Section 1: PROCESS AND PROCEDURES

1.1 What reorganisation and bankruptcy processes are available for financially troubled debtors?

There are two main categories of statutory bankruptcy proceedings in Norway both regulated by the Bankruptcy Act 58 of June 8 1964: winding-up proceedings and judicial debt negotiation proceedings. Judicial debt negotiation proceedings can be either voluntary or compulsory, subject to slightly different legislation.

It is only the debtor itself whom may petition for debt negotiation proceedings. Winding-up proceedings may be petitioned either by the debtor or by a creditor. The court decides whether the relevant conditions to open proceedings are fulfilled or not.

It is a requirement to file for statutory debt negotiation proceedings that the company is insolvent (in a position where it cannot meet its financial obligations as they fall due). It is, however, not a requirement that the company is insolvent (both insolvent and with negative not assets).

It is a requirement for the opening of winding-up proceedings that the company is insolvent.

In Norway, the court appointed administrator or liquidator is in practice always a lawyer. In judicial debt negotiation proceedings, the administrator has a supervisory function, while the board of directors maintains their duties and the company retains legal powers over its assets.

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.

A creditor committee may be appointed with one or a few representatives for the creditors, with a function comparable to a board of directors with the administrator or liquidator as chairman.

1.2 Is a stay on creditor enforcement action available?

Upon the opening of judicial debt negotiation proceedings, there is an automatic stay of any bankruptcy petitions on debt already incurred at that time. The stay lasts for 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 are opened, the automatic stay lasts throughout the proceedings.

The stay is not effective against a bankruptcy petition filed by at least three creditors who together represent at least two-fifths of all claims entitled to dividend payment.

Further, execution liens may not be attached to the debtor’s assets after the opening of judicial debt negotiation proceedings or compulsory composition proceedings.

Finally, there is an automatic stay against enforcement of any collateral or security rights during the first six months after judicial debt negotiation proceedings are opened or winding-up proceedings are filed, unless the debt negotiation committees agree to such enforcement.

The above provisions of automatic stay are binding on all parties, except for financial institutions who are allowed to agree on alternative enforcement procedures with respect to financial collateral if the customer or lender is a professional party and the agreement is made in writing.

1.3 What are the key features of a reorganisation plan and how is it approved?

While voluntary or compulsory judicial debt negotiation proceedings, the debtor has an exclusive right for a period of time to propose a reorganisation plan, though subject to approval of the administrator or creditor committee. The debtor has no right to propose a reorganisation plan while under winding-up proceedings, but may request the administrator to propose a compulsory composition.

In voluntary judicial debt negotiation proceedings, the reorganisation plan must be accepted by all the creditors.

However, a compulsory composition is only legally binding to all creditors if the following requirements are met (the number 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;

• 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.

1.4 Can a creditor or a class of creditors be ‘crammed-down’?

In voluntary debt negotiation proceedings, an objecting creditor or class of creditors cannot be crammed down. In a successful compulsory composition, the minority voters are crammed down by the majority voters (see 1.3). However, claims ranking in priority and claims that are fully secured may not be crammed down as they are entitled to full payment.

While under judicial debt negotiation proceedings, the debtor may initiate a sale of assets through a going-concern reorganisation, subject to the approval of the administrator 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. With a minor exception for certain going-concern sales, the administrator and the bank must respect any security right in the assets. The administrator may, upon acceptance from a security holder, transfer ownership of a secured asset directly to the security holder, reducing the security holder’s claim in the estate with the estimated or actual market value of the transferred assets.

The bidding process upon the sale of assets during a bankruptcy proceeding is not specifically regulated.

1.5 What are the duties of directors of a company in financial difficulty?

The director of an insolvent company must ensure that all creditors within each class are treated equally and that the company must not incur debt it is unable to pay. Further, the director should take immediate action if the company’s equity is deemed insufficient considering the size and risk of the business operations, or if the equity capital is less than half of the share capital. Such actions include, within a reasonable time, to call for a shareholders’ meeting to form and suggest solutions to better the company’s economic situation. 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 must suggest that the company is dissolved or file for bankruptcy proceedings.

After judicial debt negotiation proceedings are open, the directors maintain their rules and duties, but they have to comply with the administrator or creditors’ committee and the legal framework regulating the proceedings.

After winding-up proceedings are opened, the directors are stripped of their powers, and the board of directors no longer manages 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, debts, and documentation, as well as relevant correspondence, financial statements and agreements.

1.7 What priority claims are there and is protection available for post-petition credit?

In Norway, claims entitled to dividend payment from the estate are generally ranked in the following classes: preferential claims (such as court or as incurred by the estate); claims ranking first in priority (mainly employer 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 (such as interest accrued after proceedings were opened). The remaining claims from security holders that are not covered by the proceeds of the secured assets will fall into the relevant above-mentioned categories.

While under judicial debt negotiation proceedings, a debtor may incur new debt, establish new securities in or sell assets of significant value, without the acceptance of the debt negotiation committee.

Does there exist a different regime for banks and other financial institutions?

Under Norwegian law, banks, insurance companies and certain other financial institutions as well as present companies of such entities are subject to separate rules on insolvency proceedings, found in the Act on guarantee schemes for banks and public administration, of financial institutions (the Guarantee Schemes Act 75) of December 6 1996. Subject to the Guarantee Schemes Act, the government has the authority to place such above-mentioned financial institutions under public administration either if they cannot fulfill their obligations as they fall due and they do not have sufficient funds to secure future operations, or if they are not capable of fulfilling capital adequacy requirements. The board of directors will be heard before such actions are taken, if possible. If public administration proceedings are opened in a financial institution that is a parent company in a financial group, the other companies in that financial group may also be included in the proceedings.

Section 2: INTERNATIONAL/CROSS BORDER ISSUES

2.1 Can bankruptcy or reorganisation proceedings be opened in respect of a foreign debtor?

Bankruptcy or reorganisation proceedings may only be opened in Norway for a foreign debtor if the debtor has its main office in business in Norway — similar to the centre of main interests (CMI) principle in the EC Insolvency Regulation 1346/2000. Note, however, that Norway is not a member of the EU and has not ratified the EC Insolvency Regulation.

On July 8 2014, the High Court of Norway passed a ruling in a case where a petition for winding-up proceedings against a Polish company was delivered to a Norwegian court. The creditor was the Norwegian Tax Authorities, and the claim referred to unpaid VAT claims arising from sales made by the company's Norwegian branch. The court applied the CMI principle, and stated that bankruptcy proceedings may only be opened in Norway when the business's CMI is located in Norway. The bankruptcy petition was declined because the company in this case was deemed to have its CMI in Poland.

It is quite common for a Norwegian entrepreneur to establish an empty foreign holding company without any other business than owning a Norwegian branch; a Norwegian registered foreign business enterprise (NUF). Upon insolvency in such businesses the foreign holding company may be taken under judicial insolvency proceedings in Norway, since the actual operations of the company is based in Norway. The proceedings will continue according to the Norwegian branch, and the notification of the opening of the proceedings will be registered in the Norwegian Company Register on the company number of the Norwegian branch.

2.2 Can recognition and assistance be given to foreign bankruptcy or reorganisation proceedings?

Norway has not ratified the EC Insolvency Regulation, but has since 1953 been part of a Nordic Convention on Bankruptcy between Norway, Den-
mark, Finland, Iceland and Sweden. This conversion provides regulation on cross-border insolvencies within these member states, including rules on recognition, enforcement and choice of law in various situations.

The question of whether assistance in the form of ancillary bankruptcy proceedings to foreign main proceedings may be opened in Norway has no clear answer under Norwegian law. There have been very few cases before Norwegian courts relating to foreign bankruptcy proceedings. Old case law from the late 19th century implies that ancillary bankruptcy proceedings may be opened in Norway on request from a foreign bankruptcy estate, but these court decisions have somewhat limited legal effect today, being relatively old and passed by lower courts.

In 1994 a Norwegian district court opened sub-bankruptcy (ancillary) proceedings in Norway in a foreign entity with reference to Norwegian non-statutory bankruptcy law. The court pointed out that no matter where a debtor's assets are located, these should be sold in the interest of all creditors, domestic and international. Ancillary proceedings are a useful instrument in that regard.

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 due to a clawback claim from the debtor's Spanish bankruptcy estate, 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 (asserting 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 acknowledgment of insolvency proceedings in another state must primarily be based on international mutual agreements or legislation, and there was no such mutual agreement or legislation with Spain.

Section 3: OTHER MATERIAL CONSIDERATIONS

3.1 What other major stakeholders (such as governmental or regulatory institutions) could have a material impact on the outcome of the reorganisation?

While under judicial debt negotiation proceedings, the debtor and the administrator or creditor committee must respect the interest of the secured creditors and ensure that the continuing operations of the company does not significantly deteriorate their position.

A compulsory composition must involve full payment to claims ranking in priority (mainly wages and recent tax and VAT claims).

The tax authorities' internal guidelines as to what dividend they may accept and the timeframe for payment for their claims that are not ranking in priority are often stricter than the minimum requirements for a compulsory composition under the Bankruptcy Act.

Most of the employees' claims for wages rank first in priority. The same applies for certain pension liabilities, especially pension premiums.

With regard to termination and workforce cuts, the same rules are applicable for companies under debt negotiation proceedings and compulsory composition proceedings as for companies which are not under any insolvency proceedings.

Section 4: CURRENT TRENDS

4.1 Outline any bankruptcy and reorganisation trends specific to your jurisdiction.

Due to a drastic drop in the oil prices during the fall of 2014, and continuing low oil prices in 2015, a number of companies operating in this area have enforced cost reduction measures and executed large workforce cuts. This in turn has negative implications on the oil services industry, with a decreasing demand and lower prices of goods and services related to the oil industry. So far there has been an increase of non-judicial reorganisation and refinancing in this sector, as well as in the shipping sector, and if the situation continues we expect to see an increase in the number of winding-up proceedings within the oil services industry in the next few years.

There is an interesting development with regard to the judicial restructuring scheme in Norway. The Department of Justice has authorised a review of the provisions in the Bankruptcy Act on voluntary and compulsory judicial debt negotiation proceedings. The mandate is to evaluate whether the rules should be amended to facilitate a more flexible restructuring scheme, aimed at saving more businesses and preserving more jobs. The mandate has been given to Judge Leif Vilhør Dahl at the Oslo court of probate and enforcement, supported by attorneys Knut Ro, Steine Sørensdalen and Ståle Gjengseth, as well as professor of economics Nils-Henrik M von der Fehr. The report will be submitted by March 1, 2016.

About the author

Steine Sørensdalen is a partner at Kvale Advokatfirma DA. She gives legal aid to some of the largest banks in Norway in the area of banking and finance, insolvency regulation, refinancing, credit assurance and credit recovery. Furthermore, she assists clients with restructuring, and is also frequently appointed as bankruptcy administrator by the Oslo Bankruptcy Court. In this way, Sørensdalen has experience looking at a case from both sides of the table when working with refinancing, restructuring and debt recovery. She regularly holds lectures for Norwegian lawyers and financial institutions, and she is highly ranked both in Norwegian and international rankings, quoting from Chambers and Partners: "Sources admire the 'outstanding and very efficient' Steine Sørensdalen, who has developed an impressive reputation in the insolvency field. 'She is one of the brightest talents I have ever seen at such a young age,' enthuses one interviewee."

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Tronshaug has an LLB 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 wrote her master's thesis on European cross-border insolvencies.