SWEDEN

Law and Practice

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Wigge & Partners Advokat KB

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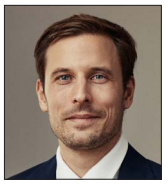

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1. Market

1.1 Debt Finance Market Performance

Transaction volumes overall decreased in 2023, with the highly leveraged (and thus interest rate sensitive) real estate sector being especially affected. Although volumes decreased quite significantly, credit losses were still generally comparably low, despite a rise in bankruptcy.

1.2 Market Players

The Swedish lending market has traditionally been dominated by domestic and Nordic banks. The lending market has however diversified in recent years and borrowers can now obtain funding from mezzanine lenders, direct lending funds and other alternative debt providers, as well as increasingly through corporate bonds. The traditional banks still hold a strong position, especially in relation to the medium risk mid-market segment, but the alternative sources of funding provide borrowers with more options than in the past.

1.3 Geopolitical Considerations

Geopolitical events like the war in Ukraine and the conflict in the Middle East have caused global instability and injected uncertainty into the Swedish market, affecting investor sentiment and transaction volumes. In 2023, Sweden experienced a recession exacerbated by global events, leading to volatility in its credit markets and rising inflation rates. Global interest rates, driven by central bank decisions, have influenced market dynamics in Sweden, impacting borrowing costs and investment appetite. High interest rates have reduced the transaction activity, particularly in the real estate market where market participants have had difficulties agreeing on property values. The Swedish bond market has suffered diminished liquidity, especially affecting the high-yield bond sector, which temporarily ceased functioning. Even top-tier bonds in primary and secondary markets experienced decreased liquidity and higher interest rates, elevating capital costs for banks and other institutions. Lenders, including banks and credit funds, adopted a more cautious stance throughout the year, resulting in documentation heavily favouring lenders. Concurrently, the COVID-19 pandemic accelerated trends such as digital transformation, influencing investment choices and transaction types. While some effects may be short-lived, lasting changes in business practices and investment strategies could persist.

2. Types of Transactions

2.1 Debt Finance Transactions

Sweden has prominent private equity and real estate sectors, which has led to acquisition finance being popular. Recently, with the industrial boom in Northern Sweden, project finance is increasingly popular. Other types of debt finance transactions (such as asset-based and securitisations) also occur but are less prominent in comparison.

3. Structure

3.1 Debt Finance Transaction Structure

Structuring debt finance transactions in Sweden is a conventional process typically involving the preparation and negotiation of key terms, followed by documentation and execution. The disbursement of funds occurs upon meeting conditions precedent. Both the borrower and lender monitor compliance with the agreed terms, with regular reporting. Repayment follows according to the agreed schedule. Legal and financial advisors play vital roles throughout the process, ensuring compliance with regula-

tions and mitigating risks. The structure varies based on factors such as the borrower's nature and market conditions, but generally involves these steps to facilitate efficient and effective financing. Moreover, important considerations when structuring debt finance transactions in Sweden relate to restrictions on financial assistance and value transfers, imposing limits on the security and guarantees which can be provided by Swedish limited liability companies.

Most common forms of bank loan facilities in Sweden include traditional term loans, providing borrowers with a lump sum of money upfront, which is repaid over a specified period with regular principal and interest payments. Other common forms are revolving credit facilities and overdraft facilities, offering access to credit with a predetermined maximum amount which borrowers can utilise as needed.

The main advantages of syndicated bank loans versus debt securities in Sweden are that syndicated bank loans offer greater flexibility in terms of structure, covenants and repayment terms. Borrowers and lenders can negotiate terms tailored to specific needs. Syndicated loans often involve a direct relationship between the borrower and a syndicate of lenders. This relationship can facilitate communication, flexibility in restructuring, and potentially better terms in subsequent transactions. Syndicated loans typically involve less paperwork and regulatory requirements compared to issuing debt securities, allowing for faster access to funds. Bank loans generally offer more confidentiality than debt securities, as details of the loan agreement may not be publicly disclosed.

The main disadvantages of syndicated bank loans versus debt securities in Sweden are that debt securities provide access to a broader investor base, including institutional investors, pension funds and retail investors, potentially allowing for larger funding amounts. Debt securities may also offer lower interest rates compared to syndicated loans, especially for high-quality issuers, as they are priced based on prevailing market rates. In addition, the terms of syndicated bank loans generally impose greater restrictions and limitations on the borrower compared to debt securities which are subject to more standardised terms and conditions offering fewer and more flexible borrowing conditions.

In Sweden, bank loan and debt securities financings attract various investors, including commercial banks, investment banks, credit funds, institutional investors and retail investors. These investors contribute to market liquidity and efficiency, with each group pursuing distinct investment strategies and risk appetites. Commercial banks and credit funds provide financing through various loan products, while investment banks facilitate debt capital markets transactions. Institutional investors such as pension funds and insurance companies seek stable returns from fixed-income securities. Retail investors, including individual investors and retail-focused investment funds, may also participate in debt securities markets, diversifying the investor base in Sweden's financial markets. They often invest in government bonds, municipal bonds or corporate bonds.

4. Documentation

4.1 Transaction Documentation

Facility agreement, intercreditor agreement and security documents (all in Nordic LMA style).

4.2 Impact of Types of Investors

The terms of a bank loan facility can be influenced by the types of investors involved. Institutional investors typically prioritise stability, favouring lower-risk profiles, leading to negotiated terms like lower leverage ratios and stricter covenants. Regulatory constraints guide banks' participation, ensuring compliance with standards. Investors with liquidity needs, like retail investors, may prefer shorter maturities. Banks' risk assessments and funding costs also impact negotiations, as they seek to manage their own balance sheet risks. Market conditions, including interest rates and investor demand, further impact terms, with favourable conditions potentially leading to more borrower-friendly negotiations. Ultimately, the interplay of investor preferences, alongside regulatory factors and market dynamics, collectively shape the terms of bank loan facilities in Sweden.

4.3 Jurisdiction-Specific Terms

Typically, only limitation language and funds accounting (*redovisningsmedel*) need to be included in cross-border loan documentation.

5. Guarantees and Security

5.1 Guarantee and Security Packages

Types of Assets and Security

The security package varies depending on the type of financing, but would typically consist of security over (nb, no material distinction between pledge and security assignment is made under Swedish law):

- shares or participations in the borrower(s), material companies (leveraged financing) or property-owning companies (real estate financing);
- material intra-group loans (leveraged financing) or structural/downstream loans (real estate financing);
- contractual rights (SPA, construction agreement, W&I insurance, potentially property insurance but often lenders rely on the statutory rights of a mortgagee to receive insurance proceeds under Swedish law);
- real estate mortgages (other than under real estate financing, only to the extent such mortgages are already issued due to stamp tax);
- business mortgages (usually only to the extent such mortgages are already issued due to stamp tax, unless required under a borrowing base relating to assets which are difficult to take specific security over under Swedish law); and
- bank accounts.

Formalities and Perfection Requirements

Share pledge

A pledge over the shares in a Swedish company is perfected by transferring the original share certificate(s) representing the shares to the pledgee. If no share certificate has been issued by the company (which is usually in such case requested by the lender), perfection is made by notifying the company of the pledge. In the event the shares are registered with a central securities depository (Euroclear Sweden AB), perfection is made by an appropriate registration of the pledge in the securities register.

Pledge over loans and receivables

A pledge over receivables and loans (not evidenced by a negotiable instrument, perfection of which is achieved with taking possession of such instrument) is perfected if two criteria are fulfilled. First, the debtor of the underlying receivable must be notified. There is no requirement as to the form for such notification other than that the notification sufficiently:

- identifies the pledged receivable;
- identifies the pledgee;
- contains information that the receivables have been pledged; and
- contains an instruction to the effect that payment of the pledged receivable only may be made to the pledgee.

Secondly, the pledgor must no longer be able to deal with the pledged receivable, eg, to collect it in its own name or agree to amendments to its terms, but servicing in all other aspects as per a securitisation or factoring transaction would be allowed as this would not be for the pledgor's benefit.

Contractual rights

Security over contractual rights is perfected by notifying the counterparty (eg, insurance company, vendor, constructor) of the pledge.

Real estate mortgages and business mortgages

Security over mortgages is perfected by the certificate being physically transferred to the pledgee or the pledgee being registered as the holder of an electronic mortgage certificate with the relevant authority (as the case may be). The creation of a mortgage carries stamp duty (for a business mortgage, this equates to 1% of the value of the new corporate mortgage and for real estate mortgage, 2% of the value of the mortgage).

Bank accounts

Security over bank accounts is perfected by notifying the account bank of the pledge. In addition, the pledgor must not be able to deal with the pledged bank account, eg, not use money credited to the pledged account or close the pledged bank account.

The above perfection requirements apply as a matter of Swedish law, and Swedish international private law generally applies the lex rei sitae rule to establish which country's law shall determine whether a security has been perfected (rights in rem) and hence shall have effect in relation to third parties. The lex rei sitae rule dictates that the law of the country where the security is located shall be applied (which entails that, eg, in relation to security over receivables, the laws of the country where the debtor of the underlying receivable is domiciled may apply in respect of perfection).

5.2 Key Considerations for Security and Guarantees

Agent and Trust Concept

Swedish law allows for lenders to appoint a facility agent and security agent to represent them in matters relating to the loan documentation, including to hold security on the syndicate's behalf, enforce the syndicate's rights under the loan documentation and apply any enforcement proceeds to the claims of all lenders in the syndicate. However, in order to enable the agent to represent the syndicate lenders in an enforcement scenario in Swedish courts, each syndicate lender will have to submit a written power of attorney in favour of the agent for legal proceedings. As regards foreign law trusts, it is uncertain whether they would be recognised under Swedish law, so it is advisable that such representatives are also appointed to act as agents.

Parallel Debt

This is not applicable in Sweden.

Restrictions on Upstream Security/Corporate Benefit

A guarantee or security provided by a Swedish limited liability company (*aktiebolag*) for obligations of any person that is not a wholly owned

subsidiary of it may be considered as a value transfer unless the guarantor or pledgor receive consideration on market terms for its undertakings or that otherwise sufficient corporate benefit accrues to it. Such value transfer is unlawful if and to the extent it, at the time when the guarantee or security is granted, impairs the restricted equity of the company providing the guarantee or security, as per its most recently adopted balance sheet (taking any subsequent adjustments in relation to restricted equity into account).

Financial Assistance

A Swedish limited liability company (*aktiebolag*) is prohibited from providing guarantees and/or security to support borrowings incurred for the purpose of acquiring shares in the company itself or any parent (and, arguably, sister) company in the same corporate group as the company granting the financial assistance. The same prohibition applies to loans and advance payments. There are however opportunities under Swedish law to provide such financial assistance after the acquisition has been completed (eg, if sufficient time has lapsed).

A prohibited loan and advance payment must be returned by the recipient. A prohibited guarantee or security may be declared void if the company that provided the guarantee or security shows that the recipient knew or should have known that the guarantee or security was prohibited. A violation of this prohibition may also cause criminal liability.

Requirement for Guarantee Fees

This is not applicable in Sweden.

6. Intercreditor Issues

6.1 Role of Intercreditor Arrangements

Intercreditor and subordination arrangements are commonly used as a means to subordinate intra-group creditors to the senior lender. Intercreditor arrangements are further used to subordinate a mezzanine lender to a senior lender or a debt fund to a super senior revolving credit facility (RCF) lender in terms of priority to payments and security interests, as an alternative to structural subordination and second ranking security.

6.2 Contractual v Legal Subordination

Whereas the subordination by contract of the claims of a class of creditors to all other unsecured creditors is effective against an administrator in the bankruptcy of the debtor, it remains uncertain under Swedish law whether an agreement on the ranking of claims as between the parties to that agreement (ie, a customary intercreditor agreement) is effective against an administrator in bankruptcy. Due to this uncertainty, it remains uncertain whether a bankruptcy administrator would abide by the intercreditor agreement when making payments from the bankruptcy estate, which entails that a senior lender may need to rely solely on the turnover provisions and therefore prefer structural subordination over contractual.

7. Enforcement

7.1 Process for Enforcement of Security

The process for enforcement depends on the type of security being enforced, and whether such enforcement occurs in bankruptcy or not. A preliminary requirement for enforcing any type of security under Swedish law in a non-bankruptcy default situation is that some claim for money

has to have occurred in order for the pledgee to be able take the relevant measures. A breach of a financial covenant is thus not sufficient in and of itself to merit enforcement (irrespective of any agreement to the contrary). Unless there is a payment default (which may be limited to default in respect of eg, interest payments), acceleration of all or part of the secured loan will be required.

Real Property Mortgages and Business Mortgages

Real property mortgages and business mortgages can, both in and outside bankruptcy, be enforced only through the Swedish Enforcement Authority and in essence require an execution order or the commencement of formal insolvency proceedings.

Other (Common) Types of Security Assets

Enforcement outside bankruptcy

Other types of security can generally, outside bankruptcy and provided that the relevant pledge agreement follows market practice, be enforced by public or private sale (by way of auction or otherwise) or in any other way, and on such terms as the pledgee in its sole discretion deems fit (including the right for the pledgee to purchase the asset itself).

It should, however, be noted that the pledgee will nevertheless be under a statutory duty of care in relation to the custody and enforcement of the security assets and it is not possible to contractually disclaim this duty entirely. In practice, the duty of care entails protecting the interests of the relevant pledgor in connection with enforcement, including obtaining a fair sales price at market level for the security assets, and to account for the proceeds of the sale (including, in the event the sales price exceeds the indebtedness for which the security was granted, distributing the surplus to the pledgor and noting that any provision to the effect that the security assets shall be forfeited in a default situation are null and void under Swedish law).

Enforcement in bankruptcy

In the case of bankruptcy, no independent enforcement is in general available for a pledgee and the provisions regarding enforcement set out in the relevant pledge agreement will in principle be overridden by the provisions of the Swedish Bankruptcy Act, entailing enforcement through the trustee in bankruptcy.

However, for a security provided by way of a pledge over movable assets (*handpanträtt*), enforcement through private enforcement procedures is permitted (ie, the pledgee may itself sell the pledged asset at a public auction, subject to such auction occurring no earlier than four weeks after the meeting for administration of oaths and the receiver in bankruptcy having been offered to purchase the relevant collateral). As regards security over shares not admitted to trading in a subsidiary of the bankrupt debtor, the pledgee may enforce such pledge in accordance with the enforcement provisions of the relevant share pledge agreement (ie, not necessarily at public auction) and, furthermore, the four-week time limit does not apply. It should, however, be noted that the pledgee must, also in respect of such shares, first ask the trustee in bankruptcy whether the bankruptcy estate wishes to purchase the shares. Security over financial instruments, currency or gold provided as security in favour of a central counterparty and certain monetary claims may further be immediately sold or enforced through private enforcement procedures by the pledgee, provided it is carried out in a commercially reasonable way.

For enforcement of security in business reorganisation, please see **8.1 Rescue and Reorganisation Procedures**.

7.2 Enforcement of Foreign Judgments

A final and conclusive judgment rendered by a court in a contracting state to:

- Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels I Regulation");
- the 1988 and 2007 Lugano Conventions on the Recognition of Judgments in Civil and Commercial Matters (the "Lugano Conventions"); or
- the Convention of 30 June 2005 on Choice of Court Agreements (the "Hague 2005 Convention"),

and which is enforceable in such state, will be recognised and enforceable by the courts of Sweden pursuant to, in accordance with and subject to the limitations of the Brussels I Regulation, the Lugano Conventions and the Hague 2005 Convention.

Judgments of courts in other jurisdictions would not be enforceable in Sweden as a matter of right without a retrial on their merits, but will be of persuasive authority as matters of evidence before the courts. However, there is Swedish case law to indicate that such judgments should be acknowledged without retrial on their merits if:

- they were based on a contract which expressly acknowledges the jurisdiction of courts outside Sweden;
- they were rendered under observance of due process of law;
- there lies no further right to appeal; and
- the recognition would not manifestly contravene the Swedish public policy.

Sweden is also a member of the New York Arbitration Convention. Accordingly, a final and conclusive arbitral award will be recognised and enforceable by the courts of Sweden according and subject to the New York Arbitration Convention and the Swedish Arbitration Act (*lag* (1999:116) *om skiljeförfarande*).

8. Lenders' Rights in Insolvency

8.1 Rescue and Reorganisation Procedures

The rescue and reorganisation procedure for businesses trying to avoid bankruptcy available in Sweden is business reorganisation (*företagsrekonstruktion*).

Business reorganisation provides a company protection from bankruptcy and gives a grace period in respect of enforcement measures and payments of debts incurred prior to initiating the reorganisation, and the most often sought after outcome of business reorganisation is to make the majority of the creditors accept a write-down of debt without the consent of all creditors.

A new act on business reorganisation (implementing Directive (EU) 2019/1023 on restructuring and insolvency) came into effect on 1 August 2022, introducing, inter alia, the concept of binding restructuring plans, debt-to-equity conversions and cross-group cram-downs. The new act explicitly states that so-called ipso facto clauses are unenforceable if they are triggered by the debtor applying for or becoming subject

to business reorganisation. There are, however, certain exemptions for, among other things, netting arrangements or if the lender has financial instruments or currency as a security asset.

While business reorganisation is ongoing, enforcement of security or other enforcement measures may not take place against the debtor. Enforcement in relation to a pledge over movable assets (*handpanträtt*) may however take place subject to the administrator's consent, provided that it is not likely that the business reorganisation would thereby be jeopardised or that the impact on the lender would otherwise be unreasonably adverse.

8.2 Main Insolvency Law Considerations

Regarding lenders' rights to enforce a loan, guarantee or security in insolvency, please see **7.1 Process for Enforcement of Security**.

Claw-Back Risks

During a certain hardening period (in most cases three months), a security interest may be subject to claw-back by the security provider's administrator in bankruptcy or administrator in business reorganisation if the security interest was either (i) not granted at the time when the secured obligations arose or (ii) not perfected without delay after the secured obligations arose, unless creating such security interest may nonetheless be deemed ordinary, and to the extent security comprises claims that have not yet arisen when granting the security, there is legal precedent suggesting that perfection will be deemed to have been delayed until such claims have arisen. Claw-back may also apply in respect of other transactions (payments, guarantees, etc).

Equitable Subordination

There is no concept of "equitable subordination" under Swedish law, only contractual subordination (commonly used by banks in relation to their capital instrument issuances).

Order of Payment

Swedish law provides a statutory order of priority of claims, which entails the following (reduced) waterfall:

- claims against the bankruptcy estate (eg, fees or costs of the bankruptcy administrator and costs accrued by the bankruptcy estate during the bankruptcy proceeding);
- claims with specific priority (eg, security over shares in subsidiaries, trademarks, patents and thereafter business mortgages and real property mortgages);
- claims with general priority (eg, certain employees' claims for wages and other compensation, certain accounting costs and claims under rescue financing provided for the purpose of supporting a company subject to business reorganisation);
- claims without priority (which normally rank pari passu); and
- subordinated claims.

In so far as a secured claim exceeds the value of the security provided for such claim, the residual claim is regarded as a claim without priority.

9. Tax & Regulatory Considerations

9.1 Tax Considerations

Creation of business mortgages and real estate mortgages attract stamp duty (see **5.1 Guarantees and Security Packages**). Sweden does not impose withholding tax on interest payments, and there are no thin capitalisation rules for tax purposes in Sweden (it can be noted, however, that certain interest stripping restrictions exist).

9.2 Regulatory Considerations

Providing debt financings in Sweden to commercial borrowers in Sweden may require a licence from or registration with the Swedish Financial Supervisory Authority (SFSA). A licence is required if the lender provides credits in Sweden to corporate borrowers while it is funding itself by receiving repayable funds from the public in Sweden. If the lender does not receive repayable funds from the public in Sweden, no licence under Swedish law is required. However, if the debt provider provides debt financings on a professional basis in Sweden, registration with the SFSA may be required for a foreign lender providing loans to corporate borrowers in Sweden if the foreign lender has an establishment (eg, a branch or a subsidiary) in Sweden. The Swedish law on foreign branches stipulates when foreign commercial business providers shall provide its business in Sweden through an establishment in Sweden. If no establishment is required in Sweden, no registration (or authorisation) is required in Sweden for the lending business to corporate borrowers.

10. Jurisdiction-Specific or Cross-Border Issues

10.1 Additional Issues to Highlight

As mentioned in **5.2 Key Considerations for Security and Guarantees**, specific considerations in Swedish debt financing transactions relate to Swedish law provisions on financial assistance and value transfers limiting the ability of Swedish limited liability companies to provide security and guarantees.

Under the financial assistance prohibition, a Swedish limited liability company is restricted from providing security or guarantees for a loan financing an acquisition of shares in itself or a shareholder within the same group. Practically, in transactions being subject to the financial assistance prohibition, target companies refrain from providing security and guarantees until a certain period after closing.

The value transfer restrictions are relevant when a Swedish limited liability company provides security or guarantees for obligations of others than its wholly-owned subsidiaries. To the extent such security or guarantee does not accrue any corporate benefit for the company granting it, the transaction would constitute a value transfer which in turn is not allowed to exceed an amount which can be lawfully distributed to its shareholders at the time of granting the relevant security or guarantee.