

NewsLetter

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Effects on Leases in Debt Enforcement Proceedings

If real property which is the subject of a lease is sold, the lessor's interest in the lease is transferred automatically to the new owner of the property. The new owner may terminate the lease only on the next termination date permitted under statutory law and then only by showing that he or she needs possession of the property for his or her own use or for use by family members. If the lessee has registered the lease in the land register, however, this right of termination will be limited; but if the lessor of the property becomes subject to debt collection proceedings, a senior secured creditor may be able to require the sale of the property in a special auction which removes the protection against termination otherwise enjoyed by the lessee under a registered lease.

Effects of Property Sales on Leases

Generally, if real property which is the subject of a lease is sold, then the lessor's interest in the lease is



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transferred automatically to the new owner of the property. The lessor-lessee relationship is otherwise undisturbed by the transfer of ownership and the lessee retains all of his or her rights under the lease agreement, including the right under statutory law to unilaterally extend the term of the lease.

So long as the lessee has paid rent when due and complied with the other material terms of the lease, the new owner may terminate the lease, without regard for contractual notice periods, on the next termination date permitted under statutory law but only by showing that he or she needs possession of the property for his or her own use or for use by close relatives or persons who are related by marriage.

Registered Leases

If, however, the lease has been registered in the land register and the lessee is not in breach of any of the

terms of the lease, then this right of termination to gain personal use of the property will not be available and the new owner may terminate the lease only when otherwise permitted by the terms of the lease agreement or if the lessee has failed to pay rent or to comply with other material provisions of the lease agreement.

Leases in Debt Enforcement

These rules generally continue to apply even if the lessor becomes subject to debt collection proceedings. But if a lease was registered without the consent of senior creditor holding a perfected senior security interest in the leased property, then the lease nevertheless may be subject to termination if the property is sold at an auction conducted in connection with the lessor's debt collection proceedings. A creditor holding such a senior security interest in the leased property may apply for the sale of the property in a two-step auction process.

"Double Call" Auction

Under this process, referred to as a "double call" auction, the property is first offered for sale subject to lessee's protections against termination under a registered lease. If the auction fails to draw a bid high enough to allow the debt owed by the lessor to the secured creditor to be repaid, then the property will be offered for sale at auction a second time, but with the possibility to remove the registration in the land register of the lease. If a higher bid is made at this auction, the property will be sold and the proceeds will be applied in accordance with law to the repayment of the debt owed to the secured creditor. In addition, the registration of the lease will be removed from the land register upon request of the purchaser of the property and he or she will then be permitted to terminate the lease on the next termination date permitted by law without being required to show any need for possession of the property for his or her own use, subject always to compliance with the terms of the lease agreement governing its termination.

The "double call" auction also can be used in debt collection proceedings by secured creditors whose

security has been reduced in value by other kinds of encumbrances which have been recorded in the land register without his or her consent. Thus, even easements, servitudes and other personal rights burdening the property may be removed if necessary to afford the senior secured creditor the opportunity to obtain a price at the auction sufficient to satisfy the outstanding debt.

None of the protections against termination of a lease described here alter the normal rule that a lease may be terminated if the lessee has failed to pay the agreed rent or to comply with the material terms of the lease.

Case Law

In 1999, the Swiss Supreme Court held that a senior secured creditor can require property leased under a long-term lease which has not been registered to be sold through a "double-call" auction held in connection with debt collection proceedings against the lessor. As a result, the purchaser of the property at the auction thereafter is permitted to terminate the lease on the next termination date permitted by law without being required to show any need for possession of the property for his or her own use, subject always to compliance with the terms of the lease agreement governing its termination.

Cancellation Notice Periods

A further question is when the acquirer of any property which is subject to a lease can tender notice of cancellation of the lease. In a normal situation under Article 656, Section 1 of the Civil Code, title to a property passes when the change of ownership is recorded in the land register. A different result, however, prevails when the change of ownership results from an auction in debt collection proceedings. In that case, title passes with the acceptance of the winning bid and from this moment the new owner may deliver notice of termination of the lease effective on the next termination date permitted by law, subject always to compliance with the terms of the lease agreement governing its termination.

Rights to Extend the Lease Term

A lessee has the right under statutory law to unilaterally extend the lease period and generally this right has priority over the lessor's right to terminate the lease with effect on the next termination date permitted by law – even if the lessor has acquired the property through a "second call" auction which otherwise has removed restrictions on the termination of the lease.

NewsLetter

The ww&p NewsLetter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this NewsLetter should seek specific advice on the matters which concern them.

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