

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

**Real Estate and Insolvency Commissions**  
Prague, 2014 – Working Session

### **National Report of Liechtenstein**

<p>Dr. Christian Presoly Batliner Gasser Rechtsanwälte Marktgass 21 FL 9490 Vaduz</p> <p>T: +423 236 0480 <a href="mailto:presoly@batlinergasser.com">presoly@batlinergasser.com</a></p>	<p>Roman Jenal, MLaw Batliner Gasser Rechtsanwälte Marktgass 21 FL 9490 Vaduz</p> <p>T: +423 236 0480 <a href="mailto:jenal@batlinergasser.com">jenal@batlinergasser.com</a></p>
--	--

**Dr. Hilka Eckardt**

Blaum Dettmers Rabstein  
Alter Wall 55  
20457, Hamburg, Germany  
Tel: +49-40-369 774 50  
[eckardt@bdr-legal.de](mailto:eckardt@bdr-legal.de)

**Anna-Kaisa Remes**

Castrén & Snellman Attorneys Ltd  
PO Box 233 (Eteläesplanadi 14)  
FI-00131, Helsinki, Finland  
Tel.: +358 (0)20 7765 273  
[anna-kaisa.remes@castren.fi](mailto:anna-kaisa.remes@castren.fi)

**Marco Ferreira Orlandi**

Boccuzzi Advogados Associados  
Av. Brig. Faria Lima, 2055, 10 andar  
01452 001, Sao Paulo, Brazil  
Tel: +55 11 30 39 63 99  
[marco@boccuzzi.com.br](mailto:marco@boccuzzi.com.br)

12 November 2013

Thank you for agreeing to be a National Reporter for the Working Session “Don’t hit the wall: how to deal with (and prevent) default in real estate projects” to be held at the AIJA Annual Congress in Prague, September 2014.

Please find below the questions which we would like you to answer. The purpose of the questionnaire is to cover the issues which will be addressed in the Working Session.

In particular, we wish to obtain a picture of how default situations arising in the context of construction and lease agreements are dealt with in practice in your jurisdiction – not only in a litigation scenario, but also when negotiating the relevant agreements – and from there build up general guidelines that may be useful for fellow practitioners who may come across this scenario and spark the debate on the Working Session. Therefore, though technical accuracy is still “de rigueur”, we would appreciate if you could be down-to-earth and pragmatic in preparing your responses to this questionnaire.

We would appreciate receiving your report and the signed Transfer of Copyright Form attached hereto by **28 February 2014**. If you have any questions, please do not hesitate to contact us at the e-mail addresses above.

## **1. Construction Contracts**

### **1.1. Defending Employer’s interests**

1.1.1. Before entering into a construction contract, how can the employer<sup>1</sup> check the financial standing of the contractor<sup>2</sup>? Is credit/financial information publicly available in your jurisdiction?

**Credit/financial information is not publicly available in Liechtenstein. However, it is possible to obtain a confirmation from the court regarding debt collection and insolvency proceedings. If the contractor is an incorporated company it is possible to obtain the annual accounts of the company.**

---

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

<sup>2</sup> The person, company or organization hired to execute the construction works.

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?

**No, Liechtenstein does not have standard conditions for construction contracts. However, it is common to include so called SIA norms provided by the Swiss Society of Engineers and Architects (SIA) into a construction contract. The SIA norms do not include clauses regarding the contractor's insolvency.**

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

**Normally, the contractor does not provide securities. Instead of that the contractor is paid in installments depending on the construction progress. This helps to reduce the risk for the employer in case the contractor defaults or goes bankrupt before the construction has been finished.**

**Moreover, it is common to withhold a part of the agreed payment even after the project has been finished in order to be able to check that everything has been duly carried out. Furthermore, it would be possible to demand for joint securities (e.g. with a bank) or guarantees for the liability for defects or to stipulate a contractual penalty.**

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

**In case of a contractor's insolvency the liquidator of the contractor's company is allowed to withdraw from the contract. However, if the liquidator is of the opinion that the fulfilling of the contract is appropriate it is also possible for the former contractor's company to finish the project despite the insolvency process.**

**If the liquidator decides to withdraw from the contract, the employer has only the possibility to engage a new contractor.**

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?

**Clauses regarding transfer of title are not common in Liechtenstein. Normally, the materials, equipment etc. are property of the contractor until e.g. the material is used on the construction site.**

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?

**No, it is not typical that construction contracts contain instruments for the financier to take over the project and the construction contract in case of employer's insolvency. Instead, the financier normally is secured by a mortgage on the real estate where the construction is to be built. Should the employer default with its loan payments the bank could seize the whole real estate. However, regularly the real estate then would be auctioned in the very state that it is (without the construction being finalized) and whoever acquires it would restart the construction work.**

## 1.2. Defending Contractor's interests

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

**In Liechtenstein it is common to demand payments on account or installments. These securities are not mandatory in Liechtenstein. However, if the SIA norm 118 (see question 1.1.2.) is included in the construction contract the constructor has the right to demand for payments on account.**

**Furthermore, the contractor has the possibility to ensure his claim with a construction lien. This is also not mandatory.**

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?

**None.**

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?

**In case of employer's insolvency the liquidator is allowed to withdraw from the contract. If the liquidator is of the opinion that the fulfilling of the contract is appropriate it is also possible to finish the project during an insolvency process.**

**However, if the SIA norm 118 is applicable and the employer or the liquidator is not in the capacity to pay the invoices, the contractor has the right to withdraw from the contract after a written notice of default and an appropriate period of grace.**

- b) If the contract does not end by law, who gets to decide whether the contract is terminated or not?

**In case of insolvency the liquidator has to decide whether the contract will be terminated or not.**

- c) If the contract is carried forward, is the employer still in charge or does the liquidator take over?

**If the contract is not terminated the liquidator takes 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?

**In both cases the contractor has the right to claim for remuneration. However, in case of termination of the contract its claim will be paid out of the bankruptcy assets reduced in proportion to the other creditors. In the case the contract is carried forward at least the remuneration claim for the rest of the performances not delivered so far will be paid in full.**

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?

**The employer is the owner of the parts of the building that have already been finished. There are no rules in Liechtenstein that would allow the contractor to get a freehold of the construction site and continue the project with a different employer. However, the contractor has the possibility to ensure his claim with a construction lien. This may be entered into the land register as soon as the contractor takes over the obligation to carry out the construction work and gives him a better position in a possible bankruptcy of the 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?

**As the contract between the contractor and subcontractor is not affected by an employer's insolvency the contractor has to fulfill the contract with the subcontractor in any case. Thus, it is important for the contractor to have as many securities as possible (e.g. payments on account, contractor's lien etc.).**

## **2. Lease contracts**

2.1. 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?

**In case there is a change of ownership e.g. due to the foreclosure of a mortgage the new landlord is allowed to terminate the lease within the statutory period of notice.**

2.2. 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.

**If the termination of a lease leads to an extreme hardship for the tenant, the court has the possibility to extend the lease up to one year. There is no right of first refusal of acquisition by law. However, such a right of first refusal of acquisition may be agreed upon by the parties.**

2.3. 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?

**The landlord is entitled to terminate the lease if the tenant does not pay the rent after a written notice of default.**

**Insolvency clauses in lease agreements are not common in Liechtenstein.**

2.4. 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?

**The landlord usually demands for a rental guarantee in the amount of one or two monthly rents.**