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# THE RESTRUCTURING REVIEW

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SEVENTH EDITION

EDITOR  
CHRISTOPHER MALLON

LAW BUSINESS RESEARCH

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The Restructuring Review

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Seventh Edition

Editor  
CHRISTOPHER MALLON

LAW BUSINESS RESEARCH LTD

# THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

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# EDITOR'S PREFACE

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I am very pleased to present this seventh edition of *The Restructuring Review*. As with the previous editions, our intention is to help general counsel, government agencies and private practice lawyers understand the conditions prevailing in the global restructuring market in 2014 and 2015 and to highlight some of the more significant legal and commercial developments and trends that have been evident in recent years, and that are expected to be significant in the future.

In many jurisdictions the general economic trends are now more positive than they have been for many years. Against this background, the trend of diminished large-scale restructuring activity has continued in many markets. This picture may suggest a global economy in robust health after the long and difficult years of recession but it would be naïve to think that stability has returned for the long term as several warning signs remain.

First, the dramatic growth of high-yield issuances of past years may lead to unknown consequences further down the road. In the United States, 2012 and 2013 were each record years for high-yield issuance, and across the Atlantic this market is finally achieving a similar stage of development. At the time of writing, total European high-yield issuances for 2014 had already surpassed the annual totals for every year before 2013, and Credit Suisse was forecasting a record level of issuances for the year. As has happened in the past, it is inevitable that such large increases in economic activity will include inappropriate or unfortunate deals, the effects of which will need to be unpicked in future years with the help of restructuring professionals. The same will no doubt apply to the surge in M&A activity that has recently been observed in many developed economies.

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

With the above in mind, and taking into account also the stresses that continue to lie beneath the surface in the eurozone and some worrying signs of instability in the

emerging economies, only the very brave would forecast a prolonged period of calm for the global economy. As such, this work continues to be relevant and important, in particular as a result of the international nature of many corporate restructurings.

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

**Christopher Mallon**

Skadden, Arps, Slate, Meagher & Flom (UK) LLP

London

August 2014

## Chapter 21

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# NORWAY

*Stine D Snertingdalen and Ingrid Tronshaug*<sup>1</sup>

### I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

The Norwegian economy is generally in a good condition, and positive developments are apparent. Reports from both IMF and OECD are positive with regard to Norway, and according to the Financial Supervisory Authority of Norway, the Norwegian banks returned good results in the first quarter of 2014.<sup>2</sup>

According to the NHO,<sup>3</sup> there was a minor slowing down in the Norwegian economy in 2013, due to a fall in spending by private households. The savings rate is at a historically high level, and only in 2005 has the savings rate of Norwegian households ever been as stable at such a high rate.<sup>4</sup> The key policy rate has been low and stable at 1.5 per cent since March 2012, and Norges Bank<sup>5</sup> forecasts a continuous low rate until summer 2015, after which they predict a slow rise.<sup>6</sup>

The impact of global events, and particularly the recent financial problems in several EU countries, has had only a minor effect on the Norwegian economy compared

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

2 [www.finanstilsynet.no/no/Artikkelarkiv/Pressemeldinger/2014/2\\_kvartal/Gode-resultater-for-bankene-1-kvartal-2014/](http://www.finanstilsynet.no/no/Artikkelarkiv/Pressemeldinger/2014/2_kvartal/Gode-resultater-for-bankene-1-kvartal-2014/).

3 Næringslivets Hovedorganisasjon, the Confederation of Norwegian Enterprise; Norway's major organisation for employers and business lobby.

4 NHO 'Økonomisk overblikk' 1/2014, a report on the Norwegian economy as per the first quarter of 2014.

5 The Central Bank of Norway.

6 'Pengepolitisk Rapport med vurdering av finansiell stabilitet' for Q1 2014, published on [www.norges-bank.no/Upload/Publikasjoner/PPR/PPR\\_1\\_14/PPR\\_1\\_14.pdf](http://www.norges-bank.no/Upload/Publikasjoner/PPR/PPR_1_14/PPR_1_14.pdf).

with the majority of the other EU/EEA countries.<sup>7</sup> The total number of bankruptcies opened in 2013 and 2014 is high, but there have been fewer bankruptcies of large companies or company groups. The total number of winding-up proceedings and forced liquidations in Norway in 2013 was 4,546 and 984, respectively, an increase of almost 20 per cent compared with 2012. By 31 May 2014, the courts have opened a total of 2,438 winding-up proceedings and forced liquidations, which is a minor increase from 2013.

The NHO reported that from early 2012 to December 2013, loan activity from banks and financial institutions to non-financial institutions fell from approximately 10 to 2 per cent. During late 2013 and 2014, however, the Norwegian banks' previously restrictive policies on the financing of businesses and property have been loosened, and financing is again more available in the market.

Further, reports from Norges Bank show that credit extension towards companies was tightened from the spring of 2011 until the beginning of 2013, mainly as a result of new and stricter capital requirements. It also reports, however, that the loan rate to businesses went up during the last months of 2013, and the growth in credit extension over the past year indicate that, in total, Norwegian businesses have good access to credit.

There have been no major events during 2013 and 2014 with a significant impact on the financial markets, but a trend, which presumably is a consequence of the 2011–2013 lowering in credit extension from financial institutions, is a significant increase in bond loans or the bond market. Bond financing has traditionally been applied in Norway within the shipping and the oil and gas sectors; however, bond financing is now also more common within other sectors.

There are no new trends when it comes to restructuring methods under Norwegian law, and the majority of restructurings are still carried out extrajudicially; only very few judicial restructuring proceedings are opened each year.

In 2013, only six judicial debt negotiation proceedings were opened in Norway. Half of these were voluntary judicial debt negotiation proceedings, and the others were compulsory proceedings. All of these proceedings but one concerned limited liability companies, while the last was for a private individual. All six proceedings ended in winding-up proceedings. The most short-lived judicial debt negotiation proceeding lasted only about one-and-a-half months and the longest lasted around eight months.

Of the four judicial debt negotiation proceedings that have so far been opened in 2014,<sup>8</sup> two are of limited liability companies and two are for private individuals. All four proceedings were initiated as voluntary judicial debt negotiation proceedings. By mid-June 2014, one had ended in a winding-up proceeding, while the other three were ongoing.

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7 Norway is a member of the EEA – i.e., may participate in EU's internal market – but is not an EU Member State.

8 As per 10 June 2014.

## 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.

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 (the Guarantee Schemes Act) of 6 December 1996 No. 75, and forced liquidation or dissolution proceedings, which both follow the rules for winding-up proceedings set out in the Bankruptcy Act.

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 be insolvent (i.e., both illiquid and with negative net assets). Thus, a company may file for judicial debt negotiation proceedings due to its illiquidity, even though it has positive net assets. Insolvency is, however, an absolute requirement to open winding-up proceedings. Only the illiquid company itself may deliver a petition for judicial debt negotiation proceedings. A petition for winding-up proceedings, however, may be filed either by the insolvent company or by a creditor, with the exception of creditors with adequate security for their claims.

After judicial debt negotiation proceedings have been opened, the company is in a position to suggest various outcomes to the creditors that would entail a successful restructuring plan for the debtor. In voluntary judicial debt negotiation proceedings, the suggested reorganisation plan must be accepted by all creditors, but if the debtor is under compulsory judicial debt negotiation proceedings and the dividend payment is a minimum of 25 per cent to all creditors, the reorganisation plan will be binding on all creditors if approval of the plan is obtained from a designated minimum number of creditors.

The main requirements for a compulsory composition to be legally binding on all creditors 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 between 25 per cent and 50 per cent, the plan must be accepted by at least three-quarters of the creditors holding at least three-quarters of the total debt.

In a successful compulsory composition, the minority voters are crammed down by the majority voters, but claims ranking in priority and claims that are fully secured do not give voting rights and may not be crammed down as they are in any event entitled to full payment. Furthermore, closely related parties to the debtor do not have the right to vote.

If the legal requirements for completing a successful composition with the creditors are not met, the judicial debt negotiation proceedings will come to an end, and winding-up proceedings will be opened by the court. Thus, there is 'no return' from a judicial debt settlement proceeding: either the company succeeds or it is wound up.



**i The taking and enforcement of security**

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

A creditor may have established a mortgage, lien or other security interests as security for its claim. Usually, most assets of some value in the estate will be applied as security for the creditors. If the security right is validly established with legal protection, such securities will prevail over the bankruptcy estate's seizure. 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.

Security interests may be enforced according to the rules in the Enforcement Act of 26 June 1992 No. 86, except during an automatic stay for enforcement proceedings against the debtor, which lasts six months from the date the petition for winding-up proceedings was filed. The stay covers all enforcement proceedings, not only those based on security interests.

It is common in Norway for the trustee to assist security holders with realising secured assets after proceedings have been opened. Security holders are usually banks or other financial institutions with mortgages or liens in the company's inventory and stock, machinery and plant, or trade receivables (all these being floating charges), as well as registered motor vehicles, real property, etc.

If 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 to restructure the company and attempt to carry through a solution or composition with the creditors. Any due secured debt established prior to the opening of the proceedings will be 'frozen', while the debtor must continue to pay running costs or instalments due to the security holder after proceedings are opened. The debtor should communicate with the security holder to safeguard the value of the secured assets, and the creditors' committee will supervise the company and work up a plan to uphold the security holder's interests during the debt negotiation proceedings.

After a petition for judicial debt negotiation proceedings has been filed, there is an automatic stay of any petitions for winding-up proceedings related to debt brought on prior to judicial debt negotiation proceedings being opened. The stay lasts three months from the proceedings being opened, but may be prolonged at the discretion of the court upon a request 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 who together represent at least two-fifths of all claims entitled to dividend payment.

Any creditor with a valid, unsecured claim against the company may establish an execution lien on nearly any asset belonging to the company, according to rules in the Enforcement Act of 26 June 1992 No. 86 and the Mortgage Act of 8 February 1980 No. 2. When the execution lien is established, the creditor may initiate enforcement of the

claim, subject to the same legislation as any creditor holding a secured claim. If, however, a petition for winding-up proceedings or judicial debt restructuring proceedings is filed less than three months after the execution lien was established, the execution lien will have no effect as regards the estate.

The Financial Collateral Act of 26 March 2004 (implementing the EU Financial Collateral Directive 2002/47/EF) 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 on how and when a financial security interest may be legally enforced, providing an exception from the mandatory legal enforcement rules set out in the Enforcement Act. Further, the statute provides exemptions from the main rules on set-off of security interests. For instance, a bank may set off a claim it has against the debtor in cash deposits in a bank account located in that bank without regard to the main principles of equal and fair treatment of creditors. This means that such set-off may not be avoided by a bankruptcy estate.

## 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 be held 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 10 years or so.

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 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 for 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, convening a shareholders' meeting to discuss the situation, and potentially filing 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 administrator's or creditors' committee's decisions and the legal framework regulating the proceedings.

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

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

### iii Clawback actions

The Satisfaction of Claims Act regulates which 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 (often referred to as avoidance or annulment). The clawback rules do not apply to voluntary debt negotiation proceedings, and there is no similar regulation for such proceedings.

Transactions carried out within the three months prior to the day when the court received the petition for bankruptcy proceedings may be subject to clawback if they are in conflict with the principle of treating all creditors equally and fairly and fulfil certain other 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 debts' and certain cases of set-off, to mention a few.

Some transactions may be subject to clawback even if they were carried out prior to the three months before the court received the bankruptcy petition. Gifts may generally be subject to clawback if given within the year prior to the day the court received the bankruptcy petition. Unfair transactions beneficial to another party deemed not to have been in good faith, and at a time when the debtor's financial situation was weak or was severely weakened by the transaction, may be subject to clawback if carried out up to 10 years prior to the day when the court received the bankruptcy petition. Furthermore, the time bars in most clawback provisions are extended to two years if the transaction in question is carried out between the debtor and a closely related beneficiary.

The result of a successful clawback process depends on the grounds on which a clawback claim is asserted. In brief, the receiving party of the avoided transaction may be obliged to disclaim any enrichment obtained from the transaction or return to the estate what was received from the debtor; alternatively, the estate may claim that the receiving party indemnifies the estate the loss it has suffered due to the transaction in question. The latter result only applies to transactions where the receiver was in bad faith upon receiving the advantageous transaction.

The absolute maximum time bar for clawback claims is 10 years. Furthermore, to avoid losing its right to claw back a transaction through limitation, an estate must take legal action no later than one year after the day when the insolvency proceedings were opened; alternatively six months after the estate had or should have had sufficient knowledge to initiate legal action.

## III RECENT LEGAL DEVELOPMENTS

There have not been any recent legislative developments or key cases relating to insolvency or restructuring law that have had an impact on the market.

Some of the most significant legislative changes enacted in 2013 are those in the Limited Liability Companies Act, easing the previous limitations on a subsidiary's right to guarantee the debt of a parent company. Such securities are now allowed as long as the security is meant to serve the financial interests of the company group.

Further, the legislation regulating which claims from employees towards a debtor in winding-up proceedings will be covered by the Norwegian Wage Guarantee Fund has been altered, and the Fund now covers fewer employees' claims than before.

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

The most active industries on the Norwegian mainland in 2013 were the construction and building industry, the engineering industry, and the contractors and suppliers to the petroleum industry. Other industries have had a low growth, which is also the case for companies in the services sector. The industries with the greatest fall in activity and productivity in 2013 were the furniture production industry and paper production industry. The latter had a production level in 2013 that was 70 per cent lower than in its peak year of 2007.<sup>10</sup>

In the services industry, Norway had an increase in telecom and IT in 2013, as well as in the hotel and restaurant industry. These industries, however, were among those that suffered the most during the financial crisis, and in 2013 they have only just managed to return to approximately the same activity level as before the financial crisis.

#### **V INTERNATIONAL**

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

There has been a Nordic Convention on Bankruptcy in place since 1933 between Norway, Denmark, Finland, Iceland and Sweden. This Convention includes regulation on how the Member States should handle the debtor's 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; it also includes recognition and enforcement rules.

#### **VI FUTURE DEVELOPMENTS**

There have been written hearings and opinions on whether Norway should implement the EC Insolvency Regulation. Many lawyers and legislators are in favour of the Regulation being implemented as Norwegian law,<sup>11</sup> but there is still no definite proposal from legislators. The Regulation will likely not be ratified in Norway – if at all – for several years.

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10 *Økonomisk utsyn over året 2013*, a financial report published by Statistisk Sentralbyrå (Statistics Norway; official statistics about Norwegian society since 1876). Published on [www.ssb.no/nasjonalregnskap-og-konjunkturer/oa/\\_attachment/167700?\\_ts=144b74690b8](http://www.ssb.no/nasjonalregnskap-og-konjunkturer/oa/_attachment/167700?_ts=144b74690b8).

11 One example is the Norwegian Advisory Council on Bankruptcy (appointed by the Norwegian Ministry of Justice and the Police), cf. their statement to the Ministry of Justice of 1 March 2011, made public at [www.konkursradet.no/konkursradet.no/element\\_db/72/721\\_Hringsuttalelse\\_fra\\_Konkursrdet\\_-\\_Norsk\\_internasjonal\\_insolvensrett.pdf](http://www.konkursradet.no/konkursradet.no/element_db/72/721_Hringsuttalelse_fra_Konkursrdet_-_Norsk_internasjonal_insolvensrett.pdf).

## Appendix 1

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# ABOUT THE AUTHORS

### **STINE D SNERTINGDALEN**

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Stine D Snertingdalen is a partner at Kvale Advokatfirma DA, specialising within three main fields: 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, such as refinancing, credit assurance and credit recovery. She regularly assists financial institutions such as Danske Bank, Handelsbanken, Bank 2, Bank 1 Oslo og Akershus and Collector AB. 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. She also holds several directorships, and has published several articles on Norwegian insolvency law. Ms Snertingdalen is highly ranked both in Norwegian and international rankings such as the *Legal 500* and *Chambers*.

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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 as well as a master's degree in law from the University of Oslo. She wrote her master's thesis on cross-border insolvencies in Europe.

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