

Quickguide to European real estate security enforcement

This table provides an overview of key issues relevant to taking and enforcing security over real estate in England and Wales¹, France, Spain, Italy and Germany as at 1 November 2020. If you have any questions regarding the information contained in this table or how it might apply in relation to any particular circumstances, please contact the Ashurst lawyers in the relevant jurisdictions whose details are set out at the end of this table.^{2 3}

	ENGLAND & WALES	FRANCE	SPAIN	ITALY	GERMANY
Security typically granted in respect of real estate	<p>Legal mortgage over property (may be contained in debenture).</p> <p>Charge over shares in property-owning SPV.</p> <p>Debenture comprising fixed and floating charges over all assets (including property, rent receivables, bank accounts, insurance claims and shares in subsidiaries).</p>	<p>Mortgage over property.</p> <p>Pledge over shares in property-owning SPV.</p> <p>Assignment by way of security of rent receivables and insurance claims (Daily-forms) and pledge of receivables. If a Daily assignment cannot be granted because the legal criteria for its implementation are not met, a pledge of receivables is usually granted in respect of intercompany loans and/or swap arrangements.</p> <p>Pledge over bank accounts.</p>	<p>Mortgage over property.</p> <p>Pledge over shares in property-owning SPV.</p> <p>Pledge over rent receivables and insurance claims.</p> <p>Pledge over bank accounts.</p>	<p>Mortgage over property.</p> <p>Pledge over shares in property-owning SPV.</p> <p>Pledge over or assignment of rent receivables and insurance claims.</p> <p>Pledge over bank accounts.</p>	<p>Land Charge over property.</p> <p>Pledge over shares in property-owning SPV.</p> <p>Assignment of rent receivables and insurance claims.</p> <p>Pledge over bank accounts.</p>
Recognition of security trustee concept	Yes.	<p>Yes, but facility agreement must expressly empower security trustee to act for the benefit of secured creditors.</p> <p>Alternatively, security interest is granted to each secured creditor who appoints the security agent to act on its behalf.</p>	<p>No, security interest must be granted to, and accepted by, each secured creditor. To enforce security, an agent must be empowered by each secured creditor under a notarised (and, where applicable, apostilled) power of attorney.</p>	<p>No, security trustee may be empowered to enforce on behalf of secured creditors, but security interest must be granted to, and accepted by, each secured creditor.</p>	<p>Yes, for non-accessory security (e.g. land charge). For accessory security (e.g. pledge) it is mandatory that the beneficiary also be a creditor of the underlying secured obligation ('parallel debt' structures are often used to support security trustee arrangements).</p>
Perfection Requirements and Cost	<p>Registration and notification to certain third parties (nominal cost).</p>	<p>For real estate, registration with mortgage registry and notarisation. Related fees and taxes are linked to the secured amount.</p> <p>For share pledges, registration costs and taxes may apply (nominal amount).</p> <p>For receivables/bank account pledges, no registration or notarisation required.</p>	<p>Stamp duty payable on mortgages over property (0.5%-2% of secured liabilities).</p> <p>Registration and notarisation (nominal cost).</p>	<p>Stamp duty payable on mortgages (2% of secured liabilities).</p> <p>Registration tax on all security interests (broadly at 0.5% of secured liabilities or value in the case of receivables; exceptions may apply) and notarisation (nominal cost).</p>	<p>Registration (land charges) and notarisation (land charges and share pledges), in both cases fees are linked to value of transaction.</p>

¹ Enforcement over Scottish property is governed by a separate regime.

² This table is intended to be a high level summary for existing lenders as well as investors engaged in direct lending and secondary trading of non-performing loans, in each case secured over real estate. This table contains information which is general in nature and subject to changes in applicable law at any time. It is not intended to replace detailed, transaction specific legal advice.

³ It is common for real estate assets located in Europe to be held through Luxembourg holding structures. For a summary of enforcement methods and the consequences of insolvency, please see our guide [here](#).

	ENGLAND & WALES	FRANCE	SPAIN	ITALY	GERMANY
Enforcement Method – Real Estate	<p>Private Sale: No court involvement.</p> <p>Receivership: Receiver appointed by secured creditor to realise secured assets.</p> <p>Administration: Administrator appointed by holder of floating charge over all or substantially all assets ('qualifying floating charge') to take control of security provider for benefit of all creditors.</p> <p>Foreclosure: Secured creditor takes title to property in discharge of debt; court order required.</p>	<p>Assuming shares are unlisted:</p> <p>Private Foreclosure: Most common method. Requires court approval for sale of property. Public auction before notary (if consensual sale) or before judge (if forced sale).</p> <p>Judicial Foreclosure: Court driven process resulting in transfer of property to secured creditor.</p> <p>Appropriation: Only available if agreed between parties (court approval not required).</p>	<p>Public Auction: Sale before notary (court approval not required). Only available if permitted under security document.</p> <p>Judicial Sale: Court administered public auction.</p> <p>Restrictions on enforcement where security provider is a consumer.</p>	<p>Judicial Foreclosure: Court administered procedure by sealed bids (<i>vendita senza incanto</i>) or public auction (<i>vendita con incanto</i>).</p> <p>Patto Marciano: automatic transfer of ownership of property (other than residential assets) to the secured creditor, effective upon material default by the debtor.</p>	<p>Private Sale: Only available if agreed between parties and applicable legal requirements met.</p> <p>Forced Auction: Court supervised public auction.</p> <p>Forced Administration: Court appointed administrator manages property and receives rental income pending sale of property.</p>
Enforcement Method – Shares	<p>Private Sale: No court involvement.</p> <p>Receivership: Receiver appointed by secured creditor to realise secured assets.</p> <p>Administration: Administrator appointed by qualifying floating charge holder to take control of security provider for benefit of all creditors.</p> <p>Appropriation: If legislation governing financial collateral arrangements applies.</p>	<p>Public Auction: Sale conducted by investment services provider or court appointed public officer.</p> <p>Judicial Foreclosure: Court driven process resulting in transfer of shares to secured creditor.</p> <p>Appropriation: Only available if agreed between parties (court approval not required).</p>	<p>Public Auction: Sale before notary (court approval not required). Only available if permitted under security document.</p> <p>Judicial Sale: Court administered public auction.</p> <p>Appropriation: If legislation governing financial collateral arrangements applies.</p>	<p>Private Enforcement: Usually private sale (although listed shares may require public auction) through contractually agreed process. Typically no court involvement, but vulnerable to debtor objection (likely to result in stay of enforcement and lengthy court process).</p> <p>Judicial Enforcement: Court administered public auction.</p> <p>Appropriation: If legislation governing financial collateral arrangements applies.</p>	<p>Private Sale or Appropriation: Only available if agreed between parties and applicable legal requirements met. Private sale cannot be agreed prior to a payment default.</p> <p>Public Auction: Court driven process dictated by applicable (mandatory) law.</p>
Enforcement Method – Receivables	<p>Collection: Collect credit balance and notify counterparty to make all future payments to secured creditor.</p> <p>Private Sale: No court involvement.</p> <p>Receivership: Receiver appointed by secured creditor to realise secured assets.</p> <p>Administration: Administrator appointed by qualifying floating charge holder to take control of security provider for benefit of all creditors.</p>	<p>Daily-forms: Notify counterparty to make all future payments to secured creditor.</p> <p>Pledge of receivables: Notify counterparty to make all future payments to secured creditor.</p> <p>Judicial Foreclosure: Court driven process resulting in transfer of receivables to secured creditor.</p> <p>Appropriation: Only available if agreed between parties (court approval not required).</p>	<p>Collection: Collect credit balance and notify counterparty to make all future payments to secured creditor.</p> <p>Public Auction: Sale before notary (court approval not required). Only available if permitted under security document.</p> <p>Judicial Sale: Court administered public auction.</p>	<p>Collection: Collect credit balance and notify counterparty to make all future payments to secured creditor.</p> <p>Judicial Enforcement: Only available in relation to receivables not yet due and payable.</p>	<p>Collection: Collect credit balance and notify counterparty to make all future payments to secured creditor.</p> <p>Private Sale: Possible, but secured creditors typically rely on enforcement of land charges or realisation and “cold” administration agreement to collect receivables.</p>
Is a payment default a pre-requisite to enforcement of security?	No.	Yes.	Yes.	Yes.	Yes.
Credit Bidding Possible	Yes.	Yes.	Yes.	Yes.	Yes.
Level of Creditor Control	High. Enforcement led by secured creditor.	Low. Most enforcement processes start with formal notice to the debtor, giving it sufficient time to file for insolvency. Outside of insolvency, there is no ability for secured creditors to appoint officeholders to sell secured assets without debtor agreement.	Low-Medium. Notary/court involvement required for most enforcement processes. Very limited control post insolvency. Very restrictive European Court of Justice ruling in connection with enforcement against consumers.	Low-Medium. Notary/court involvement required for most enforcement processes.	Medium. Notary/court/licensed auctioneer (appointed by secured creditor) involvement required.
Attitude of Courts	Creditor friendly. Very commercial.	Debtor friendly. Litigation against creditors not uncommon.	Debtor friendly.	Debtor friendly.	Depends on cooperation of insolvency administrator (secured creditors and insolvency administrator may enter into realisation and “cold” administration agreement in respect of secured property pursuant to which insolvency administrator will secure contributions to insolvency estate).

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Timing	<p>Private Sale: Quick (weeks), driven by commercial agreement.</p> <p>Receivership: Quick (weeks), if receiver satisfied best price reasonably obtainable.</p> <p>Administration: Quick (pre-pack sales not uncommon), if administrator satisfied best price reasonably obtainable.</p> <p>Foreclosure: 6-12 months.</p> <p>Appropriation: Quick (weeks).</p> <p>Collection: Minimal.</p>	<p>Private Foreclosure, Judicial Foreclosure, Public Auction: For real estate, generally between 6 months to 2 years, provided not interrupted by insolvency proceedings which can last for up to 10 years. In the case of public auction, could be shorter (few months) with debtor consent. Quicker for shares.</p> <p>Appropriation: Reasonable time following enforcement.</p> <p>Daily-form collection/appropriation of collections under receivables pledge: Minimal.</p>	<p>Public Auction: 4-6 weeks for shares; 6-9 months for property.</p> <p>Judicial Sale: 12-18 months, depending on region and court case load.</p> <p>Appropriation: 2-4 weeks.</p> <p>Collection: Minimal.</p>	<p>Judicial Foreclosure: Difficult to predict. Average length is 3-3.5 years, provided not subject to debtor objection which could add years to enforcement process.</p> <p>Private Enforcement: Up to 150 days' notice of intention to enforce; if debtor objects, could take up to 9 years.</p> <p>Judicial Enforcement: 6-12 months; if debtor objects, could take up to 9 years.</p> <p>Appropriation: Quite variable. In principle should be quicker than public auction in the context of judicial enforcement; however, if debtor objects, could take up to 9 years.</p> <p>Collection: Minimal.</p> <p>Patto Marciano: Automatic upon material default by the debtor.</p>	<p>Private Sale or Appropriation: Quick (weeks), driven by commercial agreement.</p> <p>Forced Auction or Forced Administration (Real Estate): 4-12 months, provided not interrupted by insolvency proceedings.</p> <p>Public Auction (Shares): 4-12 months.</p> <p>Collection: Minimal.</p>
Cost	<p>Minimal-Moderate. Depends on process to establish value of secured assets and receiver/administrator fees (if applicable). In the case of foreclosure, also depends on court costs.</p> <p>To the extent enforcement results in transfer of ownership to secured creditors, stamp duty will apply (on property based on sliding scale determined by nature and value of property, on shares at 0.5%).</p>	<p>Moderate-Expensive, for Judicial Foreclosure or other enforcement over property, dependent on debtor objection. Minimal-Moderate for other enforcement processes. Depends on process to establish valuation and degree of resistance by debtor to enforcement process.</p> <p>To the extent enforcement results in transfer of ownership to secured creditors, of:</p> <ul style="list-style-type: none"> - the property: related fees and taxes are linked to the value and nature of the real estate asset transferred (equal to those applicable in case of disposal); or - the shares in real estate companies: transfer tax may apply at a rate of 5%. 	<p>Moderate. Depends on process to establish valuation, amount of debt secured (determines notary fees, court fees and court taxes), and region of Spain in which enforcement procedure takes place.</p> <p>To the extent enforcement results in transfer of ownership of property to secured creditors, either (i) transfer tax (at 6-11%) or (ii) VAT (10 % or 21%, depending on type of property) plus stamp duty (0.5%-2.5%) will be payable. There is no transfer tax or VAT payable on transfer of shares pursuant to enforcement.</p>	<p>Moderate-Expensive. Depends on process to establish valuation, judicial fees (highly variable in the case of foreclosure), notary fees and degree of resistance by debtor to enforcement process.</p> <p>On enforcement of the documents of a transaction, registration tax (nominal to 3%) and negligible stamp duty will be payable.</p>	<p>Moderate-Expensive. Depends on process to establish valuation and property value (determines notary and court fees).</p> <p>To the extent enforcement results in transfer of ownership of property to secured creditors, transfer tax (currently between 3.5% to 6.5% on property or shares in property owning entity, depending on the federal state in which the property is located). Registration fees also payable (nominal cost).</p>
Legal definition of insolvency	If it becomes unable to pay its debts as they fall due or where the value of its assets is less than its liabilities, taking into account contingent and prospective liabilities.	If it becomes unable to meet its debts as they fall due and cannot pay them out of cash and/or cash equivalent resources available to it ("cessation of payment") (in which case it must file for judicial receivership within 45 days).	If it becomes unable to meet its matured obligations (current or actual insolvency) or if it anticipates that it will not be able to meet its obligations regularly and punctually (imminent insolvency) (in which case it must file for insolvency within 2 months). Only the debtor can apply for insolvency on the grounds of imminent insolvency.	If it becomes unable, on a permanent basis, to pay its debts as they fall due (in which case directors must file for insolvency in a 'timely' manner). Certain rescue procedures available if debtor is temporarily unable to pay its debts as they fall due.	If it is balance sheet over-indebted (i.e. net assets do not cover the registered share capital), unless there is a positive prognosis for continuation of the business; or if it is illiquid (i.e. unable to pay its due payment obligations) (in which case it must file for insolvency within 3 weeks). The debtor can apply for insolvency on the grounds of threatening illiquidity.
Impact of insolvency on enforcement	<p>Automatic moratorium on enforcement in administration (unless with consent of administrator or the court). No moratorium in receivership.</p> <p>Standalone moratorium introduced into law in July 2020 to assist rescue, subject to entry conditions. During the moratorium the debtor benefits from a holiday on pre-moratorium debts, although no holiday applies to financial creditors or in respect of rental payments due to landlords. While possible, property owning SPVs are perhaps less likely to use the moratorium given they typically do not have significant exposure to trading debts. This moratorium is available for debtors on an opt-in basis.</p> <p>To the extent that this moratorium applies enforcement would require the consent of the court.⁴</p>	<p>Automatic moratorium on enforcement during safeguard or judicial receivership (6-12 or exceptionally 18 months) or during any continuation of business in judicial liquidation (3-6 months), except (in particular) in relation to Dailly-form assignments.</p> <p>Except for limited exceptions, payments under pre-existing debts and termination of on-going contracts are also prohibited during that period.</p> <p>Specific rules and shorter deadlines apply to accelerated financial safeguard (to be completed within one month, renewable once) and accelerated safeguard (to be completed within three months).</p> <p>During (and shortly after) insolvency proceedings, creditors regain enforcement rights in very limited circumstances.</p>	<p>Automatic moratorium in respect of assets necessary for continuation of business during pre-insolvency (6 months) and formal insolvency (12 months). Enforcement permitted if property not considered by the court to be linked to or necessary for the continuation of business.</p> <p>If the SPV is a foreign SPV it might file for insolvency in Spain on the basis of its COMI being in Spain in order to benefit from the moratorium on enforcement.</p>	<p>Automatic moratorium during period of composition with creditors or bankruptcy; for 60 days following filing for debt restructuring arrangement process.</p>	<p>Enforcement is limited. In practice, secured creditors and insolvency administrator often agree realisation and "cold" administration agreements in respect of secured assets. The insolvency court may impose preliminary protective measures before the insolvency proceedings are formally opened, such as installing a preliminary insolvency administrator or imposing restrictions on enforcement of certain assets necessary for continuation of the business.</p>

4 For more information on the standalone moratorium and other changes to the UK insolvency regime introduced by the Corporate Insolvency and Governance Act 2020, please see our separate briefing [here](#). A real estate focused overview of the changes can be accessed [here](#).

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Are there any issues regarding upstream/ cross guarantees?	No , provided permitted by articles and corporate benefit demonstrated.	Yes , corporate benefit requirement may be based on receipt of borrowed funds.	Yes , unless 'specific consideration' given in exchange for guarantee.	Yes , unless 'real and adequate corporate benefit' given in exchange for guarantee.	Yes , enforcement will likely be subject to capital maintenance rules.
Is contractual subordination enforceable and does it survive insolvency?	Yes , contractual subordination is enforceable as a matter of English law and will survive the insolvency of the debtor. Turnover subordination and trust subordination are also recognised and upheld post-insolvency.	Yes , Contractual subordination is market practice in France but some provisions may not be enforceable in all circumstances. Insolvency law provides that plans take into account subordination arrangements entered into prior to the opening of the proceedings. No guidance is given on the manner in which they shall be taken into account and they might not be taken into account in every instance.	Yes , contractual subordination is enforceable under Spanish law and is recognised under the Spanish Insolvency Act.	No . If the subordination only relates to specific and identified creditors, it would not be enforceable in insolvency. However, a subordination arrangement with regards with all creditors of the debtor would be enforceable.	Yes , contractual subordination of claims is possible and will – if structured properly - survive the insolvency of the debtor.
Can the security be declared void and unenforceable if entered into prior to insolvency?	Yes , if certain conditions satisfied and within certain time period prior to insolvency (6 months to 2 years, depending on circumstances).	Yes , if certain conditions satisfied and within certain time period prior to insolvency (6 to 18 months).	Yes , if certain conditions satisfied and within certain time period prior to insolvency (2 years).	Yes , if certain conditions satisfied and within certain time period prior to insolvency (up to 2 years).	Yes , if certain conditions satisfied and within certain time period prior to insolvency (up to 10 years).
Is there a risk of equitable subordination when enforcing share security?	No .	No .	No .	Remote risk .	Yes , if the shares are acquired by the enforcing creditor. Shareholder claims are subordinated by law in an insolvency. There is also a risk that a creditor secured by a share pledge may be treated as quasi-shareholder if it has a measure of control over the debtor comparable to a shareholder (e.g. through voting rights and/or restrictive covenants).
Creditor ranking on insolvency	Fixed security realisations: secured creditors (after deduction of costs) Floating charge realisations: 1. Insolvency expenses 2. Preferential creditors (capped employee claims, limited pension contributions and, from 1 December 2020, unpaid VAT, taxes collected from employees on behalf of the Treasury and CIS (Construction Industry Scheme) levies) 3. 'Prescribed part' for unsecured creditors (capped at £600,000 (or £800,000 if the floating charge was created on or after 6 April 2020 or ranks equally with or after a floating charge created on or after 6 April 2020)) 4. Floating charge holder 5. Unsecured creditors	Complex and depends on whether company has entered judicial receivership or judicial liquidation. On judicial liquidation: 1. Beneficiaries of Dailly-form assignments and secured creditors with rights to retain movable assets 2. Super preferential creditors (employee claims for last 60 days' wages) 3. Court fees incurred after the opening of the proceedings and for the needs of the proceedings 4. Preferred creditors in relation to conciliation (<i>privilege de conciliation</i> , if any) 5. in relation to disposal proceeds on real estate, claims of creditors secured by security over such real estate 6. Lenders of post-filing financing, judicial fees and preferential claims (incurred for post-filing continuation of business) 7. Other secured creditors 8. Other post-filing creditors 9. Unsecured creditors	1. So-called credits against the estate (including insolvency expenses) (paid as they fall due) 2. Insolvency credits: a. Preferential creditors b. creditors with special privileges (including certain employee claims and secured creditors with mortgages over property or other specific assets (who retain specific enforcement rights over such assets)) c. creditors with general privileges (including other employee claims) 3. Ordinary creditors (i.e. not preferential and not subordinated) 4. Subordinated creditor (note transactions with creditors held to be 'specially related' to the debtor treated as subordinated claims)	1. Administrative priority claims (insolvency expenses and 'DIP' financing) 2. Other secured and priority creditors (employees, tax and social security authorities, professional service providers). Creditors with mortgages are preferred in respect of recovery proceeds deriving from the sale of the relevant mortgaged assets 3. Unsecured creditors 4. Subordinated creditors	1. Costs of proceedings (insolvency administrator and court) 2. Secured creditors 3. Creditors of the estate (e.g. liabilities incurred by the administrator; employees' claims under certain social plans) 4. Unsecured creditors 5. Subordinated creditors 6. Surplus

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<p>Has any temporary legislation (or other government intervention) been introduced in response to Covid-19 that would restrict or prohibit the enforcement of security or similar action?⁵</p>	<p>No restriction or prohibition on enforcement as a result of Covid-19 but some temporary measures have been introduced which could affect actions ancillary to enforcement:</p> <ol style="list-style-type: none"> 1. Winding up petitions presented during the 'Relevant Period' (between 1 March 2020 and 31 December 2020, subject to possible further extension) will be reviewed by the court. Winding up orders will not be made if the debtor cannot pay its debts because of Covid-19. 2. Statutory demands will be void if issued against a debtor during the Relevant Period. 	<p>Temporary legislation affects preventive and insolvency proceedings in many respects.</p> <p>Measures include the extension of various deadlines under French bankruptcy laws, a wider access of distressed companies to accelerated safeguard proceedings (and financial accelerated safeguard) and the creation of a new priority claim for new money providers during insolvency proceedings.</p> <p>Some changes can affect the processes described above and enforcement of security:</p> <ul style="list-style-type: none"> - Conciliation proceedings opened until 23 August 2020 (inclusive) can last up to ten months (instead of five) and conciliation rules can affect enforcement. - Until 31 December 2020 (inclusive) (expected to be extended to 31 December 2021), if a creditor does not suspend the maturity of its claim for the time of the conciliation proceedings when the conciliator so requests, the debtor may ask the president of the insolvency court: <ul style="list-style-type: none"> • to interrupt or prohibit any legal action for payment or for termination of contract triggered by payment default; • to stop or prohibit enforcement and distribution proceedings; • to postpone or reschedule payments, without incurring late payment fees or penalties. <p>Such measures will remain effective for the duration of the proceedings.</p> <p>In the same circumstances as described above, the debtor may also ask the president of the insolvency court for the early application of the French Civil Code grace periods (not to exceed two years), even if no formal notice has been served nor enforcement measure taken by the creditor.</p>	<p>No restriction or prohibition on enforcement as a result of Covid-19. However, some temporary measures have been introduced/ carried out which may have an impact:</p> <ol style="list-style-type: none"> 1. Until 31 December 2020, any insolvent debtor will not have the duty to apply for insolvency. 2. The Spanish Courts issued certain rulings in favour of tenant-debtors and preventing landlord-creditors enforcing contractual guarantees supporting tenants' obligation to pay rent. 	<p>No restriction or prohibition on enforcement as a result of temporary legislation (or other government intervention) introduced in response to Covid-19.</p> <p>However, as regards lease agreements, it should be noted that, during the period in which (most) retail premises have been closed pursuant to the emergency laws, certain judgments issued by the Italian Courts have intervened in favour of the tenants-debtors and preventing landlord-creditors enforcing contractual guarantees supporting the tenants' obligation to pay rent.</p>	<p>No restriction or prohibition on enforcement as a result of Covid-19 currently in place.</p> <p>However, a temporary stay of the legal obligation to file for insolvency upon becoming insolvent was introduced for cases where insolvency results from Covid-19 related impairments. The stay is currently in force until 31 December 2020 for cases of balance sheet over-indebtedness, but not for cases where the debtor is insolvent due to illiquidity.</p>

⁵ Enforcement of security, particularly involving owner-occupier properties (or where the landlord and tenant are part of the same corporate group), may be complicated by measures enacted to restrict the ability of landlord to forfeit leases for non-payment of rent.

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