

Don't hit the wall: how to deal with (and prevent) default in real estate projects

Real Estate and Insolvency Commissions

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General Report

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INTRODUCTION

Your client or company comes across a default situation in a key construction project or in a strategic long-term lease. How will you cope with the most sensitive issues arising therefrom? When negotiating these deals, which clauses should you contemplate using and what precautions would you advise your client or company to take to address a default scenario? This General Report will summarize useful information from twelve different jurisdictions taking into account both construction and insolvency legislation. With this General Report, we will provide you with a picture of how default arising in the context of construction and lease agreements is dealt with in practice, not only in a litigation scenario, but also when negotiating the relevant agreements. We will also provide you guidelines that may be useful when drafting an agreement or litigating, so you can avoid hitting the wall!

National reporters from twelve different countries have given their significant contribution to this Working Session. The national reports are also the basis of this General Report. These national reporters are: Rossella Incardona (Italy), Tiziana di Ciommo (Spain), Per-Ola Bergqvist (Sweden), Bernd Hauck (Switzerland), Anna Wyrzykowska (Poland), Barbora Paulovicova (Slovakia), Rikke Licht Botcher (Denmark), Jerome Debras (France), Philipp Esser (Germany), Alex Fox (UK), Mert Yalcin (Turkey) and Christian Presoly (Liechtenstein).

PART 1: Construction Contracts

1.1. Defending Employer's interests

1.1.1. Before entering into a construction contract, how can the employer¹ check the financial standing of the contractor²? Is credit/financial information publicly available in your jurisdiction?

All of the countries have commercial registers or similar from which the employer can obtain basic information regarding the contractor, such as its activity and the latest financial statements. This is the case at least if the contractor is an incorporated company.

¹ The person, company or organization who contracts the constructor to design (if applicable), execute and complete the construction works.

² The person, company or organization hired to execute the construction works.

Possible insolvency or enforcement proceedings can be checked in most of the countries through official registers (at least in Switzerland, Sweden, UK, Italy, Poland, France, Turkey, Germany) or obtaining a confirmation from a court (this is the case in Liechtenstein). However, such register is not necessarily publicly available and for instance in Switzerland, one has to show a legitimate interest to consult the register.

In some of the countries also private companies collect credit/financial information about companies.

It seems that in all of the countries some information is publicly (i.e. financial statements). However, obtaining more accurate credit information of the contractor could be vital in many construction projects and it seems that in none of the countries the registers are exhaustive. This is of course understandable through data protection and privacy issues.

1.1.2. Does your jurisdiction have standard conditions for construction contracts? If yes, what type of clauses do they provide for employers in case of contractor's insolvency?

Majority of the countries have some sort of standard conditions generally used for real estate projects or construction contracts. The standard conditions are in most countries not codified in law as such, but are often prepared by certain commercial organisations and are widely used. These standard conditions can be local, such as in Germany, UK, Sweden and Switzerland, but can also be adopted from abroad like in Poland and Liechtenstein. However, there are often some articles in the codified law, which are applicable and may be non-mandatory. All in all, it seems that in many countries there are certain applicable articles in the law but due to commercial need for more exhaustive contractual conditions, standard conditions have evolved in some form or another almost everywhere. However, e.g. in France there are no standard conditions but there are certain standard conditions (AFNOR) that have inspired public sector agreements.

Regarding clauses in case of the contractor's insolvency, it seems that in several countries the employer has the right to terminate the contract and engage new contractor if original (and insolvent) contractor is not able to execute the contract. There are also rules in the standard conditions, for instance in the UK, which require contractor to notify employer if it becomes insolvent. However, some standard conditions like that of Switzerland's SIA, do not include any clauses regarding possible contractor's insolvency.

1.1.3. What kind of securities does the employer usually demand from the contractor?

The most simple “security” seems to be payments in installments. This is the case e.g. in Liechtenstein where contractor does not normally provide security. When it comes to actual securities, there are several types of securities that employers require from contractors. The most common types of securities seem to be bank guarantees, insurances and performance bonds. Letter of credit from contractor’s parent company/parent company guarantee are also used e.g. in Germany and UK and Sweden.

Securities are generally 5-20% of the total consideration to the contractor. Cash deposits, personal securities, collateral securities and on-demand bank guarantees are also used.

1.1.4. In case of contractor’s insolvency during the project, what alternatives does the employer have in order to carry it through?

First of all, in most countries employer is allowed to terminate the contract if contractor becomes insolvent and then demand compensation from the guarantor. Employer may also enter into contract with bankruptcy estate or use another contractor. Estate trustee, however, is often allowed to decide whether the estate will become a party to the contract or not if the estate continues business activities. Estate’s ability to continue business activities, however, may be subject to creditor approval.

In Germany the right to terminate the contract exists only if VOB/B general conditions have been used. In Turkey construction contract is not terminated in the case of contractor’s insolvency. In Italy public contracts are an exception because public employers cannot continue contract with an insolvent party. In the UK sub-contractors often enter into collateral warranties with the employer creating a privity of contract, which allows employer to “step in” in the shoes of the contractor.

To sum up, employer’s alternatives are basically the following: 1) terminate the contract if possible and engage a new contractor, 2) continue with the insolvent contractor if it is able to continue business activities.

1.1.5. What kind of role do clauses regarding transfer of title play in construction contracts? Are clauses under which the contractor's materials, equipment and tools are deemed to be the property of the employer upon the moment the contractor brings these to the site valid in your jurisdiction and do they limit the powers of the bankruptcy estate?

Transfer of title clauses seem to be generally accepted and also used in many countries. There are however exception. For instance, in Liechtenstein and in Germany transfer of title clauses are not that commonly used.

The main rule seems to be that material, tools and equipment that the constructor brings to the site, remain as the constructors property until it is incorporated into the construction.

The treatment of transfer of title clauses in case of constructor's bankruptcy varies. For instance, in Italy, transfer of title clauses would not be valid and could be challenged by the bankruptcy estate. For instance in Sweden, the validity of the transfer of title clause depends on whether the constructor has been able to freely dispose of the material. Also in Switzerland a transfer of possession to the acquirer is required.

In many countries, the material that is incorporated into the construction will belong to the owner of the construction even in case of insolvency of the constructor. However, as regards material that has not incorporated, the employer might not be able challenge the bankruptcy estate of the constructor even in case of transfer of title clauses.

1.1.6. In case of employer's insolvency or loan default of the employer, is it typical that construction contracts contain instruments (e.g. novation agreements) for the financier to take over the project and the construction contract?

It is not typical in most of countries that construction contracts contain provisions for the financier to take over the project and the construction contract. In Italy, these types of provisions are even forbidden by law. However, the financier usually demands collateral, such as a real estate mortgage.

At least in UK, the collateral warranties can provide that the financier or its nominee have a right of "step in" to the role of the employer to carry through the project. In addition, in UK, the finance/security documents will usually contain a provision that they can be novated to the nominee upon default of the employer to ensure that the contractual arrangement continues as planned.

1.2. Defending Contractor`s interests

A) Questionnaire

1.2.1. *What kind of securities does the contractor usually demand from the employer? Are any of these securities mandatory in your jurisdiction?*

1.2.2. *What other provisions (e.g. title retention, down-payment clauses etc.) are usually included in a construction contract to protect the contractor?*

1.2.3. *Please describe the main effects on the contract in case of insolvency of the employer and focus on the following points:*

- a) *Does your jurisdiction have standard rules for termination of a contract in case of insolvency of the employer? If yes, can the parties deviate from these rules in their contract?*
- b) *If the contract does not end by law, who gets to decide whether the contract is terminated or not?*
- c) *If the contract is carried forward, is the employer still in charge or does the liquidator take over?*

1.2.4. *What happens to the claim for remuneration of the contractor towards the employer:*

- a) *In case of termination of the contract?*
- b) *In case the contract is carried forward?*

1.2.5. *During the project, who usually owns the parts of the building that have already been finished? Are there any rules in your jurisdiction that would allow the contractor to get a freehold of the construction site and continue the project with a different employer?*

1.2.6. *What kind of provisions should/can a contractor include in the contracts with his subcontractors to protect himself in case of the employer`s insolvency?*

B) International Overview of answers given in the national reports

I. Spain

1. Securities demanded from the employer

Warranty in form of a bank guarantee or advance payment: 5-20 % of the total price

2. Other common provisions

Retaining of construction until full payment

3. Termination of the contract in case of employer's insolvency

Not automatically

Clauses that establish the power to terminate the contract in case of insolvency are null and void

4. Decision over termination of contract

The Court Clerk summons the parties to a hearing

Agreement between the parties or court can decide on termination of the contract

5. Who stays in charge of the contract?

In case of voluntary insolvency: the debtor, authorization by the insolvency administrators is necessary

In case of compulsory insolvency: insolvency administrators

6. Claim for remuneration

Claims that arise after opening of insolvency proceedings are claims against the estate

Claims that arise before the opening of the insolvency proceedings are ordinary claims

Payment is carried out after claims against the estate and preferential claims are settled

7. Ownership of the building

The owner of the land is always owner of the parts of the building that have been finished. No possibility for the constructor to obtain ownership

- 8. Common provisions with subcontractors**
None

II. Slovakia

- 1. Securities demanded from the employer**
- None mandatory
- Advance payments/ partial payments
- Bank guarantee
- 2. Other common provisions**
- Tension of title (ownership right passes only after full payment)
- 3. Termination of the contract in case of employer's insolvency**
- Contracts are not automatically terminated by law
- In case of restructuring, the contractor cannot withdraw from the contract
- No deviation from the legal regulation
- 4. Decision over termination of contract**
- Bankruptcy trustee or contractor
- 5. Who stays in charge of the contract?**
- The bankruptcy trustee takes over
- In case of restructuring the employer stays in charge but all actions have to be approved by the bankruptcy trustee
- 6. Claim for remuneration**
- In case of termination of the contract:

An application for the claim for remuneration must be filed within 45 days after declaration of bankruptcy
settlement according to distribution plan

In case of restructuring: application within 30 days after permission of restructuring

7. Ownership of the building

By law the construction is owned by the owner of the land but the parties usually agree that the ownership belongs to the contractor and only passes after full payment is made

8. Common provisions with subcontractors

Provision under which the contractor can withdraw from the contract in case of the employer's insolvency

III. France

1. Securities demanded from the employer

30 days to pay the final price after completion of the project

Payment security (bank guarantee)

2. Other common provisions

- Down payments
- Late payment interests

3. Termination of the contract in case of employer's insolvency

A bankruptcy proceeding is not a valid cause for the termination of the contract

Contractual clauses that state otherwise are null and void

The contractor is not allowed to end the contract and stop the work

4. Decision over termination of contract

An insolvency administrator decides whether the contract will be terminated or not

5. Who stays in charge of the contract?

The insolvency administrator

In case of a saving procedure, the employer stays in charge, supervised by a judge

6. Claim for remuneration

The contractor has to declare his claim to the bankruptcy proceeding

7. Ownership of the building

Goods and equipment incorporated in the building belong to the employer

No possibility for the contractor to get a freehold of the construction site

8. Common provisions with subcontractors

The contractor has to provide a joint guarantee of payment to the subcontractors

No provisions to protect the contractor in case of the employer's insolvency

IV. Poland

1. Securities demanded from the employer

None mandatory

Guarantee of payment (bank or insurance guarantee, bank letter of credit)

2. Other common provisions

Advance payment

3. Termination of the contract in case of employer's insolvency

A provision according to which the bankruptcy of a party leads to the termination of the contract is null and void.

4. Decision over termination of contract

By declaration of bankruptcy, the bankrupt loses the right to dispose of the assets; his legal actions are null and void

The insolvency trustee may perform the obligations of the bankrupt or may withdraw from the contract.

He has to declare his decision within three months.

5. Who stays in charge of the contract?

The insolvency trustee is the only person who is in charge.

6. Claim for remuneration

No remuneration for non-performed work

7. Ownership of the building

The owner of the land acquires ownership of what is located on the land

8. Common provisions with subcontractors

Employer and constructor can bear a joint liability for the payment towards the subcontractor

V. Denmark

1. Securities demanded from the employer

The employer must provide security within 8 workdays after the contractor's request (usually bank guarantee or insurance guarantee, not less than 10% of the contract sum)

Obligation for the employer to take out a fire and storm insurance

Assignments of construction loans are less common

2. Other common provisions

Prepayment, current payment as the work is completed

3. Termination of the contract in case of employer's insolvency

The trustee can choose if he wants to become a party of the contract or if he wants to terminate the contract (depending on the affirmation of the estate)

Contractual provisions stating that insolvency is a breach of contract are invalid. The trustee must have the option to affirm the contract.

4. Decision over termination of contract

The trustee is in charge, but the contractor can require that the trustee decides without undue delay (= within one week) if the estate affirms the contract. If the trustee does not reply within that period, the contractor may terminate the contract

5. Who stays in charge of the contract?

The debtor loses control over his assets. The trustee is entitled to act on behalf of the estate.

6. Claim for remuneration

If the contract is terminated: the contractor lodges his claim for payment as an unsecured claim (if there is no security)

If the estate affirms the contract, work performed after the bankruptcy must be considered as pre-preferential claims

7. Ownership of the building

The parts of the building that have already been erected belong to the employer.

If the trustee terminates the contract, the employer has no right to continue his work with a different employer

8. Common provisions with subcontractors

No answer provided

VI. United Kingdom

1. Securities demanded from the employer

- Payment of funds on an escrow account
- Weighted stage payments
- Advance payment
- Project bank account (trust fund)
- Direct payment by a funder

None of the above are mandatory.

2. Other common provisions

- title retention
- advance payments
- right to suspend performance
- Retention bond or retention trust account
- provisions allowing the contractor to terminate the contract in case of the employer's insolvency
- obligation of the employer to enter into a parent guarantee

3. Termination of the contract in case of employer's insolvency

The contractor has the right to terminate the contract in case of the employer's insolvency

4. Decision over termination of contract

The contract does not end automatically, but the obligations of the parties are suspended on insolvency.

A liquidator can also disclaim a contract if it is deemed to be onerous

5. Who stays in charge of the contract?

As the parties obligations are suspended on insolvency, the works can only continue by agreement between the parties. The liquidator will then take on the role of the Employer from its insolvency.

6. Claim for remuneration

Payment obligations are suspended on termination. Upon termination for insolvency of the employer, the contractor will submit a final account for

- The total value of the work properly executed at the day of termination
- sums ascertained in respect of direct loss /expense
- reasonable cost of removal of plant and tools from site
- cost of materials and goods properly ordered for the works
- any direct loss or damage caused by the termination

If the contract is carried forward, the provisions of the contract remain alive

7. Ownership of the building

The employer owns the parts of the building that are finished and fixed to the building

8. Common provisions with subcontractors

- Suspending performance of the subcontractors on Employer insolvency
- Termination of subcontract on Employer insolvency

VII. Liechtenstein

1. Securities demanded from the employer

- Payments on account or installments
- Construction lien

(none mandatory)

2. Other common provisions

None

3. Termination of the contract in case of employer's insolvency

The liquidator is allowed to withdraw from the contract

4. Decision over termination of contract

The liquidator has to decide whether the contract shall be terminated or not

5. Who stays in charge of the contract?

The liquidator takes over

6. Claim for remuneration

In both cases the contractor has a claim for remuneration. If the contract is terminated, the claim will be paid out of the bankruptcy assets

7. Ownership of the building

The employer owns the parts of the building that have already been finished

There are no rules that would allow the contractor to continue the project with a different employer

8. Common provisions with subcontractors

The contract between the contractor and the subcontractor is not affected by the employer's insolvency

VIII. Turkey

1. Securities demanded from the employer

The contractor may legally request the registration of their legal right of mortgage (not if the employer gives an adequate security)

2. Other common provisions

- Detention over the structure
- foreclosure of the pledged property
- annotation on the title deed

3. Termination of the contract in case of employer's insolvency

No standard rules, the construction contract does not end by law.

If the construction is not completed at the time of the insolvency there is a presumption that the contract is terminated

The trustee can declare that he wants to continue the contract

The contractor has the right to terminate the contract if he demands a security from the insolvent employer or the trustee for his receivable fee and the security is not provided within reasonable time

In practice, the trustee very rarely takes over the construction contract because he doesn't have enough money to provide security for the contractor

4. Decision over termination of contract

If the trustee does not enter into the contract, the contract is deemed as terminated

5. Who stays in charge of the contract?

In case the contract is carried forward, the trustee takes over and is in charge of the contract

6. Claim for remuneration

In case the contract is terminated, the contractor can register his claim for remuneration to the bankrupt's estate as bankruptcy receivable with its default interest.

If the assets of the company do not satisfy all its debts, all creditors are invited to declare their debts within 20 days to 3 months. Then there is a first meeting of the creditors where at least 25 % of the total debt of the company must be present to have the necessary quorum. This meeting will elect the bankruptcy administration. The administration organizes a second meeting of the creditors where they decide on how to sell the company's assets. The profits from the sale are distributed among the creditors according to the ranking list.

In case the contract is carried forward, the contractor has to assert his claim for remuneration to the trustee and the remuneration is paid from the bankrupt's estate.

7. Ownership of the building

The party that owns the land has the ownership of the building that has already been finished.

The contractor can request the registration of his legal right of mortgage

There are no rules that would allow the contractor to continue the construction with a different employer.

8. Common provisions with subcontractors

No answer provided

IX. Italy

1. Securities demanded from the employer

Payment bond (not mandatory)

2. Other common provisions

- no penalty clause for delay
- right to price adjustment in the event of material variation

3. Termination of the contract in case of employer's insolvency

There is a standard rule providing that the contract is automatically terminated in case of the employer's insolvency unless the trustee decides to continue the contract upon prior authorization by the creditors. The parties cannot deviate from that rule.

4. Decision over termination of contract

The trustee gets to decide whether the contract is terminated or not

5. Who stays in charge of the contract?

The trustee takes over unless the judge authorizes the provisional operation of the bankruptcy company

6. Claim for remuneration

If the contract is terminated:

The contractor can claim remuneration for the works accepted at the date of the declaration of bankruptcy subject to the insolvency proceedings

He cannot claim remuneration/damages/reimbursement for works not yet accepted at the declaration of bankruptcy

If the contract is carried forward:

The trustee is liable for all payments due to the contractor.

7. Ownership of the building

The parts of the building that have already been finished are owned by the employer if he owns the ground on which the building is realized. In this case, the contractor cannot get a freehold of the construction site and continue the project with a different employer

8. Common provisions with subcontractors

Condition subsequent for the occurrence of the insolvency of the employer

X. Sweden

1. Securities demanded from the employer

Extremely rare in business-to-business contracts, very common in consumer contracts

None mandatory

2. Other common provisions

Down-payment clauses are very common

Payment-plan

Advance payments are rare

3. Termination of the contract in case of employer's insolvency

No standard rules

In general, the contract is terminated. The contractor has the right to terminate the contract if the employer becomes bankrupt and adequate security for the correct fulfillment of the employer's obligations to the contractor is not provided immediately upon request. If he has made such a request, the contractor is entitled to suspend the works.

The contractor is entitled to compensation for loss if the contract is terminated.

4. Decision over termination of contract

The parties get to decide.

A termination may be challenged and overridden in court (does usually not happen)

5. Who stays in charge of the contract?

If a specific contract is entered into between the contractor and the bankruptcy estate, the guardian of the estate is in charge.

6. Claim for remuneration

In case the contract is terminated: the contractor and his claim are to be found amongst the unprivileged creditors

7. Ownership of the building

There are no rules that would allow the contractor to get a freehold of the construction site and continue the project with a different employer

8. Common provisions with subcontractors

The contractor should ask for securities, down-payments or advance payments as the legal shield is very weak in Swedish law.

XI. Switzerland

1. Securities demanded from the employer

None mandatory

The parties often agree to advance payments.

2. Other common provisions

The contractor has a right to establish a statutory charge on immovable property securing the claims of tradesmen and building contractors who have supplied labor or materials etc.

3. Termination of the contract in case of employer's insolvency

No specific rules with regard to the termination of construction contracts in case of the insolvency of the employer, but general rules for the insolvency of a contract party apply:

The contract does not end by law. The bankruptcy administration is allowed to decide whether a contract is fulfilled or not. The contractor may ask for a security and can withhold performance until the security is provided. If the security is not provided, the contractor may withdraw from the contract.

It has not been decided by the Swiss federal court if the parties can deviate from these rules, but deviations are accepted in practice. The parties can thus agree on a contractor's right to terminate the contract in case of the employer's insolvency.

Financial agreements that favor a creditor in case of the debtor's bankruptcy would trigger the legislator's goal of equal treatment of the creditors and are thus not possible.

4. Decision over termination of contract

The contractor may withdraw from the contract if the requested security is not provided

5. Who stays in charge of the contract?

The bankruptcy administration takes over

6. Claim for remuneration

In case the contractor terminates the contract:

He may demand the return of any performance already made (in form of a payment).

The contractor is in the same position as the other creditors of the debtor, therefore he only receives a respective share.

If the contract is carried forward:

The contractor has a privileged remuneration claim. This claim is covered by the security that was handed over by the bankruptcy administration.

7. Ownership of the building

Buildings and building parts that are permanently installed and cannot be removed easily belong to the owner of the land.

There is no possibility for the contractor to get a freehold of the construction site and continue the project with a different employer. But tradesmen and building contractors have the right to establish a statutory charge on immovable property for certain claims

8. Provisions with subcontractors

The contractor and the subcontractor can agree on a right to terminate the contract in case of the employer's insolvency including a reduced remuneration for the subcontractor.

XII. Germany

1. Securities demanded from the employer

None mandatory, letters of credit are used most commonly

2. Other common provisions

Payment plans according to the completion of the works

3. Termination of the contract in case of employer's insolvency

There are no standard rules for the termination of the contract. The contract is not ended automatically in the case of insolvency.

As the trustee has a right to choose between the performance and non-performance of the agreement, the contractor cannot terminate the contract just because of the insolvency of the employer

4. Decision over termination of contract

The trustee gets to decide whether the contract is terminated or not.

5. Who stays in charge of the contract?

Usually the trustee, there are only exemptions if the insolvency proceeding is a special debtor-in-possession-proceeding where the old employer remains in charge.

6. Claim for remuneration

If the contract is terminated:

The claim for remuneration is an insolvency claim which is compensated just like all other unsecured creditors according to the ranking list.

If the contract is carried forward:

A claim for remuneration for works that are completed after the insolvency is considered as a privileged claim and is paid in full by the insolvency estate.

A claim for remuneration for works that had been completed before the insolvency is an unprivileged insolvency claim which is compensated just like all other unsecured creditors according to the ranking list.

7. Ownership of the building

Buildings and building parts that are permanently installed and cannot be removed easily belong to the owner of the land.

There is no possibility for the contractor to get a freehold of the construction site and continue the project with a different employer. The contractor would have to foreclose against the employer in order to obtain a freehold of the construction site, which is not allowed during insolvency.

8. Provisions with subcontractors

The contractor can include provisions in the contract with his subcontractor which state that the remuneration of the subcontractor is only due after the employer has paid the contractor

C) Conclusion

As we can see from the national reports, securities demanded from the employer are quite similar internationally. Most common are bank guarantees.

In most countries, insolvency does not immediately affect a contract, although there are some exemptions where a contract is deemed to be terminated if one of the parties is insolvent (e.g. Turkey).

A very interesting finding from the national reports is the fact that some jurisdictions allow the parties to include provisions in their contract according to which insolvency gives them a right to terminate the contract (e.g. Sweden, Switzerland) whereas in most jurisdictions, such clauses

are null and void because it is not the insolvent party that stays in charge of the contract. The trustee gets to decide in most jurisdictions whether a contract is carried on or terminated.

From what we can tell looking at the contractor's claims for remuneration, it is way more advantageous for the contractor if the trustee decides to ask for performance of the contract. In this case, most jurisdictions allow the contractor to obtain all or a substantial part of the agreed remuneration because his claims are considered as privileged claims against the estate. Even though some jurisdictions differentiate between claims for works that had already been performed before insolvency and claims for works that are only performed after insolvency, the contractor is in a better position than in case of termination of the contract. If the contract is terminated, the contractor's claims are treated as unprivileged claims and chance that he receives any money at all are quite low.

We can also state that contractors should be very aware of the risks from subcontracts as they are often not affected by the employer's insolvency and contractors risk to be bound towards their subcontractor and having to pay the agreed remuneration even if the contract with the employer is terminated and they have no use for the subcontractor's work.

Part 2: Lease contracts

1.3. Is a lease affected by the foreclosure of a mortgage or other in rem guarantee over the leased property? May the new landlord terminate the lease?

There is a marked contrast on the preferred solution to tackle this situation: while in most jurisdictions the foreclosure sale of the leased property will not normally *per se* entitle the new landlord to terminate the lease (Slovakia, Sweden, Denmark, France, Switzerland, Spain, Italy, Turkey and England and Wales: provided certain conditions are met), a few others will expressly allow the new landlord to terminate the lease (Germany, Liechtenstein, Poland: for leases with a term exceeding 2 years).

1.4. Does your jurisdiction afford any protection for the tenant in this case, for example, by guaranteeing the continuity of the lease agreement or a right of first refusal for acquisition of the leased property? Are there any requirements that need to be fulfilled if the tenant wishes to oppose these rights (if applicable) against his new landlord.

None of the jurisdictions involved in our research provide for a right of first refusal for the acquisition of the leased property by the tenant. In some of the jurisdictions where the foreclosure sale will not *per se* entitle the new landlord to terminate the lease, the lease may be registered with the real estate registry, either as a means of providing additional protection to the tenant (Slovakia and Switzerland) or as condition for ensuring that it is binding on the new landlord (Italy: for leases whose term exceeds 9 years; Turkey).

1.5. In case of insolvency of the tenant, is the landlord entitled to terminate the lease? Are insolvency clauses common in lease agreements in your jurisdiction? Are they normally upheld in court?

Insolvency clauses are common and enforceable in lease agreements in England and Wales. In other jurisdictions, though insolvency clauses are rare, insolvency may be invoked as grounds for termination if the bankrupt estate does not provide adequate security as per applicable law (Sweden, Turkey and Switzerland).

However, most jurisdictions do not allow for insolvency clauses in lease agreements (Spain, Italy, France, Liechtenstein, Denmark and Slovakia), even though they may be common in practice (Germany and Poland). Nevertheless, even in these jurisdictions the landlord will normally be able to terminate the lease if the bankrupt estate ceases to meet its obligations under the lease agreement.

1.6. What kind of securities does the landlord usually demand from the tenant? How tenant's insolvency may affect the ability of the landlord to execute these guarantees and collect rent and other monies due to under the lease?

Bank guarantees and deposits are the preferred securities for the jurisdictions involved in our research. Some jurisdictions also provide for a retention right over movable property belonging to the tenant in the leased premises (Switzerland and Slovakia).

In most jurisdictions the tenant's insolvency does not affect the landlord's ability to execute these guarantees, especially when it comes to bank guarantees (Germany, UK. Italy and Poland: depending on the wording of the bank guarantee). However, deposits may be troublesome to collect after the insolvency proceedings have started (Spain, Slovakia and Denmark).