

Warranties and guarantees according to Danish law and/or law practice (2012)

- Personal guarantees
- Mortgage (or charge) over land
- Mortgage of movable property
- Charge or assignment of choses in action e.g. Company shares
- Fixed charges and floating charges
- Impact of insolvency legislation
- Ships, aircraft and vehicle
- Conclusions & suggestions

1. Personal guarantees:

In Denmark there are 8 different kinds of personal guarantees:

- 1.1 The simple (standard) guarantee.
- 1.2 Directly liable guarantee
- 1.3 Loss guarantee
- 1.4 Limited guarantee
- 1.5 Partly guarantee
- 1.6 Following guarantee
- 1.7 Guarantee by contract
- 1.8 Guarantee from more than one part

Generally a personal guarantee is:

- A common form of security.
- Often required by banks, from company directors, in respect of loans to the company, parents, etc.
- The guarantor assumes the same responsibility for payment of the debt as the debtor himself, and can be sued by the creditor as well as, or instead of, the debtor.
- Guarantee should be in writing
- Not regulated by any law
- No requirement for registration
- Most of the guarantees will have a clause, which says that the guarantees can be enforced without a court decision against the guarantor – but the writ is governed by a lot of formal requirements.
- Not all of the guarantees can be enforced against the guarantor **before** the debtor – some of the guarantees claim that the debtor has so be unable to pay (insolvent) before the guarantee is enforceable.

2. Mortgage over land:

- Mortgages or charges of land must be in writing
- It has to be on a particular formula
- Mortgage must be registered – it is done online - from the law firm or bank or real-estate broker (others with the program and power of attorney)
- Mortgage gives creditor the right to go directly to court without a judgement to execute his right to sell the property on an action. (the action is held by the court)
- Mortgage does not give the creditor right to sell the property (private) – only on an auction held by the court.
- Order of registration decides priority of mortgages
- So check before accepting security what prior mortgages are registered
- Land register is open to public inspection
- Prior mortgages often contain restrictions prohibiting registration of later mortgages without prior lender's consent. Banks often refuse consent.

3. Mortgages of movable property:

If security is given over personal chattels for payment of a debt, and that security is contained in a document, it must be in the proper form, it is required to have a pledge agreement. And the pledge is required to be registered.

The registration is open for public search for a minor fee.

- This applies where the goods will remain in the debtor's possession
Chattel mortgages are very often used

The principal type of security on movable assets is a pledge which provides the Pledgee the right to have the assets sold upon default of the debtor and is subject to the Authorization of the Courts. The proceeds of the sale are used to repay the outstanding secured.

4. Assignment of choses in action:

Factoring is a common situation in which businesses raise finance by assigning book debts to banks.

- Notice must be given to the customers of the business, generally on each invoice raised by the business: this states that the debt created by the invoice has been assigned to the bank.
- The customer must then make payment to the bank direct.
- This is regulated by a law called (Virksomhedspant / company charges) which was enforced 1.1.2006.

5. Floating charges:

- A fixed charge may be taken over land or over movable property which is static or fixed in nature, e.g. land or plant & machinery.
- A floating charge may be taken over property which is not fixed and which changes and fluctuates over time: e.g. stock in trade, book debts.
- Crystallisation: the floating charge document will state that the charge crystallises, that is, becomes fixed, when certain events happen.

- Examples: debtor stops trading or suspends payment of debts, other creditors execute against debtor's goods, and debtor enters an insolvency procedure.
- Floating charges apply to company debtors and individuals.
- The creation of a floating charge requires a written agreement which must be filed with the land registry and it cost a fee regulated by the law.

6. Impact of insolvency legislation:

- Creditor should not assume debtor can give valid security over his assets if he is approaching insolvency.
- Securities given (from 3 months till 2 years) before formal insolvency may (and almost always are) be invalid.
- All the securities will then be cancelled and the money that was already given for instance according to the pledge has to be returned to the bankrupted debtor (more like the curator of the company)

7. Ships, aircraft and vehicle:

These have their own specialised schemes requiring registration of mortgages granted over ships, aircraft or vehicle/ machinery.

It done due to a registration fee depending by the size of the mortgage and the registration is open to the public for a minor fee.

It is handled almost the same way as mortgage over land.

The largest problem with machinery is to identify them.

8. Conclusions & suggestions:

Effective forms of guarantee:

Mortgage on land

Floating charge

Mortgage over vehicle /machinery

Simple forms of guarantees:

Personal guarantees all 8 types

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