IP Licenses and Insolvency Guide - China

3. What does this practically mean for licensors and licensees?

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# 3 (a). Does a license agreement remain valid during an insolvency proceeding

Unless the parties have expressly agreed that the insolvency or bankruptcy of the respective contracting party is a termination event or the administrator decides to terminate the same, the license agreement remains valid during an insolvency proceeding.

As mentioned earlier, the administrator has the right to decide to terminate or continue to perform an outstanding license agreement. However, the administrator has the obligation under Article 18 of the PRC Insolvency Law to inform the other party of the decision within two months after the court accepts the bankruptcy application. If the administrator does not do so, or does not respond within 30 days to the other party's enquiry as to performance or termination, the license agreement will be deemed as terminated. If the administrator elects to continue the performance of the outstanding agreement, the other party is entitled to request the administrator to provide security. Where the administrator fails to provide security, the contract is deemed to be terminated. A claim for damages (if any) resulting from the termination can be filed with the administrator as an unsecured claim.

# 3 (b). Is the trustee or receiver obliged to perform the obligations under a license agreement?

The administrator needs to perform the obligations only if it decides to continue to perform the license agreement. In the context of China where onshore entities are usually the licensees, this means that the licensor is required under the PRC Insolvency Law to continue to perform the agreement in the event that the administrator of the licensee decides to perform the license agreement, except where the licensor exercises the termination right as allowed under the license agreement prior to the appointment of administrator for the licensee.

# 3 (c). What can a licensee do, if anything, to protect its right to use the licensed IPR?

Unfortunately, since the administrator in bankruptcy has the right to decide whether to terminate or continue to perform a license agreement, there are limited means available to a licensee to protect its right to use the licensed IPR if the licensor is insolvent.

Under PRC law, without express agreement between the parties, the assignment or transfer of licensed trademarks does not affect the validity of any license granted in respect of the assigned marks. For a trademark licensee, having such an express provision in the license agreement may be helpful.

In addition, we would also suggest recording trademark and patent license agreements for such PRC registered IPs with the National IP Administration. Such a recording can be relied on against bona fide third parties in the event that the licensor transfers or licenses the IPs to third parties.

# 3 (d). Can a licensor prevent a trustee or receiver from selling or transferring the insolvent licensee's rights under a license agreement?

Unless there are agreed provisions in the license agreement prohibiting the sale or transfer of the licensee's rights, the licensor is unable to prevent the administrator from doing so. The license agreement should provide for the automatic termination of the license agreement in the event of insolvency of the licensee.

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