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# CROSSING JURISDICTIONS

DEALING WITH TENANT INSOLVENCY IN THE EUROPEAN  
AND US COMMERCIAL REAL ESTATE MARKETS





# Multi-jurisdiction guide: tenant insolvency

The global commercial real estate market paints a varied picture, with certain jurisdictions and sectors recovering quicker than others from the COVID-19 pandemic and continuing geopolitical uncertainty. Higher interest rates and leveraged balance sheets means many landlords are keeping a close eye on the financial health of their tenants. The legal remedies open to landlords of commercial property vary by jurisdiction. Local expertise is crucial, particularly as insolvency processes can be fast-paced and landlords need to respond quickly to safeguard their interests. This guide focuses on five jurisdictions - France, Germany, Spain, the UK and the US, where Herbert Smith Freehills Kramer LLP are ideally placed to advise landlord clients on these issues. We provide an overview and comparison of the insolvency processes that apply in each jurisdiction to aid landlords and investors in the commercial real estate market looking to expand into these areas. In particular, we consider:

- What are the main insolvency/restructuring processes a landlord may encounter in relation to their tenant?
- What remedies does a landlord have for the recovery of rent arrears and how are these impacted by insolvency proceedings?
- How can a landlord regain possession of their property during insolvency proceedings?
- What is the impact of a tenant's insolvency on undertenants/guarantors?

We have leading teams in each of the jurisdictions who can advise on the issues described in this guide. Please see the key contact details at the end of this document



**Matthew White**





Managing Partner, UK & EMEA Real Estate

T +44 20 7466 2461

[matthew.white@hsfkramer.com](mailto:matthew.white@hsfkramer.com)



# What are the main insolvency/restructuring processes a landlord may encounter in relation to their tenant?

<p>France</p> 	<p><b>Pre-insolvency:</b> A safeguarding procedure similar to reorganisation proceedings but takes place before the distressed tenant becomes insolvent.</p> <p><b>Insolvency Proceedings:</b></p> <ol style="list-style-type: none"><li>1. <b>Administration/Reorganisation proceedings:</b> Procedure where the primary purpose is to rescue the business, if possible, by suspending the tenant's liabilities to enable reorganisation whilst business continues and an administrator is appointed.</li><li>2. <b>Liquidation:</b> Terminal procedure to dissolve the tenant and distribute any assets.</li></ol>
<p>Germany</p> 	<p><b>Pre-insolvency:</b> Schemes of arrangement with creditors to compromise claims against the tenant where it is foreseeable that the tenant will be unable to honour the entirety of its obligations in the next 24 months.</p> <p><b>Insolvency proceedings:</b> Procedures where the tenant is insolvent or overindebted with two possible outcomes.</p> <ol style="list-style-type: none"><li>1. <b>Reorganisation:</b> A flexible procedure where the aim is to continue the business of the debtor as a whole. This is used only in the event that such continuation is likely to result in a higher satisfaction of the claims of the creditors than a liquidation.</li><li>2. <b>Liquidation:</b> Terminal procedure to dissolve the tenant and distribute its assets.</li></ol>
<p>Spain</p> 	<p><b>Pre-insolvency:</b> A statutory postponement of the obligation to file for insolvency for three months. This may be extended up to six months, if an additional three-month extension is requested, to agree a restructuring plan with creditors, or (if a restructuring plan cannot be agreed) to file for insolvency the following month. A restructuring plan is an arrangement with creditors and/or shareholders to compromise claims against the tenant (and requires court approval).</p> <p><b>Insolvency proceedings:</b> A single procedure with two possible outcomes:</p> <ol style="list-style-type: none"><li>1. <b>Reorganisation:</b> Via a voluntary composition agreement to continue the business.</li><li>2. <b>Liquidation:</b> Terminal procedure to dissolve the tenant and distribute any assets.</li></ol>
<p>UK</p> 	<p><b>Pre-insolvency:</b></p> <ol style="list-style-type: none"><li>1. <b>Company Voluntary Arrangement:</b> Agreements sanctioned by the majority of creditors to compromise the tenant's past and/or future liabilities.</li><li>2. <b>Schemes of Arrangement:</b> Arrangements with creditors to compromise claims against the tenant.</li><li>3. <b>Restructuring Plan:</b> Statutory scheme with enhanced cross-class cram down of claims against the tenant.</li></ol> <p><b>Insolvency proceedings:</b></p> <ol style="list-style-type: none"><li>1. <b>Administration/Reorganisation Proceedings:</b> Flexible procedure where the primary aim is to rescue the business, if possible, whilst imposing a statutory moratorium on creditor action to give the tenant breathing space.</li><li>2. <b>Liquidation:</b> Terminal procedure to dissolve the tenant and distribute any assets.</li></ol>

# What are the main insolvency/restructuring processes a landlord may encounter in relation to their tenant?

US






**Pre-bankruptcy:** No formal process, but the landlord and tenant may engage in negotiations related to the tenant's lease obligations.

**Bankruptcy proceeding:** A formal procedure that takes place in a U.S. Bankruptcy Court upon the filing of a bankruptcy petition. Typically, the tenant-debtor files a voluntary petition, though it is possible to file an involuntary bankruptcy against a debtor (so long as certain statutory requirements are met). Once a bankruptcy is filed, the automatic stay goes into effect, preventing creditors from taking action to collect on a claim against the debtor. This gives the debtor a breathing spell while it seeks to reorganize (chapter 11) or liquidate (chapter 7). During the bankruptcy, the debtor continues to operate its business.





# What remedies does a landlord have for the recovery of rent arrears and how are these impacted by insolvency proceedings?

	Money which fell due pre-insolvency	Money falling due after insolvency proceedings	Landlord's options
<b>France</b> 	<p>Once insolvency proceedings commence, the tenant cannot pay to the landlord any arrears which fell due pre-commencement. The landlord must declare the arrears to the creditors' representative or liquidator within two months. They are paid at the end of the insolvency proceedings in order of legal priority, in which a landlord with unsecured arrears ranks as low priority.</p>	<p>Insofar as rent arrears are in principle preferential claims, these can be collected by the landlord under the terms of the lease without any restriction.</p> <p>However, as money falling due after insolvency proceedings are subject to a legal order of priority (in which secured rent arrears ranks as medium – high priority), payment by the tenant will depend on its cash flow/financial reserves.</p>	<p>Consider a lien over the property worth the equivalent of up to two years' rent to cover pre-insolvency arrears.</p> <p>Call on the guarantees/sureties (ie parent guarantor or bank guarantee)</p> <p>Seek appointment as controller to participate in the insolvency proceedings and access information/ documents in priority of other creditors.</p>
<b>Germany</b> 	<p>For unsecured rent, the landlord must file a claim with the insolvency administrator and will only receive the insolvency quota at the end of the proceedings, which is usually a nominal amount.</p> <p>If the landlord has any security rights exercisable over the tenant's asset, such as a rental security, it can enforce them largely unaffected by the insolvency proceedings.</p>	<p>These can be collected by the landlord under the terms of the lease from the insolvency estate without any restriction.</p>	<p>Call on the guarantees/sureties (ie parent guarantor or bank guarantee).</p>
<b>Spain</b> 	<p>The landlord must notify the insolvency administrator of any rent arrears within one month of the insolvency proceedings being declared and published in the Official State Gazette.</p> <p>They are paid during the insolvency proceedings in order of legal priority. It will depend on whether the rent was unpaid before the declaration of insolvency, in which case they will be classified as ordinary claims (which are paid only after payment of general and privileged claims), or after the declaration, in which case they will be classified as claims against the insolvency estate (which are paid out of the insolvency estate as they fall due).</p>	<p>These can be collected by the landlord under the terms of the lease from the insolvency estate without any restriction.</p> <p>If the landlord exercises its ability to terminate the lease due to tenant default after the declaration of insolvency, the landlord will make claims against the insolvent estate.</p> <p>If the lease is terminated in the interest of the insolvency proceedings, the landlord will have an ordinary claim which is paid only after payment of general and privileged claims.</p>	<p>Call on the bank guarantees: if the landlord has a first demand bank guarantee and it has not been enforced before the declaration of insolvency, its enforceability will not be affected by the insolvency proceedings.</p>







# What remedies does a landlord have for the recovery of rent arrears and how are these impacted by insolvency proceedings?

	Money which fell due pre-insolvency	Money falling due after insolvency proceedings	Landlord's options
<div>UK</div> <div></div>	<p>A landlord may put a claim into the administration/liquidation for pre-appointment arrears, but as an unsecured creditor, the amount they are likely to receive is very low.</p> <p>The appointment of an administrator or a liquidator imposes a statutory moratorium prohibiting landlords from taking legal action/ proceedings against the tenant, including court proceedings, levying commercial rent arrears recovery or taking steps to forfeit (terminate) the lease.</p>	<p>In administration, rent is payable by the administrators as an expense of the administration if the property is used for the purposes of the administration. However, enforcement action by the landlord for failure to pay is restricted by the moratorium.</p> <p>Any money falling due after a liquidator is appointed is not payable in priority of other unsecured creditors.</p>	<p>Call on the guarantees/sureties (ie parent guarantor or bank guarantee).</p> <p>Drawdown on any rent deposit (restrictions may apply depending on how the deposit is held).</p> <p>Pursue any former tenants/guarantors under the lease.</p> <p>Divert rent from subtenants to pay off arrears.</p>
<div>US</div> <div></div>	<p>Upon a bankruptcy filing, any rent owed for the pre-petition period becomes a general unsecured claim, which is paid out after secured and priority claims (and often is pennies on the dollar). The landlord cannot seek to collect pre-petition amounts during the bankruptcy. If the tenant decides to assume the lease, it must cure all existing defaults (including pre-petition rent arrears) and provide adequate assurance of future performance.</p>	<p>A tenant must continue to pay post-petition rent owed on an unexpired lease.</p>	<p>If the tenant is not making post-petition payments, the landlord can request the bankruptcy court to lift the automatic stay to allow it to exercise remedies against the tenant.</p>



# How can a landlord regain possession of their property during insolvency processes?

	Termination by the landlord	Termination by or on behalf of the tenant
<div>France</div> <div></div>	<p>The landlord may terminate the lease if after insolvency proceedings have started:</p> <ol style="list-style-type: none"><li>1. there are rent arrears/charges outstanding for more than three months</li><li>2. the tenant commits a breach of the lease</li></ol> <p>If either is met, the landlord may ask the administrator/ liquidator to agree to terminate the lease. The landlord may also directly apply to court for termination.</p> <p>In liquidation proceedings, the landlord may give one month's notice to the liquidator to decide whether to continue the lease. If they fail to respond, the lease is terminated.</p>	<p>The administrator/liquidator can terminate the lease at any stage, without recourse to the landlord or tenant.</p> <p>The tenant cannot terminate the lease on its own before the end of the insolvency proceedings unless an administrator/ liquidator has not been appointed. This is rare in practice.</p>
<div>Germany</div> <div></div>	<p>The landlord cannot terminate the lease for non-payment of pre-insolvency arrears. The landlord can, however, terminate the lease due to rents not paid after the opening of insolvency proceedings as per the applicable statutory law in connection with the provisions of the lease.</p>	<p>The insolvency administrator can terminate the lease regardless of a fixed term agreed in the lease with such notice periods stipulated by statutory law (generally no longer than three months).</p>
<div>Spain</div> <div></div>	<p>The landlord may terminate the lease for tenant default both before and after insolvency proceedings are commenced, and the Court may order continued performance of the lease in the best interests of the insolvency (eg when the main activity of the insolvent company is carried out from that asset).</p> <p>The Spanish Insolvency Act also empowers the insolvency administrator to oppose eviction action brought against the tenant prior to the declaration of the insolvency, as well as to restore the validity of the lease until immediately prior to the eviction taking place. In this case, the insolvency administrator must pay all unpaid rent from the insolvency estate as well as the landlord's legal costs.</p>	<p>The Court is entitled to terminate the lease at the request of the tenant or the insolvency administrator where termination is in the best interest of the insolvency proceedings.</p>
<div>UK</div> <div></div>	<p>Generally, a commercial lease contains a forfeiture clause which entitles the landlord to terminate and recover possession if the tenant fails to pay rent. Common triggers also include a breach of the lease or insolvency processes, although the landlord should check the drafting of its lease. The latter triggers will first require the landlord to serve a notice under section 146 of the Law of Property Act 1925 and give the tenant a reasonable period to remedy the breach/trigger (if remediable). If not remedied, or if the default is non-payment of rent, the landlord is entitled to forfeit by re-entering the property or seeking a court order for possession. However, it may not do so without the consent of the administrator/liquidator or the permission of the court if a moratorium is in place.</p> <p>In a liquidation, the landlord may serve notice on the liquidator to require them to elect within 28 days whether to disclaim the lease or not.</p>	<p>In an administration, the administrator does not have any right to terminate the lease. It will need to agree a consensual early surrender of the lease with the landlord.</p> <p>A liquidator can disclaim onerous contracts, including leases, by giving notice to the landlord.</p>

# How can a landlord regain possession of their property during insolvency processes?

US



## Termination by the landlord

Generally, the automatic stay prevents the landlord from exercising remedies, including to gain possession of the property. However, if the debtor is not paying post-petition rent, the landlord can seek to lift the stay to allow it to exercise remedies to gain possession. While the landlord cannot compel the tenant to terminate the lease during the bankruptcy, it may withhold consent on any requested extension of the deadline by which the debtor must assume or reject the lease. Assuming a lease means that the debtor will continue to perform under the terms of the lease, while rejecting a lease means that the debtor has decided to essentially terminate the lease and no longer perform its obligations.






## Termination by or on behalf of the tenant

The debtor has the right to assume or reject an unexpired lease. The Bankruptcy Code gives the debtor 210 days to decide on the disposition of its lease, unless the landlord consents to a longer period (note there are specific rules for retail bankruptcy cases).





# What is the impact of a tenant's insolvency on undertenants/guarantors?

<b>France</b> 	<p>In principle, termination of a lease means any underlease will automatically terminate. Once terminated, the landlord may apply to the court for the undertenant to be evicted. If an occupier does not have an underlease or occupancy agreement, they have no right to remain in the premises and the landlord may apply to the court for the occupier to be evicted.</p> <p>During insolvency proceedings, the landlord may in principle call on guarantees given by guarantors under the lease (ie parent guarantee or bank guarantee). In safeguard and reorganisation proceedings, guarantees granted by natural persons cannot be called on by the landlords.</p>
<b>Germany</b> 	<p>If the lease is terminated, the undertenant automatically loses its right of possession regarding the leased premises vis-à-vis the landlord and can be evicted as per the applicable provisions of statutory law. The obligations of third parties vis-à-vis the landlord, eg the provision of security for obligations of the tenant to pay rent, remain unaffected in principle by the insolvency of the tenant.</p>
<b>Spain</b> 	<p>The termination of the lease will automatically terminate any underleases. A landlord may continue to enforce guarantees given by any guarantor under the lease.</p>
<b>UK</b> 	<p>During a tenant's administration and liquidation, a landlord may enforce guarantees given by former tenants as well as any current guarantor under the lease. It may also serve notice on the undertenant under section 81 of the Tribunals, Courts and Enforcement Act 2007 to divert payment of rent due pursuant to the underlease to the landlord until the tenant's arrears have been paid.</p> <p>If a liquidator disclaims the lease, this only impacts the tenant's liability under the lease. Any undertenants/guarantors remain liable as long as the landlord does not take possession of the property.</p> <p>If the lease is forfeited by the landlord, this automatically terminates any underlease. The undertenant will be entitled to apply to court for relief from forfeiture and either restoration of the lease or a new lease. The court has discretion whether to grant such relief and, if it does so, on which terms.</p>
<b>US</b> 	<p>If the debtor-tenant elects to reject its lease in bankruptcy, that rejection constitutes a breach, but does not necessarily terminate the lease. Case law is mixed as to whether rejection of a prime lease amounts to rejection of a sublease as well, and whether the subtenant may retain possession notwithstanding the tenant's rejection of the lease.</p> <p>Any guarantors remain liable and generally, the landlord can pursue claims against the guarantor (so long as the guarantor has not also filed for bankruptcy).</p>



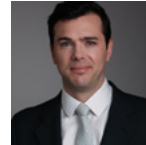
# Key contacts



**Matthew White**  
Managing Partner, UK & EMEA  
Real Estate  
T +44 20 7466 2461  
[matthew.white@hsfkramer.com](mailto:matthew.white@hsfkramer.com)



**Stefanie Herkert**  
Partner, Real Estate, Germany  
T +49 69 2222 82455  
[stefanie.herkert@hsfkramer.com](mailto:stefanie.herkert@hsfkramer.com)



**John Chetwood**  
Partner, Restructuring &  
Insolvency, UK  
T +44 20 7466 7548  
[john.chetwood@hsfkramer.com](mailto:john.chetwood@hsfkramer.com)



**Daniel Berman**  
Managing Partner, Real Estate, US  
T +44 212 715 9482  
[dan.berman@hsfkramer.com](mailto:dan.berman@hsfkramer.com)



**Tomás Díaz**  
Partner, Real Estate, Spain  
T +34 91 423 4095  
[tomas.diaz@hsfkramer.com](mailto:tomas.diaz@hsfkramer.com)



**Kelly Porcelli**  
Associate, Bankruptcy  
& Restructuring, US  
T 1 212 715 9252  
[kelly.porcelli@hsfkramer.com](mailto:kelly.porcelli@hsfkramer.com)



**Anne Petitjean**  
Partner, Real Estate, France  
T +33 1 53 57 13 55  
[anne.petitjean@hsfkramer.com](mailto:anne.petitjean@hsfkramer.com)



**Frances Edwards**  
Senior Associate, Dispute  
Resolution, UK  
T +44 20 7466 2279  
[frances.edwards@hsfkramer.com](mailto:frances.edwards@hsfkramer.com)



**Natan Hamerman**  
Partner, Real Estate Litigation,  
Bankruptcy & Restructuring, US  
T +1 212 715 7756  
[natan.hamerman@hsfkramer.com](mailto:natan.hamerman@hsfkramer.com)

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