A&O SHEARMAN

Restructuring across borders
Norway

CORPORATE RESTRUCTURING AND INSOLVENCY PROCEDURES | APRIL 2025

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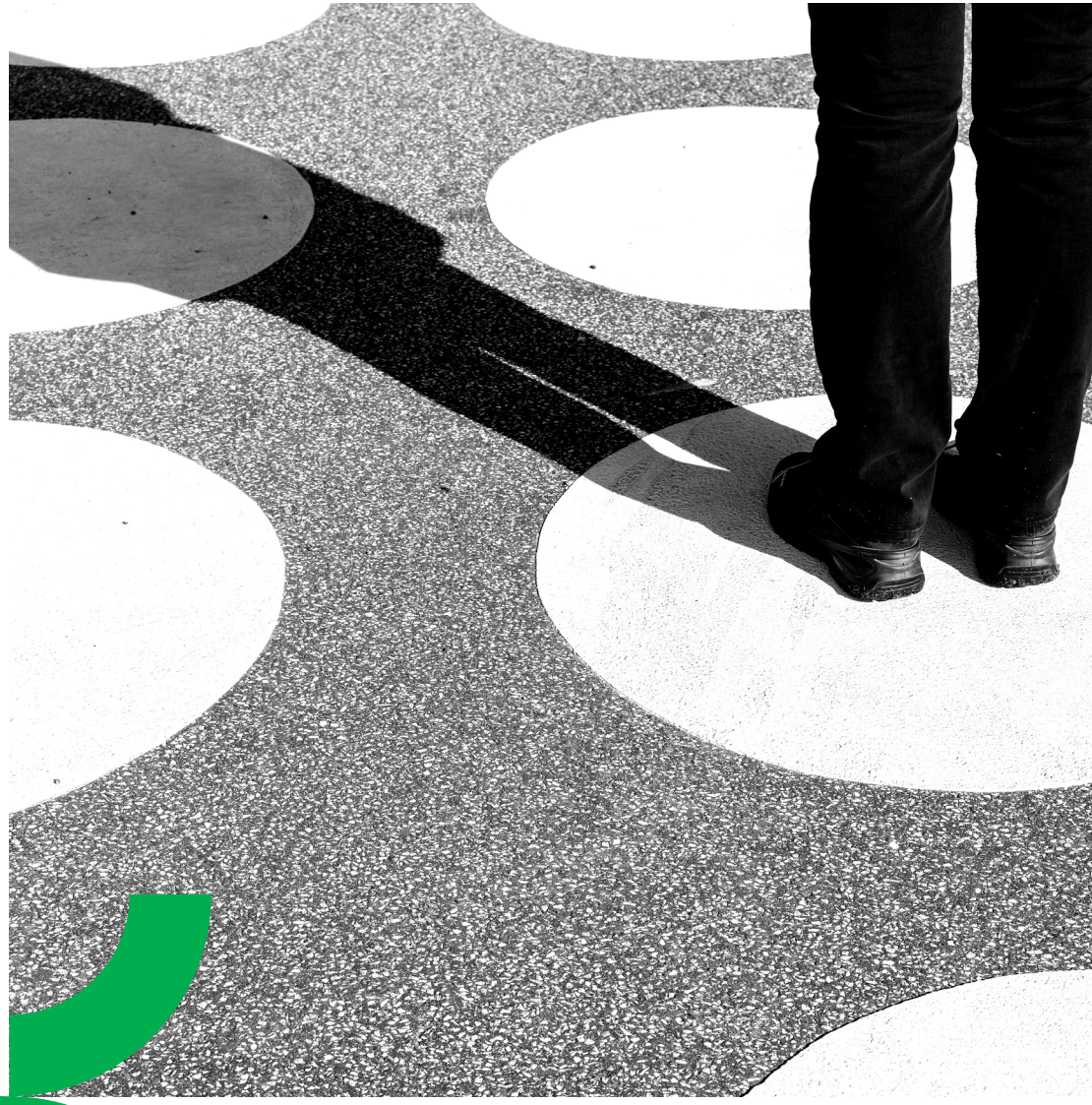
Introduction



In Norway there are in principle two in-court procedures; (1) outright bankruptcy, which in reality is a liquidation of the company, and (2) a reconstruction, either with a voluntary plan that requires unanimity, or a cram-down which requires the support of creditors representing at least 50% of claims granting voting-rights. Oftentimes, however, restructurings are handled out-of-court and include a consensual restructuring agreement with the key financial creditors.

Reconstruction proceedings may be opened by the court if the debtor is or will in the foreseeable future be in serious financial difficulties and is an alternative for companies with sufficient means to fund such a proceeding while the company's business operations continue in parallel. This in contrast to bankruptcy proceedings, which should be opened if (i) a company's debt is higher than the value of its assets, (ii) there are no funds to cover ongoing obligations as they fall due for payment, and (iii) the situation is not considered to be temporary.

Norway is party to some multilateral conventions which regulate, among other things, cross-border bankruptcy proceedings, including the Nordic Bankruptcy Convention. Norway is however not a part of the European Union (the "EU") and is hence not directly bound by EU regulation.

A voluntary liquidation process of a private limited company is available and regulated by the Companies Act. A voluntary liquidation process requires, among other things, that all the company's creditors are covered in full. We will therefore not elaborate on this process in the following.

Reconstruction

1.1 GENERAL OUTLINE AND CONDITIONS FOR OPENING RECONSTRUCTION PROCEEDINGS

The Reconstruction Act came into force on 11 May 2020 and was originally intended as a temporary act providing for remedial action for financial difficulties due to the COVID-19 pandemic. The act is currently in force until 1 July 2025. Although a proposal for a permanent reconstruction act has been circulated for public consideration, no plan for its implementation has been announced. It is expected that the temporary act will be in force until a permanent solution is in place.

The Reconstruction Act provides for two types of procedures: (i) voluntary debt settlement and (ii) compulsory composition. The conditions for opening reconstruction proceedings are the same for both, namely: A debtor may file for reconstruction proceedings when it is or in the foreseeable future will be in serious financial difficulties, while a creditor must demonstrate that the debtor is illiquid, i.e. unable to pay its debt as it falls due.

When determining whether the debtor meets the conditions for opening proceedings, the court will make an assessment from the debtor's perspective. Hence, a debtor filing for reconstruction is presumed to be, or in the foreseeable future will be, in serious financial difficulties.

Reconstruction proceedings will not be opened on the basis of a creditor petition unless the debtor consents.

1.2 THE RECONSTRUCTION BODIES

Upon the opening of reconstruction proceedings, the court shall immediately appoint a reconstructor and a creditors' committee, who together constitute the reconstruction committee. The reconstruction committee shall assist the debtor during the proceedings while also safeguarding the creditors' common interests. The reconstructor must be a lawyer with experience from insolvency proceedings.

Throughout the reconstruction process, the debtor company and its board of directors will retain control over the company's operations and finances, albeit under the supervision of the reconstruction board. This implies, among other things, that the reconstruction committee shall be granted full access to the company's financial affairs and operations, and the company is obliged to comply with any directives issued by the reconstruction committee in this context.

Further, the debtor company (by its board of directors) is responsible for making a proposal for a reconstruction plan. However, the reconstruction committee shall assist the company's committee of directors with drawing up the plan.

1.3 DURATION OF THE RECONSTRUCTION PROCEEDINGS

Reconstruction proceedings initially have a maximum duration of six months from the opening date. However, the court has a discretionary authority to prolong the negotiations following an application from the reconstruction committee. During ongoing reconstruction proceedings, there is an "automatic stay" protecting the debtor from bankruptcy and debt enforcement. However, the "automatic stay" protection is not applicable to creditors whose security is subject to the Norwegian Financial Collateral Act (Nw: "lov om finansiell sikkerhetsstillelse"). These creditors (including, for example, banks and financial institutions lending on a secured basis) may collect their security despite an ongoing reconstruction process.

If the debt is not reconstructed within six months and the proceedings are not prolonged, the court will discontinue the negotiations by declaring bankruptcy unless the debtor is able to demonstrate being solvent (i.e. both having positive net assets and being able to pay its debt as it falls due).

1.4 THE RECONSTRUCTION

One of the main intentions of the Reconstruction Act is to increase flexibility compared to the former legislation on judicial debt negotiations, which did not work as intended. The content of a debt composition under the Reconstruction Act may vary, and can for instance consist of a payment extension, debt reduction and/or liquidation of the debtor's assets. A newcomer in the Reconstruction Act is that debt may be converted to equity as part of the plan, subject to approval by the shareholders with a simple majority.

While a voluntary reconstruction plan must be unanimously accepted by all the creditors affected by the proposed plan, a compulsory composition under the Reconstruction Act may be implemented when accepted by creditors representing at least 50% of the total quantum of unsecured debt with voting rights. Furthermore, there is no requirement of a minimum dividend pay-out. Creditors whose debt is fully secured are not affected by the reconstruction plan and are not eligible to vote, meaning that only unsecured creditors are eligible to vote.

The Reconstruction Act does not currently contain provisions providing for "classing" of claims, although this has been implemented in the proposal for a permanent act.

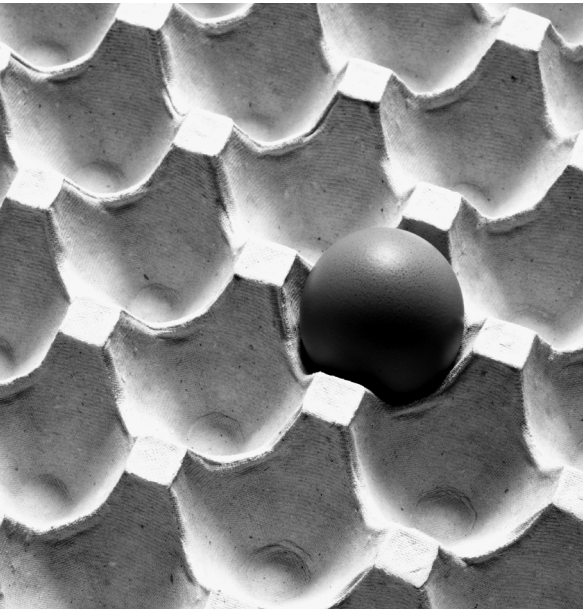
Furthermore, the Reconstruction Act allows the debtor, subject to approval by the reconstruction committee, to finance its operating costs during the proceedings. Such debt may be secured by a priority lien on certain defined assets owned by the debtor (so-called "super priority" pledges). Such debt can also be secured by a statutory lien on the debtor's already pledged assets, taking priority over other secured debt for an amount of up to 5% of each asset's value, and up to a maximum amount (currently NOK 919,800) on each asset registered in an asset register.

The courts have the authority to both overturn the reconstruction committee's approval to finance the reconstruction proceedings by loans with super priority pledges and deny confirmation of the reconstruction proposal.

Bankruptcy

2.1 FRAMEWORK

Norwegian insolvency legislation is mainly found in the Act relating to Bankruptcy of 1984 (the "Bankruptcy Act") (Nw: konkursloven) and the Creditors' Recovery Act (Nw: dekningsloven).



2.2 OPENING OF BANKRUPTCY PROCEEDINGS

If a company is insolvent and this is not of a transient nature, bankruptcy proceedings shall be opened by the court. Insolvency means that the debt is higher than the value of the assets and that available funds are not sufficient to cover ongoing obligations as they fall due for payment.

If a company is deemed permanently insolvent, the board of directors is generally required to petition for bankruptcy. There are nuances in this regard, including, among other things, if (i) creditors affected by the continued operations are informed about the situation and do not object, or (ii) the board of directors has a clear, reasonable and feasible plan to overcome the financial difficulties, bankruptcy may not be required. It is also important to note that the board of directors has a certain degree of discretion in its business judgement on how to navigate in the zone of insolvency.

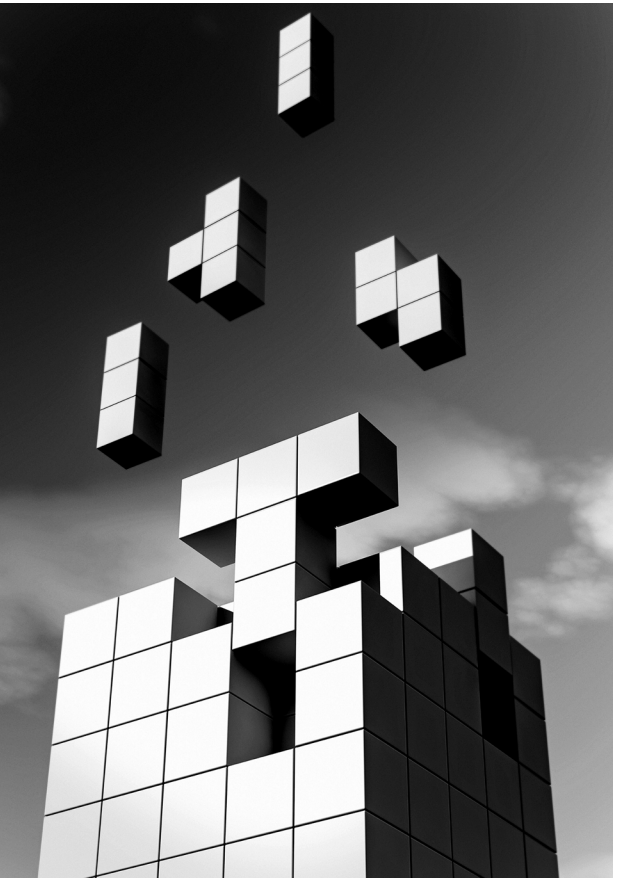
Failure to petition for bankruptcy may result in both civil and criminal liability for the board of directors and senior management.

Any unsecured creditor who has an overdue claim against the company may also petition for the debtor's bankruptcy. A creditor with security for their claim in the debtor's assets cannot petition for bankruptcy unless the claim surpasses the security.

2.3 DURING BANKRUPTCY PROCEEDINGS

The bankruptcy estate is established as a separate legal entity. The estate seizes any asset belonging to the debtor at the time of seizure, which can be sold, leased or otherwise converted into money, cf. the Creditors' Recovery Act § 2-2. This also includes any pledged assets of the debtor. The debtor hence loses control of its assets, and the board of directors becomes inoperative and is in most cases no longer authorised to act on behalf of the debtor.

Unless the bankruptcy estate sells all or part of the business operations to new owners, or the court or the bankruptcy trustee decides to (temporarily) continue some or all of the business operations, the debtor's operations will be discontinued. The debtor's contracts will normally be terminated, however, the bankruptcy estate may decide to become a party to one or more contracts. As a general rule, this right applies to all types of contracts. However, a bankruptcy estate automatically assumes the position of the debtor company in two types of contracts, namely employment contracts and tenancy agreements, unless the bankruptcy trustee, within three and four weeks of the opening of the bankruptcy proceedings, respectively, decides and expressly states to each contractual party that the estate will not do so.



2.4 REALISATION OF ASSETS

A bankruptcy estate aims to realise all the debtor's assets in the way which generates the largest income for the estate/the highest dividend to the creditors. "Assets" include all cash, bank deposits, real property, inventory, vehicles, operating assets, receivables, IPRs, etc.

The bankruptcy trustee may decide to abandon assets which cannot be realised, and/or are worth less than or equal to any encumbrances attached to them. Regular abandonment implies that the estate lifts its seizure of the asset, which reverts the legal possession of the abandoned asset to the debtor company. An alternative option for handling overly encumbered assets is to transfer the title to the asset to the pledgee. In this scenario, the pledgee is given full rights of disposal as owner and may freely decide how to handle the asset.

2.5 CLAW-BACK OF CERTAIN TRANSACTIONS

The Creditors' Recovery Act contains claw-back provisions designed to allow the setting aside of certain pre-bankruptcy (or reconstruction) transactions, based on the fundamental principle that all creditors should be treated equally. Apart from obvious exceptions, such as for secured and preferential creditors, Norwegian insolvency law is strict in its enforcement of this equality principle and a number of rules make way for invalidating transactions not compatible with that principle.

These rules aim to protect creditors and, when applicable, empower the reconstructor or bankruptcy trustee to set aside or reverse said transactions. The bankruptcy estate might pursue personal liability claims against those officers and directors who took part in decisions and transactions to the detriment of the company and/or its creditors prior to the reconstruction or bankruptcy proceedings.

2.6 CLAIMS

2.6.1 Types of claims

Claims against a debtor are generally divided into five main groups: secured, preferential, ordinary, subordinated and claims incurred during reconstruction or bankruptcy proceedings.

Secured creditors can recover their claims out of the proceeds of the sale of the assets in which they have security, and the sale may be conducted by the bankruptcy estate. Alternatively, the bankruptcy trustee may "abandon" assets by lifting the estate's seizure cf. section 2.4 above.

Preferential claims consist of certain pension and salary-related claims due for a period of up to three months before the cut off date, as well as claims for income tax, VAT and certain other government claims due for a period of up to six months before the cut-off date. In a reconstruction proceeding, such tax and VAT claims are not preferential.

Subordinated claims are claims for interest incurred after the cut off date, penalty tax and fines, gifts promised but not fulfilled, and more (cf. §9-7 of the Creditors' Recovery Act). Such claims are subordinate to regular claims.

All claims other than those described above are ordinary claims.

2.6.2 Secured creditors

Secured creditors' claims are not technically ranked with a priority, however they are preferential to the extent that such claims will be settled from the realisation of the assets in which they are secured. Any claim amount superseding the value of the assets in question will be treated as an unsecured, regular claim which may be registered as a dividend claim in the estate.

The secured creditors' enforcement will be subject to a stay or freeze lasting six months from the date on which a petition for the opening of bankruptcy proceedings was filed.
In reconstruction proceedings, the stay lasts throughout the duration of the proceeding. However, the security holder may obtain consent from the bankruptcy trustee or reconstructor to enforce their rights during the stay. For creditors whose security is subject to the Norwegian Financial Collateral Act (Nw: "lov om finansiell sikkerhetsstillelse), the automatic stay is not applicable, cf. 2.3 above.

The bankruptcy estate has various alternatives with regards to handling assets which are fully secured;

- sell the pledged asset, with full or partial coverage to the security holder. The latter usually occurs if it is beneficial for the bankruptcy estate to sell the pledged asset together with other unencumbered assets with a view to achieving a higher sales price, or if the sale forms part of a transfer of all or parts of the business operations. The pledge will follow the asset through the sale unless otherwise agreed.
- abandon the pledged asset to the debtor, which gives the lienholder a possibility to legally enforce their claim.
- transfer the pledged asset to the pledgee. A transfer of this nature requires the consent of the pledgee.

Regardless of how secured assets are handled, the bankruptcy estate has a statutory lien of up to 5% of each asset's value, limited to a maximum amount (currently NOK 919,800).
The statutory lien has better priority than all other pledges registered in each of the debtor's assets. The lien can only be claimed and used by the bankruptcy estate to cover necessary costs of the bankruptcy proceedings.

2.7 CLOSING OF THE BANKRUPTCY PROCEEDINGS

A limited liability company shall be dissolved and de-registered from the Norwegian Register of Business Enterprises upon closing of the bankruptcy proceedings. The practical effect of a limited liability company bankruptcy is that any uncovered debt will be extinguished when the company ceases to exist. A debtor only remains liable for remaining debt in the case of a personal bankruptcy, and partners in a general partnership are liable for the remaining debt in the case of bankruptcy in such a company.

Restructuring out of court

INTRODUCTION

Until Norway introduced the Reconstruction Act, almost all large restructurings were done out of court. This is still the case now after the new reconstruction rules came into effect, but we see more combinations of a consensual deal and a filing in addition to more companies than before filing for in-court reconstruction proceedings.

Two key reasons for the continued out-of-court focus are that secured creditors cannot be involuntarily bound by a reconstruction plan subject to the Reconstruction Act, and that issuance of new shares, both for cash and by conversion of debt to equity, requires the affirmative vote of the shareholders at a shareholders' meeting. In an out-of-court restructuring process, the issuance of new shares necessitates a two-thirds majority vote from the shareholders at a shareholder's meeting, whereas during a reconstruction process, only a simple majority is required. Therefore, to maintain actual control over their positions, shareholders often prefer an out-of-court restructuring process.

Given the above, a detailed analysis should be done from the get-go on what process is best suited to implement necessary changes in the capital structure to ensure a viable company emerges from the process. All the involved stakeholders will be mindful of the potential major losses they will suffer if the company goes bankrupt. This fact often has a calming effect on the various stakeholder groups in a consensual restructuring.

Based on the above, and given that the Reconstruction Act offers limited flexibility and plan structures, we expect that large companies will continue to prefer out-of-court restructurings and only dealing with key finance providers and not the creditor group at large.

Various international restructuring procedures, such as Chapter 11 (US) and Scheme of Arrangements (UK) (and similar), have been and will continue being considered additional tools or alternative options.

Key contacts

If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at A&O Shearman, or email **rab@aoshearman.com**.

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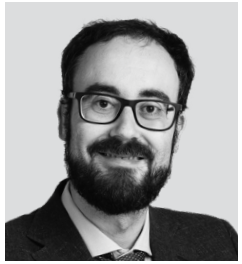

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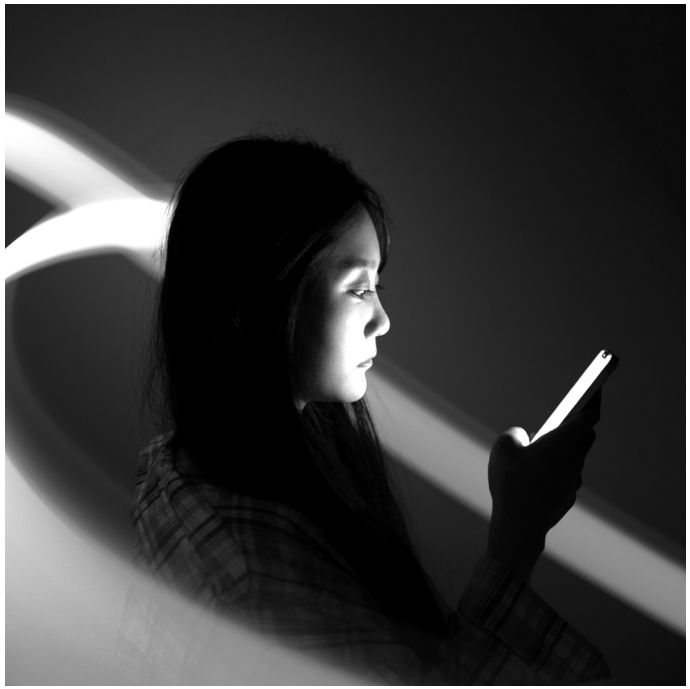
Further information

Developed by A&O Shearman's market-leading Restructuring group, "**Restructuring Across Borders**" is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, Asia, the Middle East and the U.S.

To access this resource, please **click here**.



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