

## Chapter XX

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# NORWAY

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### I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

The Norwegian economy has generally been strong in the past few years, but in November 2014, oil prices dropped dramatically from more than US\$100 per barrel to approximately US\$70 per barrel, and continued to drop through 2015 to levels as low as approximately US\$30. As of mid-June 2016, a barrel of crude oil costs between US\$45 and US\$50 per barrel,<sup>2</sup> which is still considered to be challengingly low for oil industry companies. Norwegian oil service companies, as well as a number of large businesses within the oil and oil services industries, have carried out downsizing and cost-reduction measures. The Norwegian currency has weakened, especially held up against the US dollar, the euro and the British pound.

According to the Financial Supervisory Authority of Norway (FSA), Norwegian banks had a more profitable year in 2015 than in 2014, however, results have somewhat decreased in the first quarter of 2016 compared to the first quarter of 2015.<sup>3</sup> The FSA points out that risk premiums have increased markedly from September 2015 and continue to increase in 2016, however, it will take some time before the higher financing costs will have an effect on the banks' borrowing costs. Despite a limited growth in the general economy, the banks' lending loss was low in 2015 and defaults declined in 2015 compared to 2014. In the first quarter of 2016, defaults increased somewhat and the banks' lending loss was 0.27 per cent of the total lending volume, compared to 0.17 per cent one year earlier.

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2 See [www.oil-price.net/](http://www.oil-price.net/).

3 See [www.finanstilsynet.no/no/Artikkelarkiv/Pressemeldinger/2016/1\\_kvartal/Gode-resultater-i-bankene-/](http://www.finanstilsynet.no/no/Artikkelarkiv/Pressemeldinger/2016/1_kvartal/Gode-resultater-i-bankene-/).

The key policy rate as of June 2016 is historically low, at 0.5 per cent – reduced by 0.5 per cent in the past year alone. Norges Bank<sup>4</sup> has justified the decrease with reference to reports indicating that the prospects of growth in the Norwegian economy are weakened and that price growth will slow down. It is thought that the unemployment rate will increase somewhat, and salaries are expected to increase less than last year. Norges Bank does not rule out a further reduction in the key policy rate in 2016.<sup>5</sup>

The market 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; however, it appears that the number of such proceedings is rising as more and more companies, especially in the oil and oil service industries, are facing payment problems because of the continuously low oil prices.

The total number of winding-up proceedings and forced liquidations in Norway in 2015 was 5,781, which was approximately the same as in 2014. As per 19 June, the total number for 2016 is 2,819, which is an increase of approximately 6 per cent compared to the same period in 2015.<sup>6</sup> 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 several 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. However, see Section VI, *supra*, regarding a current review of the judicial restructuring scheme in Norway. Only very few judicial restructuring proceedings are opened each year. In 2015, only three judicial debt negotiation proceedings were opened in Norway, all of which were compulsory proceedings in limited liability companies, and all of which ended in winding-up proceedings. Thus, none were successful. So far in 2016,<sup>7</sup> only two judicial debt negotiation proceedings have been opened; one compulsory and one voluntary, and both in limited liability companies. One of these has already ended in winding-up proceedings, while the other is ongoing as of mid-June 2016.

## 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 slightly different legislation. Both winding-up proceedings and judicial debt negotiation proceedings are regulated by the Bankruptcy Act of 8 June 1984 No. 58.<sup>8</sup>

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4 The Central Bank of Norway.

5 See [www.norges-bank.no/Publisert/Pressemeldinger/2016/2016-03-17-1-Pressemelding/](http://www.norges-bank.no/Publisert/Pressemeldinger/2016/2016-03-17-1-Pressemelding/).

6 All numbers are from the Register of Bankruptcies.

7 As per 19 June 2016.

8 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.

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 negotiation proceeding: either the company succeeds or it is liquidated.

#### **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, with certain limitations. All profits from the realisation of assets and collection of claims belong 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 – usually 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.) normally has to be registered in the relevant register to obtain legal protection. The registration costs are low, and the process of registering the security interest usually 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 and 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, including a creditor's attempt to establish an execution lien in any of the debtor's assets, lasting for six months.

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 administrator and creditors' committee cooperate with the board of directors and management 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 holders' 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 the security holder (usually a bank or other financial institution). The security holder pays any and all costs related to such work, since it is the security holder that has the financial interest in the realisation of secured assets.

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, cf. above, 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.<sup>9</sup> 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.

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 of the bankruptcy estate 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 transaction breaches the principle of equal creditor treatment. 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 insolvency proceedings may be subject to clawback if they fulfil certain

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

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 by the debtor to 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 economic 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 to open insolvency proceedings.

If there are grounds for a clawback claim and it is executed, the receiving party of the transaction must return to the estate what was received from the debtor. The receiving party may disclaim any enrichment obtained from the transaction. 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 as a result of 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, the 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 carried out and currently under review are suggested changes to the Bankruptcy Act regarding jurisdiction issues in cross-border cases, etc. (see Section VI, *infra*).

### IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

Over the past few years, as mentioned in Section I, *supra*, the oil industry and the oil service industry have suffered because of low oil prices, and there have been substantial lay-offs and other cost-reducing measures. As of March 2016, it was estimated that approximately 38,000 jobs had been lost because of the ongoing oil crisis.<sup>10</sup>

Furthermore, rig market prices are low,<sup>11</sup> and freight rates in shipping and the seismic industry are as low as they were in the mid-1980s.<sup>12</sup> Several companies operating in these markets are currently financed through high-yield obligation loans that will expire during the

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10 [www.nrk.no/norge/\\_-50.000-oljejobber-forsvinner-i-nedturen-1.12845392](http://www.nrk.no/norge/_-50.000-oljejobber-forsvinner-i-nedturen-1.12845392).

11 [www.hegner.no/bors/artikkel551308.ece](http://www.hegner.no/bors/artikkel551308.ece).

12 [www.dn.no/nyheter/naringsliv/2015/04/28/2152/Finans/kassen-gr-tom-uten-kte-rater](http://www.dn.no/nyheter/naringsliv/2015/04/28/2152/Finans/kassen-gr-tom-uten-kte-rater).

next couple of 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 includes medium-sized businesses as well as large businesses.<sup>13</sup> 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.<sup>14</sup>

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).

Recent larger bankruptcies emerging from the current oil crisis are the listed company Dolphin Group ASA and its subsidiary Dolphin Geophysical AS, which were taken under bankruptcy proceedings in December 2015, and the oil service company Atlantic Offshore AS, which filed for bankruptcy in April 2016. Dolphin Geophysical AS was a global supplier of marine geophysical services, operating seismic vessels and performing surveys, multi-client projects and processing services.<sup>15</sup> One of the main reasons for the bankruptcy was said to be reduced revenues as a result of the oil crisis. Atlantic Offshore AS operated several oil service vessels and experienced economic difficulties because of (according to the debtor) a lower demand for services from the oil industry. The company filed for bankruptcy proceedings following lengthy restructuring attempts, as it was no longer able to meet terms and conditions of its bond loans.

## 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.

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 because

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

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

15 See [www.dolphingeo.com/about/company-overview/](http://www.dolphingeo.com/about/company-overview/).

of 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 (if, indeed, at all). However, in April 2016, the Ministry of Justice and Public Security published a legislative proposal to add a chapter with new provisions on cross-border insolvency matters. The chapter includes provisions on both territorial and factual jurisdiction, choice of law rules, as well as recognition of foreign insolvency proceedings and the impact foreign proceedings shall have in Norway. Some of these legal principles appear to resemble certain provisions of the EC Insolvency Regulation. An amending act complying with the legislative proposal was enacted by the Norwegian parliament in June 2016, but has not yet entered into force.

The judicial restructuring scheme in Norway is under review, subject to a mandate given by the Ministry of Justice to Judge Leif Villars-Dahl with the Oslo Court of Probate and Enforcement. His mandate included, *inter alia*, to evaluate 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 submitted his evaluation report on 1 March 2016. The Ministry of Justice 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.



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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.

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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, in addition to 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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