Key comparisons of security in England and Finland

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The creation of perfected security is fundamental to any lender who provides secured financing. In this changing business environment where lending and borrowing is becoming increasingly global involving multiple jurisdictions, it is vital to synchronising as far as possible the legal framework of the various jurisdictions to create a seamless security package.

The typical security package in any project financing could include:

1. fixed charge over real property;
2. all pervasive floating charge;
3. shares pledge;
4. charges over bank accounts;
5. assignment of the contractual rights under various project documents (eg. offtake contracts, insurance receivables, hedging contracts);
6. completion and payment guarantees; and
7. direct agreement with key project contractors.

This short note aims to examine some key differences between English law and Finnish law when perfecting and enforcing certain security interest commonly used in project financing transactions and the Finnish requirements for taking and perfecting security over mining rights.

Fixed Charge

Under English law, according to the Law of Property Act 1925, a fixed charge over land is created by way of a legal mortgage. To perfect this security, typically, the lender’s lawyers will have carried out a pre-completion priority search at the Land Registry that gives a priority period of 30 days.1 If registration of the mortgage at the Land Registry is not completed within this priority period, then the mortgage would be subject to any other mortgage that might have been filed in that period. Additionally, the charge has to be registered at Companies House in accordance with Section 395 of the Companies Act 1985.

A real estate mortgage in Finland is established by applying for a court registration of mortgage notes in respect of the piece of real estate in question and registering this with the Register of Land Ownership and Mortgages. The relevant mortgage notes are then transferred to the pledgee as evidence of the security. Unlike English law registration where the mortgagor can preserve its priority for 30 days from the date the priority search was conducted, in Finland the order of priority is determined by the date of registration.

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1 Rules 131 and 147 – 149, and Registration Act 2003
Under English law\(^2\), the procedure for enforcement of security over immovable property such as land and buildings can be achieved without administration by a court of law by:

1. appointing a receiver for the property;
2. taking possession of the property; or
3. enforcing the power of sale or foreclosure.

The mortgagee cannot enforce the security in Finland without a decision from the court of law and the property must be sold through a public auction carried out by an execution officer. The pledgee is allowed to take part in the auction and the asset will be sold to the highest bidder.

**Floating charge**

Under English law, a floating charge is a charge on a class of assets of a shifting nature. The hallmark of a floating charge is that the chargor retains control of the charged assets to the extent it remains entitled to deal with those assets in the ordinary course of its business without further consent of the chargee. Such floating charges automatically crystallise not only on the appointment of a receiver or the commencement of winding up but immediately upon the company ceasing to carry on business as a going concern\(^3\). Future assets can be subject to a floating charge. The charging instrument must be registered with the Companies House within 21 days from the date of creation of such charge\(^4\).

In Finland, the market practice is for a floating charge to be established by registering the floating charge promissory note for a definite amount in the Register of Floating Charges that forms part of the Business Mortgage Register maintained by the National Board of Patents and Registration (NBPR). The floating charge can be submitted for registration by the borrower or a representative authorised by the borrower (such as the lender). As a general rule under Finnish law, a floating charge gives security interest over the movable property belonging to the pledgor's business and does not give security interest over real property or assets over which a mortgage can be registered. Following the establishment of the floating charge, it is perfected by entering into a pledge agreement and delivering the promissory note to the lender. The pledgor is then forbidden from pledging such property and any such pledge is not binding on the floating charge holder, except for securities and receivables. Where there are several registered floating charges, the order of priority is determined by the date of registration. The pledgee cannot enforce his right under the floating charge on his own but the property may only be realised by an execution officer through public auction.

The realisation under Finnish law requires that the pledgee has a judgment concerning the payment obligation of the pledgor. A floating charge lender may only recover 50% of the enforcement proceeds and the remainder is divided between all creditors.

**Bank Accounts**

Under English law, a charge over the bank accounts can either be a fixed charge or a floating charge depending on the extent of control that is exercised by the lender over the proceeds in the account. In Finland, a pledge over a bank account or bank receivables

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\(^2\) Section 101 of the LPA 1925


\(^4\) Section 396(1)(f) of the Companies Act 1985
is established by notification to the bank and such a pledge may not be valid unless it
is a blocked account i.e.: the pledgor is prevented from accessing the bank account. In
connection with the notification to the account bank, the account bank should undertake
not to exercise any right of set-off against the pledgor in respect of the assets on the
relevant bank account. Enforcement may take place without a public authority simply
by the pledgee collecting the amount from the account (similar to English law).

Receivables

In England, lenders can take an assignment of rights under a contract as security such
as a charge over the book debts. Such charges include present and future assets and are
perfected by registration at Companies House and an appropriate notice being given to
the counter-party. Under the rule in Dearle v Hall, the priority of charges or assignments
over choses in action is governed by the date of notice to the counter-party unless the
subsequent mortgagee had actual or constructive notice of the prior security at the time
the money was lent or charge obtained.

In Finland, only existing receivables can be pledged as security through written notice
to the debtor. The traditional view that future (unearned) receivables cannot be pledged
under the so-called "earnings principle" has been watered down by a recent Supreme
Court ruling which indicates that future receivables can, at least in some circumstances,
be pledged if they can be sufficiently identified at the time of the pledge. A general
assignment of rights under a contract does not exist under Finnish law.

Similar to English law, an enforcement may take place without a formal procedure by
the pledgee simply collecting the debt under the receivable.

Mining Rights

Under Finnish law, the pledge of a mining concession is registered by noting the pledge
on the original mining certificate and by registration of the pledge with the Mine
Register maintained by the Ministry of Trade and Industry. The mining certificate is
then transferred to the pledgee as evidence of the security interest held by the pledgee.

There are no specific statutory rules concerning enforcement of the pledge of mining
concessions. The pledgee is always entitled to apply for a judgment and execution against
the pledgor. It may, however, also be possible for the pledgee to sell the pledged mining
concession on his own motion without first bringing court proceedings.

According to the Finnish Mining Act 1965, a transfer of the mining concession must be
notified to the Ministry of Trade and Industry for registration in the Mine Register. In
connection with the transfer notice, the transferee must present a clarification that he is
authorised to stake a claim to a deposit.

Pursuant to the Mining Act, natural and legal persons with residence within the EEA
are authorised to stake a claim to a deposit. The Ministry of Trade and Industry may give
permission also to other natural or legal persons to carry on mining activities. This may
be relevant when considering the potential buyers in connection with the enforcement
of the pledge through sale of the mining concession.

5 (1823-28) 3 Russ 1.
Conclusion

Finnish law explicitly prohibits a contract provision according to which the pledgor would automatically forfeit the pledged asset upon occurrence of a specific event. Hence, Finnish law does not allow direct seizure of the pledged assets without a private or public enforcement process. Similar to English law, in Finland upon any enforcement of a pledge, the pledgee has a duty of loyalty to the pledgor, entailing inter alia the obligation to realise the relevant asset to the highest possible amount. There is also a general requirement to return to the pledgor any surplus if the enforcement brings more proceeds than the amount of the debt for which the pledge was given.

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