

O.W. Bunker: The Derivative Law Suits

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Derivative Contracts – ENGLISH law & jurisdiction

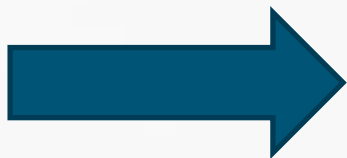
ISDA 2002 Master Agreement - Section 2(a)(iii)



- *Each obligation of each party under Section 2(a)(i) is subject to (1) the condition precedent that no Event of Default or Potential Event of Default with respect to the other party has occurred and is continuing*

OWB General Terms and Conditions for Derivatives Trading – Clause 3.3

- *Payments under this Agreement will only be required to be made by a party subject to the condition precedent that no Event of Default with respect to the other party has occurred and is then continuing*



Payment obligations suspended

The Danish Securities Trading Act – S. 58H (2) (2)

- In situations where the defaulting party is made subject to insolvency proceedings, said party may, however, demand that the close-out netting be carried out in such a manner that the conditions applicable to the parties are the same as they would have been if close-out netting had been effected without undue delay after the time when the non-defaulting party knew, or should have known, that the defaulting party was made subject to insolvency proceedings.*



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English or Danish jurisdiction?

- What does it take to overrule English law and jurisdiction clauses?
- The test applied: Is the matter to be considered hardcore bankruptcy or general contract interpretation?
- Does the Danish courts actually have jurisdiction?



THE DANISH EASTERN HIGH COURT – THE DANISH CASE

- Subject was dismissal because of lack of jurisdiction
- The estate had to prove that the issues were “hardcore bankruptcy”-related.
- The Danish shipping line argued that although the dispute was a result of bankruptcy, it really related to general contract interpretation.
- The court’s decision: the case relates to bankruptcy related issues making it possible to derogate from the jurisdiction clause

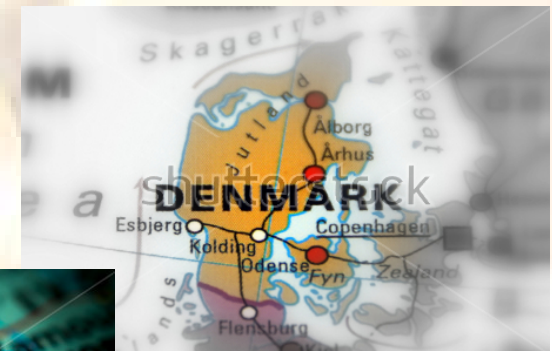


or



THE DISTRICT COURT OF AALBORG – THE FOREIGN CASES

- Completely similar cases except that none of the defendants had ties to Denmark and pleadings were declaratory instead of money actions
- Section 242 of the Danish Administration of Justice Act
 - ◆ *Legal proceedings concerning contractual relationships may be instituted in the court of the judicial district in which the obligation giving rise to the claim has been performed or is to be performed*
 - ◆ *The provision of subsection (1) does not apply to money claims...*



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DISTRICT COURT OF AALBORG – THE FOREIGN CASES

- The estate now pleaded the cases were concerning contractual relationships in contrast to their position in the Danish Eastern Court
- We pleaded that the case concerned insolvency and a money claim in disguise
- The court's decision: Dismissal of the suit in its entirety



OUTCOME

- The outcome of the “foreign cases” means:
- If you are “out of the money”, you can protect yourself against an insolvent Danish derivate partner, unless you are based in Denmark
- Fairness and ethics are not part of chapter 22 on jurisdiction in the Danish Administration of Justice Act

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