



ICLG

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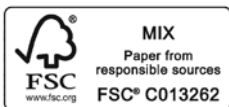
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1 Issues Arising When a Company is in Financial Difficulties

1.1 How does a creditor take security over assets in Norway?

If a creditor has an adequate basis for legal enforcement, that creditor may petition for attaching an execution lien to the debtor's assets as security for debt that has fallen due. With a few exceptions, such as VAT claims and tax claims, any asset belonging to the debtor may be encumbered with an execution lien, and the execution lien may also be effectuated as attachment of earnings. The process of obtaining an execution lien could take months to complete.

An execution lien gives the creditor a security interest comparable to a pledge or a mortgage, and may be applied as grounds for petitioning a forced sale of the asset. Both the process of establishing the execution lien and the process of enforcing it are regulated by the Enforcement Act of 1992.

An execution lien established less than three months prior to the date of the filing of the bankruptcy proceedings will have no legal effect towards the bankruptcy estate.

1.2 In what circumstances might transactions entered into whilst the company is in financial difficulties be vulnerable to attack and what remedies are available from the court?

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

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

1.3 What are the liabilities of directors (in particular civil, criminal or disqualification) for continuing to trade whilst a company is in financial difficulties in Norway?

Directors are obliged by law to take immediate action if the company's equity or cash flow is considered insufficient for the size and risk of the business operations, or if the company's equity is less than half of the share capital. Such actions include to within reasonable time call for a shareholders' meeting to inform of and suggest solutions to better the company's economic situation, as well as to actually take steps to better the economic situation.

A company may continue business while insolvent if this is in the interest of the creditors and there is a reasonable chance of rescuing the company. In general, the board of directors must in such a situation ensure that none of the creditors are inflicted further loss and that they are treated equally/fairly, and the company must not incur debt it is unable to pay or obligations it is unable to fulfil. If the board of directors finds that there are no grounds for improvement actions or such actions are not feasible and it is unlikely that the economic problems may be solved, the board of directors shall suggest that the company is dissolved or file for bankruptcy proceedings.

The CEO, or the chairman of the board if the company has no CEO, is responsible by law to ensure that employees' tax deduction is secured in a separate bank account. Failure to comply imposes a joint liability for the CEO or chairman of the board, who will be personally liable for that tax claim.

Further, there is joint and several liability for the board members and/or CEO for a penalty fee from the Norwegian Accounts Register if the debtor fails to submit annual accounts for the company within set deadlines.

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

Most directors' liability cases in Norway concern claims for damages from a single creditor who delivered goods or services on credit without being informed of the fact that the debtor would probably not be able to pay for the delivery. There have, however, also been a few cases resulting in bankruptcy estates receiving damages from directors who filed for bankruptcy proceedings too late, or who failed to petition for bankruptcy at all.

A debtor, or the board of directors in an insolvent company, may be held liable if they deliberately or negligently have sold, posed as security for old debt or otherwise have disposed over an asset in a way that prevents it from serving as coverage/payment to the creditors. Further, a "debtor", i.e. one acting on behalf of the debtor, may be held criminally liable for disposing of assets in

an irresponsible way, causing the debtor to become insolvent and withdrawing those assets from the creditors, *cf.* the General Civil Penal Code of 1902 § 282.

An administrator of winding-up proceedings may recommend to the court that a member of the board of directors of the bankrupt company, the CEO or someone else with a leading role in the bankrupt company, is quarantined from establishing companies or serving as a board member or a managing director in any company for a period of two years. The ruling is made by the court after the person recommended to be quarantined has been given the opportunity to object/submit written or oral pleadings.

2 Formal Procedures

2.1 What are the main types of formal procedures available for companies in financial difficulties in Norway and can any of these procedures be used in a restructuring?

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

Judicial debt negotiation proceedings can be either voluntary or compulsory, subject to slightly different legislation. Judicial debt negotiation proceedings can be used in a restructuring process, but is rarely applied as of today. In Norway, it is far more common with out-of-court restructuring processes.

The judicial restructuring scheme in Norway is currently under review, authorised by the Department of Justice. The mandate given includes, *inter alia*, to evaluate whether the current rules should be amended to facilitate a flexible restructuring scheme, aimed at saving more businesses and preserving more jobs. The evaluation report shall be submitted by 1 March, 2016.

2.2 What are the tests for insolvency in Norway?

A company is considered insolvent in Norway if it is in a position where it is consistently unable to meet its financial obligations as they fall due (“illiquid”), unless the actual value of the company’s assets and income in sum are sufficient to satisfy the company’s obligations (i.e. the company has positive net assets).

It is a requirement for the opening of winding-up proceedings that the company is insolvent. However, to open judicial debt negotiation proceedings, either voluntary or compulsory, it is only a requirement that the company is illiquid.

2.3 On what grounds can the company be placed into each procedure?

It is only the debtor itself whom may petition for debt negotiation proceedings. The court may decide to reject the petition if it finds it unlikely that debt negotiation proceedings will be successful.

Winding-up proceedings may be petitioned either by the debtor or by a creditor (including employees).

The court decides whether the relevant conditions to open proceedings are fulfilled or not.

2.4 Please describe briefly how the company is placed into each procedure.

The petition for either judicial debt negotiation proceedings or winding-up proceedings shall be made in writing.

If the board of directors of the company files the petition themselves, the court will decide whether proceedings should be opened without any court hearing being held.

When a creditor petitions for winding-up proceedings, the court shall set a date for a court hearing to try the petition. If possible, the hearing shall be held within one week from receiving the petition.

The court may give the parties the opportunity to give written pleadings to further enlighten the case, before deciding on whether or not to open winding-up proceedings.

If judicial debt negotiation proceedings are opened, the court appoints an administrator whose main role is to supervise the proceedings and act as an advisor to the company’s board of directors. The board of directors maintains its duties and the company remains legal powers over its assets, and the company’s operations continue as usual. All debt incurred prior to the opening of proceedings is “frozen” and creditors may not enforce such claims after debt negotiation proceedings are opened.

In winding-up proceedings, the bankruptcy estate is established as a separate legal entity with automatic seizure of all the debtor’s assets. The administrator controls and has legal powers over the bankruptcy estate and over the debtor’s assets and rights.

In Norway, the court appointed administrator/liquidator is in practice always a lawyer.

A creditor committee may be appointed in either of the proceedings, with one or a few members from the creditors. In judicial debt negotiation proceedings the creditor committee and the administrator has a supervisory function, while in winding-up proceedings, the committee’s function is comparable to a board of directors in a company, with the administrator/liquidator as chairman.

In either of the proceedings, an auditor may be appointed by the court to audit the bankruptcy estate and to assist the administrator in investigating the company. Any findings will be presented in a report to the court with a copy to all creditors, the content and aim of which will differ somewhat dependent on whether the debtor is under judicial debt negotiation proceedings or winding-up proceedings.

2.5 What notifications, meetings and publications are required after the company has been placed into each procedure?

The opening of judicial debt negotiation proceedings shall be notified in the Brønnøysund Register Centre (containing various registers for all businesses in Norway). The administrator shall also notify all known creditors of the proceedings and that they must file their claims within a set date, and summon for a creditors’ meeting to be held within two months from the opening of the proceedings. The administrator and the creditor committee shall issue a written report about the debtor and its economic affairs, to be sent to the creditors together with the debt restructuring proposal. Furthermore, the administrator and the creditor committee shall provide information about the prospects of the debtor fulfilling the terms in the proposal and if they recommend that the creditors accept the proposal.

Notification of the Brønnøysund Register Centre and all known creditors is also required upon the opening of winding-up proceedings. The administrator shall present a report to the court within three months from the opening of the proceedings, which shall be made available to the debtor and all creditors. The report shall include, *inter alia*, information about the economic affairs of the debtor, the status of the proceedings, the assets and debts of the debtor and any uncovered criminal offences related to the debtor’s economic affairs.

The court will schedule a court hearing, usually within three weeks from the opening of winding-up proceedings, where the report is presented orally to the court. The creditors may attend this hearing.

If the winding-up proceedings last more than one year, the administrator and any creditor committee shall issue an annual report and the estate's annual accounts to the court each consecutive year. Furthermore, the administrator and any creditor committee shall issue a final report once the bankruptcy proceedings are finalised.

The court may call for a hearing during the proceedings if the court deems this necessary, if required by law or if required by the administrator, a member of the creditor committee or 1/5 of the creditors allowed to vote. However, except for the first hearing, oral hearings are rarely held in Norwegian insolvency proceedings.

2.6 Are "pre-packaged" sales possible?

There is no concept of "pre-packaged" sales in Norwegian insolvency law.

Thus, the debtor's sale of assets or business prior to the opening of winding-up proceedings, may not receive any formal acceptance from any court or court-appointed administrator, and is entered into at the risk of the parties with regard to, *inter alia*, rules on claw-back and director's liability.

While under judicial debt negotiation proceedings, the debtor may initiate a sale of assets through a going concern reorganisation plan, subject to the approval of the administrator/liquidator and the creditor committee as well as from any security holder.

In winding-up proceedings, the administrator has the sole power to sell assets that are not encumbered.

3 Creditors

3.1 Are unsecured creditors free to enforce their rights in each procedure?

Upon the opening of judicial debt negotiation proceedings, there is an automatic stay of any bankruptcy petitions based on debt already incurred at that time. The stay lasts three months from the opening of the proceedings, but may be prolonged at the discretion of the court upon request from the debtor. If compulsory composition proceedings or winding-up proceedings are opened, the automatic stay lasts throughout the proceedings.

Further, in all three insolvency proceedings there is an automatic stay against attaching an execution lien to the debtor's assets in order to secure claims that arose prior to the opening of the proceedings. The stay lasts throughout the proceedings.

3.2 Can secured creditors enforce their security in each procedure?

Secured creditors may not enforce any collateral or security rights during the first six months from when judicial debt negotiation proceedings are opened or a petition for winding-up proceedings is filed, unless the administrator and any creditor committee agrees to such enforcement.

There is an exception from the automatic stay with regard to financial collateral, provided that the financial institution and a lender/creditor who is a professional party enter into an agreement on an alternative enforcement procedure with regard to specific financial collateral.

3.3 Can creditors set off sums owed by them to the company against amounts owed by the company to them in each procedure?

In voluntary judicial debt negotiation proceedings, the general rules of set-off apply.

In compulsory composition proceedings and winding-up proceedings, a creditor may set off its claim against the debtor in sums owed to them by the debtor, as long as both claims existed at the time when proceedings were opened.

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

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

4 Continuing the Business

4.1 Who controls the company in each procedure? In particular, please describe briefly the effect of the procedures on directors and shareholders.

After judicial debt negotiation proceedings are opened, the shareholders and the directors maintain their roles and duties, but they have to comply with the legal framework regulating the proceedings, and they are subject to supervision of the administrator and any creditors' committee.

After winding-up proceedings are opened, the shareholders and the directors are in general stripped of their powers over the debtor's assets and rights, and their duties are no longer to manage the company. Instead, the directors have a duty to assist the court and the administrator with providing information, such as information regarding the debtor's assets and debts, and documentation, such as relevant correspondence, financial statements and agreements.

4.2 How does the company finance these procedures?

Judicial debt negotiation proceedings must be financed by the company's available equity and/or revenues from its business operations. To open such proceedings, the court may require that the company pays a fee as security for the initial costs of the proceedings (often set at NOK 100,000).

If a creditor files for winding-up proceedings, it must pay a security amount of NOK 43,000, which will cover the costs of the proceedings if there are not sufficient funds in the estate.

If the board of directors of the debtor themselves file for winding-up proceedings, this security amount of NOK 43,000 is covered by the government, and no security payment is required from the petitioner.

The winding-up estate has a statutory lien in any assets that have been posed as security by the debtor or any third party for the debtor's debt. The lien is limited to 5% of the actual value of such asset, and should only be used to cover necessary costs related to the handling of the proceedings.

4.3 What is the effect of each procedure on employees?

There are no particular rules in Norwegian law regulating the employees' rights/protection and obligations under voluntary or

compulsory judicial debt negotiation proceedings. The employees' claims for wages have first priority in all three judicial insolvency proceedings.

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

The employees' claims for wages are protected by the Norwegian wages guarantee fund, which is a state fund to secure salary to any employees whose employer is wound up. The employees shall send their application for coverage to the administrator of the bankruptcy estate. There are several rules limiting which claims are covered under the wages guarantee scheme, the most important being that the notice period is only covered with one month's pay, and that each employee may only receive a maximum payment of approximately NOK 180,000.

4.4 What effect does the commencement of any procedure have on contracts with the company and can the company terminate contracts during each procedure?

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 governed by the Satisfaction of Claims Act.

The bankruptcy estate is its own legal entity, and the administrator may choose which contracts the estate shall become party to ("cherry-picking").

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

A contract party to the debtor may not terminate the contract solely on the basis of the insolvency, unless that party has requested the administrator, whether or not the estate will become a party to the contract, and provided the administrator is given reasonable time to consider the request. Once the administrator confirms that the estate will not become a party to that contract, the other party may terminate the contract on the grounds of insolvency.

Exceptions are found for employment contracts and tenancy agreements to which the estate is automatically a party unless the administrator, within set time limits of three and four weeks, respectively, actively declares that the estate chooses not to become a party.

The estate's and the contract parties' rights and duties once the estate has become a party to any of the debtor's contracts differ somewhat between the various types of contracts.

5 Claims

5.1 Broadly, how do creditors claim amounts owed to them in each procedure?

Any creditor must file their claim with the appointed administrator of the estate. This is the case for either of the judicial proceedings. The claim must state the name of the debtor, as well as the name,

address and contact information of the creditor. Furthermore, the claim must specify the total amount due, whether or not the claim is secured and what the claim relates to. Finally, the claim should be documented.

5.2 What is the ranking of claims in each procedure? In particular, do any specific types of claim have preferential status?

Claims entitled to dividend payment from the estate are generally ranked in the following classes: preferential claims (such as costs incurred by the estate); claims ranking first in priority (mainly employees' claims for wages); claims ranking second in priority (mainly recent tax and VAT claims); regular claims (dividend claims with none of the other priorities); and claims ranking last in priority (e.g. interest accrued during the course of the proceedings).

The remaining outstanding amount of any secured creditor after the sale of all secured assets will fall into the relevant abovementioned categories.

5.3 Are tax liabilities incurred during each procedure?

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

The debtor will not incur any tax liabilities after winding-up proceedings are opened. The bankruptcy estate itself may, however, incur tax liability if it continues the debtor's business operations for a considerable period of time and not merely for a short period until the assets may be sold.

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

6 Ending the Formal Procedure

6.1 What happens at the end of each procedure?

Once the proposal is accepted by the creditors, the judicial debt negotiations proceedings are finalised.

If a proposal is rejected by the creditors or is not accepted by the necessary majority of creditors, the company may submit a second proposal for debt restructuring, subject to the approval of the administrator and the creditors' committee.

If voluntary or compulsory judicial debt negotiations are not successful, winding-up proceedings will be opened by the court. Winding-up proceedings may have one of three different outcomes:

- either there is no money in the estate and the proceedings are finalised without any dividend payment to the creditors; or
- there is money in the estate and some or all creditors receive dividend payments, depending on their claim's class of priority;
- if there is sufficient money in the estate to cover all reported claims, if all creditors expressly agree, or if a majority of the creditors accept the administrator's proposal for a compulsory composition while under winding-up proceedings, the estate may be "handed back" to the debtor, i.e. the veil of bankruptcy is lifted and the company is no longer under bankruptcy proceedings.

7 Restructuring

7.1 Is a formal statutory procedure available to achieve a restructuring of the company's debts in Norway and, if so, to what extent is it supervised by the court?

As described above in question 2.1, there are formal statutory procedures available to achieve a restructuring of the company's debts in Norway, and such proceedings are supervised by the court.

7.2 If such a procedure is available, is a debt for equity swap possible and how are existing shareholders dealt with?

Norwegian restructuring and insolvency law does not include rules on debt for equity swaps. The shareholders keep their powers, rights and obligations during a judicial debt restructuring process.

7.3 Is a moratorium available as part of the restructuring process?

In both voluntary and compulsory judicial debt negotiation proceedings, there is effectively a moratorium of debt established prior to the opening of proceedings. The debtor, however, must honour any debt accrued while under proceedings.

7.4 Can dissenting creditors be crammed down?

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

The voting requirements are as follows (the numbers referring to creditors and claims that are granted voting rights, i.e. excluding certain secured claims, conditional claims and claims from certain closely related parties):

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

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

7.5 Is consent needed from other stakeholders for a restructuring?

While under judicial debt negotiation proceedings, the debtor and the administrator/creditor committee must respect the interest of the secured creditors and ensure that their position is not lessened from keeping the operations of the company running.

A compulsory composition must involve full payment to claims ranking in priority, i.e. mainly employees' claims for wages and recent tax and VAT claims.

Tax and VAT claims older than six months have no priority, and for this part of their claims the tax authorities will vote as a creditor with an ordinary claim. The tax authorities' internal guidelines as to what dividend they may accept in a compulsory composition, as well as to the timeframe for payment, are often stricter than the minimum requirements for a compulsory composition under the Bankruptcy Act.

8 International

8.1 What would be the approach in Norway to recognising a procedure started in another jurisdiction?

There are no general rules on ancillary proceedings or rules otherwise recognising foreign insolvency proceedings.

Norway is not a member of the EC, and has not ratified the EC Insolvency Regulation.

However, Norway has, since 1933, been part of a Nordic Convention on Bankruptcy between Norway, Denmark, Finland, Iceland and Sweden. This convention provides regulation on cross-border insolvencies within these member states, including rules on recognition of insolvency proceedings in other Nordic countries.

There have been very few cases before Norwegian courts relating to foreign bankruptcy proceedings. In a decision from 2013, the Supreme Court of Norway addressed the question of whether an established execution lien in a Spanish debtor's assets in Norway could be clawed back by the Spanish bankruptcy estate, and/or whether the debtor's assets in Norway were protected by a stay on creditor enforcement actions due to the debtor being under Spanish insolvency proceedings. The court decided that the insolvency proceedings in Spain did not prevent separate debt recovery proceedings against the debtor's assets in Norway, i.e. 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 or legislation, and there was no such mutual agreement or legislation with Spain.

As for executing a foreign judgment in Norway, the rules of the Lugano Convention apply.



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She has several years' experience of 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 LL.M. 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 is a business law firm that advises on all aspects of business law. Our insolvency team is one of the largest in Norway, with 22 people, 15 of which are lawyers with insolvency as their key practice area. Five partners in our team are regularly appointed by the courts as trustees/administrators of bankruptcy estates and judicial debt negotiation estates.

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

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