IP Licenses and Insolvency Guide - Germany

| Contents |
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| To generate table of contents, right-click here and select **Update Field.** |

# 1. What does the applicable law provide regarding the treatment of IP license agreements in insolvency proceedings in your jurisdiction?

## 1 (a). What are the general principles of the treatment of IP license agreements in insolvency proceedings? Is there a difference depending on the type of proceeding (e.g., a court-appointed receivership, a bankruptcy, a restructuring, etc.)?

Under German law, licensed IP rights fall into the insolvency estate.

The insolvency administrator (or, in case of debtor-in-possession proceedings, the management of the debtor) is in a position to decide on the fate of the license based on the right to choose whether the contractual relationship should be fulfilled or terminated. If the insolvency administrator choses fulfillment, the obligations under the license have to be fulfilled by both parties. If the administrator refuses performance, the licensee will only have a damage claim in the rank of an unsecured insolvency claim.

There is one exception; where a license agreement has been "fully performed" by both parties according to German insolvency law, the trustee cannot decide whether the contractual relationship should continue to be fulfilled. However, the assessment of whether the license agreement is therefore insolvency-proof depends on the circumstances of each case.

At the moment, neither legislation nor case law provides general guidance on making a license agreement insolvency-proof. Several attempts to introduce legislation to this effect have failed so far.

## 1 (b). What are the laws governing the treatment of IP license agreements in insolvency proceedings?

The treatment of IP licenses follows Sec. 35 and Sec. 103 et seq. of the German Bankruptcy Code (InsO).

# 2. Are contractual provisions automatically terminating licenses (and distribution agreements) or automatically transferring licensed IPR to the licensee by virtue of an act of insolvency valid and enforceable, having regard to anti-deprivation rules?

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It is not possible to provide for an automatic termination of the agreement explicitly because of the insolvency of a party.

However, one could include provisions in an IP license agreement that provide for an automatic termination of the agreement due to its continuation being unreasonable for the licensee, combined with an automatic transfer of the licensed IPR to the licensee. Depending on the individual circumstances, the insolvency of the licensor and the decision of the trustee not to continue the agreement could be regarded as rendering the continuation of the agreement unreasonable for the licensee. However, the validity of such provisions and their wording should be checked in each individual case.

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

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

Yes, a license agreement remains valid and enforceable if the trustee chooses to either fulfill a contract of the bankrupt party themselves or demand performance from the contractual partner. If the trustee chooses to refuse performance, the license agreement does not lapse but claims under the agreement are not enforceable for the duration of the insolvency proceedings. In this case, the solvent party has claims for damages that can be enforced only according to the German rules on insolvency proceedings. From an economic perspective, the right of the insolvency administrator to choose the non-fulfillment of the license equals a termination right.

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

No, the trustee has the right to choose whether the contractual relationship should continue to be fulfilled by both parties or to refuse performance.

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

At the moment, neither legislation nor case law provides a watertight solution for the licensee to protect its rights to use the licensed IPR against an insolvency of the licensor. However, different options are being discussed, such as the grant of a usufruct to the licensee. In any case, the potential insolvency of the licensor should be addressed in the license agreement.

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

If the trustee decides to continue the agreement, the contractual provisions of the license agreement govern the transfer of rights under the agreement. Thus, if the agreement prohibits the selling or transfer of rights under the agreement, the trustee cannot deviate from this. If the agreement allows the transfer, the trustee can do so.

In addition, if the trustee refuses performance, they are bound by the contractual provisions. However, even if the license agreement allows the transfer of the licensee's rights, since in this constellation claims under the agreement are not enforceable for the duration of the insolvency proceedings, a transfer is not possible.

# 4. Are there differences regarding trademark, copyright and patent licenses, noting any exceptions, e.g., mandatory licensing or standard essential patents?

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Trademarks, patents, designs, utility models and copyrights, and the rights to use those IPRs, are valuable assets in the sense of German insolvency law and fall into the insolvency estate. Due to their character as personal rights, several special provisions apply to copyrights, *e.g.*, moral rights are excluded from the insolvency estate.

# 5. Is there a risk in transferring licensed IPR to a third party in anticipation of an insolvency?

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Yes. There is a risk that the transfer may be contested and that the third party may have to transfer the licensed IPR back to the respective party.

# Contacts

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