The International Insolvency Review

Third Edition

Editor
Donald S Bernstein

Law Business Research

The International Insolvency Review

The International Insolvency Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in The International Insolvency Review - Edition 3
(published in October 2015 – editor Christopher Kandel)

For further information please email
Nick.Barette@lbresearch.com

The International Insolvency Review

Third Edition

Editor
Donald S Bernstein

Law Business Research Ltd

PUBLISHER
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

SENIOR ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee, Felicity Bown, Joel Woods

ACCOUNT MANAGER
Jessica Parsons

PUBLISHING MANAGER
Lucy Brewer

MARKETING ASSISTANT
Rebecca Mogridge

EDITORIAL ASSISTANT
Sophie Arkell

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Claire Ancell

SUBEDITOR
Janina Godowska

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2015 Law Business Research Ltd
www.TheLawReviews.co.uk
No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of October 2015, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-909830-72-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ARENDT & MEDERNACH

BAE, KIM & LEE LLC

BAKER & MCKENZIE LLP

BAKER & PARTNERS

BÄR & KARRER AG

CASTRÉN & SNELLMAN ATTORNEYS LTD

CHAJEC, DON-SIEMION & ŻYTO LEGAL ADVISORS

CLIFFORD CHANCE

DAVIS POLK & WARDWELL LLP

FERRERO ABOGADOS

GSK STOCKMANN + KOLLEGEN

KVALE ADVOKATFIRMA DA

LETT LAW FIRM

M & P BERNITSAS LAW OFFICES

MANNBENHAM ADVOCATES LIMITED

MAPLES AND CALDER

NCTM LLP

OSCÓS ABOGADOS

PERCHSTONE AND GRAEYS

QUINZ

RESOR NV

SERGIO BERMUDES ADVOGADOS LAW FIRM

SLAUGHTER AND MAY

SRS ADVOGADOS – SOCIEDADE REBELO DE SOUSA E ASSOCIADOS, RL

TAYLOR DAVID LAWYERS

CONTENTS

Editor's Preface ...vii
Donald S Bernstein

Chapter 1 RECOGNITION AND COMITY IN CROSS-BORDER INSOLVENCY PROCEEDINGS... 1
Donald S Bernstein, Timothy Graulich, Damon P Meyer and Christopher Robertson

Chapter 2 AUSTRALIA... 17
Scott D Taylor

Chapter 3 BELGIUM ... 32
Bart Lintermans, Wouter Deneyer, William Standaert and Remco Lemarcq

Chapter 4 BRAZIL... 44
Marcelo Carpenter

Chapter 5 BRITISH VIRGIN ISLANDS ... 54
Arabella di Iorio and David Welford

Chapter 6 CANADA... 65
Frank Spizzirri, Michael Nowina and Glenn Gibson

Chapter 7 CAYMAN ISLANDS ... 75
Aristos Galatopoulos and Caroline Moran

Chapter 8 CHINA ... 87
Ni Jiahua and Liu Tiecheng

Chapter 9 DENMARK... 107
Henrik Sjørslev and Dennis Højslet

Chapter 10 ENGLAND & WALES.. 118
Ian Johnson

Chapter 11 FINLAND.. 152
Pekka Jaatinen, Anna-Kaisa Remes and Elina Pesonen

Chapter 12 GERMANY... 162
Andreas Dimmling

Chapter 13 GREECE... 177
Athanasia G Tsene

Chapter 14 HONG KONG.. 192
Mark Hyde and Joanna Charter

Chapter 15 IRELAND.. 204
Robin McDonnell, Saranna Enraght-Moony and Karole Cuddihy

Chapter 16 ISLE OF MAN.. 218
Miles Benham and James Peterson

Chapter 17 ITALY.. 230
Andrea De Tomas

Chapter 18 JERSEY... 241
William Redgrave and Ed Shorrock

Chapter 19 KOREA.. 249
Bo Youl Hur

Chapter 20 LUXEMBOURG... 256
Pierre Beissel and Sébastien Binard

Chapter 21 MEXICO.. 272
Dario U Oscós Coria

Chapter 22 NETHERLANDS.. 290
Sijmen H de Ranitz, Lucas P Kortmann and Abslem Ourhris

Chapter 23 NIGERIA 305
Folabi Kuti and Ugochukwu Obi

Chapter 24 NORWAY 312
Stine D Snertingdalen and Ingrid E S Tronshaug

Chapter 25 PERU 324
Alfonso Pérez-Bonany López

Chapter 26 POLAND 334
Krzysztof Żyto and Milena Bełcząцka

Chapter 27 PORTUGAL 349
José Carlos Soares Machado and Vasco Correia da Silva

Chapter 28 SINGAPORE 361
Nish Shetty and Mingfen Tan

Chapter 29 SOUTH AFRICA 373
Gerhard Rudolph and Nikita Shaw

Chapter 30 SPAIN 388
Iñigo Villoria and Irene Arévalo

Chapter 31 SWITZERLAND 398
Thomas Rohde

Chapter 32 UNITED STATES 415
Donald S Bernstein, Timothy Graulich, Damon P Meyer and Christopher S Robertson

Appendix 1 ABOUT THE AUTHORS 447

Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS .. 467

EDITOR'S PREFACE

This third edition of *The International Insolvency Review* once again offers an in-depth review of market conditions and insolvency case developments in key countries around the world. As always, a debt of gratitude is owed to the outstanding professionals in geographically diverse locales who have contributed to this book. Their contributions reflect diverse viewpoints and approaches, which in turn reflect the diversity of their respective national commercial cultures and laws.

The preface to the 2014 edition of this book touched upon the challenges faced by large multinational enterprises attempting to restructure under these diverse and potentially conflicting insolvency regimes. These challenges are particularly acute in large corporate insolvencies, because neither UNCITRAL's Model Law on Cross-Border Insolvency nor other enactments, such as the European Union's Regulation on Insolvency,[1] provide the tools necessary for consolidated administration of insolvencies involving multiple legal entities in a corporate group, with operations, assets and stakeholders under different corporate umbrellas in different jurisdictions.[2] Insolvent corporate groups are therefore obliged to cobble together consensual restructurings with local stakeholders in key jurisdictions, or to initiate separate plenary insolvency proceedings for individual companies under multiple local insolvency regimes (as illustrated in the cases of *Nortel*

1 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, 2000 O.J. (L 160) 1, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:en:PDF.

2 On 20 May 2015, the European Parliament and Counsel published the Recast Regulation on Insolvency 2015/848 (the 'Recast Regulation'), which will apply to insolvency proceedings initiated after 26 June 2017. The Recast Regulation contains a provision for voluntary, non-binding group coordination proceedings in the EU. The practical impact of this new tool remains to be seen.

and *Lehman Brothers*, among others), with added costs, dispersed control, legal conflicts and inconsistent judgments.

As discussed in last year's edition, the search for a legislative or treaty-based solution to this problem is ongoing, but any such solutions would necessarily involve some degree of relinquishment of national sovereignty and a ceding of local jurisdiction and control that may be difficult for local interests to accept, especially without substantial convergence in national insolvency laws. Given the lack of statutory tools, for some time it has been common in cross-border cases to implement insolvency protocols designed to address potential procedural, and in some cases substantive, conflicts. These agreements may be limited to providing a general framework for cross-border cooperation and coordination, or they may also include specific procedures for deferral, claims resolution, communication between the courts or other particular needs of an individual case.[3] Since the time of the *Maxwell Communications* case, cross-border protocols have enjoyed widespread support from insolvency practitioners and organisations, including from the American Law Institute, the International Insolvency Institute and INSOL Europe.[4]

However, while cross-border protocols are often valuable tools in multinational corporate group insolvencies, they are inherently limited in important ways. Absent supranational legal regimes, courts can only adjudicate disputes under the laws of their own countries, and parties can only be bound to the extent that the writ of the local court can be enforced against them. Fundamentally, cross-border protocols cannot expand the sovereignty or jurisdiction of the court presiding over an insolvency proceeding, superimpose a single governing substantive law or extend the reach of enforcement of local law against foreign parties. This is especially true if multiple plenary insolvency proceedings have been instituted under divergent national legal regimes with respect to members of a corporate group. Cross-border protocols are not a replacement for the enactment of supervening multi-jurisdictional solutions that bring all of the proceedings under a single controlling legal umbrella.

Some observers believe that the deficiencies in the protocol approach to cross-border insolvencies go beyond their inherent limitations. Questions have been raised about whether the effort to overcome these deficiencies leads to aberrational results, as the parties and the courts try to live up to the cooperative spirit of such protocols. In one such critique, former US bankruptcy court Judge James M Peck, who oversaw a number of cases employing cross-border protocols, most notably the *Lehman Brothers* case, recently addressed this issue in the context of the ongoing fight over distributions in

3 See UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, New York 2010, available at www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf.

4 See Final Supplemental Order Appointing Examiner and Approving Agreement Between Examiner and Joint Administrators, *In re Maxwell Comm. Corp,* Case No. 91-15741 (Bankr. S.D.N.Y. 15 January 1992); see also Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, published by the American Law Institute (16 May 2000) and adopted by the International Insolvency Institute (10 June 2001); European Communication and Cooperation Guidelines for Cross-Border Insolvency, prepared by INSOL Europe's Academic Wing (2007).

the *Nortel Networks* insolvency cases.[5] As discussed in greater detail in the United States chapter of this review, various Nortel entities initiated plenary insolvency proceedings in the US, UK and Canada. After the sale of substantially all of Nortel's assets, the question remained of how to allocate the resulting US$7.3 billion fund among creditors of the various estates. The parties implemented a cross-border protocol that was designed to promote consistent determinations of legal issues in the various proceedings.[6] After years of legal manoeuvering, the US and Canadian courts did indeed reach consistent decisions, following a trial 'held in two cross-border courtrooms linked by remarkable and effective technology,' on the methodology for distributing the fund to creditors.[7] However, despite the legal wrangling that has so far cost the Nortel and its creditors over US$1 billion in legal fees, as Judge Peck notes, US bondholders have questioned the legitimacy of the rulings under US law, and appeals have been filed.[8] As Judge Peck explains, even the most accomplished commercial judges may have a 'propensity to seek pragmatic resolutions in good faith that may solve the problem presented but that may deviate from a merits based determination'.[9] While judges in multi-jurisdiction insolvency cases should be praised for trying to fit a single irregular peg into both a square and a round hole, it is certainly worth asking whether the integrity of a court's process can be compromised in the struggle to do so.

Judge Peck argues that courts should not overly strive to enhance consistency in decision making across jurisdictions, as 'judges who are performing their jobs faithfully within their home court system are doing all that is required of them.'[10] If parties fear inconsistent outcomes, they may be more willing to enter into binding arbitration or find other means of settling their differences as, Judge Peck suggests, they did in the *Lehman Brothers* case.[11]

While it runs against the grain, after all the efforts of the past 25 years to promote cooperation and coordination in international insolvencies, to suggest that judicial cooperation can sometimes work at cross-purposes with efficient administration of cross-border insolvencies, there is no denying that the likelihood of speedy, clear and accurate (even if inconsistent) substantive adjudication drives settlements in large complex cases. In cross-border cases, striving for judicial decisions that are hard to challenge, even if inconsistent, may be a straighter path to a practical outcome than striving to attain wholly symmetrical results.

5 James M. Peck, A Cross Border Judicial Dilemma – Conflict and Consistency in Insolvency Cases that Span the Globe, Banking & Financial Services Law Association, Brisbane, Australia (4 September 2015).

6 Id.

7 *In re Nortel Networks, Inc.*, 532 B.R. 494 (Bankr. D. Del. 2015).

8 James M. Peck, A Cross Border Judicial Dilemma – Conflict and Consistency in Insolvency Cases that Span the Globe, *supra* note 4.

9 Id.

10 Id.

11 Id.

Of course, the need for judges to make such pragmatic choices would be reduced if there were clear legal enactments providing for the alignment of insolvency outcomes across jurisdictional lines.

I once again want to thank each of the contributors to this book for their efforts to make *The International Insolvency Review* a valuable resource. As each of our authors, both old and new, knows, this book is a significant undertaking because of our effort to provide truly current coverage of important commercial insolvency developments around the world. My hope is that this year's volume once again will help all of us reflect on the larger picture, keeping our eye on likely, as well as necessary developments on the near and, alas, distant horizon.

Donald S Bernstein
Davis Polk & Wardwell LLP
New York
October 2015

Chapter 24

NORWAY

Stine D Snertingdalen and Ingrid E S Tronshaug[1]

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

There are two main categories of statutory bankruptcy proceedings in Norway, which are both governed by the Bankruptcy Act of 8 June 1984 No. 58. These are judicial debt negotiation proceedings and winding-up proceedings. While the purpose of winding-up proceedings in Norway is a liquidation of the debtor, judicial debt negotiation proceedings aim to rescue the debtor's business.

Judicial debt negotiation proceedings may be either 'voluntary' or 'compulsory'. In voluntary proceedings, all of the creditors must agree to any plan which reduces their rights, payment or both, while in compulsory proceedings, a minority of the creditors may be crammed down.

Although very rarely applied, subject to provisions in the Bankruptcy Act, the shareholders may rescue the company from liquidation even after winding-up proceedings are opened, subject to full payment of or approval from all creditors.

To succeed with voluntary judicial debt negotiation proceedings, all creditors who are not paid out in full must accept the offered solution. In a compulsory judicial debt negotiation proceeding, acceptance by all creditors is not necessarily required to carry a plan through. If the dividend payment is a minimum of 25 per cent to all creditors with unsecured claims not ranking in priority,[2] the reorganisation plan will be binding on all creditors if approval of the plan is obtained from a specified minimum of creditors with a right to vote. In other words, the minority voters will be crammed down by the

1 Stine D Snertingdalen is a partner and Ingrid Tronshaug is a senior associate at Kvale Advokatfirma DA.

2 The priority of claims is regulated in the Satisfaction of Claims Act of 8 June 1984 No. 59, Chapter 9.

majority voters. If the legal requirements for completing a successful composition with the creditors are not met, the judicial debt negotiation proceedings will come to an end, and winding-up proceedings will be opened by the court.

The court-appointed administrator in judicial bankruptcy proceedings is in practice always a lawyer.

In a judicial debt negotiation proceeding, the administrator has more of a supervisory role. The company retains legal powers over its assets, and the company's board of directors maintains responsibility for the ongoing business. One might say that the company continues 'business as usual' while attempting to find solutions with its creditors, all the while being supervised by the administrator.

In winding-up proceedings, the bankruptcy estate is formed as its own legal entity with its own identification number in the Norwegian company register. By law, the bankruptcy estate seizes all the debtor's assets immediately upon the opening of judicial winding-up proceedings, and the debtor no longer holds any powers over its assets. The administrator may choose to lift the seizure with regard to assets considered to be either without any value to the estate or a possible liability for the estate ('abandoning' the seized assets), after which the debtor (through its board of directors) again holds legal powers over such assets.

A bankruptcy estate's seizure of the debtor's assets, including which assets are exempt from seizure, is legislated in the Satisfaction of Claims Act of 8 June 1984 No. 59. This statute also regulates the estate's right to claw back transactions carried out within certain time limits prior to the date of the filing for bankruptcy, aiming to annul transactions that in certain ways are contrary to the principle of treating all creditors equally (often referred to as avoidance or annulment).

There are several provisions regulating different kinds of transactions that may be clawed 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 if 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).

The estate's rights and obligations towards the debtor's ongoing contracts, including the right to either disregard or make use of such contracts, are also governed by the Satisfaction of Claims Act. Since a bankruptcy estate in Norway is its own legal entity, it is not automatically a party to the debtor's contracts, but may – in most cases – choose to disregard such contracts. If the administrator finds that a contract could be useful for the estate, for instance, for collecting assets or securing ongoing business, the general rule is that the bankruptcy estate may enter into that one contract as a party, but only with an obligation to respect future contractual obligations. Furthermore, after becoming a party to a contract, the estate has 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 in the contract stating that it is non-terminable. The estate's and the contract parties' rights and duties are somewhat different for certain contracts, and the Satisfaction of Claims Act has an entirely different approach for

employment contracts and tenancy agreements. The bankruptcy estate automatically becomes a party to such contracts, unless the administrator, within time limits of three and four weeks, respectively, actively declares otherwise to the contract party.

Furthermore, the Satisfaction of Claims Act regulates which claims are entitled to a dividend payment from the estate and the order of priority for these claims.

Employees' claims for unpaid wages, with certain limitations, rank first in priority. With mainly the same limitations and up to a certain maximum amount, outstanding wages will in the event of a bankruptcy be covered by the Norwegian Wages Guarantee Fund, in accordance with the Norwegian Wages Guarantee Act of 14 December 1973 No. 61. The Wages Guarantee Fund then subrogates the employee's claim and becomes a creditor in the estate for the same amount that was paid by the Fund to the employee.

Certain tax and VAT claims rank second in priority. Remaining claims have no priority, except for interest accrued after the bankruptcy proceedings were opened and certain other claims, which rank last in priority.

Other relevant statutes in relation to insolvency proceedings are the Mortgage Act of 8 February 1980 No. 2, the Limited Liability Companies Act of 13 June 1997 No. 4 and the Financial Collateral Act of 26 March 2004 No.17.

The Mortgage Act regulates the validity and legal protection of various security interests in assets, such as floating charges, pledges and liens.

Also regulated by the Mortgage Act is the bankruptcy estate's statutory lien in the debtor's pledged assets. The estate has a statutory lien in all pledged assets belonging to the debtor and assets pledged as security by third parties for the debtor's liabilities. The lien is 5 per cent of the sales proceeds of each pledged asset, limited to a maximum amount for each asset (602,000 kroner as of August 2015). The lien has priority over all other liens and security interests. The proceeds from the lien may only be used to cover the estate's necessary administration costs and expenses, and only if the estate does not have other funds to cover such costs. Shares pledged pursuant to the Financial Collateral Act of 26 March 2004 (implementing the EU Financial Collateral Directive) are exempt from the statutory lien.

The Financial Collateral Act regulates financial collateral arrangements that secure obligations a corporate body has towards a financial institution. Subject to this statute, the parties may agree in writing on how and when a financial security interest may be legally enforced, providing an exception from mandatory legal enforcement rules set out in the Norwegian Enforcement Act. Further, the statute provides exemptions from the main rules on set-off of security interests. For instance, a bank may set off a claim it has against the debtor in cash deposits in a bank account located in that bank, without regard to the main bankruptcy principle of equal treatment of creditors. This means that such a set-off may not be avoided by a bankruptcy estate.

The board of directors in a limited liability company in financial difficulty shall ensure that the company's creditors are treated fairly and equally, and that the company does not incur any debt that it cannot pay unless the creditor is familiar with, or informed of, the company's financial situation and the risks involved with providing credit.

Furthermore, the directors must act promptly if the company's equity is considered insufficient compared with the size and risk of the business operations, or if

the company's equity is less than half of the share capital.[3] Such actions include measures to improve the company's financial situation, convene a shareholders' meeting to discuss the situation and ultimately to file for bankruptcy proceedings if it is unlikely that the financial difficulties can be resolved in the immediate future.

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.

ii Policy

As mentioned above, most judicial insolvency proceedings in Norway result in a liquidation of the debtor, rather than a restructuring. If the aim of initiating insolvency proceedings is to restructure or refinance a company or a company group, pursuing out-of-court negotiations with the creditors is the most common approach.

Although there have been several successful judicial debt negotiation proceedings in recent years, such proceedings are rarely utilised by Norwegian companies. The main reason for this is probably that the Norwegian regime imposes extensive responsibilities on the debtor towards its creditors during such proceedings, and in particular towards the secured creditors. Such proceedings are therefore not appropriate for restructuring companies which will operate at a loss during the proceedings or for companies that are unable to finance the costs of the administration of such proceedings with working capital, capital contribution or any other funding that will not compromise the position of existing creditors.

There have been a few cases where Norwegian companies with fairly loose connections with the United States have opened Chapter 11 proceedings in the United States, as the company's Norwegian and US legal advisers have considered the US proceedings to be a better alternative for their client than Norwegian judicial debt negotiation proceedings. The bankruptcy courts of New York and Houston seem to be preferred venues. Examples of such cases are those of Norwegian companies Petroleum Geo-Services ASA (filed for Chapter 11 proceedings in 2003) and Viking Drilling ASA (filed for Chapter 11 proceedings in 2008).

The judicial restructuring scheme in Norway is currently under review (see Section IV, *infra*).

When winding-up proceedings are opened, all operations of the debtor usually come to an end. The bankruptcy estate may decide to keep the operations going for a short period, depending on the risk involved, available financing, the character and profitability of the business as well as the chances of selling the continuing operation. Normally, such decisions are subject to the security holder(s)' approval and financing, since the debtor normally will have posed most of its assets as security to banks, leasing companies or bondholders. The estate may sell the business as going, normally leaving all debt and most contract liabilities in the bankrupt company.

3 Sections 3–4 and 3–5 of the Limited Liability Companies Act.

iii Insolvency procedures

As explained in Section I, *supra*, the main insolvency proceedings available to wind up or rescue companies in Norway are judicial debt negotiation proceedings (either voluntary or compulsory) and winding-up proceedings. There are also certain other judicial insolvency proceedings, such as public administration for banks, which will be discussed briefly in Section II.vi, *infra*, and liquidation or dissolution, which will be briefly introduced in the following paragraphs.

Forced liquidation or dissolution proceedings follow the procedural rules of a winding-up proceeding and are governed by the Bankruptcy Act. The law differentiates between forced dissolution and forced liquidation, as the conditions for the opening of the two proceedings are different.

According to Section 16-14 of the Limited Liability Companies Act, the court may take charge of a dissolution process if the company has reported to the National Register of Business Enterprises that it is in the process of a regular dissolution but has not managed to complete the dissolution process within a year from delivering the first notification. The court may also take charge of a dissolution process if this is requested by shareholders representing at least one-fifth of the total shares in the company.

A company may be subject to a forced liquidation process if it has failed to fulfil certain legal requirements, including those related to the composition of the board of directors, the appointment of an authorised public auditor, and the reporting of the company's annual accounts to the Register of Company Accounts.

Insolvency is not a precondition for the opening of forced dissolution or liquidation. The business may even be solvent and ongoing and still be subject to proceedings, as the conditions to open such proceedings are objective and absolute. Nevertheless, most of these cases result in liquidation of the company, since the process of returning the company to its shareholders is often complex, time-consuming and expensive.

iv Starting proceedings

Judicial debt negotiation proceedings, both voluntary and compulsory, may be petitioned by a debtor that is no longer in a position to meet its financial obligations as they fall due (i.e. is illiquid). The debtor may, however, still have positive net assets. Only the debtor itself may request the opening of debt negotiation proceedings pursuant to the Bankruptcy Act.

If a debtor is insolvent (i.e. is both illiquid and has negative net assets), the court shall open bankruptcy proceedings, namely winding-up proceedings, upon the filing of a petition from the debtor itself or any creditor who has a claim entitling it to any potential dividend payment from the debtor's estate.[4] However, claims that are fully secured may not give grounds for a bankruptcy petition.

As described in Section I.i, *supra* an insolvent debtor may also have a duty by law to file for bankruptcy to avoid inflicting further loss on its creditors.[5]

4 Chapter 6 of the Satisfaction of Claims Act.

5 Section 284 of the General Civil Penal Code of 22 May 1902 No. 10.

A creditor petitioning for winding-up proceedings must deposit 43,000 kroner with the court as security for the costs of the proceedings, unless he or she is an employee of the debtor. If the debtor itself files for bankruptcy, it is not required to make a deposit.

Norwegian courts may open bankruptcy proceedings in a foreign company if that company has a duly registered Norwegian branch and if that business's actual centre of business is in Norway.[6] Such branches are not independent legal entities in Norway, and bankruptcy proceedings will therefore be opened in the main company (i.e. the foreign company) and registered in Norway on the branch's company number.

Over the past 11 years or so, several limited liability companies have been established by Norwegians in foreign countries – usually the United Kingdom – while the business is run through a Norwegian branch. Norwegian law used to require initial share capital of 100,000 kroner for limited liability companies, and there was a statutory requirement that all Norwegian limited liability companies have a registered auditor. This led many Norwegian entrepreneurs to establish limited liability companies in other countries, due to the much lower initial share capital requirement and because Norwegian branches of foreign limited liability companies with an annual turnover of less than 5 million kroner were exempt from the auditor requirement. Recent legal amendments have lowered the initial share capital requirement for limited liability companies to 30,000 kroner (since 1 January 2012), and the statutory requirement to have a registered auditor in limited liability companies now only applies to companies with an annual turnover of more than 5 million kroner. Probably due to these legal amendments, we have already seen a drastic decrease of establishments with a foreign 'letter box company' and main business operated through a Norwegian branch.[7]

The opening of insolvency proceedings

If a bankruptcy petition has been filed by the debtor itself or a creditor, the court will open winding-up proceedings provided that the debtor is insolvent. Insolvency is the main condition for opening winding-up proceedings.

When judicial debt negotiation proceedings or winding-up proceedings are opened, the court immediately appoints an administrator (a trustee). Further, the court may also appoint one or more creditor representatives to form a debt settlement committee or a creditors' committee, respectively, as well as an estate auditor to assist the administrator and the committee. The committee members and the estate auditor are usually appointed upon request from the administrator after a consideration of the complexity of the estate and accessible means.

In judicial debt negotiation proceedings, the administrator, the debt negotiations committee and the estate auditor will cooperate in overseeing the proceedings.

In winding-up proceedings, the administrator is in charge of the practical management of the estate, and the creditors' committee administers the estate (the administrative body).

---

6 For example, the High Court's decision of 8 July 2014, published in HR-2014-1446-U.

7 According to the Business Registry, these numbers dropped dramatically from 2011: www.altinn.no/no/Starte-og-drive-bedrift/Nyheter/NUF-mindre-attraktiv/.

Prevention or stay of proceedings

A petition to open judicial debt negotiation proceedings may be rejected by the court; for instance if the petition is not consistent with certain form requirements, or if the court finds it unlikely that the debtor will be able to achieve the proposed composition with its creditors.

When the court receives a petition for winding-up proceedings from someone other than the debtor and finds the petition has merit, the court calls for a court hearing to test the bankruptcy petition. If the debtor disputes the claim, the court must make a preliminary ruling and determine the validity of the claim to establish whether the creditor is in a position to petition for bankruptcy and whether the debtor is in fact insolvent.

The decision to open winding-up proceedings may be appealed within one month of its passing. If the appellate court accepts the appeal, the proceedings will be brought to an end and the debtor will regain control over its business and assets.

v Control of insolvency proceedings

Winding-up proceedings and judicial debt negotiation proceedings are governed by the district court in the judicial district in which the debtor has its main business centre or, alternatively, its regular legal domicile.[8] Only the district of Oslo has a court specialising in insolvency matters, while in other districts, the regular county court handles insolvency cases.

The court's authority includes the opening and closing of bankruptcy proceedings, ending judicial debt negotiation proceedings, determining the fees of the administration of the estate, deciding in cases concerning disputed claims, and passing decisions in probate actions initiated by the administrator, the debtor or a creditor. Most decisions made by the court are initiated by petitions from the administrator, the debtor or a creditor.

Regardless of the foregoing, the courts usually have a fairly limited role in the day-to-day handling of bankruptcy proceedings in Norway, and mainly supervise the administration of the estate through reports submitted by the administrative bodies at regular intervals.

Duties of the board of directors of a company in judicial bankruptcy proceedings

The board of directors of a debtor in judicial debt negotiation proceedings has a responsibility to ensure that the creditors are treated fairly and that the specific limitations in the Bankruptcy Act for companies undergoing debt negotiation proceedings are adhered to.

Further, the members of the board of directors are obliged to provide the court, the administrator, the creditors' committee and the estate auditor with any information regarding its business, financial statements, etc. These duties also apply in winding-up proceedings, where the debtor's board members are also obliged to assist the administrator in obtaining necessary documents and secure assets.

8 Section 146 of the Bankruptcy Act.

vi Special regimes

In general, insolvency proceedings may be opened in any physical and juristic person; however, insolvency proceedings may not be opened in companies not acting as such towards third parties (e.g., silent companies and other internal partnerships), or in joint ownerships and joint ventures that are not companies.[9]

Further, banks, insurance companies and certain other financial institutions, as well as parent companies of such entities, cannot be subject to judicial debt negotiation proceedings or winding-up proceedings pursuant to the Bankruptcy Act, as insolvency proceedings for such entities are governed by the Guarantee Schemes Act of 6 December 1996 No. 75.

The Guarantee Schemes Act gives the government the authority to place financial institutions under public administration if (1) they cannot fulfil their obligations as they fall due and they do not have sufficient funds to secure future operations, or if (2) they are not capable of fulfilling capital adequacy requirements. If possible, the board of directors will be heard before such actions are taken. If public administration proceedings are opened in a financial institution that is a parent company in a financial group, the other companies in that financial group may also be included in the proceedings.

vii Cross-border issues

Norway is member of the EEA but not the EU, and has not ratified the EC Insolvency Regulation. There have been written hearings and opinions on whether Norway should implement the EC Insolvency Regulation, but there is still no such proposal from the legislators.

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.

The question of whether ancillary bankruptcy proceedings to foreign main proceedings may be opened in Norway currently has no clear answer, although legal theory and a few court decisions support there being a doctrine of ancillary bankruptcy proceedings in Norway.

There have been very few cases before Norwegian courts relating to foreign bankruptcy proceedings. Old case law from the late 19th century implies that ancillary bankruptcy proceedings may be opened in Norway on request from a foreign bankruptcy estate. Two Supreme Court decisions published in Rt. 1887 p. 456 and Rt. 1891 p. 329 establish an institution called *hjelpekonkurs* or *underkonkurs* ('assisting bankruptcy' or 'sub-bankruptcy'). The court reasoned that there was a need for such a procedure under Norwegian law to prevent a debtor from disposing of assets in Norway while under bankruptcy proceedings in a different jurisdiction.[10] Further, it was preferable

9 Andenæs, *Konkurs* 2009, pp. 77–78.

10 'Det internasjonale konkursvernetinget': master's thesis by an anonymous student published on www.duo.uio.no, with reference to Huser 1998 p. 460.

that individual creditors would not be able to seek payment through realising assets in Norway at the expense of other, foreign creditors.[11]

In 1994 a Norwegian district court opened sub-bankruptcy (ancillary) proceedings with reference to Norwegian non-statutory bankruptcy law.[12] The court agreed with the much-debated perception that the institution of sub-bankruptcies still exists under Norwegian law. Given the lack of statutory legislation, the court leaned on other written sources to support this view. Further, the court pointed out that the sub-bankruptcy procedure satisfies a practical need in international business, and that no matter where a debtor's assets are located, these should be realised in the interest of all creditors and not only in the interest of that one creditor initiating enforcement actions in that one state.

In 2007, another Norwegian district court opened sub-bankruptcy proceedings in Norway to a German bankruptcy estate, with the same reasoning as the verdict from 1994.[13]

All the aforementioned court decisions have somewhat limited legal effect today, being relatively old or passed by a lower court. Thus, as pointed out by the Supreme Court in a decision from 2013, it is still not clear whether Norwegian law allows for ancillary bankruptcy proceedings being opened in Norway.

The court decision of 2013 is interesting in several aspects. The question was whether or not assets in Norway belonging to a debtor under insolvency proceedings in Spain could be seized by creditors, or if they were protected by the Spanish insolvency proceedings.[14] The court decided that the insolvency proceedings opened in Spain did not prevent separate debt recovery proceedings related to the debtor's assets in Norway. The court stated that acknowledgement of insolvency proceedings in another state must primarily be in accordance with mutual agreements or legislation, and no such mutual agreement or legislation with Spain existed.

However, the court also stated that it is still uncertain whether or not there is an institute of ancillary bankruptcy proceedings in Norway. The court gave no conclusion, since the Spanish estate had not petitioned for ancillary proceedings. Furthermore, the court stated that a although foreign insolvency proceedings do not impose a stay on creditors' debt recovery proceedings against the debtor's assets in Norway, the foreign bankruptcy estate will be acknowledged in Norwegian courts as a representative for the common interests of the debtor's creditors.

A few other court cases from the past few years should also be mentioned. In a decision passed in 2013, the High Court of Sweden addressed the question of whether a Norwegian company is obliged to respect Swedish rules on clawback.[15] A bankruptcy estate in Sweden took legal action against a Norwegian company to claw back a payment the Swedish debtor had made to the Norwegian company shortly before bankruptcy proceedings were opened. The court concluded that Swedish rules on clawback applied.

---

11 Ibid, p. 462.

12 Decision by the Asker and Bærum county court of 7 March 1994.

13 Verdict from Romsdal tingrett of 10 October 2007 in Case No. 07-143650KON-ROMS.

14 Decision by the Supreme Court of Norway, Rt. 2013 p. 556.

15 Decision by the High Court of Sweden, Ö 743-11.

On 8 July 2014, the High Court of Norway passed a ruling in a case where a petition for winding-up proceedings against a Polish company was delivered to a Norwegian court. The creditor was the Norwegian Tax Authority, and the claim referred to unpaid VAT claims for sales made by the company's Norwegian branch. The court stated that bankruptcy proceedings may only be opened in Norway when the centre of main business is located in Norway. The bankruptcy petition was declined because the company in this case had its main business centre in Poland.[16]

II INSOLVENCY METRICS

In general, the Norwegian economy has been strong over the past few years, but in November 2014, oil prices dropped dramatically, and have maintained at a low level. This has had a significant impact on the Norwegian oil industry, and especially oil service companies, which have carried out downsizing and cost reduction measures. Reports state that so far more than 20,000 oil industry jobs in Norway have been lost due to the oil price drop, and a further 10,000–20,000 jobs are expected to be lost over the next year.[17] The Norwegian currency has been significantly weakened, which is especially noticeable when compared with the currency exchange rates for the US dollar, the euro, the British pound and the Danish and Swedish krone.

The key policy rate was reduced from 1.25 per cent to a historically low 1 per cent on 18 June 2015. Norges Bank[18] explained the decrease by referring to reports indicating that the Norwegian economy has suffered and is still suffering more than previously expected from the decreased oil prices and a lower demand in the petroleum industry.

A market trend seems to be that banks and other lenders are willing to negotiate solutions for companies in breach with economic covenants or in payment default by providing waivers, extensions of payment, etc. These measures might have reduced the need for restructurings and insolvency proceedings in Q1 and Q2, 2015.

The total number of winding-up proceedings and forced liquidations in Norway in 2014, and in Q1 and Q2 2015, was 4,558 and 1,044, respectively, representing an increase of approximately 5.5 and 6.1 per cent respectively, compared with 2013. The number of proceedings is steadily growing and is getting closer to the peak year of 2009, when there were 4,985 bankruptcies and 1,490 forced liquidations in Norway. The courts had opened a total of 3,818 winding-up proceedings and forced liquidations as per 31 August 2015, which is an increase from 2013 when the equivalent number was 3,468.[19]

Although the total number of bankruptcies is high, most of these cases concern smaller companies and private persons.

In 2014, only six judicial debt negotiation proceedings were opened in Norway (the same number as in 2013). Four of these were voluntary judicial debt negotiation

16 Decision by the High Court of Norway of 8 July 2014, published in HR-2014-1446-U.

17 www.aftenbladet.no/energi/--Opptil-20000-oljejobber-ryker-pa-ett-ar-3749449.html.

18 The Central Bank of Norway.

19 All numbers are from the Brønnøysund Register Centre.

proceedings, and the remaining two were compulsory proceedings. Four proceedings concerned limited liability companies, while two concerned private individuals. Three have ended in winding-up proceedings, while the remaining three, including those two concerning private individuals, are still ongoing. Thus, none have so far been successful. As per 31 August, there have been three openings of judicial debt negotiation proceedings in Norway in 2015; all in limited liability companies and all compulsory debt negotiation proceedings. Two of these have ended in winding-up proceedings, while the third is ongoing.

III PLENARY INSOLVENCY PROCEEDINGS

Generally, there have been few new winding-up proceedings and judicial debt restructuring proceedings in larger companies or company groups in Norway in the past year. There have, however, been quite a few bankruptcy proceedings in small and medium-sized companies and company groups, and statistics show that the numbers are continually increasing.[20]

One case worth mentioning is the opening of winding-up proceedings in New Store Europe AS and two of its Norwegian subsidiaries. New Store Europe AS was the parent company of a large, international company group that worked with 'shop-fitting', i.e., production, delivery and installation of shelves, lighting, etc., in various shops. A few of the group's customers were Apple, Microsoft, Skype, H&M, Lindex, Marks & Spencer, Tesco, Sainsbury's, Salomon, Swarovski, Boots pharmacies, Statoil, BP, Intersport and Dixons. The opening of bankruptcy proceedings in the parent company not only led to bankruptcy proceedings in two Norwegian subsidiaries, but started a chain of bankruptcy openings in other companies in the group, including Sweden, the UK, the Netherlands, Germany and Italy. Other subsidiaries were sold by the Norwegian bankruptcy estate in their respective home countries: Finland, the Czech Republic, Denmark and Poland.

The assets in the Norwegian companies were mainly posed as security to Swedbank, and the bankruptcy estate worked closely with the bank to sell the assets, including selling several subsidiaries as well as the business of New Store Europe Norge AS as a going concern.

Another bankruptcy case worth mentioning from the past year was the opening of winding-up proceedings in Cecon ASA, a company listed on the Oslo Axess Stock Exchange. Cecon ASA was an offshore and subsea contractor providing project management, engineering and subsea installations for the offshore oil and gas industry.[21] Cecon ASA was the parent company in an international company group, with subsidiaries in Norway and in the Netherlands. In December 2014, the company filed for compulsory judicial debt negotiation proceedings in Norway, which lasted until April 2015 when the board of directors in the company concluded that a composition could not be reached. The debt negotiation proceedings were brought to an end, and winding-up proceedings were opened. There seem to be no prospects for a dividend payment to the creditors.

20 See Section II, *supra*.

21 www.cecon.no.

IV ANCILLARY INSOLVENCY PROCEEDINGS

The question of whether ancillary bankruptcy proceedings to foreign main proceedings may be opened in Norway currently has no clear answer, although legal theory and several court decisions support there being a doctrine of ancillary proceedings in Norway. The last known court case where ancillary insolvency proceedings were opened in Norway was passed by a lower court in 2007. See Section I.vii, *supra* for further information.

V TRENDS

As mentioned in Section II, *supra*, there have been significant developments in the Norwegian economy since November 2014, when oil prices dropped more than 30 per cent in a matter of weeks. The oil prices have since then decreased further, and as of August 2015 oil prices are at the same level as in 2009; in other words the same low level as right after the financial crisis of 2007–2008.[22]

Bond financing in Norway has traditionally been applied within the shipping and oil and gas sectors; however, bond financing is now also more common within other sectors and over the past few years, it appears that there has been a significant increase in bond loans. Several companies operating in distressed markets are currently financed through high-yield bond loans which will expire during the next two years. It is likely that these companies will be forced to seek alternative financing and that some of these will be forced to reconstruct or liquidate their business if such financing cannot be obtained.

There have been no significant changes in Norwegian statutory law during the past year, or any court cases of fundamental importance to the insolvency field. However, 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. His mandate includes, *inter alia*, evaluating whether the current rules should be amended to facilitate a more flexible restructuring scheme with the aim of saving more businesses and preserving more jobs. Judge Villars-Dahl shall submit his evaluation report by 1 March 2016. The Ministry of Justice has appointed a group of three lawyers and one economist to support him in his work.

Over the past decade, there has been an increase in the number of directors' liability cases related to bankruptcies, which implies that creditors and bankruptcy estates are more prone to hold the directors of the companies responsible for a failed business or loss inflicted on creditors through bankruptcy. A legislative change in effect from 1 July 2013 expressed a further responsibility of the board of directors of limited liability companies, stating that the company should have not only an adequate equity at all times, but also an adequate cash flow, given the size and risk of the company. The amendment emphasises the directors' duty to make continuous assessments of the company's financial status. The change was not meant to alter the state of the law, but was merely a written expression of the previously existing legislation.

22 www.nrk.no/verden/rekordlav-oljepris-etter-borsfallet-1.12516044.

Appendix 1

ABOUT THE AUTHORS

STINE D SNERTINGDALEN

Kvale Advokatfirma DA

Stine D Snertingdalen is a partner at Kvale Advokatfirma DA, specialised within banking and finance, insolvency and restructuring, and investigations and compliance. Ms Snertingdalen gives legal aid to some of the largest banks in Norway in the area of banking and finance, and debt and insolvency-related issues. She also assists clients with restructuring their businesses, and was Norwegian legal counsel for Exide Technologies during the Chapter 11 restructuring process.

Snertingdalen is frequently appointed as bankruptcy administrator by the Oslo Court of Probate and Enforcement, and has worked on several of the largest insolvency cases in Norway. Ms Snertingdalen regularly holds lectures for the Norwegian Law Society and for financial institutions. She has an LLM from Utrecht University in the Netherlands, and she is a 'Next-Gen' member of the International Insolvency Institute. Ms Snertingdalen has published several articles on Norwegian insolvency law, and is highly ranked both in Norwegian and international rankings such as *The Legal 500* and *Chambers*.

In 2015, the Norwegian Ministry of Justice appointed an expert group to assist in the evaluation of the Norwegian rules on judicial restructuring, and Ms Snertingdalen was appointed as a member of this expert group.

INGRID E S TRONSHAUG

Kvale Advokatfirma DA

Ingrid E S Tronshaug is a senior associate in Kvale Advokatfirma DA, specialising mainly in insolvency law, including restructuring, bankruptcy and mortgage law. She also has experience in real estate and construction law. Ms Tronshaug has several years' experience working with various insolvency proceedings, including working on some of the largest bankruptcy proceedings and judicial debt negotiation proceedings in Norway. Further, she assists clients with various acts of enforcement of Norwegian and foreign claims.

Ms Tronshaug has an LLM in corporate and commercial law from the University of Southampton as well as a master's degree in law from the University of Oslo. She holds several directorships and frequently lectures and publishes articles on insolvency law.

KVALE ADVOKATFIRMA DA
Fridtjof Nansens plass 4, 6th floor
PO Box 1752 Vika
0122 Oslo
Norway
Tel: +47 22 47 97 00
Fax: +47 21 05 85 85
ss@kvale.no
itr@kvale.no
www.kvale.no