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## **SAMUELSSON NEUGEBAUER**

In recent years the Danish legal market has seen a number of small, but highly specialised law firms - and 3-4 full service law firms. Samuelsson Neugebauer specialises in torts and insurance and white collar crime. The field of competence of our 10 lawyers comprises product liability, contractual liability, professional liability, directors' and officers' liability, IT-related liability and personal injury. Many of our lawyers are frequent publisher of articles and books.

**Samuelsson Neugebauer  
Law Firm**

**Directors, Officers and Managers Personal  
Liability: The Legal Position in Denmark**

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## **DIRECTORS, OFFICERS AND MANAGERS PERSONAL LIABILITY IN DENMARK**

In Denmark there are a number of different corporate entities structures primarily governed by statute law. The chosen corporations for commercial activities are “*Aktieselskaber*” (Public Liability Companies) and “*Anpartsselskaber*” (Private Limited Companies). The difference is in particular a lesser capital demand and less formal requirements as for the private limited company. *Aktieselskaber* is usually identified by an “A/S” attached to the name of the business and *Anpartsselskaber* by an “ApS”.

Most claims against directors and officers are concerned with such corporations.

Until now we have rarely seen shareholders suits but rather suits by creditors – most often following a bankruptcy. Lately, however, we have seen suits against the board of trust funds at the order of the Danish Commerce and Companies Agency carrying out its duties to inspect the affairs of trust funds. The future may see an enhanced interest from shareholders and pension holders in reviewing the administration of companies and pension funds and bring forth legal action against those responsible for losses.

### **1. The Structure of Corporate Entities in Denmark**

Section 140 of the Danish Companies Act sets forth a liability rule with regard to directors and officers in public limited liability companies. It is more or less a codification of the general rule of negligence. The same rule applies in Norwegian and Swedish legislation since this part of the Companies Act originates from co-ordinated Nordic legislation. In Danish practice the rule in itself has no independent influence on the liability although the courts may cite the rule.

For many types of corporate entities there is no statute governing liability. But it is widely accepted in case authority that the general rule on liability is applicable – if directors and officers are negligent in carrying out their duties and thereby are the cause of losses for the corporate entity, its creditors or shareholders, they are liable for damages. The challenge in most cases is to determine the duties in the concrete circumstances and deciding if the breach actually did cause a loss.

The following will concentrate on *Aktieselskaber* and *Anpartsselskaber*.

## **2. Who are Directors, Officers and Managers?**

- (a) **Directors** – The board of directors have the responsibility for the overall strategic management of the company and the responsibility to oversee the board of managers’ decisions. The shareholders at the Annual General Meeting elect the board. The board of directors is a separate body from the day-to-day management board. Individuals outside the day-to-day management usually comprise it. Following financial scandals in the late eighties a low influence of the daily management in the board of directors is considered preferable. The Danish Commerce and Companies Agency register directors and the information is published. Only those registered are directors.
- (b) **Officers (managing board)** - The day-to-day management of the company is in the hands of the officers forming the management board. One of the duties of the board of directors is the appointment of one or several officers to take charge of the day-to-day management (and some say this is the board’s most important duty along with the duty to dismiss the management if so called for). The Danish Commerce and Companies Agency register those officers. The information is publicly available. Only those registered are officers. Corporate officers are judged against the same rule of conduct as the directors but the nature of their duties is different.
- (c) **Managers** - There is no specific office of “manager” under Danish law. Only those registered as such in The Danish Commerce and Companies Agency are directors and officers. Any employee in a corporation in principle is liable for his or her actions and omissions both towards the corporation and towards a third party suffering damage. Rules in the Liability and Torts Act modifying the liability of employees means that this liability is of no practical concern.

## **3. Legal Basis of Directors, Officers and Managers Liability in Canada**

### **(a) Statutory, Civil and Contractual Legal Framework**

As mentioned above liability for directors and officers is in particular based on negligence.

Section 140 of the Companies Act has the following provision:

§ 140 - Promoters, members of the board of directors and of the management board who, in the performance of their duties have caused damage to the company due to wilful misconduct or

negligence, shall be liable in damages. This consequence shall also apply where damage has been inflicted upon shareholders, creditors of the company or any third party by a violation of the provisions of this Act or the articles of association.

Determining if there is a wilful misconduct or negligence is judged against the duties of directors and officers. The duties are laid down in the Companies Act and other legislation. It goes without saying that there are a number of duties and requirements that are not codified in legislation or in guidelines. In any individual claim one must determine the actual performance of the director or the officer and then one must determine if this conduct is negligent when taking into consideration the conduct of a reasonable officer or director in that particular situation.

Breach of corporate contracts do not as such lead to liability for directors, officers or managers. As long as the corporation is alive and solvent, any third party should direct its claim against the corporation. However, if a director wilfully allows the corporation to breach a contract and the corporation is not able to remedy the breach, that director may be personally liable. Also the loss suffered by the corporation itself may be the liability of those directors who sanctioned the breach of contract.

There are a number of requirements in legislation concerning tax, accounting and insider trading etc. containing individual duties for directors, officers and managers. For example the failure to report and settle withholding tax or value added tax might give rise to civil and criminal liability for directors and officers. There are rules in environment legislation and safety and health regulation providing for criminal liability on directors and officers. When promoting a corporation in a public offering there are numerous statutes to be observed and they may all, if disregarded, create civil liability. The basic requirement in a public offering as well as in a private placement naturally being accurate and adequate disclosure of all relevant facts.

**(b) Duties and requirements of Directors, Officers and Managers**

Directors and officers shall be legally competent and must not be under guardianship. There are varying requirements as to the number of Danish directors on the board of Danish companies. Note in this connection that any EU citizen counts as a Danish citizen. Note also that any citizen from a third country will count as a “Danish director” if he or she is domiciled in Denmark.

**(c) The Business Judgement Rule**

The Danish courts in general will not set aside a business decision made in good faith and for the good of the company even if there was an error in judgement. However, if the foundation for the decision was inadequate or even negligent, the directors and officers may be required to prove that such errors did not influence the decision itself. In case of bankruptcy and the issue being liability for extended credits, the courts may overrule an optimistic view by the directors and officers as to the chances to work through a business crisis.

**(d) Duties of Directors, Officers and Managers toward the Corporation**

When appointed or elected, directors and officers should disclose their share portfolios in the corporation and any subsequent acquisition or sale. Directors and officers may not participate in transactions or speculation involving the company's assets. Basic obligations are set forth in the Companies Act section 50. The board of directors shall have the overall responsibility for the management of the company's business and furthermore the board of directors shall ensure proper organisation of the company. The management board (officers) shall be in charge of the day-to-day business of the company and shall in that capacity follow the directions and guidelines provided by the board of directors. The day-to-day business shall not include transactions which are unusual or of great significance in consideration of the position of the company. The management board may only undertake such transactions pursuant to a specific authorisation given by the board of directors, for example where a resolution of the board of directors cannot be awaited without major inconvenience to the business of the company. In any such case the board of directors shall be notified as soon as possible of the transaction which has been made. Furthermore it is the board of director's responsibility to ensure that the capital of the company is always secure.

The basic obligations are set forth in the Companies Act section 56. For example the chairman shall call meetings of the board of directors whenever required and shall ensure that all members of the board of directors are given notice of such meetings. Claimants in liability suits may often seek to rely on a low frequency of board meetings as a sign of poor management. The board of directors shall adopt specific rules of procedure relating to the exercise of their powers. Deviation from such rules of procedure may often be an issue in liability suits.

Under the Companies Act section 58 a member of the board of directors or of the management board may not take part in decisions concerning agreements between the company and him nor concerning legal proceedings against him nor concerning any agreement or legal proceedings against the company and any third party, if the member of the board of directors or of the

management board has a major interest therein, which may be contrary to the interest of the company.

**(e) Duties of Directors, Officers and Managers towards Majority and Minority Shareholders**

Directors, officers and managers owe a duty of loyalty to the company and not to the majority or minority shareholders. Directors, officers and managers are bound by statute law, the articles of association and should at any time act in the best interest of the company.

During the general meeting of the shareholders the board of directors should of course comply with any legitimate resolution put forth by the shareholders.

**(f) Duties of directors, Officers and Managers in Case of Bankruptcy**

Only the board of directors can file a bankruptcy petition on behalf of the company. If the company is in the process of winding up only the liquidator can file the petition of bankruptcy.

Once the bankruptcy is declared the board of directors and officers ceases to exist and an administrator is appointed to handle all of the company's further affairs. During this period the former directors and officers have a duty to attend meetings in the Probate Court and a duty to disclose to the court all relevant aspects of the company affairs.

There is no direct liability for the payment of employee wages, withholding tax, values added tax or the like. However, if deemed negligent that a director or an officer allowed the company to continue business thereby increasing the company's debt, there may be personal liability for such losses.

**(g) Status of the Enforcement of Directors, Officers and Managers Liability with Respect to Tax, Labour and Environmental Regulations**

At the outset any liability for tax, wages or environmental damage in the cause of the company's business is the liability of the company itself. If company is insolvent, however, in case of negligence the directors and officers may be held liable.

Offences under tax, labour and environmental regulations may also lead to criminal liability for the directors and officers independently of whether or not the company is able to meet its civil liability.

Unsettled taxes and duties will often lead to liability suits initiated by the tax authorities. One rarely sees suits based on labour or environmental legislation.

**(h) Directors, Officers and Managers Criminal Liability**

There is an extensive regulation following from Danish rules and EU regulation important for the business life. Nearly all such regulation provides for criminal liability in case of negligence. Criminal liability following from such regulations is most often seen with regard to tax, safety and health regulations and the like.

Often criminal action will be confined to penalizing the corporation itself.

**4. Statute of Limitations**

In Denmark the universal limitation rule provides for a 5-year limitation period from the time when the claim is mature and a 20-year limitation period from the time when the claim was founded. There are a number of specific limitation rules but basically any liability matter is governed by the mentioned rules.

**5. Who Can Sue?**

**(a) Corporation (Derivative Actions)**

Suits by shareholders against third parties enforcing claims on behalf of the company are not seen in Denmark. The Companies Act section 144 (3) enables minority shareholders representing a shareholding of at least 10 % to take legal action against officers and directors for liability even in spite of a promise of liability exemption from the general meeting. If a bankruptcy decide that it will not pursue a possible claim against any third party or any director or officer – because of lack of funds to carry the legal costs or for other reasons – any creditor or shareholder may then take legal action on behalf of the bankruptcy. Any award in such legal action is payable to the bankruptcy, however.

**(b) Shareholders (Direct Actions and Class Actions)**

Danish courts have seen some direct actions by individual shareholders or groups of shareholders. Danish legislation does not provide for actual class actions. A recent decision concerning liability for a bank, accountants and directors in connection with a public offering created much debate concerning the lack of class actions in Danish law. It is not probable, however, that Danish legislators will consider the introduction of US style class actions.

**(c, d, e) Creditors, Third Parties and Insolvency Administrators**

Suits from creditors and insolvency administrators are the most common liability suit against directors and officers. It is common practise following insolvency that banks or sub suppliers will consider a suit concerning credit extended in the period immediately before the bankruptcy. Sometimes the insolvency administrator will take legal action based on all creditors' loss due to credit extended. Actions from third parties are rarely seen.

**(f) Regulatory Authorities**

Suits from regulatory authorities are hardly applicable. The Danish Commerce and Companies Agency is responsible for supervising and inspecting the requirements in the Companies Act and other legislation concerning corporations. Usually the agency will act by way of orders and decrees. The same goes for the Copenhagen Stock Exchange. As mentioned above the supervision of trust funds and the like may involve dismissing the board and appointing a new board. In this connection The Danish Commerce and Companies Agency may order the new board to sue the old board for damages.

**(g) Employees**

Discrimination and sexual harassment suits most often are brought only against the individual who committed the wrongdoing. We have still to see a suit against directors and officers of the corporation for discrimination or sexual harassment by employees. There have been a few cases against the company for failing to take measures to ensure the employees against sexual harassment. Suits involving discrimination and sexual harassment are more frequent nowadays but still happen only in restricted numbers. Damages are relatively modest (DKK 25-35.000,00).

## **6. What is the Enforceability of a Foreign Judgement on Danish Directors, Officers and Managers under Danish Law?**

Foreign judgements are generally enforceable in Denmark if the countries from delivering the judgement also enforce Danish judgements. Denmark has agreed to a number of treaties concerning enforceability of foreign judgements, for example The EC Judgements Convention and therefore recognises foreign judgements from all of the participating countries in the EU. A foreign judgement on punitive damages may not be enforceable since it would be against Danish public policy.

## **7. Can the Directors, Officers and Managers be Liable for Punitive Damages under Danish Law, and are Punitive Damages Insurable under Danish Law?**

Directors, officers and managers cannot be held liable for punitive damages under Danish law. As for punitive damages under foreign law, they are insurable in Denmark but in general cover is excluded from the directors liability insurance.

## **8. Can the Company Indemnify its Directors, Officers and Managers under Danish Law and under Which Conditions?**

Indemnification agreements with the company are not prohibited. Actual waivers on the part of the company may not have effect against creditors and faith shareholders. Indemnification agreements concerning personal liability towards any third party would usually be unnecessary as long as the individual in question acted honestly and in good fave with a view to the best interest of the corporation. Should the individual be liable, the corporation would be required to indemnify the individual.

## **9. Is Directors, Officers and Managers Liability Insurance Legal?**

Insurance as stated is legal. It is allowed for the company to pay the insurance premium. Some years ago the tax authorities held that the insured would then be taxable. This is no longer the case. If a director, officer or manager takes out a personal insurance and pays the premium himself, the premium would be deductible. It is not a requirement that the D&O insurance policy is issued by a

local admitted insurer but insurance business in Denmark, offering D&O policies on the Danish market, require the insurance company to establish itself according to EU and Danish regulation.

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