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Global Practice Guides

Insolvency

Norway – Law & Practice

Contributed by
Kvale Advokatfirma DA

2016

NORWAY

LAW & PRACTICE:

p.3

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law & Practice

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CONTENTS

1. Market Panorama	p.5	7.3 Jurisprudence Related to Valuations	p.10
1.1 Market Dynamics	p.5	8. Directors' Duties and Personal Liability	p.10
1.2 Market Developments	p.6	8.1 Duties of Directors in a Distressed Company	p.10
2. Debt Trading	p.6	8.2 Enforcement of Creditors' Claims	p.10
2.1 Limitations on Non-Banks and Foreign Institutions	p.6	8.3 Chief Restructuring Officer	p.11
2.2 Debt Trading Practice	p.6	8.4 Shadow Directorship	p.11
2.3 Loan Market Guidelines	p.7	9. Solvent Restructuring/Reorganisation and Rescue Procedures	p.11
2.4 Transfer Prohibition	p.7	9.1 Statutory Mechanisms	p.11
2.5 Navigating Transfer Restrictions	p.7	9.2 Position of Company During Procedure	p.11
3. Informal and Consensual Restructuring Framework	p.7	9.3 Position of Creditors During Procedure	p.11
3.1 Consensual Restructuring	p.7	9.4 Claims of a Dissenting Class of Creditors	p.12
3.2 Consensual Restructuring Process	p.7	9.5 Trading Claims of Dissenting Creditors	p.12
3.3 New Money	p.8	9.6 Re-organising a Corporate Group	p.12
3.4 Duties of the Parties	p.8	9.7 Conditions Applied to Use or Sale of Assets	p.12
3.5 Consensually Agreed Restructuring	p.8	9.8 Distressed Disposals	p.12
4. Legislative Regime Applicable to Restructuring and Insolvency	p.8	9.9 Release of Security and Other Claims	p.12
4.1 General Overview	p.8	9.10 Priority	p.12
4.2 Restructuring and Solvency Regimes	p.8	9.11 Determining the Value of Claims	p.12
5. Remedies Available to Unsecured Creditors	p.8	9.12 The Agreement Amongst Creditors	p.12
5.1 Unsecured Creditors	p.8	9.13 Rejecting or Dismissing Claims	p.12
5.2 Rights and Remedies	p.8	9.14 Releasing Non-Debtor Parties from Liability	p.12
5.3 Pre-Judgment Attachments	p.9	9.15 Rights of Set-Off or Netting in a Proceeding	p.12
5.4 Timeline for Enforcing an Unsecured Claim	p.9	9.16 Implications of Failure to Observe Agreed Plan	p.13
5.5 Rights and Remedies for Landlords	p.9	10. Mandatory Commencement of Insolvency Proceedings	p.13
5.6 Special Procedures for Foreign Unsecured Creditors	p.9	10.1 Obligation to File Within Specific Timeline	p.13
6. Secured Creditors: Security and Enforcement	p.9	10.2 Procedural Options	p.13
6.1 Types of Security	p.9	10.3 Implications of Not Commencing Insolvency Proceedings	p.13
6.2 Enforcing Security	p.10	11. Insolvency Proceedings	p.13
6.3 Timeline for Enforcing Security	p.10	11.1 Types of Voluntary and Involuntary Insolvency Proceedings	p.13
6.4 Foreign Secured Creditors	p.10	11.2 Distressed Disposals	p.14
7. The Importance of Valuations in the Restructuring and Insolvency Process	p.10	11.3 Failure to Observe Agreed Rescue Plan	p.14
7.1 Purpose and Importance of Valuations	p.10	11.4 Priority New Money	p.15
7.2 Initiating the Valuation	p.10	11.5 Liquidation on a Combined Basis/Under Related Proceedings	p.15

NORWAY LAW & PRACTICE

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11.6 Organisation of Creditors	p.15
11.7 Use or Sale of Assets During Insolvency Proceedings	p.15
12. Transactions That May Be Set Aside	p.15
12.1 Grounds to Set Aside/Annul Transactions	p.15
12.2 Look-Back Period	p.15
12.3 Identity of Claimant	p.15
12.4 Claims in Insolvency and Restructuring Proceedings	p.15
13. Priorities and Waterfalls	p.15
13.1 Priority Claims	p.15
13.2 Priority Over Secured Creditor Claims	p.16
13.3 Statutory Waterfall of Claims	p.16
14. Courts and Arbitration	p.16
14.1 Courts	p.16
14.2 Specialist Judges	p.16
14.3 Limitations on Matters that Can be Heard	p.16
14.4 Arbitration	p.16
15. International Issues and Recognition	p.16
15.1 Recognition/Relief in Connection with Overseas Proceedings	p.16
15.2 Protocols in Cross-Border Cases	p.16
15.3 Foreign Creditors	p.16

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Kvale Advokatfirma DA's insolvency and corporate recovery team administrates close to a total of 150 new bankruptcy estates and judicial debt restructuring cases each year. The team of Kvale Advokatfirma DA consists of 15 attorneys, comprising five partners and ten attorneys, making it one of the largest in Norway. All five partners are regularly appointed by Norwegian courts as administrators/trustees, each specialised within different areas of national and in-

ternational insolvency-related work. Experiences and insights from complex and large national and international cases has made the team uniquely able to assist clients in a very broad range of insolvency-related cases, including re-financing, reorganisations, inter-creditor agreements, tactical advice and drafting assistance to banks in problem cases, out-of-court debt negotiation proceedings, administration of bankruptcy proceedings and advanced debt collection.

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From 1993 and up until the dotcom crisis, the Norwegian economy was in good condition and there were relatively few corporate defaults and debt restructurings.

The second large crisis was the global financial crisis that culminated in 2008. The number of bankruptcies in Norway rose from 2,845 in 2007 to 3,637 in 2008 and 5,013 in 2009, and included several large companies and company groups. However, Norway once again managed to get through the crisis affected to a lesser extent than many other European countries, mostly due to the consolidated bank market after the bank crisis and the stable offshore, and the oil and gas industries.

There have been very few large corporate defaults and bankruptcies in Norway in the last few years. Most of the 4,449 bankruptcies recorded in 2015 were opened in small companies within the construction business, the retail sector and other service industries.

1. Market Panorama

1.1 Market Dynamics

Over the past 30 years or so, there have been two large financial crises that have affected the Norwegian economy. The country is now experiencing a third.

The first crisis lasted from approximately 1988 to 1993 and was set off by the October 1987 stock market crash and the bursting of a housing bubble that had built up. This led to a bank crisis which resulted in several bank mergers and the major banks being nationalised, amongst other things.

From approximately 1998 to 2002/2003, the so-called "dot-com" collapse affected markets all over the world. Although Norway was also affected, it took a lesser blow than many other countries, largely due to the major importance of the offshore, oil and gas industries in Norway; industries which remained stable throughout the dotcom turmoil.

The large financial crisis that Norway is now experiencing is sector-based, and in contrast to the previous two, the present crisis is emanating from the offshore and oil and gas sector. The driver for this was of course the collapse in oil prices from November 2014 onwards. The crisis worsened throughout 2015 and the first months of 2016, resulting in a severe decrease in revenue, cancelled contracts and a reduced volume of new projects, which again has led to an overcapacity in the market, inter alia for supply vessels, rigs and seismic projects. For example, numbers from The Norwegian Shipowners' Association show that the number of laid-up Norwegian offshore vessels increased from zero to around 100 in 2015, and the numbers are increasing.

Throughout 2015 and thus far in 2016, companies within the affected industries have been cutting costs wherever possible, and banks and other financial institutions have been extending payment dates and waiving covenants to keep as many companies as possible afloat. From November 2014 to April 2016, approximately 35,000 jobs in the Norwegian oil industry were lost. The effect is most evident on the west coast around the "oil capital of Norway", Stavanger, where accommodation, dining and transportation businesses, as well as the real estate market, have been severely affected.

The outlook for the offshore and oil sectors is grim unless the oil prices increase significantly from levels recorded in April 2016 of USD40-50 per barrel. If not, many companies will run out of cash in 2016 and 2017, and unless the market improves, it will be very difficult to obtain new credit or raise cash. The typical capital sources in this sector - banks and syndicates, as well as Eksportkreditt/GIEK (providing governmental export credit, with more than 80% of their portfolio within the offshore and oil sectors) - are expected to continue to seek solutions in an attempt to reduce the crises' overall effect on the market. However, many companies are also partly financed through high-yield bonds, often held by anonymous bondholders with diverse individual motives who may be difficult to handle in refinancing and restructuring negotiations. The identities of the bondholders change as the bonds are being traded, and the recent trend is that bonds are being traded at lower and lower valuations, (see 1.2).

Despite the current efforts to conduct out-of-court restructurings and refinancing negotiations between the largest stakeholders, the over-capacity in the market and serious liquidity problems have already resulted in new bankruptcies, and will probably result in several more large bankruptcy proceedings in 2016 and 2017.

1.2 Market Developments

The Norwegian shipping, oil & gas and offshore markets have traditionally involved high-yield bond financing. The current oil prices and over-capacity in the industry has trig-

gered trading of bonds at falling levels, with several bonds being traded way below 50% of face value. Investors buying debt at such low prices may often push aggressively for solutions that will secure them a quick payment which exceeds their original entry price and enables them to reinvest their money. Though still not evident in the market, it is expected that some industrial investors buy bonds at low prices with the intention of negotiating a conversion into equity to obtain (further) shares. Whilst the majority of the market participants experience economic challenges, others have cash reserves or initiate start-ups to take a market share whilst the prices are low.

Both the trading of distressed debt (mainly with regard to high-yield bonds) and the number of distressed M&A transactions have increased in the markets affected by the crisis, and will increase further as the crisis deepens.

2. Debt Trading

2.1 Limitations on Non-Banks and Foreign Institutions

In general, there are no limitations for non-banks or (other) foreign institutions from holding loans or bonds. However, an authorisation (licence) is required if an institution provides financing to companies on a professional basis as part of its business.

2.2 Debt Trading Practice

The use of standard/customary primary debt documentation is common in Norway. For syndicated loans, the LMA documentation is widely applied, either in full or in a simpler form adapted to Nordic contract law. In relation to bonds, Nordic Trustee, the region's largest provider of trustee services acting as trustee for investors in interest-bearing securities etc, has issued standard contracts regulating the rights and duties of the issuer, the bond holders and the trustee.

Under Norwegian law, debt may in general be transferred without consent by the debtor. Norwegian law operates with one single legal concept of transfer/assignment of debt, and does not operate with the English legal concept of novation.

Bonds are tradeable securities under Norwegian law, and must be registered in Verdipapirsentralen, the Norwegian securities register. Thus, bonds are freely tradeable in a manner similar to shares in public limited companies. In Norway, bonds may be listed and traded on regulated or non-regulated markets, with the Oslo Stock Exchange ("OSE") and Nordic ABM (a non-regulated bond market organised by OSE) as the main Norwegian markets.

A syndicated loan may be secured by various types of security that are held by a security agent, in which case the debt may – subject to any intercreditor agreement regulation – be

traded without affecting the established security. The same applies for bonds, where the trustee operates as a security agent regardless of changes of ownership of the bonds.

Upon the sale of a debt provided by a creditor who is also holding all security for that debt, the debt trading contract will under Norwegian law typically facilitate the new owner/creditor's claim to all rights under the security interest securing that debt.

Unless otherwise agreed with a professional party, any third party guaranteeing the debt will be notified of the change of creditor if the credit was issued by a financial institution (see Section 58 of the Norwegian Financial Contracts Act).

2.3 Loan Market Guidelines

Loan market guidelines on transparency and the use of information do not apply in general to the trading of private debt in Norway. Furthermore, Norwegian law does not provide regulation aimed at ensuring equal information to all interested parties in private debt trading processes, except for the rules that generally apply, such as fair treatment of contract parties and unfair contract terms, competition law, requirements for listed companies and companies who have issued listed bonds, including rules on insider trading, rules on tort and criminal liability for fraud, etc.

As a result of the above, loan market guidelines do not have any legal or quasi-legal effect as a result of being enforced by regulators.

2.4 Transfer Prohibition

Loan agreements governed by Norwegian law have traditionally facilitated the transfer of the debt without the need for prior consent from the borrower; alternatively, consent from the borrower may not be unreasonably withheld. However, there seems to be an increasing trend towards restricting a creditor's right to transfer loans, inter alia, by requiring consent from the borrower (unless an event of default has occurred).

2.5 Navigating Transfer Restrictions

Norwegian courts will generally look to pierce through and set aside structures that appear to be set up for the purpose of navigating around a legal restriction.

3. Informal and Consensual Restructuring Framework

3.1 Consensual Restructuring

Participants in the Norwegian restructuring market generally do not support consensual restructuring frameworks such as the "INSOL Principles".

Out-of-court consensual restructurings are preferred by market participants in Norway. There are only a few cases each year where distressed companies file for formal court restructuring proceedings, and once filed, the outcome is rarely successful.

The perception amongst stakeholders, including financial institutions, seems to be that consensual restructuring processes best preserve both the value of the business and value for the stakeholders. Stakeholders tend to be supportive of a company experiencing financial difficulties pending a more detailed assessment of its financial position, as long as the stakeholders' position is not materially worsened. It is common in Norway that a financial institution has pledges/mortgages in most or all of the debtor's assets, and they will always weigh their involvement in a consensual out-of-court restructuring against the probable outcome of a sale of the secured assets in a bankruptcy.

There are no rules in Norway imposing a duty to negotiate with creditors before filing for bankruptcy or governing "pre-packed" bankruptcies.

If the creditors' situation has not worsened and there is a reasonable hope of succeeding with an out-of-court restructuring plan, the company is allowed to continue the procedures though insolvent (see Section 8 regarding the duties of a board of directors and the managing director in such situations).

3.2 Consensual Restructuring Process

There is no tradition of appointing steering committees or co-ordinators in consensual proceedings. The process is usually organised by the debtor's legal adviser or other representatives of the debtor, and carried out by negotiations with the largest stakeholders in separate or joint meetings, whilst attempting to raise capital to finance a restructuring or a composition.

The company may introduce a "standstill" of their debt, except for running costs necessary to keep the business going whilst attempting to negotiate a restructuring. Such a standstill may be applied to all creditors or only to the largest/key stakeholders and intercompany debt.

Creditors will normally expect to receive information about the company's economic situation and future prospects for the business, as well as the expected outcome for the creditors if the restructuring is successful versus the outcome if it is not. Financial institutions will often require that the shareholders contribute with new capital.

All contracts and security interests must be respected unless otherwise agreed through negotiations, and all creditors

must be treated equally (according to the priority of their claim) and fairly.

3.3 New Money

Norwegian restructuring law has no provisions facilitating super-priority financing. It is not common for super-priority to be accorded to new money outside a statutory or formal process. New funds aimed at financing the restructuring period in consensual restructuring proceedings are usually provided by existing secured lenders and/or shareholders.

3.4 Duties of the Parties

There is no specific legislation regulating out-of-court restructuring processes. Applicable principles imposing duties between creditors or between the debtor and creditors or third parties, include, inter alia, the standard of proper business conduct, a duty for contract parties to act in good faith, rules enabling the court to set aside or revise unfair contract terms, an obligation for insolvent companies to treat all creditors equally and fairly, EU-based competition regulation, including rules on preventing discrimination, and tort and criminal liability for fraudulent actions. Furthermore, all parties are bound by statutory laws aimed at preventing money laundering, corruption, illegal insider trading, etc.

3.5 Consensually Agreed Restructuring

There is no “cram-down” feature in out-of-court consensual restructurings in Norway. However, it is still perceived as a more workable process than compulsory judicial debt-restructuring proceedings, which do provide for a “cram-down” of a dissenting minority of creditors.

4. Legislative Regime Applicable to Restructuring and Insolvency

4.1 General Overview

The Bankruptcy Act of 1984 regulates both voluntary and compulsory judicial restructuring proceedings (the latter providing “cram-down” rules), as well as winding-up proceedings.

The Satisfaction of Claims Act of 1984 regulates an estate’s and a creditor’s seizure of the debtor’s assets, the estate’s handling of the debtor’s contractual obligations, which claims are entitled to dividend payment and the priority between these claims.

Other relevant legislation includes the Mortgage Act of 1980 regulating security interests such as pledges, mortgages, liens, retention of title rights, etc, the Enforcement Act of 1992 regulating enforcement of secured and unsecured claims, the 2004 Act on Financial Security providing, inter alia, some exceptions to the Enforcement Act, the Limited Liability Companies Act of 1997 regulating compulsory liq-

uidation and directors’ liability, the Wages Guarantee Scheme Act of 1973 regulating employees’ right to payment from the governmental Wages Guarantee Fund, and the 1996 Act on Guarantee Schemes for Banks and Public Administration etc of Financial Institutions providing regulation on insolvency proceedings in financial institutions.

4.2 Restructuring and Solvency Regimes

The 1996 Act on Guarantee Schemes for Banks and Public Administration, etc of Financial Institutions requires that each bank with its main office or a subsidiary in Norway has to be a member of The Norwegian Banks’ Guarantee Fund. The Guarantee Fund guarantees the customers against loss due to an insolvent bank not being able to honour their bank deposits, limited to NOK2 million per customer, and also provides a guarantee scheme for insurance customers.

Furthermore, the Act provides that insolvency proceedings according to the Bankruptcy Act may not be applied to banks or insurance companies. Such a financial institution may instead be taken under public administration if it is unable to pay its obligations as they fall due and cannot secure a sufficient economical basis for further operations, or if it is unable to fulfil its capital requirements.

5. Remedies Available to Unsecured Creditors

5.1 Unsecured Creditors

It is not uncommon in Norway for informal and consensual restructuring negotiations to be carried out only between the key stakeholders, leaving the unsecured trade creditors unaffected.

5.2 Rights and Remedies

After a petition for voluntary judicial debt-restructuring proceedings has been delivered to the court, there is an automatic stay of any new or pending bankruptcy petitions against the debtor. The stay lasts for three months after proceedings are opened, but may be prolonged by the court upon the debtor’s request if the court finds it likely that the debtor will be able to carry through a successful restructuring plan.

If compulsory judicial debt restructuring proceedings are opened, the debtor is protected from bankruptcy petitions throughout the proceedings.

However, a bankruptcy petition filed by at least three creditors entitled to dividend payment, and whose claims amount to a total of at least two fifths of all known creditors entitled to dividend payment, is exempt from the aforementioned stays. Furthermore, petitions based on claims that arose after

the opening of the proceedings are generally exempt from such stays.

Unless the court has decided otherwise, creditors cannot attach an execution lien in the debtor's assets for claims that arose prior to the opening of debt-restructuring proceedings.

5.3 Pre-Judgment Attachments

A creditor may petition for a temporary seizure of the debtor's assets pending a court hearing or enforcement of their claim if there is reason to believe that the debtor will dispose of its assets before the creditor has had time to obtain security or a judgment.

Further, someone with an alleged claim which is not a monetary claim against another party may petition for a temporary injunction to secure the claim and prevent any damaging action awaiting a judgment or enforcement decision.

The Maritime Act of 1994 provides rules on the arrests of vessels.

5.4 Timeline for Enforcing an Unsecured Claim

An undisputed claim could form direct grounds for a petition for the attachment of an execution lien, whilst a disputed claim will first need to be confirmed through a judgment.

Once an execution lien is attached to the debtor's assets, the creditor may claim enforcement by way of a forced sale.

The length of time it will take to handle an enforcement petition depends on the efficiency and capacity of the relevant execution office. In general, it will take two to three months from when a petition is sent until an execution lien is established.

Thereafter, the creditor must petition for enforcement of the execution lien. The timeline for a forced sale of an asset depends on, *inter alia*, the type of asset, and may take several months. During this process, the court's decision may be subject to appeal, possibly delaying the process for months or sometimes even years.

5.5 Rights and Remedies for Landlords

In winding-up proceedings, the bankruptcy estate is initially not bound by any tenancy agreement, but must pay rent on a day-to-day basis as a preferential claim until the estate gives notice that it will not be a party to the contract and makes the property available to the landlord. If the trustee fails to take these steps within the first four weeks of the winding-up proceedings, the estate is made a party to the tenancy agreement.

The landlord's right to evict tenants who are not paying their rent is subject to the automatic stay in bankruptcy proceedings (see 5.2).

Except for the preferential claim for day-by-day payment of rent and any amount deposited in a separate locked bank account, the landlord's claims/losses are unsecured and not ranking in priority.

5.6 Special Procedures for Foreign Unsecured Creditors

There are no special procedures or impediments that apply to foreign unsecured creditors.

6. Secured Creditors: Security and Enforcement

6.1 Types of Security

A real estate mortgage must be registered in the national property register in order to obtain legal protection against other creditors and a bankruptcy estate.

A pledge in the shares of a company obtains legal protection upon notification to the company. The pledgee will normally also require a copy of the company's shareholder register evidencing the correct registration of the pledge.

Moveable property is generally divided into "inventory/stock", "machinery and plant" and "motor vehicles and construction machines". Assets included in these categories may be pledged as floating charges. Motor vehicles may also be pledged individually, and creditors could secure retention of title in assets included in these categories unless the assets are intended for onward sale. Trade receivables may also be encumbered by way of a floating charge or a factoring agreement, and a single monetary claim may be pledged or transported as security, obtaining legal protection through notification to the debtor.

All floating charges, as well as all encumbrances in registered motor vehicles, obtain legal protection by registration in the relevant register in the Brønnøysund Register Centre.

Mortgages and other rights in ships and other moveable offshore installations obtains legal protection through registration in the Norwegian International Ship Register, if the vessel is registered there, or in the Shipbuilding Register, if the vessel under construction or the construction contract is registered there.

The costs for establishing voluntary security interests in assets in Norway are generally low, and the process is fairly time-efficient.

An asset may also be encumbered with statutory liens, eg in a real property securing shared costs in a housing association or water and sewer fees to the municipality. Particularly interesting in insolvency cases is the bankruptcy estate's statutory lien in all assets posed by the debtor or by a third party as security for the debtor's obligations. The lien is capped to 5% of the net value of the relevant asset, and the estate may only apply the lien to cover necessary costs for handling the bankruptcy process.

6.2 Enforcing Security

In informal and consensual restructuring processes, secured creditors retain all their rights and they are free to accept or decline any proposal from the debtor whilst during the first six months of judicial insolvency processes they are stayed from enforcing their security interests.

The debt restructuring committee in judicial debt restructuring proceedings will work out a plan that safeguards the interests of secured creditors.

In winding-up proceedings, encumbered assets may only be sold by the bankruptcy estate if:

- all claims secured by the relevant asset are paid in full;
- all creditors with such secured claims who will not be paid in full agree to the sale;
- the sale of secured assets along with other assets belonging to the debtor will give a higher sales price than a piece-by-piece sale, or if secured assets are included in a sale of the business (these options are rarely applied in practice); and
- the estate petitions for a forced sale.

6.3 Timeline for Enforcing Security

The timeline for enforcing a secured claim depends somewhat on the character of the security and the caseload of the local court, but it usually takes at least two to three months to conclude a forced sale of encumbered assets through an execution officer or the court. In non-consumer contracts, a financial institution may agree on a quicker and easier enforcement process for financial securities, such as bank accounts and shares, as long as the agreement is made in writing.

6.4 Foreign Secured Creditors

There are no special procedures or impediments that apply to foreign secured creditors.

7. The Importance of Valuations in the Restructuring and Insolvency Process

7.1 Purpose and Importance of Valuations

Security holders and other stakeholders often require valuations and economic assessments to be able to assess their

position and the chances of a successful out-of-court restructuring plan. In judicial debt restructuring processes, valuations and an exhaustive list of the debtor's assets and obligations are required, whilst in winding-up proceedings, the trustee decides whether or not formal valuations will be made.

7.2 Initiating the Valuation

In judicial debt-restructuring processes, the debt-restructuring committee will, in co-operation with any debt-restructuring auditor, evaluate the assets and record them in an exhaustive list. In winding-up proceedings, the trustee will initiate valuations if it is found to be necessary.

7.3 Jurisprudence Related to Valuations

Valuation jurisprudence in a restructuring and insolvency context is not very developed under Norwegian law, and is mainly limited to what is described in sections 7.1 and 7.2.

8. Directors' Duties and Personal Liability

8.1 Duties of Directors in a Distressed Company

A limited liability company must at all times have reasonable equity and liquidity, given the size and risk of the company's business operations. Furthermore, the equity is not to be lower than half the share capital. If these requirements are not met, the board of directors must immediately call for a General Meeting to inform the directors of the company's financial situation and suggest correctional measures. If the board of directors cannot find grounds for suggesting any measures, or if available measures are considered unfeasible, the board of directors must propose to dissolve the company or petition for judicial insolvency proceedings.

If the board of directors intentionally or with gross negligence omits to carry out these duties, it may give grounds for liability for damages. Furthermore, this may give grounds for a fine and/or up to two years' imprisonment if the omission has: (i) hindered the estate from clawing back money or assets and this is likely to reduce significantly the dividend payment to the creditors; or (ii) if the business operations are clearly running at a loss and the debtor has to know that it will not be able to settle due claims within a reasonable time.

Furthermore, a creditor may hold the board members and the general manager liable for damages if they have misled the creditor in order to provide credit which is not likely to be settled.

8.2 Enforcement of Creditors' Claims

A bankruptcy estate may pursue a claim for damages against directors and other persons in leading positions (as well as the debtor's auditor and accountant) for actions or omis-

sions inflicting economic loss on the company and/or all the creditors.

If a loss is inflicted on only one or a few creditors, this/these creditor(s) must pursue their own claim for damages.

8.3 Chief Restructuring Officer

Although appointed in only a few cases so far, there seems to be an increasing trend to appoint CROs in larger consensual restructuring proceedings.

8.4 Shadow Directorship

The legal concept of shadow directorship does not exist in Norwegian legislation.

9. Solvent Restructuring/Reorganisation and Rescue Procedures

9.1 Statutory Mechanisms

In Norway, there is a two-step test for insolvency, which are illiquidity and negative net assets. To open judicial restructuring proceedings, however, the court only applies an illiquidity test, and a company can thus be solvent upon petitioning for debt-restructuring proceedings. The only insolvency proceeding in Norway requiring that the debtor be insolvent is that for winding-up proceedings (described in section 11).

It is only the debtor who may file a petition for judicial debt restructuring proceedings. A court decision to open judicial debt-restructuring proceedings is public and cannot be appealed.

When proceedings are opened, payment of accrued debt is stayed. The court appoints an administrator (in practice, a lawyer) and a creditors' committee, forming a debt-restructuring committee with the administrator as leader. The members of the creditors' committee are usually representatives from large creditors, and in some cases employee representatives.

The debtor's business operations usually continue as normal, and the board of directors upholds the functions and duties, being controlled and supervised by the debt-restructuring committee whilst working out a plan to propose to the creditors. The court tends to take a very passive role.

Judicial debt-restructuring proceedings can be either "voluntary" or "compulsory".

A voluntary debt-restructuring proceeding is successful if all creditors whose claims are affected vote for the plan. If certain conditions are fulfilled, including that no one votes against the plan, the plan can also be carried through if cred-

itors representing at least three quarters of the total claims agree to the plan.

In a compulsory proceeding, a majority may cram down the minority of creditors entitled to vote.

If the proposed composition entails a dividend payment of at least 50% of the unsecured claims not ranking in priority, the composition is approved if at least three fifths of the voting creditors accept and if they represent at least three fifths of the total debt entitling voting rights.

If the proposed composition entails a dividend payment of less than 50% and more than 25%, the composition is approved if at least three quarters of the voting creditors accept and if they represent at least three quarters of the total debt entitling voting rights.

Any plan entailing less than a 25% dividend payment will need to meet the voting requirements of a voluntary debt-restructuring proceeding.

Creditors with security in the debtor's assets will not have voting rights for any part of a claim that is fully secured. Furthermore, no voting rights are granted for claims ranking in priority and any other claim which is to be paid in full, as well as contingent claims and claims from creditors who are closely related parties to the debtor.

A new proposal may be made if the plan does not reach the voting requirements, subject to certain requirements. If the restructuring attempt is unsuccessful, winding-up proceedings will "automatically" be opened by the court. Thus, there are only two outcomes of judicial debt-restructuring proceedings: a successful plan or winding-up proceedings.

9.2 Position of Company During Procedure

There is an automatic stay for enforcement of claims against the debtor, and a standstill of existing claims as of the petition date. The company can continue "business as usual". See 5.2 and 9.1 above.

9.3 Position of Creditors During Procedure

Norwegian insolvency law does not operate with classes of creditors. Proceeds from encumbered assets are paid to the secured creditor(s), and remaining funds in the estate are divided between the claims according to their priority (see Section 13).

There is no organisation of creditors other than the aforementioned creditors' committee.

The creditors are informed of the opening of proceedings, and the debt-restructuring committee and any court-appointed auditor will issue a report on the debtor's economic

affairs which will be distributed to the creditors along with the plan, informing them of whether or not the committee and auditor recommend the plan and the effects on the creditors if the plan is not accepted.

9.4 Claims of a Dissenting Class of Creditors

The claims of a dissenting class of creditors may not be modified without their consent.

9.5 Trading Claims of Dissenting Creditors

A creditor may sell its claim at any time during a restructuring or insolvency proceeding, as long as the position of the debtor and the other creditors remains unaffected.

9.6 Re-organising a Corporate Group

There are no corporate group insolvency rules under Norwegian law.

9.7 Conditions Applied to Use or Sale of Assets

During a restructuring or insolvency procedure, the debtor is not allowed to sell or rent out its real property, its business premises or any asset of significant value without the prior consent of the debt-restructuring committee.

The debtor may sell pledged inventory/stock, machinery and plant, and motor vehicles and machines whilst under judicial debt-restructuring proceedings, as long as this is part of the debtor's regular business operations and the secured creditors' security interests are not significantly impaired. Any asset the debtor acquires whilst under judicial debt-restructuring proceedings is not included in any pre-existing general pledge without the consent of the debt-restructuring committee.

9.8 Distressed Disposals

The debtor executes sales of assets whilst under debt-restructuring proceedings. The debt-restructuring proceedings do not prevent a purchaser from acquiring good title in a sale, free and clear of claims, if the debt-restructuring committee and the security holders agree or the secured claim is paid in full (see 9.7).

There is no legislation in Norway that regulates credit bidding or pre-packed sales.

9.9 Release of Security and Other Claims

In a voluntary judicial debt-restructuring proceeding, security and other claims can only be released with consent from the creditor, unless paid in full.

In a compulsory restructuring proceeding, any pledges exceeding the estimated value of the pledged asset are annulled if the proceeding is successful. The value of the pledged assets is determined by the debt-restructuring committee, but

a pledgee may, under certain circumstances, deliver a demand for a valuation to the court (see Section 7).

9.10 Priority

Priority new money may not be made available to the company pursuant to the restructuring procedure, nor can it be secured on the assets of the company, unless it is accepted by the creditors and the debt-restructuring committee on a voluntary basis.

9.11 Determining the Value of Claims

The outcome of a judicial debt-restructuring proceeding is either a successful composition or winding-up proceedings. These proceedings are therefore not suitable solely for the determination of the value of claims nor for those creditors with an economic interest in the debtor.

9.12 The Agreement Amongst Creditors

A voluntary debt-restructuring plan is final and binding when the voting requirements have been met, whilst a compulsory debt-restructuring plan is binding when the court has affirmed the plan in a court decision and the time of appeal has expired.

There is no general fairness test to be applied, but the court may dismiss the plan in certain situations, eg if the debtor has committed criminal offences whilst doing business, or if a creditor has benefited at the cost of others or if the plan is not in the creditors' common interest.

9.13 Rejecting or Dismissing Claims

Neither the company nor an office holder is permitted to reject or disclaim contracts in this procedure.

9.14 Releasing Non-Debtor Parties from Liability

Any guarantor for claims against the debtor could be released of their liabilities through a successful debt restructuring, since any settlement or reduction of the guaranteed claim would reduce the guarantor's liability correspondingly.

9.15 Rights of Set-Off or Netting in a Proceeding

Creditors with a right to set off their claim before proceedings have opened are, as a general rule, also entitled to do so after proceedings are opened. However, if the debtor's claim fell due before the opening of proceedings, whilst the creditor's claim had not fallen due as per the opening of proceedings, set-off is not permitted.

A creditor who has acquired a claim against the debtor less than three months prior to when the petition for proceedings was received by the court, or acquired a claim earlier than this whilst knowing that the debtor was insolvent, cannot set off such a claim with a claim that the debtor owned when the creditor acquired its claim.

If the creditor has obtained a claim against the debtor in a way comparable to a transaction eligible for claw-back, set-off is prohibited.

Claims ranking last by order of priority cannot apply for set-off unless the claims have arisen out of the same legal relation or all other claims ranking higher in priority are covered in full. The right to set off a claim is also limited if the creditor's claim is contingent.

9.16 Implications of Failure to Observe Agreed Plan

The accepted/court-approved plan is binding on all creditors who are affected by it, and if the debtor fails to observe the plan, creditors must collect their claim according to ordinary debt-collection rules.

If the debtor is taken under winding-up proceedings before the plan has been fulfilled, any creditor who has not received full payment according to the plan will have a right to calculate their dividend payment from the full amount of their original claim; however, any dividend payment from the bankruptcy estate may never exceed the amount accepted as full payment under the composition plan.

10. Mandatory Commencement of Insolvency Proceedings

10.1 Obligation to File Within Specific Timeline

Norwegian law does not set specific timelines in this respect (see Section 8 on directors' liability).

10.2 Procedural Options

The company can commence non-judicial voluntary restructuring proceedings or other voluntary arrangements, judicial debt-restructuring proceedings (either voluntary or compulsory) or winding-up proceedings.

10.3 Implications of Not Commencing Insolvency Proceedings

See Section 8.

11. Insolvency Proceedings

11.1 Types of Voluntary and Involuntary Insolvency Proceedings

As mentioned in 9.1, the only restructuring proceeding in Norway that applies an insolvency test is the winding-up proceeding.

Either the debtor themselves or a creditor may petition for winding-up proceedings.

Winding-up proceedings will be opened by the court if the debtor is insolvent, ie the debtor cannot meet its obligations as they fall due and this situation is not temporary (illiquidity), and the debtor's assets and income are not sufficient to satisfy all obligations if one allows for a delayed settlement whilst awaiting a sale of the assets (expressed as negative net assets). The court assesses the petition and tests whether the debtor is in fact insolvent. If a creditor files for bankruptcy based on a contested claim, the court will also make a pre-judgment as to whether the claim exists and can serve as grounds for the bankruptcy petition.

Proceedings will not be opened if the petitioning creditor has adequate security for its claim.

If the debtor files for winding-up proceedings, the court rarely overrules the petition and it usually takes only a few hours or days until proceedings are opened.

A creditor-initiated petition for winding-up proceedings will usually be processed by the court within one to two months. However, it may take longer, depending on the nature of the claim, whether the debtor raises any objections, the efficiency/capacity of the local court, etc.

The court appoints a trustee to handle the estate (in practice, always a lawyer). The court may also appoint an auditor for the estate and a creditors' committee. An auditor is usually only appointed in larger cases.

The debtor is stripped of any powers over the business operations and assets upon the opening of winding-up proceedings. The trustee and creditors' committee decide whether or not the business operations are to continue after proceedings are opened, and how and when the debtor's assets should be realised.

The court sets a deadline for the creditors to file their claim with the bankruptcy estate within approximately six weeks from the opening of proceedings. The deadline is not time-barring, and any claim filed later but before the bankruptcy proceedings have been finalised will usually be duly registered.

Most claims that arose prior to the opening of proceedings are entitled to a dividend payment, including contingent claims.

The trustee and creditors' committee test registered claims only if and when it is determined that there will be a dividend payment to those claims. If a claim is disputed, the trustee is to inform the court of the matter, and the court will set a deadline for the creditor to take legal action. If the creditor does not take legal action, the court rules in favour of the trustee. When all claims have been tested, a meeting

will be held where all creditors with approved claims receiving dividend payment will have a right to participate and offer comments. The court then confirms the distribution in a decision which can be appealed.

Creditors are free to trade their claims at any point whilst the debtor is under bankruptcy proceedings. The transfer should be notified and documented to the trustee.

The creditors' right to set off their claim against the debtor's claim follows the same rules as those for judicial debt-restructuring proceedings (see 9.15).

The bankruptcy estate is a separate legal entity from the debtor. As a result, a creditor cannot set off a claim against the debtor with a claim at the hand of the bankruptcy estate, such as a claw-back claim. Furthermore, this has the effect that the bankruptcy estate is not a party to any ongoing court proceedings or any of the debtor's contracts.

If the debtor is a plaintiff in a pending court proceeding, that proceeding is automatically stayed. If the debtor is a defendant, the proceeding is not stayed, and the plaintiff has the right to bring the bankruptcy estate into the court proceeding as a new party, even if the bankruptcy estate has no desire to become a party to the dispute.

Though not a party by default, the bankruptcy estate has a right to become a party to all the debtor's contracts, and may practice "cherry-picking" and only enter into those contracts that are beneficial to the bankruptcy estate. Upon becoming a party, the estate is only bound with effect from the opening of bankruptcy proceedings, and the estate does not have to pay any contractual claim the other party might have which arose before proceedings were opened. Such claims will have to be filed in the bankruptcy estate.

The bankruptcy estate is also granted an extraordinary termination right pursuant to the Satisfaction of Claims Act, allowing for a customary notice period or at most a notice period of three months, disregarding any less favourable termination clause in the contract.

There are two exceptions to the main rule of a bankruptcy estate not being a party to the debtor's contracts: the bankruptcy estate automatically becomes a party to employment contracts and tenancy agreements if the trustee fails to declare otherwise within three and four weeks, respectively.

With regard to the timeline of proceedings and information to the creditors, the trustee delivers an initial report to the court which includes information about the debtor, any discovered assets, potential claims and liabilities, etc. The report is also normally presented orally to the court in a hearing, usually scheduled within the first month or two after pro-

ceedings are opened. Creditors may attend the hearing. Further, the trustee and creditors' committee submit an annual report with annual accounts for the estate. The trustee and creditors' committee also submit to the court a final report with final accounts for the estate when the proceedings are ready to be finalised. Creditors will receive the initial and final reports, and will also receive certain other information from the estate.

Any distribution to the creditors will take place after the court has passed a decision to conclude the proceedings and accept the proposed distribution plan, and after the one-month time limit for an appeal has expired. If it is clear that the estate has sufficient funds to pay all claims within a priority class in full, eg all claims ranking first in priority, distributions are to be made as soon as possible, even though the bankruptcy proceedings have not been finalised. Furthermore, any payment to security holders upon the sale of encumbered assets will normally be made immediately after those assets are sold.

The duration of the proceedings depends on the size of the estate. Large bankruptcy proceedings could go on for years, depending on, for example, when all assets have been realised and the conclusion of any court disputes related to claw-back or liability claims.

A limited liability company may in some situations be subject to forced liquidation or dissolution proceedings in accordance with provisions in the Limited Liability Companies Act. Such proceedings are opened by the court, follow the same rules and are treated in the same way as winding-up proceedings. The grounds for forced dissolution proceedings include not submitting annual accounts or not having an auditor or a board of directors in compliance with statutory requirements.

11.2 Distressed Disposals

The trustee executes the sale of assets or the business operations. The bankruptcy proceedings as such do not wipe out any security holders' rights in the debtor's assets, but if the assets are sold as a whole or as part of the debtor's business operations with intent to continue the operations, the assets may be sold free of any pledge or security rights that supersede the value of the asset.

Norwegian law has no rules on credit bidding or pre-packed sales. Any pre-packed sale must be done non-judicially and could be subject to claw-back rules and the consent of the trustee.

11.3 Failure to Observe Agreed Rescue Plan

See 9.16.

11.4 Priority New Money

As the Norwegian liquidation proceeding involves liquidating and dissolving the company, not restructuring it, the only financing an estate would need is the financing of the costs of handling the estate and the sale of assets. It is not uncommon that secured creditors enter into agreements with the administrator of a bankruptcy/liquidation estate to guarantee or cover the administrator's costs related to the sale of secured assets, investigation of certain affairs of the company prior to bankruptcy etc. However, this is a voluntary agreement between the estate and the entity contributing the guarantee, and is not regulated by law.

11.5 Liquidation on a Combined Basis/Under Related Proceedings

There is no statutory insolvency proceeding in Norway that can be utilised to liquidate a corporate group on a combined basis. If more than one company in a company group is taken under bankruptcy proceedings, there will be a separate bankruptcy estate for each of the companies in the group. It is common practice that the court appoints the same trustee for all bankruptcy estates within the same company group or in affiliated companies.

11.6 Organisation of Creditors

The court appoints the members of the creditors' committee (usually between one and three members) following suggestions from the trustee. Employees may have a right to appoint a representative. The creditors' committee is usually only involved in the most important decisions to be made during the proceedings, and has more of a controlling function. Any remuneration paid out from the estate is usually limited.

11.7 Use or Sale of Assets During Insolvency Proceedings

All assets are automatically seized by the bankruptcy estate, and the trustee will make the decision to use or sell assets without being required to seek permission from the court.

12. Transactions That May Be Set Aside

12.1 Grounds to Set Aside/Annul Transactions

Transactions performed by the debtor prior to the opening of proceedings may on various grounds be set aside or annulled ("clawed back") by the bankruptcy estate.

"Extraordinary payments", meaning any payment of debt made prior to the opening of proceedings with extraordinary means of payment, prior to its due date or with an amount which has considerably diminished the debtor's ability to meet their obligations, may be set aside unless the payment is considered to be ordinary.

"Security for old debt", ie any pledge or other security established by the debtor prior to the opening of proceedings, may be set aside to the extent that it secures debt accrued before the security was agreed, or if legal protection has not been obtained without unnecessary delay.

Any execution lien established in the debtor's assets later than three months prior to when the court received the petition for opening proceedings has no legal effect towards the estate.

Certain cases of set-off, unreasonable payments to closely related parties and gift transactions could also be set aside.

Finally, "bad faith transactions" may be clawed back. This means a transaction that improperly benefits a creditor at the expense of other creditors, or withholds the debtor's assets from serving as settlement to the creditors, or increases the debtor's debt to the detriment of the creditors, may be set aside if the debtor's financial standing was already weak or severely weakened by the transaction, and if the beneficiary knew or should have known about the debtor's weak financial standing and those circumstances making the transaction improper.

12.2 Look-Back Period

The general look-back period for claw-back is three months (one year for gifts). However, if the receiver/beneficiary is a closely related party to the debtor, the look-back period is usually extended to two years, and in the case of a "bad faith transaction" it is extended to ten years. The extended look-back period will usually be subject to a test excluding transactions made during a time when the debtor was, without doubt, solvent.

12.3 Identity of Claimant

Only the bankruptcy estate represented by the trustee can bring such claims.

12.4 Claims in Insolvency and Restructuring Proceedings

These claims may be brought only in compulsory judicial debt-restructuring proceedings (by the debt-restructuring committee) and in winding-up proceedings.

13. Priorities and Waterfalls

13.1 Priority Claims

Before any distribution from the estate to the creditors can take place, all costs related to the handling of the bankruptcy proceedings are to be covered, ie fees to the trustee, the creditors' committee and estate auditor, in addition to costs incurred by the bankruptcy estate after proceedings have been opened.

If there are further means in the estate after covering these costs and fees, they will be distributed to the creditors in the following waterfall sequence: (i) claims from employees for wages, remuneration and vacation allowance, subject to specific conditions; (ii) claims for tax and VAT not older than six months; (iii) “regular claims”; and (iv) claims ranking last in priority, such as interests accrued after bankruptcy proceedings were opened, and subordinated claims.

13.2 Priority Over Secured Creditor Claims

Unsecured creditors’ claims have no priority over secured claims with regard to any proceeds from the realisation of secured assets. Remaining sales proceeds after all secured creditors have been paid out in full will be divided between the other creditors according to the waterfall provisions (see 13.1), and any remaining claim that a secured creditor may have after all securities have been realised will be categorised according to the same waterfall provisions.

13.3 Statutory Waterfall of Claims

See 13.1.

14. Courts and Arbitration

14.1 Courts

The district court of the debtor’s domicile handles and supervises all cases of restructuring, liquidation and administration proceedings. Oslo is the only city in Norway with a specialised court for such cases, which is “Oslo byfogdembete” (the Oslo Court of Probate and Enforcement).

14.2 Specialist Judges

There are no specialist judges in the field of restructuring, liquidation and administration proceedings in general, other than judges working in the specialised court in Oslo.

14.3 Limitations on Matters that Can be Heard

The Oslo Court of Probate and Enforcement has limited jurisdiction. However, any other district court can handle

all matters necessary (though not necessarily as part of the bankruptcy proceedings).

14.4 Arbitration

Arbitration cannot be utilised in relation to restructuring, liquidation and administration matters as such, but an estate could in some cases be involved in arbitration proceedings at the discretion of the trustee (not conflicting with the principle that bankruptcy proceedings are to remain public) or if it decides to pursue a claim on the debtor’s behalf which arises from a contract with an arbitration clause.

15. International Issues and Recognition

15.1 Recognition/Relief in Connection with Overseas Proceedings

Foreign bankruptcy proceedings are not recognised by Norwegian courts unless based on a mutual agreement with the home state of the debtor. Norway has only entered into one cross-border agreement with regard to insolvency proceedings: The Nordic Convention on Bankruptcy of 1933 between Norway, Denmark, Finland, Iceland and Sweden. This convention provides regulation on insolvency proceedings within these states, including rules on recognition, enforcement and choice of law in various situations.

15.2 Protocols in Cross-Border Cases

The courts in Norway have not entered into any protocols or other arrangements with courts in other countries to coordinate proceedings in cross-border cases.

15.3 Foreign Creditors

In Norway, foreign creditors are in general not dealt with any differently from domestic creditors in insolvency proceedings.

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