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General Chapters:

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1 Overview

1.1 Where would you place your jurisdiction on the spectrum of debtor to creditor-friendly jurisdictions?

Many debtors are reluctant to enter into a Norwegian restructuring process as it, at least compared to certain common law jurisdictions, appears creditor-friendly rather than debtor-friendly. This cultural aspect of how the market more often than not frowns upon business failure and a fresh start for companies that cannot satisfy their creditors is a matter that should be addressed now that the current Norwegian restructuring regime is being reformed, with the aim to make it more attractive and effective, and with a higher success rate.

1.2 Does the legislative framework in your jurisdiction allow for informal work-outs, as well as formal restructuring and insolvency proceedings, and are each of these used in practice?

Norwegian legislation allows for informal work-outs as well as formal restructuring and insolvency proceedings. Restructuring proceedings are often handled out-of-court, while insolvent winding up proceedings are handled in formal, judicial proceedings.

2 Key Issues to Consider When the Company is in Financial Difficulties

2.1 What duties and potential liabilities should the directors/managers have regard to when managing a company in financial difficulties? Is there a specific point at which a company must enter a restructuring or insolvency process?

A company may continue its operations even though it is illiquid, or even insolvent, as long as the continued operations and restructuring work are in the creditors' best interest and have a reasonable chance of success, and the largest creditors allow the company time to work out a rescue plan. Unless the company has the creditors' approval, it must not take on new obligations it is unable to fulfil, and the board of directors must ensure that creditors are treated equally and fairly and that no further loss is inflicted on any of them. Accounts must be kept and taxes must be reported and paid.

The board of directors is obliged by law to take immediate action if the company's equity or cash flow, or both, are considered insufficient for the size and risk of the business operations, or if the company's equity is less than half of the share capital. Such actions include to within reasonable time call for a shareholders' meeting to give information and suggest measures to better the situation, as well as to actually initiate such measures.

If the board of directors finds that there are no grounds for improvement actions or such actions are not feasible and it is unlikely that the economic problems will be solved, the board of directors shall suggest that the company is dissolved, or file for judicial insolvency proceedings.

There is no specific point in time or a final deadline for when a company must enter a restructuring or insolvency process.

Failure to comply with their statutory duties may lead to the directors being held liable for damages and/or criminally liable.

Most directors' (and general managers') liability cases in Norway concern claim for damages from a single creditor who delivered goods or services on credit without being informed that the debtor might not be able to pay. There have also been a few cases where bankruptcy estates have been awarded damages from directors who failed to petition for bankruptcy or who petitioned for bankruptcy too late, resulting in increased loss for the creditors as a group.

Another important duty for the board of directors is to make sure that the company pays government tax claims, and in particular employees' tax deduction. Failure to comply with such duties may lead to the directors being held liable for damages or criminally liable. Corresponding statutory provisions are also in force for other company structures, such as companies listed on the stock exchange.

The board members in an insolvent company may be held criminally liable if they deliberately or negligently have disposed over an asset in a way that prevents the creditors/estate from attaching that asset. Further, the board members may be held criminally liable for disposing of assets in an irresponsible way when this leads to the debtor becoming insolvent.

An administrator of winding up proceedings may recommend to the court that a board member, the CEO or anyone with a leading role in the bankrupt company is quarantined from establishing new companies or serving as a board member or a CEO for a period of two years. The court decides whether the debtor is quarantined or not after hearing the debtor's written or oral pleadings.

2.2 Which other stakeholders may influence the company's situation? Are there any restrictions on the action that they can take against the company?

The shareholders are the company's topmost authority through the General Meeting, and may instruct the board of directors and in that way influence how the company's situation is to be dealt with.

It is only the debtor itself whom may petition for debt negotiation proceedings, while winding up proceedings may be petitioned either by the debtor or by a creditor (including employees).

2.3 In what circumstances are transactions entered into by a company in financial difficulties at risk of challenge? What remedies are available?

The Satisfaction of Claims Act of 1984 regulates the estate's right to reverse transactions carried out within certain time limits prior to the date of the filing for winding up or judicial compulsory debt restructuring proceedings, aiming to annul transactions that in certain ways are contrary to the principle of treating all creditors equally (often referred to as "clawback", avoidance or annulment).

There are several provisions regulating different kinds of transactions that may be subject to claw-back; for example transactions considered to be extraordinary payments, gifts, security for old debt and certain cases of set-off. In general, the transaction in question must have been performed within three months prior to the date on which the court received the bankruptcy petition (for gift transactions, the general time limit is one year). However, older transactions may also be annulled if the beneficiary and the debtor were related parties (applying a two-year time limit) or the beneficiary has not acted in good faith with regard to the poor economical state of the debtor and the unfairness of the transaction (applying a more subjective element of assessment and a 10-year time limit).

3 Restructuring Options

3.1 Is it possible to implement an informal work-out in your jurisdiction?

A Norwegian company may implement an informal work-out at any point in time; however, an out-of-court restructuring must be accepted by all creditors affected by the work-out plan.

3.2 What formal rescue procedures are available in your jurisdiction to restructure the liabilities of distressed companies? Are debt-for-equity swaps and pre-packaged sales possible?

There are two main categories of judicial bankruptcy proceedings in Norway, both regulated by the Bankruptcy Act of 1984: winding up proceedings and judicial debt negotiation proceedings.

Judicial debt negotiation proceedings can be either "voluntary" or "compulsory", subject to slightly different legislation. A rescue plan in a voluntary proceeding must obtain consent from all creditors, while "cram down" rules are available in compulsory composition proceedings, thus enabling the debtor to impose a partial debt release on the unsecured creditors if a majority of the unsecured creditors accept the plan.

Normally, a rescue plan under the two regimes focuses on reducing the "old debt". However, the debtor may also initiate a sale of assets while under judicial debt negotiation proceedings, though subject to the approval of the administrator, the creditors' committee and – if that specific asset is posed as security – from the security holder.

There are no rules on debt-for-equity as part of a rescue plan in a restructuring proceeding. Furthermore, there is no concept of "pre-packaged" sales in Norwegian bankruptcy law. Thus, a sale of the debtor's assets or business operations prior to the opening of winding up proceedings will not receive any formal acceptance from the court or court-appointed administrator of the bankruptcy estate, and is entered into at the risk of the parties with regard to, *i.a.*, rules on claw-back and directors' liability.

The judicial restructuring scheme in Norway is currently under review, and a report with suggestions for legislative changes was delivered to the Norwegian Justice Department on 1st March of this year. The mandate from the Justice Department included considering whether or not rules on debt-for-equity swap and pre-packed sale of assets should be introduced. The aim of the reform is to facilitate a more flexible restructuring scheme that may result in more businesses being rescued and more jobs being preserved.

3.3 What are the criteria for entry into each restructuring procedure?

A company that is "illiquid", meaning in a position where it is consistently unable to meet its financial obligations as they fall due, may petition for judicial debt negotiation proceedings.

The petition for judicial debt negotiation proceedings shall be made in writing to the court, after which the court decides whether the conditions to open proceedings are fulfilled or not. The creditors are not heard.

3.4 Who manages each process? Is there any court involvement?

The court appoints an administrator to manage the judicial debt negotiation proceedings, in practice always a lawyer.

A creditors' committee is usually also appointed, with one or a few representatives from the creditors.

The administrator and the creditors' committee have more of a supervisory function, with full transparency as regards to the company's economic affairs. The board of directors maintains its duties and the company remains legal powers over its assets, while the company's operations continue as usual.

An auditor may be appointed by the court to audit the estate and to assist the administrator in supervising and investigating the company. Any findings will be presented in a report to the court with a copy to all creditors.

3.5 How are creditors and/or shareholders able to influence each restructuring process? Are there any restrictions on the action that they can take (including the enforcement of security)? Can they be crammed down?

All debt incurred prior to the opening of judicial debt negotiation proceedings is "frozen" and may not be paid unless as part of an approved rescue plan. Furthermore, there is an automatic stay against both bankruptcy petitions based on such debt (lasting three months with the possibility of extension), and a creditor's right to attach an execution lien to the debtor's assets (lasting throughout the proceedings).

If compulsory composition proceedings or winding up proceedings are opened, the automatic stay against bankruptcy petitions based on "old debt" lasts throughout the proceedings.

Secured creditors may not enforce any security rights during the first six months from the opening of judicial debt negotiation proceedings, unless the administrator and the creditors' committee give their consent.

There is an exception from the automatic stay with regard to "financial collateral", *i.e.* where the debtor is a professional party and the security is provided to a financial institution in an asset that is deemed to be financial collateral (*e.g.* bank accounts and shares).

In voluntary debt negotiation proceedings, an objecting creditor or class of creditors cannot be crammed down, *i.e.* the debtor's proposal for a debt restructuring must be accepted by all creditors.

In compulsory composition proceedings, creditors may be crammed down. The voting requirements are (the numbers referring to creditors/claims that are granted voting rights):

- if the dividend payment is a minimum of 50%, the plan must be accepted by at least three-fifths of the creditors with a total of at least three-fifths of the total debt; or
- if the dividend payment is less than 50% but a minimum of 25%, the plan must be accepted by at least three-quarters of the creditors with a total of at least three-quarters of the total debt.

Claims ranking in priority and claims that are fully secured may not be crammed down as they are entitled to full payment.

While a company is under judicial debt negotiation proceedings, the debtor must respect the interest of the secured creditors and ensure that their position is not lessened from continuing the operations of the company.

A compulsory composition must involve full payment to claims ranking in priority, *i.e.* mainly employees' claims for wages and recent claims for taxes and VAT. Tax and VAT claims older than six months have no priority, and for this part of their claims the tax authorities will vote as a creditor with an ordinary claim. However, the tax authorities' internal guidelines as to what dividend or extension of payment they may accept are often stricter than the legislative minimum requirements for a compulsory composition.

3.6 What impact does each restructuring procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

Any termination provision in the debtor's contracts may be upheld in a restructuring process, except termination based on payment default of the old, "frozen debt" or provisions which gives the other contracting party a wider termination access due to the debtor's insolvency.

In voluntary judicial debt negotiation proceedings, the general rules of set-off applies. In compulsory composition proceedings (and winding up proceedings), a creditor may set off its claim against the debtor in sums owed to them by the debtor, as long as both claims existed at the time when proceedings were opened.

If the debtor's claim against the creditor fell due prior to the opening of proceedings, but the creditor's claim had not fallen due at that time, the claims cannot be set off.

Any termination provision in the debtor's contracts may be upheld in a restructuring process, except termination based on payment default of the "frozen debt" or provisions which gives the other contracting party a wider termination access due to the debtor's insolvency.

3.7 How is each restructuring process funded?

Judicial debt negotiation proceedings must be financed by the company's available equity and/or revenue from its business operations. The court may require that the debtor pays a fee as security for the initial costs of the proceedings, as a requirement for opening proceedings.

Thus, a successful restructuring under the Norwegian regime is in most cases based on contribution from one or more creditors, usually the debtor's bank, or from the shareholder(s).

4 Insolvency Procedures

4.1 What is/are the key insolvency procedure(s) available to wind up a company?

Under Norwegian legislation, the only available procedure to wind up an insolvent company is through formal, judicial winding up proceedings (*Nw:* "*konkurs*").

4.2 On what grounds can a company be placed into each winding up procedure?

It is a condition for the opening of winding up proceedings that the company is insolvent, requiring the debtor to be both illiquid and with negative net assets (*i.e.* the value of the company's assets and income in sum are insufficient to satisfy the company's obligations).

A petition for winding up proceedings shall be made in writing to the court, and may be filed by the debtor or by a creditor. If the petition is filed by the company's board of directors, the court will make a decision based on the petition. If the petition is filed by a creditor, the court summons the parties to a court hearing, which should be held within one week from receiving the petition. The court may allow the parties to deliver written pleadings to further enlighten the case before deciding on whether or not to open winding up proceedings.

4.3 Who manages each winding up process? Is there any court involvement?

In winding up proceedings, the bankruptcy estate is established as a separate legal entity with automatic seizure of all the debtor's assets. The court appoints an administrator, in practice always a lawyer, who controls and has legal powers over the bankruptcy estate and over the debtor's assets and rights.

A creditors' committee may be appointed, with one or a few representatives from the body of creditors. The creditors' committee's function is comparable to that of a board of directors in a company, with the administrator as chairman.

An auditor may be appointed by the court to audit the estate and to assist the administrator in investigating the company.

The court's involvement in winding up proceedings is usually minimal. The court may be further involved by a demand for a hearing during the proceedings from the administrator, the debtor or a creditor, but this rarely happens in practice.

4.4 How are the creditors and/or shareholders able to influence each winding up process? Are there any restrictions on the action that they can take (including the enforcement of security)?

The shareholders lose their power over the company when winding up proceedings are opened, and have little or no opportunity to influence a winding up process except raising objections to the supervising court and demanding that the court reviews how the process is handled, the administrator's disposal over assets, etc.

The creditors have the same opportunity to object to the supervising court, and in addition they have influence through the appointed members of the creditors' committee.

Upon the opening of winding up proceedings, there is an automatic stay of any bankruptcy petitions against the debtor and against any creditors attaching an execution lien to the debtor's assets in order

to secure claims which arose prior to the opening of the proceedings. The stay lasts throughout the proceedings. Furthermore, secured creditors may not enforce any security rights during the first six months from the opening of winding up proceedings, unless the administrator and the creditors' committee give their consent.

4.5 What impact does each winding up procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

The bankruptcy estate is its own legal entity, and may choose whether to disregard or become a party to the debtor's contracts ("cherry-picking"). Exceptions are provided for employment contracts and tenancy agreements, to which the estate is automatically a party unless the administrator, within three and four weeks from the opening of proceedings, respectively, actively declares that the estate will not become a party to the contract.

Should the estate choose to become party to a contract, the estate has, as a general rule, a right to terminate the contract without cause and with a customary notice period, or alternatively with a three-month notice period, regardless of any provision stating that the contract may not be terminated.

The estate's and the contract parties' rights and duties once the estate has become a party to the debtor's contract(s) differ somewhat between the various types of contracts. However, the bankruptcy estate is only bound by the contractual obligations with effect from when the estate became a party to the contract. Any contractual claim the contracting party might have against the debtor may be filed as a claim in the estate.

When bankruptcy proceedings have been opened, a contract party to the debtor may not terminate the contract solely on the basis of the debtor's insolvency or non-payment, except if the administrator of the estate explicitly states (within a reasonable time from a request by the creditor) that the estate will not become a party to that contract.

If a contract party terminates the contract, it is not obliged to perform outstanding obligations except to pay any outstanding debt to the debtor. Furthermore, a contract party's claim for performance may be converted to a monetary claim and filed with the estate.

A creditor may set off its claim against the debtor in sums owed to them by the debtor, as long as both the claim and counter-claim existed when proceedings were opened. However, if the debtor's claim against the creditor fell due prior to the opening of proceedings, but the creditor's claim had not fallen due at that time, the claims cannot be set off.

A creditor may not set off its claim against the debtor in any claim arising on the estate's hand after proceedings were opened, *e.g.* claims for clawback or for payment of goods sold by the estate.

4.6 What is the ranking of claims in each procedure, including the costs of the procedure?

The ranking of claims in winding up proceedings is as follows:

The costs of the proceedings and any expenses/obligations brought on by the estate are preferential claims, and should be covered in full before any of the debtor's debts are paid.

After preferential claims have been covered in full, employees' claims for unpaid wages, with certain limitations, rank first in priority. Some of the outstanding wages will also be covered by the governmental wages guarantee scheme, and if so the Wages Guarantee Fund subrogates the amounts paid to the employees and files them as first priority claims in the estate.

Certain tax and VAT claims less than six months old rank second in priority.

The vast majority of claims fall within the group that has no priority.

Finally, interests accrued after the opening of winding up proceedings and certain other claims rank last in priority.

4.7 Is it possible for the company to be revived in the future?

A company may be revived after winding up proceedings if the creditors are paid in full (with certain exceptions for secured creditors) or if they expressly agree to the estate being returned to the shareholders/the company being "revived", and if the costs of the proceedings are covered in full.

If the winding up proceedings were based on a breach of the legislative requirements to *i.a.* register the annual accounts or have a correctly registered board of directors, the breach needs to be remedied in addition to the abovementioned requirements for a revival.

5 Tax

5.1 Does a restructuring or insolvency procedure give rise to tax liabilities?

In judicial debt negotiation proceedings, the business operations of the company continue as usual, and the debtor may incur tax and VAT liabilities.

In winding up proceedings, any further operations of the bankrupt company's business is carried out by the bankruptcy estate and not by the debtor, and thus any tax liability from such operations is incurred by the estate itself. However, the estate will only be liable for taxes in the rare occasion that the estate should operate the business for a considerable period of time and for a long-term economic gain, and not merely for the time it will take to sell the assets/business.

If the debtor was registered in the VAT-register, the bankruptcy estate, as a separate legal entity, will as a general rule also be registered in the VAT-register.

6 Employees

6.1 What is the effect of each restructuring or insolvency procedure on employees?

There are no particular rules in Norwegian law regulating employees' rights/protection and obligations under voluntary or compulsory judicial debt negotiation proceedings.

In winding up proceedings, the administrator must notify the employees within three weeks if the estate does not want to become a party to the employment contracts, or else the estate automatically becomes a party. In addition, the administrator must give notice to the employees that their employment with the debtor is terminated.

Some of the employees' claims for wages are protected by the Norwegian governmental wages guarantee fund if winding up proceedings are opened. There are several rules limiting which claims are covered by the wages guarantee scheme, the most important being that the notice period is only covered with one month's pay from the opening of the proceedings, and a maximum payment of approximately NOK 180,000 per employee.

7 Cross-Border Issues

7.1 Can companies incorporated elsewhere restructure or enter into insolvency proceedings in your jurisdiction?

Norwegian courts may open winding up proceedings in a foreign company if that company's actual centre of business is in Norway.

Norwegian courts regularly open winding up proceedings in branches of foreign companies based on this principle. In practice, the foreign companies are taken under winding up proceedings in Norway, and the proceedings are registered on the branch's number in the Company Register.

7.2 Is there scope for a restructuring or insolvency process commenced elsewhere to be recognised in your jurisdiction?

There has been a Nordic Convention on Bankruptcy in place since 1933 between Norway, Denmark, Finland, Iceland and Sweden. This convention provides regulation on cross-border insolvencies within these member states, including rules on recognition, enforcement and choice of law in various situations.

Norway is member of the EEA but not the EU, and has not ratified the EC Insolvency Regulation.

In a judgment in 2013, the Supreme Court of Norway held that restructuring or insolvency proceedings commenced elsewhere will usually not be recognised in Norway unless there is a convention or agreement in place with the country where the proceedings have been opened. The Supreme Court stated that the administrator of the foreign estate must pursue the estate's rights as a creditor representative; typically applying for an attachment in the debtor's assets in Norway.

There have been written hearings and opinions on whether Norway should implement the EC Insolvency Regulation. On 1st April 2016, a proposal for amendments in Norwegian insolvency law concerning international insolvency matters was delivered to the Norwegian Parliament, *cf.* section 9 below. The preposition does not suggest implementation of the EC Insolvency Regulation, but is influenced by some of its principles.

7.3 Do companies incorporated in your jurisdiction restructure or enter into insolvency proceedings in other jurisdictions? Is this common practice?

Norwegian companies in general do not enter into insolvency proceedings in other jurisdictions. There are exceptions, however, and there have been a few cases over the years where Norwegian companies have opened Chapter 11 proceedings in the United States, as the company has considered the US proceedings a better alternative than Norwegian proceedings.

8 Groups

8.1 How are groups of companies treated on the insolvency of one or more members? Is there scope for co-operation between officeholders?

There are no rules on group insolvencies in Norway. It is common for the court to appoint the same administrator for all the group companies taken under winding up proceedings.

9 Reform

9.1 Are there any proposals for reform of the corporate rescue and insolvency regime in your jurisdiction?

The judicial restructuring scheme in Norway is currently under review, subject to a mandate given by the Ministry of Justice to Judge Leif Villars-Dahl with the Oslo Court of Probate and Enforcement. Mr. Villars-Dahl delivered his report on 1st March of this year. The mandate included, *i.a.*, to evaluate whether the current rules should be amended to facilitate a more flexible restructuring scheme, aimed at saving more businesses and preserving more jobs.

Further, a proposition for changes in the Norwegian rules on international insolvency was recently delivered to the Norwegian Parliament. The suggested changes include amendments to jurisdiction and choice of law rules, and the effects of foreign insolvency proceedings in Norway, including recognition and enforcement rules.

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Stine is frequently appointed as a bankruptcy administrator by Oslo Court of Probate and Enforcement, and has worked on a number of the largest bankruptcy and judicial debt restructuring cases in Norway. She regularly lectures for the Norwegian Law Society and financial institutions, and has published several articles on Norwegian insolvency law in international publications. Furthermore, Stine is appointed by the Justice Department as member of the expert group of four persons assisting Judge Villars-Dahl in the evaluation and reform of the Norwegian rules on judicial restructuring, and as a member of the Norwegian Advisory Board on Bankruptcy.

Stine is highly ranked both in Norwegian and international rankings such as *The Legal 500* and *Chambers and Partners*.

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KVALE

Kvale Advokatfirma DA is a business law firm giving advice on all aspects of business law. Our insolvency team is one of the largest in Norway with 22 team members, of which 15 are lawyers with insolvency as their key practice area. Five partners in our team are regularly appointed by the courts as trustees/administrators of bankruptcy estates and judicial debt negotiation estates.

The team also handles out-of-court insolvency matters, and is a preferred legal advisor to several large banks. Kvale's insolvency team is especially well-known for administrating complex bankruptcy proceedings including cross-border cases, assisting banks in securing and recovering values from customers in financial distress, and judicial debt restructuring proceedings for large companies and company groups.

Kvale is top-ranked in ratings such as *The Legal 500* and *Chambers and Partners* within insolvency.

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