



Enforcement of security interests in banking transactions

Steenstrup Stordrange has been asked by the International Bar Association to participate as Norwegian representative in a multi-jurisdictional survey regarding enforcement of security interests in banking transactions.

The total survey is available at www.ibanet.org.

Bank finance and regulation

Multi-jurisdictional survey

Norway

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Part I - types of security

1. *What are the most common types of security in banking transactions in your jurisdiction (eg, standard security package)? Please provide a brief characteristic of each type of security.*

Norwegian law requires a statutory basis for establishing a security interest. The pledge act of 8 February 1980 no 2 (the 'Pledge Act') is the legal basis for most types of security which can be established pursuant to Norwegian law. It is a general condition for establishing a security interest that the assets to be pledged are transferable, and to the extent transferability is conditional the same condition will apply to the security.

A standard security package can include security over inventory, machinery and plant (including intellectual property), vehicles and equipment, trade receivables, bank accounts, payment claims, shares and other assets such as real estate, aircraft, ships, rigs and ship building contracts.

Each security interest needs to be perfected according to the applicable requirement to have protection in case the pledgor becomes insolvent. The perfection requirement varies for different assets. Generally it is also a requirement that the maximum secured principal amount is agreed and registered in the appropriate register.

2. *In relation to the following types of assets, please provide the types of security that can be created or granted in your jurisdiction and give details of any registrations required:*

a. Real estate;

Asset based financing transactions may include security over real estate, aircraft, ships or rigs. This type of security is a fixed form of security and perfection is achieved by registering the pledge in the applicable asset register. There is a land register for Norway, two ship registers and a civil aircraft register. Standard form pledge deeds are used to register such pledges.

b. Charging assets (inventory, stocks etc);

Security over inventory, machinery and plant (including intellectual property), vehicles and equipment and trade receivables is perfected by registration of the pledge in the Norwegian register for movable property. A standard form pledge deed is used and the parties names, address and maximum secured amount is registered. These pledges typically include all the mentioned assets the pledgor owns from time to time and is a form of floating charge. The pledgor remains in possession of the assets until an event of default occurs.

c. Movables;

See b.

d. Shares;

In group financings it is common that security is taken over shares. The perfection requirement for shares in private limited companies is notice to the company which shares are pledged. For public limited companies security over shares is perfected by registration of the pledge in the securities register in which the shares are registered. The only Norwegian authorised securities register is Verdipapirsentralen ASA (VPS). Security over other financial instruments registered in the VPS is perfected by registration of the pledge in VPS.

e. Rights under contracts (receivables);

See f.

f. Bank accounts;

Security over payment claims and bank accounts are perfected by notice to the debtor. Payment claims in this context means monetary claims that have not been documented by promissory notes or registered in a securities register. Deposits in bank accounts can normally be pledged, however, it is currently uncertain if a pledge over bank accounts can be perfected if the deposit taking bank is also the secured party. The reason for this is that the perfection requirement, notice to the debtor, is considered not to be satisfactory in this case and further that this arrangement should be considered as a contractually agreed set off right instead. The main consequence of this is that in case of set off the secured party's 'security' will not cover interest due after the opening of bankruptcy proceedings. The Ministry of Justice has in September 2009 publicised a draft amendment to the Pledge Act which would entail that security over bank accounts with the secured party are perfected by written agreement and recognised as a pledge.

g. Financial instruments (eg, securities);

See d.

h. Intellectual property;

See b.

i. Plant and machinery;

See b.

j. Other assets.

See answers to a, b, d and f.

According to the petroleum activity act of 29 November 1996 no 72 (the 'Petroleum Act'), all production licenses are registered in the Norwegian petroleum register (the 'Petroleum Register'). The Norwegian Petroleum Ministry (the 'Ministry') has control of all licenses

granted on Norwegian territory. No licenses may be transferred without the consent of the Ministry.

Licenses granted by a ministry are normally not eligible for mortgaging. However, there are exceptions, and there is such an exception for licenses according to the Petroleum Act.

According to section 6-2 of the Petroleum Act a license can be mortgaged with the consent of the Ministry. The Ministry can give its consent on certain conditions. The mortgage is legally perfected through the registration in the Petroleum Register. The license may be mortgaged as a whole, or a participant in a partnership may mortgage its total part of the license.

3. Can a trustee or security agent be used in your jurisdiction, or must security be granted in our favor of all lenders? Is the parallel debt clause concept recognised in your jurisdiction?

A security agent can be used in Norway and hold the security on behalf of itself and other secured parties such as lenders in a syndicated loan transaction. The use of a trustee is not recommended as the trustee concept is not recognised and properly regulated in Norway. The parallel debt concept is not used in Norway.

4. Please explain the latest amendments to the law governing secured transactions in your jurisdiction. Are there any amendments which will be introduced in the near future (within one to two years) which might have an impact on the legal framework of secured transactions? Please also explain recent practical developments regarding secured transactions in your jurisdiction.

The Pledge Act, which mainly regulates the taking of security in Norway, has during the last years not been amended in any material way.

In 2004 a statutory lien in favor of the bankruptcy estate of a debtor was introduced in Norwegian law. The bankruptcy estate of a debtor has a first priority statutory lien over all assets of the debtor securing necessary administration costs of the estate. The statutory lien is considered perfected and valid without registration, possession or other legal requirements. This statutory lien ranks ahead of all other contractually agreed liens and is limited to five per cent of the value of the respective assets. For securities which are registered with an asset register (eg, the land registry, the ship registers (including the Norwegian international ship register), the Norwegian civil aircraft register and similar registers of rights) the statutory lien is capped at 700 times the applicable Norwegian court fee which currently is NOK 860, equal to NOK 602 000 at present. The statutory lien can be used only to cover necessary expenses in connection with bankruptcy proceedings. The statutory lien is not applicable to any security interest which falls within the scope of the financial collateral act of 26 March 2004 no. 17 (the 'Financial Collateral Act').

The Financial Collateral Act came into force on 1 July 2004. To the extent applicable this act generally increases the protection afforded to the secured party, increases the flexibility in case of enforcement and provides added certainty. The act implements Directive 2002/47/EC.

To the extent the parties to an agreement relating to financial security are financial institutions (including banks, central banks, pension schemes, securities firms, securities funds, management companies for securities funds, clearing agencies and CSDs) or between a financial institution and a legal entity the act is as a starting point applicable. It is further a requirement that the secured amount is a financial obligation and the act only applies to certain assets, namely cash deposits and financial instruments. A financial instrument is defined in the Norwegian securities trading act and includes transferable securities (including shares and bonds), holdings in securities funds, money market instruments and derivatives.

Part II - enforcement of security

1. *Please explain briefly general rules of enforcement of security indicated in answer to the Question 1 in Part I above (excluding rules in a bankruptcy or insolvency proceeding - see Question 3 below). In your answer please explain whether specific security may be enforced only through judicial proceedings or whether extra-judicial methods are also available. Furthermore, please provide estimate of costs (if they create significant obstacle in enforcement, including applicable taxes and any other duties/costs) and timing for enforcing such security. Please also explain degree of difficulty (eg, burdensome formalities, whether enforcement requires actions of a state body) in enforcing security. Also please explain whether taking security by an entity from other jurisdiction influences possibility of establishing security and its enforcement.*

Enforcement of security in Norway is generally subject to mandatory provisions included in the enforcement act (the 'Enforcement Act'). Such enforcement starts with a petition to the local district court or the execution and enforcement commissioner ('Bailiff'), followed by certain formalities and thereafter a sale by public auction or using a court appointed intermediary. Forced use of the pledged assets can also be an alternative for a limited period. The Enforcement Act states that the enforcement method to be used shall be the one which is likely to procure the highest price.

The timing involved in enforcing security pursuant to the Enforcement Act can vary between local district courts/Bailiffs. We contacted five different district courts/Bailiffs and based on the feedback we estimate that it typically takes between four and nine months to complete enforcement proceedings. However, there are timing differences also with respect to different assets and also depending on the pledgor's cooperation or opposition to enforcement. The costs involved include court fees and fee payments to intermediaries (if applicable). The buyer of real property has to pay a stamp duty of 2.5 per cent calculated on the market value of the property. The court fees are not material, approximately NOK 3 000. Fees to intermediaries are often based on the sales price achieved and range from 1 per cent to 2.5 per cent. There is no requirement that the secured party is a Norwegian entity and public approvals are usually not required.

Enforcement of security over shares which is subject to the Financial Collateral Act can be done in accordance with the contractual arrangements between the parties to the extent

this is done in a commercially reasonable manner. It is common that the secured party upon default may sell the shares in the market or take ownership to the shares subject to a valuation by for instance a securities firm or a state authorised auditor. The determined value is then set off against the secured amount. This kind of enforcement is beneficial for the secured party as it does not require involvement of the district court and it can be done swiftly. The costs in such cases would typically be fees to the securities firm selling the shares or the party producing the valuation. If the buyer of the shares gains control of the company this may require notification and approval of the transaction by competition authorities. If the company in question is a regulated entity such as a bank, insurance company or securities firm approvals from the Financial Supervisory Authority of Norway/Ministry of Finance may also be required. To the extent the company's articles of association (or this follows from the applicable companies act) require that transfers of shares are approved by the board such approval needs to be procured before the transaction can be finalised. The other shareholders may also have pre-emption rights according to the articles of association or applicable companies' law, and handling this may delay and complicate the enforcement process.

As mentioned in Part 1, 2. f, security over monetary claims is perfected by notice to the debtor. In some cases it is agreed that the pledgor shall be entitled to receive payments from the debtor until an event of default occurs. In such cases enforcement is made by notifying the debtor of the default and that discharging payment can only be made by payment directly to the secured party. Such enforcement does not involve the enforcement authority and can be done swiftly.

2. *Please explain briefly specific features (if any) of enforcement of security established over following types of assets:*

- a. *Real estate;*
- b. *Charging assets (inventory, stocks etc);*
- c. *Fixed charge over movables;*
- d. *Shares;*
- e. *Rights under contracts (receivables);*
- f. *Bank Accounts;*
- g. *Financial instruments (eg, securities);*
- h. *Intellectual property;*
- i. *Plant and machinery;*
- j. *Other assets.*

See answers to 1 above.

In case of a pledge of petroleum licenses the Ministry may in advance consent to a forced sale or forced use according to the Norwegian Enforcement Act to take place without any change in the terms of the license. Such prior consent may ease any enforcement later on and increase the value of the mortgage.

3. *How does commencement of bankruptcy or insolvency proceedings influence the rights of the security holder to enforce its rights? In bankruptcy or insolvency proceedings, what are the suspect periods, is claw-back possible, and what other types of rights (tax debts, employees, etc) have preference over security granted? Please explain briefly specific features (if any) of enforcement of security established over following types of assets in a bankruptcy or insolvency proceeding:*

- a. Real estate;*
- b. Charging assets (inventory, stocks etc);*
- c. Fixed charge over movables;*
- d. Shares;*
- e. Rights under contracts (receivables);*
- f. Bank accounts;*
- g. Financial instruments (eg, securities);*
- h. Intellectual property;*
- i. Plant and machinery;*
- j. Other assets.*

For a period of six months from the opening of insolvency proceedings (bankruptcy or debt settlement proceedings) enforcement of security is generally subject to the consent of the bankruptcy estate or the debt settlement committee. There are practically important exceptions from this rule. Consent is not required for enforcement of monetary claims as this is done without the involvement of the enforcement authority. Security arrangements covered by the Financial Collateral Act can also be enforced at any time without the consent of the bankruptcy estate or debt settlement committee.

There are a number of preference rules which can invalidate security agreements. Practically important is the rule applying to security for old or existing debt. This means that if security is established less than three months before the trigger date and the security was established for previously unsecured debt, or not perfected promptly after the debt was incurred, the security shall be set aside as invalid. There are a number of other preference rules applicable to transactions in the 3 month period preceding the trigger date, and such transactions can be invalidated based on mainly objective criteria. Norwegian law also includes a fraudulent preference rule which applies for a period of up to ten years. As a main

rule the 'trigger date' is the date when the application for debt settlement proceedings was received by court or the date when the application for bankruptcy which is opened was received by court.

Norwegian bankruptcy legislation includes provisions ranking the claims of creditors. The following unsecured claims rank ahead of the ordinary unsecured claims: estate costs and expenses, costs incurred whilst the debtor was subject to debt settlement proceedings, salary claims (with exceptions), certain taxes due to the state or local communities, tax deductions, VAT and social security payments, provided certain conditions are applicable.

The statutory lien mentioned in Part 1, 4, ranks ahead of contractually agreed secured claims. The same applies to certain other statutory liens within the maritime, aviation and real estate sectors.

In case of petroleum licenses a license may be revoked by the Ministry if the company, or other association holding the license, is dissolved or enters into debt settlement proceedings or bankruptcy proceedings.

4. Are there any specific features or problems of enforcement proceedings if the security is granted to a trustee or security agent or the parallel debt structure is used?

As mentioned the parallel debt structure is to our knowledge not used in Norway. In syndicated transactions it is normal that one of the lenders acts as security agent on behalf of itself and the other lenders. The security agent will in these circumstances be registered in the applicable register as the sole secured party.

Certain procedural rules may require that all the secured parties are named in the enforcement petition and other applicable enforcement documents. In recent court cases involving Norsk Tillitsmann ASA (the party acting as trustee in the Norwegian bond market), the courts determined that the trustee could not legally represent the bondholders. The standard loan documentation in the Norwegian bond market states that collection and enforcement of bond debt shall be carried out by the loan trustee and that the bondholders may not take legal action separately. However, both the Oslo Court of Execution and Enforcement and the Borgarting Court of Appeal rejected this referring to that Norsk Tillitsmann ASA was not the ultimate creditor of the issuer. According to section 1-3 of the Norwegian Civil Disputes Act of 17 June 2005 no. 90 the party bringing an action before a Norwegian court must establish a genuine need for having the claim determined against the respondent. Importance shall be attached to the relevance of the claim and to the connection of the parties to the claim. Even though there are several practical and other reasons for having a trustee, the courts were of the opinion that the trustee did not fulfill the requirements of section 1-3, and that a separate statutory basis is required in order for the trustee to have legal capacity to act on behalf of the bondholders. The decisions will also affect any other companies acting as loan trustee in Norway. Norsk Tillitsmann ASA has appealed the decision to the Norwegian Supreme Court. A decision from the Supreme Court can be expected in April 2010.

The Ministry of Finance has, on the basis of the uncertainty created by the mentioned decisions, asked the Financial Supervisory Authority of Norway to prepare draft legislation which will clarify that a trustee acting for the bondholders shall be entitled to act on their behalf in legal proceedings.

5. *Please explain the latest amendments to the law governing secured transactions in your jurisdiction in relation to a bankruptcy or insolvency proceeding. Are there any amendments which will be introduced in the near future (within one to two years) which might have impact on the legal framework of the enforcement of secured transactions in the light of insolvency law? Please also explain recent practical developments regarding secured transactions in your jurisdiction in relation to insolvency law.*

See part 1, 4

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