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New legislation paves the way for mining pledge in Finland¹

Introduction

Pursuant to recent mining legislation reform, the new Finnish Mining Act (621/2011) (the 'Mining Act') together with certain decrees has been introduced in Finland. The Mining Act entered into force on 1 July 2011 and revoked the previous Mining Act of 1965. It is further expected that the new Finnish Mining Decree (the 'Mining Decree'), which includes among other things more detailed pledge provisions, will enter into force in May 2012 at the latest.²

From the financing perspective, of particular interest in the Mining Act and the Mining Decree are the provisions on pledges over both mining permits and exploration permits (collectively mining pledges). As one of the new features, such provisions allow the grant of both first and second ranking mining pledges, which may be practicable, for instance, in large mining projects involving both bank and debt capital financing. Further, pursuant to the revised provisions, the previously experienced uncertainties in respect of the establishment of an effective mining pledge have been overcome. Generally speaking, the mining pledge can nowadays be considered as an effective and bankable security.

Rights covered by the mining pledge

As background, the Finnish mining legislation follows (instead of a concession or land owner system) a system based on exploration permits (previously claim rights) and mining permits (previously mining rights). An exploration permit allows its holder to exercise ore prospecting in the given area and priority in obtaining a mining permit. The mining permit, on the other hand, allows its holder to extract ore or minerals from the ground and thereby receive title to them. Generally, the relevant rights under both an exploration permit and mining permit are considered proprietary rights that may, among other things, be transferred or pledged to a third party.

It should be noted that the mining and claim rights established pursuant to the previous Mining Acts of 1965 and 1943 remain in full force and effect despite the latest reform. The same applies to the previously established mining pledges over such rights. In broad terms, the legal effects associated with such rights are very close to the ones associated with the new mining and exploration permits.

Further, the Mining Act allows the pledging of both mining and exploration permits and previous mining rights pursuant to the new provisions. Although the wording of, or the preparatory works to, the Mining Act do not support such interpretation, it may, following the stipulation under the Mining Act of 1965, be argued that the purpose of the new act has not been to exclude the possibility of pledging previous claim rights also pursuant to the new provisions.

Although the relevant provisions of the Mining Act and the Mining Decree are rather comprehensive, issues relating to, for example, the enforcement of a mining pledge and the legal relationship towards third parties are to be solved following the general rules and principles of Finnish law.

Establishment

Pursuant to the Mining Act, a mining pledge is perfected by a notification to the mining official, nowadays being the Finnish Safety and Chemicals Agency (Tukes). The notification needs to be made by the pledgor (ie the holder of the relevant permit or right) and following rather detailed requirements under the Mining Decree. A copy of the relevant pledge agreement or undertaking needs to be attached to the notice.

It is also worth mentioning that the perfection under the Mining Act of 1965 was understood to be based on registration of the pledge in the mining register, although some concerns were raised in respect of the notes evidencing mining and claim rights (*kaivos- ja valtauskirjat*). Since the Mining Act does not recognise such notes, they no

longer play any role in, for instance, the transfer of title or pledging of the mining or claim rights (or the mining or exploration permits under the new act).

The new statutes allow the establishment of multiple mining pledges with different rankings. The secured amount under a pledge may be limited to a certain amount (in euro or other currency), thereby allowing the pledgor to, for example, grant a first ranking pledge for bank financing and a second ranking pledge for debt capital financing. As a curiosity, both the first and behind ranking pledges are perfected by means of the pledgor notifying the mining official of the relevant pledge. However, in case of a behind ranking pledge, the pledgor is obligated to make a notification to the pledgees of the ahead ranking pledges also.

Changes in ranking and legal protection of the pledgees

The ranking of mining pledges may be easily changed by a notice to the mining official provided, however, that the pledgees of the ahead ranking pledges give their consent to such change. A pledgee may also transfer its pledge to a third party without the consent of the pledgor, the other pledgees or the mining official.

Thanks to the Mining Decree, it may be stated that a considerable improvement in the legal protection of the pledgees is about to take place. Pursuant to the decree, the mining official has an obligation to notify each pledgee separately of any pending cancellation or changes involving the underlying permit or right. The pledgees have accordingly a right to be heard in the process, which means in practice that the mining official must grant the pledgees a reasonable time to provide their statements in the matter. Further, pursuant to a specific provision of the Mining Decree, a cancellation of the underlying permit or right applied by the pledgor himself is always subject to the consents of the pledgees.

Enforcement

The Mining Act and the Mining Decree include no provisions on the enforcement of a mining pledge. However, following the general rules and principles outlined in the Finnish Commercial Code, a pledgee

does have the right to enforce the pledge by himself even in the case of bankruptcy of the pledgor. The enforcement may be carried out by the pledgor by selling the relevant rights under the permit (in practice, by transferring the permit) to a third party or under certain circumstances by redeeming such rights. Both the sales price and the redemption price are subject to the general requirement of fidelity and should be carefully considered beforehand. Depending on the applicable terms of the pledge agreement or undertaking and the possible insolvency proceedings of the pledgor, certain additional requirements (such as notifications to the pledgor or its bankruptcy estate) may need to be followed also.

Further, it should be noted that the transferee of a permit or right under the pledge needs to qualify as entrepreneur pursuant to section 73 of the Mining Act. The transfer needs to be notified to and consented by the mining official that may, however, refuse to give its consent only in very exceptional circumstances set out in the Mining Act.

Other issues

Although the mining pledge may nowadays be characterised as a bankable and very feasible security, attention should be given to other related security issues. In particular, if the mining activities are carried out on a land owned by a third party and without a transferrable lease right to such land, a mortgage over the relevant real property or lease right may not be used as security. It is further possible that a third party may obtain title to the movable assets originally owned by the relevant entrepreneur and built or transferred to the property for the purpose of carrying out the mining activities (such as buildings and the elevator machinery of the mine) even if such assets were subject to a floating charge registered against the assets of the entrepreneur.

Notes

- 1 The author has been engaged in the preparation of the discussed new mining legislation.
- 2 This article is based on the draft Mining Decree dated 19 December 2011. The provisions of the final decree on mining pledge should follow such draft in all material respects (information received from the Finnish Ministry of Employment and the Economy on 8 March 2012).