The Restructuring Review

Eighth Edition

Editor
Christopher Mallon

Law Business Research

The Restructuring Review

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EDITOR'S PREFACE

I am very pleased to present this eighth edition of *The Restructuring Review*. As with the previous editions, our intention is to help general counsel, government agencies and private practice lawyers understand the conditions prevailing in the global restructuring market in 2015 and 2016, and to highlight some of the more significant legal and commercial developments and trends that have been evident in recent years, and that are expected to be significant in the future.

At the time of writing, a number of factors threaten to disrupt the relatively benign global economic conditions that have prevailed in recent months. The crisis in the eurozone, and in particular the distress suffered by Greece, has once again been leading the news in Europe. The conflicting political imperatives driving the actions of Greece and its eurozone creditor nations appear to gain strength with each new twist of the crisis, to such an extent that a long-term solution satisfactory to all parties that keeps Greece in the eurozone may prove to be a chimera.

Elsewhere in the Orthodox world, the interventions made by Russia in Ukraine have led relations between Russia and NATO to deteriorate to their worst state since the Cold War, with firm sanctions being imposed by many western countries on Russia. The economic uncertainty caused by such tensions provides another challenge to global growth and stability.

The situation in the Middle East continues to be a grave security concern and the human cost of the political turmoil in the region is horrifying. From an economic perspective, however, the dramatic events in Syria, Iraq and elsewhere have had a minimal impact, which perhaps has contributed to the apparent inability of world powers to formulate a means of resolving the conflicts in the region.

Possibly the most important events for global long-term economic prospects are the problems in the Chinese economy that are suggested at the time of writing by, among other symptoms, a dramatic decline in Chinese stock prices. Chinese economic and fiscal indicators are notoriously enigmatic, but if a serious economic crisis does affect China, as is anticipated by many commentators, such a crisis may be significantly exacerbated

by the weaknesses in the Chinese banking system, and the consequences for the global economy could transcend the impact of the problems in the eurozone.

A further factor to note is the continued employment of unorthodox monetary policy by many central banks. There remains considerable uncertainty as to the broader economic effects when quantitative easing is unwound and interest rates return nearer to the long-term average; many commentators expect that when the monetary tide retreats, many businesses that until now have managed to conceal their weaknesses may be left dangerously exposed.

With the above in mind, it seems likely that the global economy is set for a period of further uncertainty in the year to come. As such, this work continues to be relevant and important, in particular as a result of the international nature of many corporate restructurings.

I would like to extend my gratitude to the contributors from some of the world's leading law firms who have given such valuable support and cooperation in the preparation of this work, and to our publishers, without whom this work would not have been possible.

Christopher Mallon
Skadden, Arps, Slate, Meagher & Flom (UK) LLP
London
August 2015

Chapter 20

NORWAY

Stine D Snertingdalen and Ingrid E S Tronshaug[1]

I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

The Norwegian economy has generally been strong in the past few years, but in November 2014, the oil prices dropped dramatically from more than US$100 per barrel to approximately US$70 per barrel. This has been hard on the oil industry, and especially oil service companies in Norway, and a number of large businesses within the oil industry and oil services industry have carried out downsizing and cost-reduction measures. The Norwegian currency has been weakened, which is especially noticeable when compared with the currency exchange rates for the US dollar, the euro and the British pound.

According to the Financial Supervisory Authority of Norway (FSA), the Norwegian banks returned 8 per cent better results in the first quarter of 2015 than in 2014.[2] The FSA concludes that the main reason for the improved results is an increase of interest revenues, caused mainly by an increased volume of loans to consumers and businesses, and lower costs on financing through securities markets.

The key policy rate was as of July 2015 historically low at 1 per cent. Norges Bank[3] justified the decrease with reference to reports indicating that the Norwegian economy has suffered and is still suffering more than previously expected from the low oil prices

1 Stine D Snertingdalen is a partner and Ingrid E S Tronshaug is an attorney-at-law at Kvale Advokatfirma DA.

2 www.finanstilsynet.no/no/Artikkelarkiv/Pressemeldinger/2015/2_kvartal/Gode-resultater-for-bankene-og-god-avkastning-i-forsikringsselskapene-i-forste-kvartal-2015.

3 The Central Bank of Norway.

and a lower demand from the petroleum industry. Norges Bank forecasts a continuous low rate over the next year, after which they predict a slow increase.[4]

The marked trend related to distressed companies seems to be that the banks and other lenders are willing to negotiate solutions in cases of breached economic covenants or payment default by providing waivers, extensions of payment, etc. These measures seem to 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 numbers are continuously rising, moving closer to the peak year of 2009, when there were 4,985 bankruptcies and 1,490 forced liquidations. The courts had opened a total of 2,834 winding-up proceedings and forced liquidations by 21 June, which is a minor increase from 2013.[5] Although the total number of bankruptcies is high, most of these cases still concern smaller companies and private persons, as has been the case for the past few years.

There are no new trends when it comes to restructuring methods under Norwegian law, and the majority of restructurings are still handled outside of the courts. Only very few judicial restructuring proceedings are opened each year. 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 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 are still ongoing. Thus, none have so far been successful. The numbers so far in 2015 include three openings of judicial debt negotiation proceedings,[6] all in limited liability companies and all compulsory debt negotiation proceedings. However, two of these have already ended in winding-up proceedings, while the third was still ongoing as of July 2015.

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

There are two main categories of statutory bankruptcy proceedings in Norway: winding-up proceedings and judicial debt negotiation proceedings. Judicial debt negotiation proceedings can be either voluntary or compulsory, each regulated by

4 'Pengepolitisk Rapport med vurdering av finansiell stabilitet' for Q2 2015, published on http://static.norges-bank.no/pages/103514/PPR_2_15.pdf?v=18062015143906?v=18062015143906&ft=.pdf.

5 All numbers are from the Register of Bankruptcies' 2014 annual report.

6 As per 21 June 2015.

slightly different legislation. Both winding-up proceedings and judicial debt negotiation proceedings are regulated by the Bankruptcy Act of 8 June 1984 No. 58.[7]

A company must be illiquid to file for judicial debt negotiation proceedings (i.e., in a position where it cannot meet its financial obligations as they fall due). It is not, however, a requirement that the company is insolvent (i.e., both illiquid and with negative net assets). Thus, judicial debt negotiation proceedings may be opened even though the debtor has positive net assets. Insolvency is, however, an absolute requirement to open winding-up proceedings.

Only the debtor may deliver a petition for judicial debt negotiation proceedings, while a petition for winding-up proceedings may be filed either by the debtor or by a creditor with an unsecured (or only partly secured) claim against the debtor.

After judicial debt negotiation proceedings have been opened, the debtor shall suggest a reorganisation plan to the creditors. Such a reorganisation plan may consist of various elements. In voluntary judicial debt negotiation proceedings, the suggested plan must be accepted by all creditors. In compulsory judicial debt negotiation proceedings, however, the minority voters are crammed down by the majority voters. The plan must provide a minimum dividend payment of 25 per cent to all unsecured creditors with claims not ranking in priority, and the reorganisation plan requires a majority both in number of creditors and of the total amount of all claims filed to be binding on all creditors ('double majority').

The main requirements for reaching a double majority in a compulsory composition are (the numbers referring to creditors and claims that are granted voting rights):

a if the dividend payment is at least 50 per cent, the plan must be accepted by at least three-fifths of the creditors holding at least three-fifths of the total debt; or

b if the dividend payment is less than 50 per cent (but not below 25 per cent), the plan must be accepted by at least three-quarters of the creditors holding at least three-quarters of the total debt.

Claims ranking in priority shall be paid in full, and will therefore not entitle the respective creditors the right to vote. Nor will secured claims give grounds for voting rights, to the extent that they would have received payment if the secured assets were to be sold or realised. Finally, closely related parties to the debtor do not have the right to vote.

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. Thus, there is 'no return' from a judicial debt settlement proceeding: either the company succeeds or it is liquidated.

7 Other judicial insolvency proceedings include public administration for banks regulated by the Act on guarantee schemes for banks and public administration, etc., of financial institutions of 6 December 1996, and forced liquidation or dissolution proceedings regulated by the Limited Liability Companies Act of 1997 Section 16-18.

i Taking and enforcement of security

When winding-up proceedings are opened in Norway, a bankruptcy estate is established as a separate legal entity from the debtor. Subject to the Satisfaction of Claims Act of 8 June 1984 No. 59, the bankruptcy estate has automatic seizure of all the debtor's assets, with only few exceptions. This means that the estate can sell, use or dispose of in any other way all the debtor's assets, claims and rights, and all profits from the realisation of assets and collection of claims go to the estate, which in turn makes dividend payments to the creditors based on, *inter alia*, the claims' security and priority.

The common situation in Norway is that the creditors – normally the debtor's bank – have established securities in most of the debtor's assets, including inventory and stock, machinery and plant, trade receivables (these three security interests being similar to floating charges), as well as registered motor vehicles, real property, etc. If the security right is validly established with legal protection, such securities will prevail over the bankruptcy estate's seizure, in the sense that those assets will not be of any real value to the bankruptcy estate since all sales profits shall ultimately be paid to the security holder. The rules on validity, legal protection and a number of other issues related to security interests may be found in the Mortgage Act of 8 February 1980 No. 2, with a few *lex specialis* rules in other acts, such as the Financial Collateral Act of 26 March 2004 (see below). Most assets that may be posed as security are registered in national registers, in which case the security interest (lien, pledge, etc.) will normally need to be registered in the relevant register to obtain legal protection. The registration costs are low, and the process of registering the security interest normally takes from a few days to one or two weeks.

Prior to the filing of a petition for any insolvency proceeding, any creditor with an unsettled, due claim against the debtor may seek to establish an execution lien in nearly any asset belonging to the debtor. Once the execution lien is established, the creditor may initiate a forced sale or realisation of the encumbered asset or assets. However, if a petition for winding-up proceedings or judicial debt negotiation proceedings is filed less than three months after the execution lien was established, the execution lien will have no legal effect towards the bankruptcy estate.

Security interests, including execution liens, may be enforced according to the mandatory rules of the Enforcement Act of 26 June 1992 No. 86. The opening of an insolvency proceeding will, however, impose an automatic stay on enforcement proceedings against the debtor lasting for six months. This six-month period also stays a creditor's attempt to establish an execution lien in any of the debtor's assets.

After a petition for judicial debt negotiation proceedings has been filed, there is a three-month automatic stay of any petitions for winding-up proceedings related to debt incurred prior to the opening of judicial debt negotiation proceedings. The stay may be prolonged at the discretion of the court upon a motion from the debtor. If compulsory judicial debt negotiation proceedings are opened, the automatic stay lasts throughout the proceedings.

The stay is not effective against a petition for winding-up proceedings filed by at least three creditors with voting rights whose total claims in sum represent at least two-fifths of all claims entitled to dividend payment, even though the debt arose prior to the filing of the petition.

If voluntary or compulsory debt negotiation proceedings are opened, the business of the illiquid company will continue more or less as usual, while the administrators and creditors' committee cooperates with the board of directors of the debtor to restructure the company and to work out a reorganisation or composition plan, or both, to be proposed to the creditors. Any due debt established prior to the opening of the proceedings will be 'frozen', while the debtor must continue to pay running costs as well as instalments of secured debt, lease agreements etc., after proceedings are opened. The creditors' committee shall supervise the company and suggest a plan to uphold the security holder's interests during the debt negotiation proceedings.

If winding-up proceedings are opened, it is common in Norway that the secured assets are realised by the estate in cooperation with, and at the expense of, the security holder (normally a financial institution).

The Financial Collateral Act of 26 March 2004 (implementing the EU Financial Collateral Directive 2002/47/EU) regulates financial collateral arrangements that secure obligations a corporate body has towards a financial institution. Subject to the rules of this statute, the parties may agree in writing to deviate from the otherwise mandatory rules of the Enforcement Act with regard to how and when a security interest in financial collateral may be enforced. Further, the statute provides exemptions from the main rules on set-off of security interests, allowing the financial institutions to net outstanding amounts or apply netting in certain situations where set-off is otherwise prohibited. Finally, if one were to adapt a strict interpretation of the provision on the six-month automatic stay period in the Bankruptcy Act, the automatic stay will not be effective for financial collateral governed by the Financial Collateral Act.

ii Duties of directors of companies in financial difficulties

The Limited Liability Companies Act of 13 June 1997 has several provisions that regulate the duties of directors of limited liability companies, as well as in which situations the directors may be held liable for damages or criminally liable. Corresponding provisions for other common company structures can be found in the Partnerships Act of 27 June 1986 and the Public Limited Liability Companies Act of 13 June 1997, but the rules on liability for members of the board of directors and for the general manager of businesses have mainly evolved through case law over the past few decades.

Directors of companies in financial difficulties must ensure that all of the company's creditors are treated equally and fairly, and that the company does not incur any debt that it cannot pay unless the respective creditor is familiar with, or informed of, the company's financial situation and the risk involved upon providing the 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.[8] 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.

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

After judicial debt negotiation proceedings are opened, the directors maintain the same roles and duties as before such proceedings were opened, but they must act in compliance with the administrators and creditors' committee's decisions and the legal framework regulating the proceedings.

When winding-up proceedings are opened, the directors maintain their positions, but have no authority over the company or its assets and rights. They no longer have any managerial duties, but must assist the administrator in obtaining information and documentation.

iii Clawback actions

Transactions made by the debtor prior to the opening of either winding-up proceedings or compulsory judicial debt negotiation proceedings may be subject to clawback if the breach against the principle of equal treatment of the creditors. The rules on clawback are found in the Satisfaction of Claims Act, and do not apply to voluntary debt negotiation proceedings.

Transactions carried out within three months prior to the day when the court received the petition for bankruptcy proceedings may be subject to clawback if they fulfil certain criteria set out in various provisions in Chapter 5 of the Satisfaction of Claims Act. Such transactions include 'extraordinary' payments of debt, gifts, security for 'old debt' and certain cases of set-off, to mention a few.

Some transactions may be subject to clawback even if they were carried out more than three months prior to the filing of the petition for compulsory debt restructuring proceedings or winding-up proceedings. Gifts may generally be subject to clawback if given within a period of one year prior to the filing of the petition. Furthermore, the time bar in most clawback provisions is extended to two years if the transaction in question is carried out between the debtor and a closely related beneficiary. Unfair transactions beneficial to the receiving party at a time when the receiving party is deemed not to have been acting in good faith, and at a time when the debtor's financial situation was weak or was severely weakened by the transaction, may be subject to clawback if carried out within a 10-year period prior to the filing of the petition.

If there are grounds for a clawback claim, the receiving party of the avoided transaction must either disclaim any enrichment obtained from the transaction or return to the estate what was received from the debtor. However, if the receiving party was deemed to have been in bad faith, the estate may claim that the receiving party indemnifies the estate for the loss it has suffered due to the avoidable transaction.

The estate must take legal action to collect the clawback claim within one year after the opening of the bankruptcy proceedings; alternatively, if the estate does not have sufficient knowledge to initiate legal action when the one-year time limit expires, at a later time but no less than six months after the estate should have gained such knowledge.

III RECENT LEGAL DEVELOPMENTS

There have been no significant changes in Norwegian statutory insolvency law during the past year, or any court cases of fundamental importance to the insolvency field. An

evaluation of the rules on judicial debt restructuring in the Bankruptcy Act has been initiated (see Section VI, *infra*).

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

Over the few past years, as mentioned in Section I, *supra*, the oil industry and the oil service industry have suffered due to the low oil prices, and there have been substantial layoffs and other cost-reducing measures.

Furthermore, rig market prices are low,[9] and freight rates in shipping and the seismic industry are as low as they were in the mid-1980s.[10] Several companies operating in these markets are currently financed through high yield obligation loans that will expire during the next two years, and will probably be forced to seek alternative financing, which may lead to more bankruptcies if such financing cannot be obtained. The Norwegian bond market has experienced record growth in the number of corporate bonds listed since the financial crisis, and now includes medium-sized businesses as well as large businesses.[11] The Oslo Stock Exchange and the Nordic Alternative Bond Market were, combined, the third-largest market place for high yield bonds in the world in 2014.[12]

The Nordic mining industry has been suffering for a while, and in December 2014, the iron ore mining company group Northland Resources, with operations in several of the Nordic countries, decided to file for bankruptcy proceedings in a number of the group companies. In May 2015, the government decided to fund the mining company 'Store Norske' with 500 million Norwegian kroner after the company announced that it was in desperate need of funding to keep its operations going. The company runs three coalmines on Spitsbergen that together employ approximately 320 employees (Spitsbergen has only 2,670 inhabitants).

V INTERNATIONAL

Norway has not implemented the EC Insolvency Regulation; nor has it adopted the UNCITRAL Model Law.

The Nordic Convention on Bankruptcy has been in place since 1933 between Norway, Denmark, Finland, Iceland and Sweden. This Convention includes regulations on how the Member States should handle debtors' assets located in the respective states when bankruptcy proceedings are opened in one of the other states. Further, the Convention establishes which country's law should be applied in various situations, and provides rules on recognition and enforcement.

9 www.hegnar.no/bors/artikkel551308.ece.

10 www.dn.no/nyheter/naringsliv/2015/04/28/2152/Finans/kassen-gr-tom-uten-kte-rater.

11 Oslo Børs and Nordic ABM: 'Issuing corporate bonds in Oslo – an efficient, flexible and mature market for raising debt capital'.

12 'Norway: A transformed bond market', *IFLR*, Erik Lind and Klaus Henrik Wiese-Hansen.

There is very limited Norwegian case law on international insolvency cases. However, a decision of the Supreme Court of Norway from 2013 is worth mentioning. The Court addressed the question of whether an established execution lien in a Spanish debtor's assets in Norway could be clawed back or set aside by the Spanish bankruptcy estate, and whether the debtor's assets in Norway were protected by a stay on creditor enforcement actions due to the Spanish insolvency proceedings, thus giving the opening of insolvency proceedings in Spain legal effect with regards to the Spanish debtor's assets in Norway. The Court ruled that the insolvency proceedings in Spain did not prevent separate debt recovery proceedings against the debtor's assets in Norway, that is, stating that a clawback claim from the Spanish bankruptcy estate would not be recognised, and allowing creditors to enforce execution liens established in the debtor's assets in Norway while the debtor was under insolvency proceedings in Spain. The Court stated that acknowledgement of insolvency proceedings in another state must primarily be based on mutual agreements between states or international legislation, and that no such agreement or legislation existed involving Spain.

VI FUTURE DEVELOPMENTS

There have been written hearings and opinions on whether Norway should implement the EC Insolvency Regulation, but there is still no such proposal from legislators. The Regulation will likely not be ratified in Norway for several years (indeed, if at all).

The judicial restructuring scheme in Norway is currently under review, according 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: attorney Knut Ro, attorney Staale Gjengseth, attorney Stine D Snertingdalen and Professor Nils-Henrik von der Fehr.

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.

She is frequently appointed as bankruptcy administrator by the Oslo Bankruptcy Court, 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 government 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 Tronshaug is a senior associate at Kvale Advokatfirma DA, specialising mainly in insolvency law, including restructuring, bankruptcy and mortgage law, but she also has experience in real estate and construction law. She 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.

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