appointed as Supervisor and that he/she fulfils the impartiality requirements in section 238 of the Bankruptcy Act. If the petition does not meet these requirements, the petition is without effect. The Bankruptcy Court is however not committed to appoint the suggested Supervisor.

If the petition is filed by a debtor the Bankruptcy Court will immediately take the company under restructuring and appoint a Supervisor.

If the petition is filed by a creditor the Bankruptcy Court will only take the company under restructuring and appoint a Supervisor if the debtor agrees hereto. In the case that the debtor does not agree, the Bankruptcy Court will call for a meeting with the debtor where the petition is discussed and where the Bankruptcy Court will decide on whether the company is to be taken under restructuring. If this is the case, the Bankruptcy Court will appoint one or more Supervisors.

Normally the Bankruptcy Court will only appoint more than one Supervisor in large and complicated companies. In such case, the two Supervisors will bind the estate separately.

3.4 Change of Supervisor?

As a general rule the appointed Supervisor cannot be removed after he/she has been appointed by the Bankruptcy Court.

4. THE OFFICIAL BODY FOR TRUSTEES AND SUPERVISORS IN DENMARK

4.1 Official Body

As there are no formal requirements to whom may take up appointments as Trustee or Supervisor, there are no official bodies for Trustees and Supervisors in Denmark.

The work of the individual Trustee and the individual Supervisor are overseen by the Bankruptcy Court.

4.2 Bankruptcy Estates

In recent years, there has been increasing focus in Denmark on speeding up the administration of bankruptcy estates. This resulted in amendments to the Bankruptcy Act in 2007. The purpose of these amendments was to ensure on-going control to prevent the estate administration from entering into "*dead*" periods.

The Trustee has a duty to submit briefings to the creditors on an on-going basis. These must also be submitted to the Bankruptcy Court, cf. section 125 of the Bankruptcy Act.

The briefings must am0ng other things contain an account of the administration and what tasks have been performed in the period from the previous briefing.

The first briefing must be sent immediately upon the issuing of the bankruptcy order, the next three weeks after, the third four months after and thereafter every six months.

The Bankruptcy Court ascertains that the Trustee has spent time on the administration. If no new tasks have been performed and thus no time spent the Bankruptcy Court will request the Trustee to explain the reason for the lack of momentum in the administration. If the explanation is not satisfactory the Bankruptcy Court can demand that the administration is concluded as quickly as possible and eventually remove the Trustee.

However, the Bankruptcy Court only verifies that the administration of the estate is duly proceeded with. The Bankruptcy Court does thus not carry out a general substantive control of the estate administration.

4.3 Restructuring

The rules on restructuring entered into force on 1 April 2011.

The Bankruptcy Court's control is limited to overseeing that the Supervisor respects the time limits laid down in the Bankruptcy Act:

Within 4 weeks after the initiation of restructuring the Supervisor must convene a meeting in the Bankruptcy Court. At the same time he must have prepared and submitted a draft restructuring plan to the creditors.

Within 3 months after the initiation of restructuring the Supervisor must send a statement to the creditors and the Bankruptcy Court. This statement must contain all important information on the restructuring process and an indication as to when the Supervisor expects to submit a reconstruction plan to the creditors.

Within 6 months after the meeting in the Bankruptcy Court the Supervisor must convene another meeting in the Bankruptcy Court where the creditors present will vote on the proposed restructuring plan. This time limit may be extended by a maximum of 4 months if approved by the creditors.

4.4 The powers of the Bankruptcy Court

The Bankruptcy Court may remove a Trustee or a Supervisor at any time.

However, it is only under special circumstances that the Trustee or the Supervisor can be removed, cf, section 11g (1) and section 114 (1) of the Bankruptcy Act. This could be the case if the Trustee or the Supervisor does not fulfil his/her duties. The Trustee or the Supervisor can be removed if the Bankruptcy Court, a creditor or the debtor finds that the administration of the estate is not duly proceeded with or if the Bankruptcy Court, a creditor or the debtor does not believe in that Supervisor can find a reasonable solution to the company's financial difficulties.

It is only the Bankruptcy Court who can decide to remove the Trustee or Supervisor. The debtor or a creditor can request the Bankruptcy Court to remove the Trustee or Supervisor, but it is the Bankruptcy Court alone that makes the decision. Furthermore, a person who has a legal interest in the restructuring process can also put forward a request for a removal of the Supervisor.

In practice, the sanction of the Bankruptcy Court is to reprimand a Trustee or a Supervisor. It is thus very rare that the Bankruptcy Court decides to remove a Trustee or a Supervisor.

4.5 Private Associations

The lawyers who are admitted to the "list" of the respective Bankruptcy Courts have formed their own associations. In the Copenhagen area, there is 'Kuratorforeningen' (the Association of Permanent Trustees), whose 24 members are the attorneys appointed as permanent Trustees at the Bankruptcy Division of the Maritime and Commercial High Court, which covers all insolvency proceedings in the Greater Copenhagen Area and thus a large number of the insolvency proceedings in Denmark.

In addition, there is an association, 'Danske Insolvensadvokater' (the Association of Danish Insolvency Practitioners), of which one can become a member by declaring to have been working with insolvency law for a number of years. The association has introduced a certification scheme, but it is not a requirement for being appointed as Trustee or Liquidator to be a certified insolvency lawyer.

5. HOW MUCH DOES A TRUSTEE AND A SUPERVISOR GET PAID AND HOW IS REMUNERATION CALCULATED?

5.1 Approval of fee

The Bankruptcy Court must approve the Trustee's and the Supervisor's fee. The fees are paid by the estate as preferential claims prior to any other claims.

The Trustee and the Supervisor must send a fee recommendation to the Bankruptcy Court with information as to the time spent on the individual tasks and when the tasks were performed. The Bankruptcy Court will then assess the work performed, with due regard to the scope of the work and the nature of the estate, the responsibility undertaken in the work and the results obtained under the prevailing circumstances.

The on-going briefings, cf. 4.2. above, must contain information on the tasks performed by the Trustee, the time spent thereon and when the tasks were performed. These reports make it easier for the Bankruptcy Court to assess the Trustee's fee.

The Supervisor's fee is to be paid by the debtor. As a result hereof the Supervisor is not in the same way as a Trustee obligated to submit reports to the Bankruptcy Court on a continuous basis. However, the Bankruptcy Court must still approve the size of the Supervisor's final fee. The criteria used for this approval are the same as those used to assess the fee to the Trustee.

5.2 Security for the costs of administering an estate

The issuing of the bankruptcy order is generally conditional on the party filing for bankruptcy providing security for the costs, see section 27 (1) of the Bankruptcy Act. The Bankruptcy Court determines the amount of security, which is normally DKK 30,000 (approx. EUR 4,000). This requirement applies to a creditor petitioning for bankruptcy as well as the debtor.

In cases where a floating company charge is registered on the debtor's assets, cf. section 47c of the Land Registration Act, the holder of the floating company charge is obligated to pay a security of DKK 50,000 (approx. EUR 6,700). This obligation is unconditional and thus not conditional on the holder having filed for bankruptcy. This security is subordinated to the security pursuant to section 27 (1) of the Bankruptcy Act. If the holder of a floating company charge provides security, the Bankruptcy Court will typically reduce the security from DKK 30,000 to DKK 15,000 (approx. EUR 2,000).

The security is set to cover the Trustee's costs in connection with the estate administration if the funds of the bankruptcy estate are not sufficient.

In the cases where there are no funds in the bankruptcy estate the Trustee must finalise the administration of the estate as soon as possible, cf. section 143 of the Bankruptcy Act. If the Trustee finds that there is a need for further examinations, it is a condition for such examinations that the Trus-

tee's costs in this connection are guaranteed by the creditors of the bankruptcy estate or the state treasury.

If there are sufficient funds in the estate, the Trustee's fee is covered only by those funds and the security is repaid to the creditor who paid the security.

If the petition for bankruptcy is filed by an employee on the basis of a wage claim and if the petition is filed by the court appointed Liquidator of a company in compulsory liquidation the cost of administering the estate will be covered by the state treasury, cf. section 27 (3) of the Bankruptcy Act, if the estate does not have sufficient funds itself. Thus in such cases the state provides the guarantee for the costs.

5.3 Realisation of assets

If the debtor's assets are charged by way of mortgage, the Trustee alone has the right to sell the charged assets. The Trustee will usually sell the assets in cooperation with the mortgagee. If the mortgaged asset has not been sold within six months, the mortgagee may demand that the asset be sold at a compulsory auction, see section 86 of the Bankruptcy Act.

The mortgagee pays to the bankruptcy estate the cost incurred on the estate in respect to administration and sale of the mortgaged asset. These costs include the time spent by the Trustee.

5.4 Fee on account

The Bankruptcy Court may approve a fee on account for the Trustee if the fee on account is justified by specific circumstances, e.g. by the sale of a charged asset. This will often be the case in very large bankruptcy estates or in estates having been administered for a long time. The assessment of the fee on account is also based on the criteria of section 239 of the Bankruptcy Act.

5.5 Security for the costs of administering a company under formal restructuring

As mentioned above the Supervisor's fee is to be paid by the debtor and therefore no security is required by law for the cost of the restructuring process.

However, in the case where the restructuring process is initiated without prior consent from the debtor, the creditor who has requested the restructuring process shall provide security for the costs of the restructuring process, see section 11a (4) of the Bankruptcy Act. The size of the security is equal to the security required in accordance with section 27 (1) of the Bankruptcy Act, which normally is DKK 30,000 (approx. EUR 4,000).

In all cases – irrespective of whether it is the debtor or a creditor who has requested the restructuring process – a security must be provided for potential bankruptcy proceedings, see section 11a (7) of the Bankruptcy Act. The reason being that the restructuring process will automatically conclude with a bankruptcy if the restructuring fails. The size of the security

shall correspond to security required after section 27 (1) of the Bankruptcy Act.

However, in cases where a floating company charge is registered on the debtor's assets, see section 47c of the Land Registration Act, the security pursuant to section 11a (7) of the Bankruptcy Act can be reduced by half, i.e. normally DKK 15,000 (approx. EUR 2,000).

6. NEED FOR REVISION?

After the floating company charge was introduced in 2006, we experience an increasing number of bankruptcy estates with no unencumbered assets. As all proceeds from sale of charged assets are distributed to the chargee in question, there are limited funds in the estate for conducting investigations and to pursue claims, e.g. claims for avoidance.

There are discussions as to whether the rules on appointment of Trustees need revision.

The Trustee may only be elected by the creditors if they have prospects of receiving dividend. This means that creditors with large secured claims do not have any influence on who is appointed as Trustee and is thereby to realise the charged assets.. If all assets have been charged, there are no prospects of dividend and no creditors can vote at all. Thus the creditors are unable to elect another Trustee than the Trustee appointed when the bankruptcy order was issued, even though this attorney may have been suggested by the debtor and does not have the trust of the creditors.

On the other hand creditors experience that creditors (e.g. finance creditors) with very large claims can elect the Trustee. The minority creditors may have doubts as to whether the Trustee will act in the interest of all creditors, or whether the Trustee will e.g. be inclined to "overlook" voidable payments received by the creditor which elected the Trustee in order to avoid a conflict with the creditor and risk not being elected in future bankruptcy estates.