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in 28 jurisdictions worldwide

2014

Contributing editor: Joseph Philip Forte



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Contributing editor

Joseph Philip Forte
DLA Piper LLP (US)

Publisher

Gideon Robertson

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Lydia Gerges

Senior production editor

Jonathan Cowie

Senior subeditor

Caroline Rawson

Subeditor

Anna Andreoli

Director

Callum Campbell

Managing director

Richard Davey

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Fax: +44 20 7229 6910
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Norway

Belinda Taranger Ingebrigtsen, Knut Prestvik and Frode Olsen

Kluge Advokatfirma DA

GENERAL

1 Legal system

How would you explain your jurisdiction's legal system to an investor?

The Norwegian legal system is a civil law system.

The principle of freedom of contract is strong in Norway. There are normally no requirements as to form when entering into a contract, and oral contracts are thus as binding as written contracts.

The Norwegian courts follow the principle of free evaluation of evidence. There is a legal principle of fairness in order for a contract or an individual clause to be binding, and unreasonable contracts and clauses may be set aside. However, the rule has limited application in business transactions where the bargaining positions of the parties are generally deemed to be equal.

An injunction may in certain cases be obtained before the courts to deal with urgent issues. Arrest of property and other temporary precautionary measures may be ordered and enforced by the courts and the execution and enforcement authorities.

Norway is not a member of the European Union, but is a member of the European Economic Area (EEA). Other members are the EU member states, Iceland and Liechtenstein. Much of the harmonised EU legislation is implemented in Norwegian law as a result of the EEA Agreement.

2 Registration and recording system

Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

Norway has a national system for registration of land called the Norwegian Mapping Authority's Land Registry. In this Registry, titles of ownership, encumbrances, securities, third-party rights etc, are registered linked to the specific lands registration number. Registering transfer of ownership, securities etc, is not mandatory. Failure to register a transaction may, however, result in the non-registered transaction or encumbrance being ranked below interests that are already registered and also behind registrations made afterwards. The non-registered transaction may thus be extinguished. While the non-registered transaction will still be enforceable inter partes, the third party who has registered his or her right(s) will often be given priority (registered rights are given priority according to the principle of 'first in time best in right', unless priority is waived). Therefore, save for where the agreement of purchase, lease, security etc, in itself is voided, registration in the land register will guarantee a right for the purchaser, lessee or security holder against any competing right not already registered at the time of registration.

3 Registration and recording

What are the legal requirements for registration or recording of conveyances, leases and real estate security interests?

Registration of conveyances, leases, securities etc, is done by submitting the relevant original document with the necessary signatures to the land registration office, which will inspect and register the document in the public land registry.

The most relevant applicable fees are a registration fee for securities, titles, leases etc currently set at 1.06 kroner, and for transfer of property or title, a tax of 2.5 per cent of the market value of the property, both to be paid by the purchaser.

Due to the 25 per cent tax on transfer of real estate, many of the larger commercial properties and buildings are owned by single purpose companies, which contrary to the property itself may to a large degree be transferred tax-free. As the property in this case does not change owner, no changes are made in the land registry, and the taxes described above are therefore not relevant.

4 Land records

What are the requirements for non-resident entities and individuals to own real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

As a main rule buying real estate in Norway requires that the buyer is given a licence. The exceptions are so comprehensive, however, that in practice the requirement to obtain a licence mainly applies to agricultural properties, some residential properties in certain areas and also larger land areas. There are in general no further provisions requiring foreign nationals to have specific licences regarding ownership or leases.

If an investment is carried out through a Norwegian legal entity, the regular reporting and compliance obligations for the chosen legal entity will apply, including applicable accounting and audit requirements. A foreign investor investing directly in Norway without the use of a Norwegian legal entity may become liable to Norwegian tax and associated reporting and compliance obligations.

Independent service providers are available who can take care of the reporting and compliance obligations, including tax and VAT reporting. It should be noted that penalties and interest charges on incorrect or incomplete tax and VAT reporting are harsh.

The incorporation of a Norwegian limited liability company is straightforward and may often be completed in a matter of days. Shelf companies are available, but not widely used due to the ease and speed of incorporation.

The incorporation of a partnership is more complex, normally more time-consuming and centred on the partnership agreement that the partners have to conclude.

As mentioned above, a Norwegian limited liability company is subject to Norwegian corporate tax on its net income, taxable at a

rate of 28 per cent (reduced to 27 per cent in the proposed National Budget for 2014).

It should be noted that a restriction on tax deductibility for individual entities within a group has been introduced in the 2014 National Budget presented by the resigning socialist coalition on 14 October 2013. Under these rules, the interest deductibility for tax purposes for intra-group loans may be restricted if the total interest cost exceeds 30 per cent of a 'tax EBITDA' on a single-entity basis. It is not clear whether the new conservative coalition will retain this legislation.

Norway has an exemption method for tax purposes that is summarised below without providing the level of detail that may be required for assessing the suitable structure of a specific investment case. The exemption method applies to Norwegian limited liability companies and certain other entities investing in EEA limited liability companies, etc. In addition, certain qualifying investments outside the EEA may qualify (over 10 per cent, over two years) provided the jurisdiction in question is not a low-tax jurisdiction.

With effect from 2012, capital gains from disposal of qualifying participations are fully exempt from taxation at the hands of a Norwegian limited liability company, etc.

Dividends received by a qualifying recipient from a qualifying entity in the EEA are in most cases only subject to a 0.84 per cent Norwegian tax (proposed reduced to 0.81 per cent in 2014). Similar rules also apply to certain distributions from a partnership. An exemption may from 2012 be available in groups with more than 90 per cent ownership.

No dividend withholding tax is due on dividends paid to limited liability companies and so on resident within the EEA.

The Norwegian tax exemption rules usually make a (profitable) sale of shares or a participation in a partnership more favourable from a tax perspective than the sale of real estate itself. A careful review of the structure and intended future use of the real estate is necessary to ensure an appropriate structure from a commercial, legal and tax point of view.

The regulations on corporate restructurings in Norway are flexible, including restructuring on a tax-free (rollover) basis, especially as far as demergers are concerned. Demerger of real estate into single-purpose entities owning one estate each is common. Nevertheless, it should be noted that, under Norwegian tax legislation, the application of measures against predominantly tax-motivated restructurings is generally more aggressive than in many other jurisdictions.

5 Exchange control

If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

There are no exchange control issues for non-residents investing in Norwegian real estate or in entities owning real estate in Norway, even if profit is repatriated. However, strict statutory corporate rules on distribution of dividends and other funds must be complied with.

6 Legal liability

What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

Liability in Norway for tort and compensatory damages generally requires proof of negligence. However, a more far-reaching basis for liability has been introduced in recent years, whereby a party can be liable for losses that occur as a result of events that are within his control.

The Pollution Control Act stipulates a strict or no-fault liability for environmental damage.

7 Protection against liability

How can owners protect themselves from liability and what types of insurance can they obtain?

Protection from liability may be obtained by buying insurance. Insurance can cover many of the most common situations in which liability may be imposed. For insurance regarding environmental damages, see question 25.

It is common to include contractual limitations on third-party claims in both lease and sales contracts. However, consumer protection legislation may restrict the right to impose such contractual limitations in a tenancy relationship. The parties cannot normally contract out of liability for loss caused by gross negligence and intent.

Indirect ownership through a limited company will in most cases protect the owner from third-party claims.

8 Choice of law

How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

Disputes in international matters may only be brought before the Norwegian courts if the facts of the case have a sufficiently strong connection to Norway. Norway follows the domicile principle and, as a result, the domicile is the connecting factor for choosing the applicable law in the matter.

Norway is a party to the Lugano Convention, which is directly applicable as Norwegian law. All the EEA countries apart from Liechtenstein are parties to the convention. The Convention has detailed rules assigning jurisdiction for the dispute to be heard, and governs the recognition and enforcement of foreign judgments.

Norway is party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which requires courts of contracting states to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement.

Norway has no multilateral or bilateral agreement with the United States on the recognition and enforcement of court judgments, and US entities should therefore be aware that a decision from their courts will have no effect in Norway and vice versa. Decisions of US arbitral tribunals are, however, enforceable in Norway through the New York Convention.

Norwegian law permits the parties to a large extent to agree on both an appropriate venue and the choice of law in contracts.

9 Jurisdiction

Which courts have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

The court system in Norway consists of district courts, courts of appeal and the Supreme Court.

The venue is regulated in the Dispute Act. The Act provides that real property actions may be brought in the judicial district where the real property is situated. If the property is situated in more than one judicial district, an action may be brought in each of the districts. Actions relating to contractual relationships may be brought at the place where the obligation upon which the action is based has been performed or is to be performed. If no venue can be established pursuant to the relevant sections of the Dispute Act, but the case is still subject to Norwegian jurisdiction, an action may be filed with the Oslo City Court.

A judgment is only binding between the parties, so that the parties to the dispute must be parties to the action for enforcement

reasons. However, the parties are not always required to appear before the court in person.

A party need not be qualified to do business in Norway in order to enforce remedies.

10 Commercial versus residential property

How do the laws in your jurisdiction regarding real estate ownership, leasehold and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

The rules on ownership, financing and enforcement are essentially the same for commercial and residential properties.

For residential properties there are, however, some unalterable rules in place to safeguard the lessee, especially relating to termination of the lease and rent adjustments.

In 2012, the Financial Supervisory Authority of Norway also introduced a rule for private housing loans, stating that banks may not lend out more than 85 per cent of the purchase price, requiring the borrower to have at least 15 per cent of the equity required.

11 Planning

How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

There are several levels of zoning regulation, which allow or forbid different forms of development regarding new as well as existing structures and land usage, in different degrees of detail. Paramount area plans outline the desired development of the area, while more detailed zoning plans may be suggested either by government officials or private parties (though the municipality must approve any plans suggested by private parties), regulating the allowed uses of specific areas.

Additionally, new construction works (presuming that these adhere to the relevant zoning plans) must be applied for and accepted by the municipality prior to any works being carried out.

12 Compulsory purchase

Does your jurisdiction have a legal regime for compulsory purchase of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

The state and municipalities, or private individuals or entities, may in certain cases, and for certain purposes, obtain land or property without the consent of the owner. Such compulsory purchase does require that a statutory provision allows for compulsory purchase, and an administrative decision must be made in this regard. The Norwegian Constitution furthermore requires that the owner receives full economic compensation, and the national courts shall determine the actual compensation to be paid. The owner may demand that the body performing the compulsory purchase shall pay the owner's legal fees.

13 Forfeiture

Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

Real estate may be seized if it has been obtained as a result of illegal action, or has been purchased with funds that come from illegal actions. If the real estate obtained through illegal action is subsequently sold to a third party, it may then, as a main rule, be seized if the third party should have known that the real estate was procured through illegal actions.

INVESTMENT VEHICLES

14 Investment entities

What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

The most commonly used legal entity for investments into Norway is a private limited liability company (AS), which requires a minimum share capital of 30,000 kroner. Public limited liability companies (ASA), which require a minimum share capital of 1 million kroner, will normally have few benefits and are seldom used in real estate structures unless the entity is listed on a stock exchange. Both private and public limited companies are subject to Norwegian corporate tax.

A number of partnerships are available. The most commonly used type of partnership for real estate is the *Kommandittselskap* (KS), which is a limited liability partnership. A KS will have a general partner, which is normally a single-purpose limited liability company (AS). The limited partners have a pre-agreed liability cap. A Norwegian partnership is not subject to Norwegian corporate tax, as the net taxable result is taxed by the partners. A non-Norwegian partner will normally have a Norwegian tax obligation as a result of its participation in the partnership.

Investors are protected against liability both as shareholders in an AS and an ASA and as a limited partner in a KS. An investor is only likely to be held liable for amounts exceeding the share capital (AS) or the pre-agreed liability cap (KS) in exceptional cases.

15 Foreign investors

What form of entities do foreign investors customarily use in your jurisdiction?

Most investors prefer to invest through a Norwegian limited liability company, an AS or occasionally through an ASA. In order to adapt to more sophisticated or tax-optimised non-Norwegian structures, various partnership structures may be used.

16 Organisational formalities

What are the organisational formalities for creating the above entities? What requirements does your jurisdiction impose on a foreign entity? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

The incorporation of a Norwegian limited liability company is straightforward and may often be completed in a matter of days. Shelf companies are available, but not widely used due to the ease and speed of incorporation.

The incorporation of a partnership is more complex, normally more time-consuming and centred on the partnership agreement that the partners have to conclude.

As mentioned above, a Norwegian limited liability company is subject to Norwegian corporate tax on its net income, taxable at a rate of 28 per cent, which should be reduced to 27 per cent from 2014.

Norway has an exemption method for tax purposes that is summarised below without providing the level of detail that may be required for assessing the suitable structure of a specific investment case. The exemption method applies to Norwegian limited liability companies investing in EEA limited liability companies, etc. In addition, certain qualifying investments outside the EEA may qualify (over 10 per cent, over two years) provided the jurisdiction in question is not a low-tax jurisdiction.

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Dividends received by a qualifying recipient from a qualifying entity in the EEA are in most cases only subject to a 0.84 per cent Norwegian tax, proposed to be reduced to 0.81 per cent from 2014. Similar rules also apply to certain distributions from a partnership. An exemption may from 2012 be available in groups with more than 90 per cent ownership.

No dividend withholding tax is due in most cases on dividends paid to limited liability companies and certain other types of entities resident within the EEA.

The Norwegian tax exemption rules usually make a (profitable) sale of shares or a participation in a partnership more favourable from a tax perspective than the sale of real estate itself. A careful review of the structure and intended future use of the real estate is necessary to ensure an appropriate structure from a commercial, legal and tax point of view.

The regulations on corporate restructurings in Norway are flexible, including restructuring on a tax-free (rollover) basis, especially as far as demergers are concerned. Demerger of real estate into single-purpose entities owning one estate each is common. Nevertheless, it should be noted that, under Norwegian tax legislation, the application of measures against predominantly tax-motivated restructurings is generally more aggressive than in many other jurisdictions.

ACQUISITIONS AND LEASES

17 Ownership and occupancy

Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

Leaseholds and ownerships are the most common categories of ownership and occupancy in Norway. With regards to residential homes and holiday homes, Norwegians to a large extent own their homes. Leaseholds are common for companies and corporations, in all sizes, though the larger corporations will often be involved in planning, construction and potentially also the sale (to an investor) of new properties that they themselves will lease or will own the office building where they operate from.

Ownership may be held by a single legal entity, or a group. Many housing cooperations are also in place, where the land and building is owned by the cooperative, and shares corresponding to specific apartments are bought and sold in the same way as ordinary titles of ownership.

While absolute ownership entitles the owner to make use of the property in any way desired (subject to public regulations; zoning plans, protected areas etc), which also entails a duty to pay public taxes and maintain the property, a lessee or any other person or company with an occupancy interest will need to limit their use in accordance with the lease or foundation of the occupancy right. A lease will typically state what the lease object may be used for (offices, industry, shop, storage etc). Furthermore it will normally state how the costs for maintenance are to be divided. Commonly in leaseholds the lessee will be responsible for standard indoor maintenance of lease object, while the lessor is responsible for outdoor maintenance, construction and necessary replacements. Responsibility for insurance is divided along the same lines, while public taxes are generally the responsibility of the lessor.

In addition to common leaseholds for (parts of) land or buildings, Norwegian law has provisions for a ground lease, which is a special form of lease where the lessee leases the ground on which he has erected or will erect his own building. This form of leasehold is most common for cottages and the like. For smaller installations (boathouses etc), a right to erect and maintain a building on another person's property may be established for an unlimited period of time, even without the ownership to the specific piece of land being transferred, as an encumbrance on the land.

Establishing benefits to or burdens on real estate is most commonly done by way of mutual agreement between the landowner and the entitled or obligated party. The right or obligation may then be registered on the servient property, see question 2.

18 Pre-sale

Is it customary in your jurisdiction to execute a form of non-binding agreement before the execution of a binding contract of sale? Will the courts in your jurisdiction enforce a non-binding agreement or will the courts confirm that a non-binding agreement is not a binding contract? Is it customary in your jurisdiction to negotiate and agree on a term sheet rather than a letter of intent? Is it customary to take the property off the market while the negotiation of a contract is ongoing?

Pre-contractual agreements can be entered into freely, and letters of intent or term sheets are often executed before entering into a final contract. Letters of intent, term sheets, and other pre-contractual agreements often set out directives for the negotiations that are to take place, and may often give the potential buyer exclusivity in addition to including provisions on confidentiality.

19 Contract of sale

What are typical provisions in a contract of sale?

There are no formal requirements for entering into an agreement for the sale of real property or companies owning real property in Norway. Contracts may be oral, although this is rather unusual.

Contracts for the sale of real property and SPEs owning real property are quite standardised. Contract negotiations will commonly be based on standard contracts, such as the Norwegian Real Estate Agents Association's standard contract for sale of shares in an SPE limited company owning real property. With the exception of smaller residential development projects, sale of a single purpose entity owning real property is more common than sale of the property itself.

There are no mandatory rules regarding the contract regulations between businesses. For the sale of residential real property (developed or under development) to consumers, however, there are mandatory regulations in the Sale of Real Property Act and the Housing Development Act.

Typical warranties given by the seller in a contract regarding sale of real property will be related to the following:

- title and ownership of the property;
- third-party rights in the property, encumbrances;
- compliance with relevant public regulations, such as zoning plans;
- orders and injunctions from authorities (including courts);
- planned development of real property or infrastructure in the neighbourhood;
- public fees;
- leases;
- VAT deductibility;
- pollution; and
- the accuracy of information provided to the buyer.

In contracts for the sale of SPEs owning real property, the following provisions are common in addition to the warranties mentioned above:

- ownership and capacity to the shares in the company;
- third-party rights in the shares;
- security interest granted to a third party for the debt of another;
- the company's operations;
- change of control provisions;
- accuracy of registered information;
- disputes or potential disputes, including tax audits;

- accounts; and
- taxes, VAT and public fees.

It is common for the buyer to perform an investigation (due diligence) of legal, financial and technical aspects of the real property and the entity owning it. The investigation may be done before or after a binding agreement is entered into.

The remedies for breach of warranty will commonly be limited to price reductions, damages and termination of the contract when the breach is material. Warranties will typically be valid for periods from six to 24 months, with the exception of warranties regarding tax, VAT and environmental issues, which commonly last up to 10 years after closing.

20 Environmental clean-up

Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

The Pollution Control Act is based on the principle that the entity that is responsible for the pollution shall also be liable for the clean-up and costs related to the pollution ('polluter pays' principle). The polluter is also under strict liability to cover social and community expenses caused by the pollution. The owner of real property is jointly liable with the polluter, regardless of whether the owner is to blame. As it can be difficult to prove who is responsible for the pollution, the owner of real property will always risk being held liable.

A lessee's liability for pollution will, according to the legislation, survive the term of a lease contract as long as it is possible to prove that the lessee has caused the pollution.

In sales contracts, the seller will typically be fully liable for contamination that is proved to have occurred before closing.

21 Lease covenants and representation

What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

The warranties regarding existing leases in a sales contract for real property will commonly cover the following issues:

- that the lease contract is valid and binding;
- the remaining term of the lease at closing;
- the lessee's obligation to cover operational expenses;
- outstanding payments and maintenance obligations; and
- deposits or warranties made by the lessees.

In a sales contract, the seller will commonly undertake not to enter into any lease contract or make any other unusual or material dispositions without the buyer's consent between the contract date and the date of closing.

When selling real property, no other contract positions other than the lease contracts will be transferred to the buyer unless otherwise agreed. The situation is of course different for sale of an SPE, which will continue to be a party to all its contracts.

Estoppel certificates are not customarily used in Norway. However, declarations from lessees will sometimes be required, for example regarding prolonging options, or in cases where the lease contract contains change of control regulations.

22 Leases and real estate security instruments

Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants?

When determining the priority between different encumbrances registered against real property, the time of registration of the encumbrance is decisive. If a forced sale is to take place due to a foreclosure, the sale may be executed only if the price obtained covers all encumbrances with a better priority. Encumbrances that are not monetary (eg, usufructs) must be taken over by the buyer unless the rights holder accepts that the encumbrance will be converted into a monetary encumbrance. A lease with priority before a mortgage will thus be protected.

There is a difference between monetary encumbrances and usufructs. The latter may remain registered on the property regardless of foreclosures, depending on the priority of the encumbrances.

A lease will often be registered as a monetary encumbrance. The same applies to some usufructs. Many banks demand subordination of usufructs so that the mortgage may obtain the best priority. Subordination is generally permitted, but requires consent from the rights holder. Non-disturbance agreements are not very common, but such agreements are permitted.

It should be noted that the Norwegian state has the right to lien by operation of law (legal mortgage) against real property as security for public taxes and so forth.

23 Delivery of security deposits

What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

If the sales object is an SPE owning the real property, it is usually not problematic to obtain the security deposits made under the lease contracts. When the property is sold, the sales contract will commonly regulate the transfer of security deposits to the buyer. It is common, but not mandatory, for letters of credit or guarantees made by the lessee's parent company or bank to be assignable. This should be investigated by the buyer before closing.

Most lease contracts require the lessee to deposit securities for its obligations under the lease contract. The security will commonly be held as a cash deposit, a bank guarantee or as a guarantee from the lessee's parent company (if the parent company's solidity is sufficient).

Lease contracts with a duration of more than three years commonly contain rent regulation clauses, which typically provide for regulation in accordance with changes in the Norwegian consumer price index. Contracts where the lessee has the right to prolong the lease contract will often, but not always, be subject to a rent adjustment to market value for the next lease period.

24 Due diligence

What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate.

The Land Register should always be explored before buying real property. An investigation of registered encumbrances is easy to perform and inexpensive. Subject to some exceptions, the Land Register has affirmative effect so that anyone relying on the register shall be placed in the same position as if the register were correct. Encumbrances registered in the Land Register will have priority above any non-registered encumbrances (save if the entitled party had information of the existence of the non-registered encumbrance prior to establishing their own interest), and the registered

encumbrances will be prioritised according to 'first in time, first in right', unless otherwise agreed between the entitled and the obligated parties.

25 Structural and environmental reviews

Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available? Is it customary to obtain a zoning report or legal opinion?

It is common for buyers, as part of their due diligence investigation, to look into structural and environmental issues, and to investigate conformity with public regulations and resolutions (eg, zoning plans). The scope and thoroughness of the investigation will depend on the buyer's intentions for buying the property.

Warranties with regard to environmental issues are common.

Environmental damage to real property is commonly covered by liability insurance. However, liability caused by pollution on the real property itself is usually not covered by any insurance.

26 Review of leases

Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Leases are commonly reviewed by lawyers as part of the due diligence process. The review will point out aspects of the contract that depart from the general principles established by legislation or from what is considered customary. Sections regarding, for instance, durability, collateral, options, maintenance, liability and discharge are thoroughly reviewed and often summarised in the report.

27 Other agreements

What other agreements does a lawyer customarily review?

All contracts and legal documents regarding the property and the use and management of it are customarily reviewed by lawyers during the due diligence. When the sales object is an entity, the due diligence investigation will also include all contracts and legal documents relating to the company involved.

28 Closing preparations

How does a lawyer customarily prepare for a closing?

A closing process usually follows the instructions agreed upon when signing the sales contract, where all conditions for fulfilment of the parties' contributions are included. A lawyer will typically prepare all documentation, verify conditions precedent, ensure that agreed refinancing of the property takes place, and that the parties' deliverables are exchanged at the same time. If the target is a company, the closing will among other things include change of share registers, issuance of a share certificate and replacement of board members.

If a lawyer is engaged as a closing agent, the lawyer will secure the property involved by registering a mortgage with a face value equal to the property value stated on the property's deed. The mortgage will include restrictions on disposal of the property without the mortgagee's consent.

29 Closing formalities

Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

Closing does not require all parties to be present at the same time. Often a broker or lawyer will take care of all necessary documentation regarding the transaction, including obtaining all necessary

signatures etc, in accordance with closing instructions agreed upon between the parties. There are standardised closing instructions that are suitable for most transactions, though it may be necessary to make adjustments depending on the specifics of the transaction.

For transfer of large real estate properties, it may be necessary to apply to the relevant municipality for permission to purchase the property.

30 Contract breach

What are the remedies for breach of a contract to sell real estate?

In case of breach by the seller, the purchaser may by way of the courts have the contract enforced, evicting the seller if necessary and having the title transferred to the purchaser. Incurred costs may also be claimed.

In case of breach by the purchaser, the seller has the option of reselling the property, and claiming damages for any loss incurred due to the new selling price being lower than the original selling price, as well as any additional expenses (broker, capital cost etc) incurred.

31 Breach of lease terms

What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply?

The Norwegian lease law contains fairly extensive rules governing the lease of real property. The law is to a large extent unalterable in relation to the lease of private housing, though for commercial properties the parties will ordinarily set out extensive regulations for the lease in the contract, deviating from the law.

Depending on the category of breach, a tenant will usually have the option of claiming a reduction in the rent. In case of defects, the tenant may demand that the defect be repaired, and potentially claim damages for costs incurred to remedy the defect if this is not done within a reasonable time by the landlord. Where a material breach has occurred, the tenant will have the option of terminating the contract, and claiming damages for any other costs incurred as a direct consequence of the breach.

A landlord will ordinarily only have the option of claiming damages (for harm to the lease object, late payment etc), and if the breach is sufficiently severe, terminate the contract.

FINANCING

32 Secured lending

Discuss the types of real estate security instruments available to lenders in your jurisdiction.

The most common real estate security is to register the real estate as collateral for the loan. This is then registered in the Land Registry, as an encumbrance on the specific property, so as to notify any subsequent lenders or purchasers, see question 2.

33 Form of security

What is the method of creating and perfecting a security interest in real estate?

The conditions for establishing security are laid down in the Mortgage Act. A mortgage on real property is created by a written contract (security agreement) between the mortgagor and the mortgagee. The contract is normally registered in the Land Register. Security in real property may also be created by registering a lease together with the machinery and plant.

The parties may also agree for the security to be granted in other assets, including shares in limited liability companies.

34 Valuation

Are third-party real estate appraisals required by lenders for their underwriting of loans? Must appraisers have specific qualifications?

Third-party appraisals are commonly used in the valuation of property, though there is no formal requirement for this to be done. Appraisals will most commonly be made by certified real estate agents with knowledge of the specific area.

35 Legal requirements

What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

There are no restrictions on non-Norwegian lenders making loans into Norway, even if the loan is secured by collateral. However, a foreign lender who on a regular basis provides financial services to Norwegian clients may be subject to regulatory or banking requirements.

There is no mortgage recording tax calculated on the basis of a percentage of the loan or similar in Norway. However, a fee of 1,935 kroner is payable upon registration of a lien in the Land Register.

36 Loan interest rates

How are interest rates on commercial and high-value property loans commonly set? What rate of interest is unreasonably high in your jurisdiction and what are the consequences if a loan exceeds the reasonable rate?

Loan interest rates are commonly set with reference to NIBOR (Norwegian interbank offered rate). There is no publicly fixed limit for interest pursuant to legislation. The loan agreement including interest can be adjusted by the court if the court finds that the interest level is unreasonably high compared with what is common for corresponding agreements. However, the courts are cautious about intervening in loan agreements made between businesses.

37 Loan default and enforcement

How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

If a debtor is in default, the contract between the parties may state to what extent non-payment or other breaches of the contract are sufficient to bring a loan to foreclosure. If the contract is silent on this point, the loan may be foreclosed and a claim for recovery made against the debtor if there is a substantial breach of the contract.

If the parties cannot agree on terms for the debtor to resolve the default, the creditor must obtain a writ of execution in order to obtain an enforceable remedy against the debtor. The act relating to enforcement of claims contains specific rules regarding restraint orders, forced sales and writs of execution.

If the parties have agreed on security prior to the default, the arranged security is deemed to be a basis for execution. In these situations, the creditor may request a writ of execution for a forced sale. The request is submitted to the execution and enforcement authority, which will handle the further proceedings. Where a prior agreement is the basis for execution, and the debtor objects to the request, the case will be transferred to the ordinary courts.

If the parties have not agreed on security, the creditor may apply to the execution and enforcement authority for a restraint order. The

creditor must present either a certificate of debt that states the debt may be recovered without an order of the court, or a court judgment in his or her favour (a decision from a foreign court is in some cases sufficient), or a document proving that the parties have entered into a judicial settlement. Other written evidence of a claim may be sufficient if the debtor does not object to the claim.

When a restraint order is granted, either on real property or on other objects, the restraint order can serve as a basis for a writ of execution for a forced sale.

38 Loan deficiency claims

Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there any limitations on the amount or method of calculation of the deficiency?

The borrower will always be liable for the full loan. Any residual amount after sale of the property offered as security may therefore be claimed from the lender directly. A guarantor may, however, never be held liable for any amount exceeding the guarantee.

39 Protection of collateral

What actions can a lender take to protect its collateral until it has possession of the property?

See questions 37 and 45.

40 Recourse

May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

The contract and the security documents normally limit the debtor's liability to the interest and repayments agreed on and also often recovery costs. Recourse is typically limited to the agreed collateral.

If the loan is secured by a guarantee from another company or person, the guarantee may lead to full recovery.

41 Cash management and reserves

Is it typical to require cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

The loan agreement will customarily include provisions regarding where the lender's bank accounts should be placed, and where the cash flow from the lease contract should be paid. Factoring agreements are permitted pursuant to Norwegian law.

42 Credit enhancements

What other types of credit enhancements are common? What about forms of guarantee?

Payments under loan agreements are often conditional on the lender having certain equity capital. Instead of equity capital, Norwegian banks usually accept a subordinated loan or a warranty from the entity's owners. Building loans will contain provisions regarding the sale of apartments or volume of lease contracts made before payment under the loan agreement is made.

Recourse carve-back guarantees are not common in Norway.

Update and trends

Norway is still managing very well compared to most other countries in Europe. The Norwegian economy is still growing although there has been some hesitation in the markets for the last year. This hesitation has for example stalled the real estate prices from the continued growth we have seen in the last few years, and has resulted in a slight price-reduction. The Norwegian unemployment rate is however still low at around 3.6 per cent, although unemployment has increased in the last year. Furthermore the prime office yield is 5.25 per cent, and the key policy rate in Norway is 1.5 per cent.

The last year the consumer price index has risen slightly more than expected, with 3.2 per cent over the last 12 months. However the Norwegian krone has deflated a bit, increasing the interest for Norwegian export wares, as well as investments in Norway.

There is also fairly good activity in the transaction market for commercial properties, as well as the market for commercial

lease contracts, though there is a tendency showing that lessee's have stricter requirements to standard and location than they have had before. In the first half of 2013 the total revenue regarding commercial real estate was approximately 21 billion kroner. Expected total turnover for 2013 is approximately 50 billion kroner.

As an election has just been held in Norway, there has been a shift in government replacing the block of political parties that have been in government for the last eight years, with two more non-socialist political parties. The new government will, according to its own statements, focus more on building properties for students, road construction etc. Furthermore the new government plans to simplify the Planning and Building Act, and will rely to a larger extent on the use of public private partnership (PPP) in order to finance and structure road construction and public buildings.

43 Loan covenants

What covenants are commonly required by the lender in loan documents? What is the difference depending on asset classes?

Typical covenants in loan agreements include compliance with laws, lease contracts and authorisations, and prohibitions against disposal of major assets, raising further loans or giving warranties to third parties. There will also usually be covenants regarding the value of the property, the insurance certificates and the maintenance of the property. Covenants with respect to ownership and structural changes in the lender are also common.

44 Financial covenants

What are typical financial covenants required by lenders?

Loan-to-value covenants are common in Norway. Debt-service coverage ratio is also a common financial covenant. Furthermore, loan documents will often contain periodic financial reporting requirements. Ongoing appraisals are unusual.

45 Bankruptcy and insolvency

Briefly describe the bankruptcy and insolvency system in your jurisdiction.

Bankruptcy is handled by the district courts, which, after opening bankruptcy proceedings, will appoint a trustee, who will be a lawyer.

During bankruptcy, all the debtor's assets are realised. Some assets are exempt from this rule, such as clothes, furniture and other personal belongings. Creditors may not collect payment in any form after bankruptcy proceedings are opened. Payments made prior to the declaration of bankruptcy may in some cases be subject to reversal. Creditors with legitimate security will be preferred upon realisation of the secured asset.

Full settlement for unsecured creditors is rare.

Debt relief is not granted after bankruptcy. Any unsettled debt must be covered by the debtor's future income. When a limited company goes bankrupt, the company will cease to exist, thus meaning that the debt will never be settled.



KLUGE

Belinda Taranger Ingebrigtsen
Knut Prestvik
Frode Olsen

bti@kluge.no
knut.prestvik@kluge.no
frode.olsen@kluge.no

Laberget 24, Hinna Park
 PO Box 277
 4066 Stavanger
 Norway
 Tel: +47 51 82 29 00
 Fax: +47 51 82 29 01

Støperigata 1
 PO Box 1548 Vika
 0117 Oslo
 Norway
 Tel: +47 23 11 00 00
 Fax: +47 23 13 92 01

Starvhusgaten 2 B
 PO Box 394 Sentrum
 5805 Bergen
 Norway
 Tel: +47 55 21 98 00
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46 Secured assets

What are the requirements for creation and perfection of a security interest in moveable property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

See question 33.

47 Single purpose entity (SPE)

Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

Lenders do not require each borrower to be a single purpose entity. Real property can be owned by companies performing other types of operations, although there is a tendency to place property in SPEs for tax and risk purposes. There is no concept of an independent director of an SPE in Norwegian law. The requirements for creating an SPE are described in question 16.

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