NORTON ROSE FULBRIGHT

International Restructuring Newswire

A quarterly newsletter from the global restructuring team at Norton Rose Fulbright

Q3 2025

In this issue:

Contents

International Restructuring Newswire

***International Restructuring Newswire* is published by Norton Rose Fulbright and is not a substitute for fact-specific legal counsel.**

International Restructuring Newswire

Published by Norton Rose Fulbright – Q3 2025 – Issue 30

Editor
David Rosenzweig
+1 (212) 318-3035
david.rosenzweig@nortonrosefulbright.com

Publication Coordinator
Helen M. Lamb
+1 (212) 408-5172
helen.lamb@nortonrosefulbright.com

To our clients and friends:

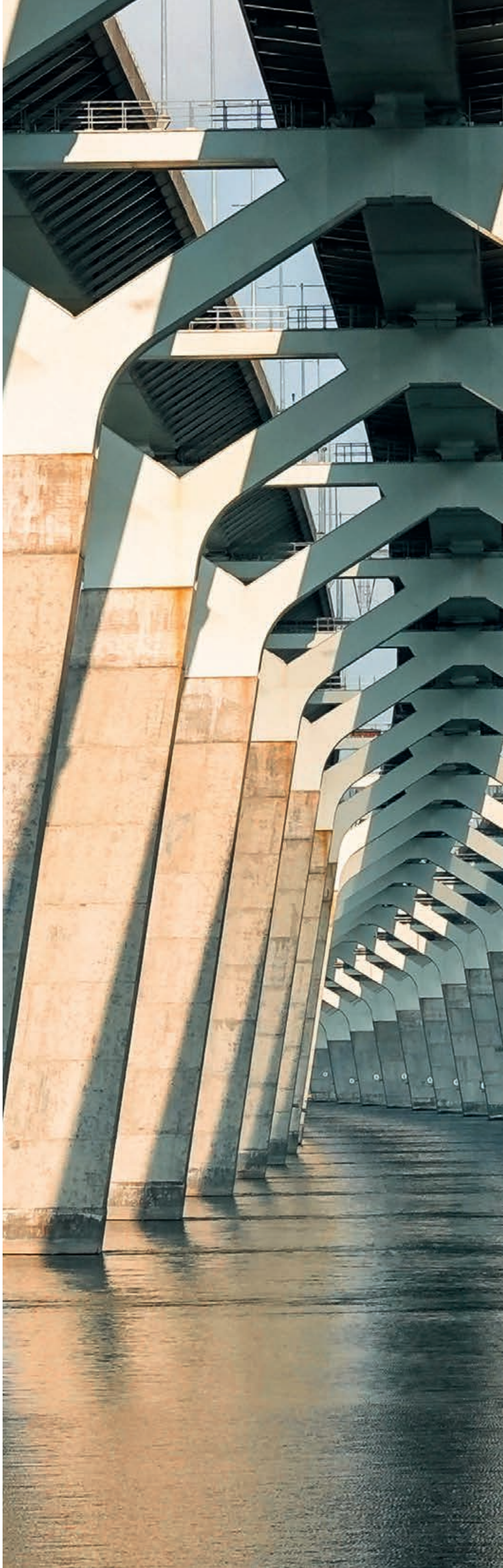
As we reach the second half of 2025, global restructuring and insolvency trends are having a significant impact on the business landscape, driven by economic pressures, legal reforms, and industry-specific challenges. Insolvency rates are rising worldwide, especially in Asia-Pacific and North America, as high interest rates and limited access to credit continue to pressure businesses. Key sectors like retail, hospitality, commercial real estate, healthcare, and tech are facing elevated financial distress. Businesses and investors are also contending with ongoing geopolitical volatility, supply chain disruptions, and inflation, pushing the demand for innovative and tailored restructuring solutions.

Given the current global economic outlook, staying informed on restructuring developments worldwide is more crucial than ever. Our global team of restructuring lawyers is prepared to deliver the strategic guidance and counsel needed to navigate these challenging times.

For this third quarter, our lawyers in the US discuss recent important decisions on the application and interpretation of the Cape Town Convention Alternative A in the SAS chapter 11 case, our Canadian team discuss a Canadian court's confirmation that the "interest stops" rule in bankruptcy does not apply to secured creditors and as a result they may recover post-bankruptcy interest, and our UK team discuss the treatment of IP licenses in insolvency and how licensees can protect themselves.

We hope you find these articles useful.

Scott Atkins
Global Head of Restructuring



In the news

INSOL International – 2024/25 Fellowship Class

Jeff Black (Perth) and Beelee Seah (Singapore) have been named Fellows in INSOL International's 2024/25 class of inductees. They are members of a class of 24 new INSOL Fellows worldwide who have completed the Global Insolvency Practice Course, INSOL's pre-eminent advanced educational qualification focusing on international insolvency.

Insolvency Law Reform

Scott Akins and Rodney Bretag (Sydney) recently completed another mission to Bhutan in July, supporting our work with the Asian Development Bank to develop the country's insolvency framework in what is often called the "happiest kingdom." It is anticipated that a final draft of a new comprehensive insolvency law will be submitted to the country's parliament within the next few months.

Los Angeles Business Journal

Rebecca Winthrop and Debbie Birndorf-Zeiler were named to the *Los Angeles Business Journal's* 2025 Women of Influence: Attorneys list, a recognition honoring the city's most influential women attorneys.

Private Banker International

Gemma Long (London) published an article in *Private Banke*r International earlier this month (co-authored with James Collis) titled "Private Credit's New Era: Embracing Market Challenges - Private Banker International."

Los Angeles Bankruptcy Forum

May 6, 2025
Rebecca Winthrop (Los Angeles) moderated an exceptional panel of attorneys from the Southern California Bankruptcy Bar speaking on the future of the bankruptcy practice at the Los Angeles Bankruptcy Forum's "A Night with Bankruptcy Luminaries."

World Bank Group

May 9, 2025
Scott Atkins (Sydney) attended the World Bank Group conference on "Enhancing Credit Infrastructure to Support Resilience" held in Washington, DC. Scott also participated on the panel "Climate Risk in Action: Insights from Real World Case Studies. "

UNCITRAL Working Group V

May 12–16, 2025
Scott Atkins (Sydney) attended the UNCITRAL Working Group V as the official representative of the Australian Government. The Working Group V is the official global body shaping international insolvency and restructuring law, covering areas as diverse as corporate and personal insolvency, restructuring, cross-border recognition of insolvency proceedings, recognition and enforcement of foreign judgments, group enterprise insolvency, recognition and enforcement of mediated agreements in insolvency, director's duties and obligations in the insolvency sphere. Scott also holds a standing invitation from The World Bank to attend its (typically) biannual Washington forum where the global standard for insolvency laws is reviewed, adjusted and reset. The World Bank is the officially designated Standard Setting agency for insolvency law.

International Insolvency Institute

June 9–11, 2025
Scott Atkins (Sydney) attended the 25th Annual International Insolvency Institute's conference in Sao Paulo. Scott participated on a panel on the topic: "In Cross-Border Restructuring and Insolvency, Challenges and Development re Data Protection and Artificial Intelligence."

Insolvency Mediation Foundation, the Netherlands

Webinar: Mediation as a Bankruptcy Game Changer

June 19, 2025
Scott Atkins (Sydney) and Prof. Omar Salah (Amsterdam) spoke at an international webinar hosted by the Insolvency Mediation Foundation in the Netherlands, where they shared their insights and experiences with restructuring and insolvency cases in which mediation played a decisive role. The discussion highlighted key themes from Mr. Atkins' recent article, "Mediation as a Bankruptcy and Insolvency Game Changer," published in HERO magazine. They explored the growing recognition of mediation's benefits and how international legislation, and regulatory frameworks are increasingly giving mediation a formal place within insolvency proceedings.

R3 & INSOL Europe Conference, London

July 3, 2025
Prof. Omar Salah (Amsterdam) participated in a panel discussion at the 19th annual R3 & INSOL conference in London, where the focus was on liability management exercises (LMEs) — a US-based strategy for restructuring corporate debt outside of formal insolvency proceedings. LMEs typically involve tactics such as exchanging existing debt for higher-priority obligations, transferring assets to secure new financing, or creating new structural priorities among creditors. The panel examined whether these approaches could be effectively adapted for use in Europe to help companies avoid formal restructuring processes.

AUTM Central Region Meeting

July 22, 2025
Julie Harrison (Houston) spoke at the Central Region Meeting for the Association of University Technology Managers (AUTM) regarding Runaway Licenses: Tales of Secret Assignments, Licensee Bankruptcies, and Lessons Learned about Structuring Your License Agreement to Retain Control. The panel also included Austin senior counsel Mike Stimson and Houston associate Andy Guo.

Cape Town Convention Alternative A stowed away (for now): Decision affirmed that Alternative A not applicable to claim treatment in SAS chapter 11 case

David Rosenzweig, Emily Hong, Cathy Shu

The chapter 11 case of SAS, Scandinavia's national airline, considered the applicability of Alternative A of the Cape Town Convention and its Aircraft Protocol to United States bankruptcy proceedings for the first time.[1]

Parties have thus far avoided litigating this question: US-certificated air carriers can rely on Section 1110 of the US Bankruptcy Code, upon which Alternative A is based, while foreign airlines filing chapter 11 in the US have previously opted to resolve Alternative A-related issues through consensual arrangements.

On March 4, 2025, the United States District Court for the Southern District of New York affirmed the Bankruptcy Court's decision that Alternative A had no bearing on certain claims made by two aircraft lessors. On appeal, District Judge Lewis A. Kaplan reiterated the Bankruptcy Court's holdings that, essentially: (a) a country's adoption of Alternative A can only be effected through formal notification or declaration in accordance with the Convention (which Sweden did not make); and (b) even if applicable, Alternative A did not govern the classification or priority of the lessors' claims where the leases are rejected under the Bankruptcy Code.

Cape Town Convention and Alternative A

The Cape Town Convention is an international treaty aiming to enhance certainty and reduce costs with respect to aviation-related assets, which (due to their mobility) interact with different legal systems and treatment of security interests, bankruptcy protections, and contractual defaults. It is ratified by over 80 countries, including the US and Sweden.

Under Article XI of the Aircraft Protocol, countries that have adopted the Convention may declare that, if they are a debtor's "primary insolvency jurisdiction," one of two alternatives will apply:

- Under "Alternative A," a debtor leasing aircraft must (a) cure all lease defaults and agree to perform future contractual obligations; or (b) relinquish possession of the aircraft by the earlier of (i) the end of a "waiting period" specified under the country's Alternative A declaration, and (ii) the date the counterparty would otherwise be entitled to possession under applicable (i.e. national) law.
- In contrast, "Alternative B" leaves the timing and manner of the creditor's remedies to the discretion of the courts of the contracting state.

Sweden, which parties agreed was the "primary insolvency jurisdiction" of SAS, has adopted Alternative A in its domestic law with a 60-day waiting period, but has not made a declaration adopting Alternative A. The US has not made a declaration adopting Alternative A.

The Lessors' claims

In SAS, two aircraft lessors entered into stipulations with SAS, agreeing (a) to extend the 60-day "waiting period" under the Alternative A, if applicable, as well as Section 365(d)(5) of the US Bankruptcy Code[2], and (b) for SAS to pay rent at a rate reduced from the contract rate during the extended "waiting period" while the parties attempted to negotiate restructured leases.[3] The lessors also reserved their right to make arguments pursuant to, and with respect to the applicability of, Alternative A, including whether the lessors were entitled to additional compensation during the extended "waiting period." Similar agreements have been entered between aircraft lessors and airline debtors, both in SAS and earlier non-US airline chapter 11 cases (e.g. Avianca, Latam, AeroMexico, PAL, and GOL).

1 Norton Rose Fulbright represented SAS as special aviation counsel in its chapter 11 cases.

2 Section 365(d)(5) requires that (unless extended by court order), after a 60-day period commencing from the day the debtors file for chapter 11, debtors must perform all obligations under unexpired leases of personal property until such lease is rejected or assumed.

3 In substance, the Stipulation was similar to stipulations commonly seen in US airline chapter 11 cases entered under Section 1110(b) of the US Bankruptcy Code extending the 60-day period under Section 1110.

The parties were unable to reach agreement on restructured leases. As a result, prior to expiry of the "waiting period," SAS rejected the two leases under Section 365 of the US Bankruptcy Code and returned the relevant aircraft to the lessors.

The lessors filed claims for *both* prepetition rejection damages *and* post-petition administrative expense claims (which generally have priority under the Bankruptcy Code's distribution scheme) through the aircraft return date at the full contract rates.

The parties' dispute largely centered around the lessors' post-petition claims related to (a) maintenance reserves and rent at the prepetition contract rate, and (b) SAS's failure to comply with lease requirements for "end of lease" maintenance payments. The lessors' post-petition claims relied on Alternative A, which provides that the debtor's obligations (e.g. to pay contract rate rent) may not be modified without the creditor's consent. The Bankruptcy Court held that US bankruptcy law governed the classification and priority of the lessors' claims and, as a result, the lessors' administrative expense priority claims during the extended "waiting period" were limited to the "fair market rental value" of the aircraft.

District Court judgment

Judge Kaplan, like the Bankruptcy Court, rejected the lessor's Alternative A-based arguments.

First, he held that neither Alternative A nor Swedish law applied. Although Sweden adopted Alternative A for domestic purposes, it did not make the requisite "declaration" under the Convention with the official depository (UNIDROIT), which could notify other countries and thus give the adoption international effect. Judge Kaplan was unsympathetic to the lessors' argument that EU law prohibits EU member states from issuing declarations themselves, observing that a "notification" conforming to relevant requirements would also be accepted by UNIDROIT, and has been made by and accepted for other EU member states.

Second, even if Alternative A applied, it would not entitle the lessors to the post-petition claims sought. While Alternative A – like Section 1110 for a US airline -- permitted debtors to retain aircraft if they cured outstanding defaults (and agreed to perform future obligations), it did not require a debtor to comply with lease conditions (e.g. to pay contract rate rent) ***during*** the "waiting period," if the lease was ultimately rejected. More importantly, the issue before the court was claim classification and priority, which is not dictated by Alternative A nor any other provision of the Convention. For the same reason, the lessors' arguments on the basis of lease "modification" were also irrelevant.

As such, the District Court held that the Bankruptcy Court properly applied US bankruptcy law to determine the amount and priority of the lessors' claims.

Takeaways

Moving forward:

- Parties hoping to rely on Alternative A should expect scrutiny of the adoption or declaration process of relevant "primary insolvency jurisdictions";
- Parties should be wary of relying on Alternative A for claim classification or treatment issues; and
- While Judge Kaplan determined that Alternative A was not applicable to this case, the lessors' claims may signal a shift in creditor appetite to assert rights under Alternative A going forward.

* This article was first published on May 15, 2025 in Norton Rose Fulbright's *Restructuring Touchpoint* blog series.

David Rosenzweig is a partner and Emily Hong and Cathy Shu are associates in the New York office in the firm's global restructuring group.

Canadian court confirms "interest stops rule" does not apply to secured claims

Katie Mak

When a company enters formal Canadian insolvency proceedings, whether it is a restructuring or liquidation scenario, the Canadian legislation and courts have held that the "interest stops rule" applies in respect of unsecured claims, meaning interest ceases to accrue on such claims after the filing date. A recent decision from the Alberta Court of Appeal has confirmed that the interest stops rule does not apply to secured claims to the extent there is sufficient value in the creditor's collateral. The decision has confirmed that secured creditors are entitled to payment of their post-filing interest as part of their secured claim, while unsecured creditors' post-filing interest entitlements are to be disregarded, thereby affording equivalent treatment to the class of unsecured creditors whether or not their claims are interest-bearing.

In Canada, bankruptcy is a legal process governed by the *Bankruptcy and Insolvency Act* (the "BIA") whereby an appointed trustee in bankruptcy liquidates the company's assets, determines the claims of creditors and distributes according to a statutory priority scheme. The BIA specifically provides that for unsecured claims, interest stops accruing at the time of the bankruptcy. Interest is only payable on the provable unsecured claims after bankruptcy in instances where there is a surplus after payment of all claims. In a bankruptcy, secured creditors are unaffected and are entitled to payment of their debt, plus interest, to the extent of the value realized from their collateral, ahead of other creditors and in accordance with the statutory priority scheme.

While the interest stop rule on unsecured claims is not codified in restructuring proceedings under the *Companies Creditors Arrangement Act* or in receivership proceedings, the Courts have extended the rule to apply in such proceedings (see *National Bank of Canada v Twin Butte Energy Ltd.*, and *Nortel Networks Corporation*). The interest stops rule has been described as a necessary corollary of the *pari passu* principle, the purpose of which is to provide for fairness to unsecured creditors and an orderly administration of an insolvent debtor's estate. The result is that the assets of the insolvent debtor are to be distributed amongst creditors of the same class rateably and equally as those assets and claims are found at the date of insolvency.

In the recent receivership proceeding of *Easy Legal Finance Inc. v. Law Society of Alberta* the Law Society of Alberta obtained an order appointing a custodian over Higgerty Law, a law firm where trust funds were suspected of being misappropriated from one of the firm's trust accounts. The Law Society and custodian then applied to appoint a receiver over any financial entitlements associated with the contingency files for which Higgerty Law was retained as counsel. At the same time, they sought an order stopping accrual of interest in relation to Easy Legal Finance Inc's secured claims, arguing that the court-ordered stay of proceedings and remedies imposed in the receivership prevented interest from accumulating and was necessary to prevent a dissipation of the assets in favour of the secured creditor, which would erode some or all unsecured creditors' recoveries. Easy Legal Finance Inc. was the largest secured creditor of Higgerty Law.

The lower court judge favoured the disallowance of secured creditors' post-filing interest, considering that to be a balance of the burdens of the proceedings and equities for all creditors by avoiding a shift of further recoveries in favour of the secured creditor's accruing interest.

This lower court decision represented a novel approach to the accrual of post-filing secured interest and, if adopted widely, would have material implications for secured lenders who may find themselves and their recoveries tied up for an extended period in an insolvency proceeding they do not control, and

during which their contractual interest entitlements would not accrue. This approach would significantly incentivize secured creditors to move for expedited recoveries for their own claims that are no longer accruing interest, regardless of the impact on value maximization, the overall restructuring process, or on other stakeholders.

Following the Law Society of Alberta's success at the lower court, Easy Legal Finance Inc. appealed the decision of the lower court terminating the ongoing accrual of secured interest. In the appeal proceeding, the respondents argued that the impact of regulatory function and the nature of the collateral necessitated an expansion of the interest stops rule in this case to include the appellant's accruing secured interest claims. They argued that there may be public policy reasons to protect particularly vulnerable unsecured creditors, specifically in this case the clients of the law firm who may suffer due to trust shortages. The Law Society tried to further distinguish the current case from other cases taking the position that the circumstances were different because these particular receivership and liquidation proceedings were not only because of the law firm's insolvency, but were also to deal with the transfer and winding up of live files.

Despite the facts of this case being arguably unique, giving rise to a public policy argument, the Court of Appeal did not find sufficient basis to encroach on a secured creditor's contractual right to interest. It is clear from this decision that the purpose underlying the interest stop rule is to ensure equal treatment of similarly situated unsecured creditors within the same class, and does not therefor apply to secured creditors. The decision reaffirms that a secured creditor's contractual interest entitlements remain protected in insolvency proceedings, at least to the extent of that secured creditor's collateral value, despite any public policy arguments that the circumstances favor equivalent treatment of all creditors' interest claims.

Accordingly, despite proceedings taken in relation to a debtor's insolvency, secured creditors continue to accrue interest to the extent of the value of the creditor's collateral and as contractually or otherwise legally entitled until the date of payment, so long as the rate of interest charged is in compliance with Canadian laws regarding penalties and criminal rates.

Katie Mak is a partner in our Vancouver office in the firm's global restructuring group.

IP versus IP: How does the appointment of a UK Insolvency Practitioner affect a licensee's Intellectual Property rights?

Mike Knapper, Matthew Thorn, Nicole McKenzie, Helen Coverdale

Overview

Many businesses license intellectual property (IP) rights such as copyright from third parties. The licence will give the licensee a contractual right to use the licensor's IP rights and therefore avoid an infringement of the IP right. Complex issues regarding the protection and realisation of IP rights can arise where a licensor (i.e., the person or entity that owns the IP rights) gets into financial difficulties. Although the Insolvency Act 1986 does not provide for the automatic termination of IP licences on the commencement of insolvency proceedings, an insolvency practitioner has broad powers which include the ability to:

i. transfer the IP and licence; and/or
ii. repudiate (i.e., decline to perform) the licence; and (in a liquidation) "disclaim" the licence.

This article outlines the principal risks and potential remedies of a licensee of IP rights when the licensor enters into an insolvency process.

The value of IPR

For many businesses, IP represents an increasingly valuable asset class. Commercial exploitation of IP rights is typically manifested through the licensing of user rights, which could be in the form of a bespoke exclusive licence (e.g., of a patent) or a non-exclusive, mass market standard form copyright licence (e.g., a shrink-wrapped, end-user computer software agreement). An exclusive licence gives the holder a greater degree of control, while a non-exclusive licence is more permissive and allows for multiple parties to use the property.

Licensees should consider the risks posed by the licensor's potential future insolvency proceedings, including the powers of any subsequently appointed insolvency office holder.

Insolvency practitioners' power of sale under English law

In general terms, the Insolvency Act 1986 (IA 1986) confers wide powers on insolvency office holders (being administrators, administrative receivers and liquidators) appointed in respect of corporate entities. A core function of insolvency office holders is to identify the company's assets, then realise and distribute the proceeds to the company's creditors in accordance with the statutory waterfall of payments on insolvency.

If preservation of the IP licence is not considered to be in the best interests of the insolvency estate and the IP rights are of value, the insolvency practitioner will likely seek to sell the IP rights to realise the value for the benefit of creditors. The insolvency practitioner has the power to sell the IP rights to a third-party purchaser, subject to any required consents from secured creditors (absent a court order).

IP rights may be included in the sale of all the assets of the relevant company in a pre-pack administration sale. If the IP has been licensed, the insolvency practitioner may liaise with the licensee – particularly where there is an exclusive licence – to explore whether the licensee wishes to purchase the IP rights, but this is not strictly required. The sale and purchase agreement will usually be drafted on the basis that any purchaser will purchase only such right, title and interest as the company may have in the relevant asset.

There is a risk that the licensor's IP rights are purportedly sold free from the licensee's rights. The position here would be the same as if the transfer was made when the company was not in insolvency proceedings. If the licence relates to a registered IP right (such as patents, trademarks and registered designs) and the licensee's rights are registered at the UK Intellectual Property Office, any third party will be on notice and thereby bound by the licence. However, if registration has not occurred – or is not available for the IPR in question (for example, in the case of a software licence or other licence of copyright) – a bona fide purchaser for value acting in good faith without notice of the licence may take the IP free of the licensee's rights. This principle is codified in some IP legislation, for example s 90(4) of the Copyright, Designs and Patents Act 1988. In other words, where a purchaser acquires IP rights without notice of a licensee's rights, the licence may fall away.

Licences commonly contain prohibitions or restrictions on assignment of the IPR by the licensor. If the licensor, acting by its insolvency office holder, breached such a provision, there may be a claim in breach of contract against the insolvent licensor, but the claims would rank with other unsecured claims in the relevant proceedings (with likely a very limited recoverability).

The insolvency practitioner also will likely receive indemnities in the sale contract from the purchaser to protect the insolvency practitioner (and in some cases, the insolvent company as seller) from loss and/or third-party claims. This is a commercial risk for the purchaser which should be factored into the price paid.

In cases where the licensor has been dissolved and the IP rights of the licensor have been transferred to the Crown as bona vacantia assets, the licensee may wish to purchase the IP rights direct from the Crown. The Crown acts through the Bona Vacantia Department of the Government Legal Department. If it is unwilling to engage in a sale, it may be necessary to restore the licensor company to the register and appoint an insolvency practitioner to allow the licensee to purchase the IP rights from the insolvency practitioner instead. This will be subject to the usual requirements and time limits on restoration.

Liquidator's right of disclaimer

If a liquidator (but not an administrator or administrative receiver, referred to here together as administrators) considers that that the licence is an "onerous or unprofitable" contract (for example, because the value of the licensed IP has increased such that the licence fee is no longer market value) they may seek to disclaim the contract under s 178 IA 1986. Disclaimer is achieved simply by serving notice on prescribed parties.

To be considered onerous, a contract must be more than simply unprofitable and generally there would need to be obligations to be performed or costs to be incurred by the insolvent licensor. Disclaimer presents a risk even when the licence is perpetual, irrevocable and fully paid up (i.e. the consideration was paid upfront), provided "it may give rise to a liability to pay money or perform any other onerous act". This could include cases where the licensor is contractually required to maintain registered rights such as trademarks or patents that involve renewal fees.

Where a liquidator successfully disclaims a licence, the whole contract is disclaimed. For example, where there is an agreement that covers the licensing of software and provides for ongoing support and maintenance, the liquidator would not be able to disclaim the support and maintenance obligations alone. Moreover, a disclaimer only operates to determine the rights, interests and liabilities of the licensor company.

Where a liquidator disclaims an IP licence, any party with an "interest" in the disclaimed property (e.g., an exclusive licensee) can apply to the court to have the IP rights vested in it under s 181 of IA 1986. In practice, if the licensee offered the liquidator a fair sum (plus costs) to take an assignment of the underlying IP rights, the liquidator would generally be willing to sell such rights to the licensee, rather than disclaim it. This is because the liquidator's function is to realise assets to maximise funds in the insolvent estate. In administration, where there is no power to disclaim onerous property, the administrator may be open to a consensual assignment.

Position on administration

Unlike a liquidator, an administrator has no statutory right to disclaim onerous contracts. Instead, if a licensor (acting by its administrator) breaches its obligations under a licence, the licensee will have an unsecured claim for damages. Occasionally it may be possible to seek a court order for specific performance on the part of the insolvent licensor. However, such orders are rare.

There may be a potential claim against the administrator in the tort of inducing a breach of contract. The rule in *Said v Butt* [1920] 3 KB 497 is often relied upon by administrators as authority for the proposition that the administrator (as agent of

the company) will not be personally liable for causing a breach of contract provided they were acting within their powers and in good faith. Note however that in the context of directors, the UK Supreme Court recently concluded that *Said v Butt* does not apply to tortious liability and civil wrongs "which do not depend on any contract or voluntary arrangement between the parties and where liability arises even if they are complete strangers to one another" including trademark infringement – see *Lifestyle Equities CV v Ahmed* [2024] UKSC 17.

Protections for the licensee

At the time of granting a licence to use IP rights, the licensee should consider what protections it may obtain should the licensor subsequently enter into an insolvency process. These may include insolvency remote ownership structures and taking security over the IP. They also may include structuring perpetual, irrevocable, or long-term paid-up licences so that they contain minimal onerous obligations (for example, ensuring that software maintenance obligations are contained in a separate contract). Other considerations include:

1. Registration

Where possible under the law, the licensee should register their rights as a licensee with the UK Intellectual Property Office. A licence that is registered in this way will be binding on any successor in title to the registered IP. If an insolvency practitioner purports to sell the registered IP to a third party where the licence is recorded on the public register (or the new owner has actual notice of the licence), the new owner would be bound by the terms of the licence.

The position in relation to IP rights in other countries which are licensed by an insolvent UK licensor would depend on the local rules around registration of such licences.

2. Restriction on assignment

The licensee may negotiate a contractual restriction on the licensor assigning the IP rights to a third party. If such provision is breached, the licensee would have a remedy against the (insolvent) licensor for breach of contract, as noted above. As the licensee cannot sue a company in administration without the consent of the insolvency practitioner or leave of the court, the breach of contract would generally be dealt with as part of the insolvency process and rank as an unsecured claim. In practice, the licensee *may need to negotiate with the assignee and their rights in this regard will depend on the facts.*

3. Automatic assignment/Option to purchase

The contract may include an express provision, triggered by the insolvency of the licensor, for either:

i. an automatic assignment of the licensed IP rights to the licensee; or

ii. an option to acquire the IP rights from the licensor.

However, as noted above, any breach of contractual provisions by the insolvent company will rank only as an unsecured debt and therefore the prospect of any meaningful return in the insolvency is low.

A provision of this kind also would need to be considered and drafted carefully. Any purchase price would need to be set at an arm's length amount to avoid falling foul of the anti-deprivation principle: this is the principle that seeks to prevent creditors from contracting out of the statutory payment waterfall. For example, if the option to purchase is only exercisable on insolvency and at a nominal value, it likely would be ineffective.

4. Escrow agreements

Escrow arrangements are most commonly used in the context of software licences.

Traditional "on premises" software licence agreements – where the software is installed and used on the licensee's own computer system – often grant the licensee a right to demand that the source code be put into escrow, or to join an existing escrow agreement. The NCC single licensee software escrow agreement provides that upon the licensor's insolvency and other prescribed events (e.g. breach of contract by the licensor), the source code and other information deposited with the escrow agent will be released to the licensee, subject to duties of confidentiality and other obligations. Title in the source code generally remains with the licensor. While the licensee would usually be unable to transfer the source code and property to a third party, it permits the licensee to use the source code to enable it to continue benefitting from the licence it has paid for (e.g., using the source code to maintain the software).

As with an option to purchase, there is a risk that an insolvency practitioner may challenge an escrow agreement for offending the anti-deprivation principle. In practice, this is likely to be a challenge to the licensee's rights to use the source code on release rather than a challenge to the release of the source code itself. In a properly drafted escrow agreement, the escrow agent would have to release the escrowed material it holds to the licensee upon the occurrence of the defined escrow release event (e.g., the insolvency of the licensor) and there usually would be no contractual mechanism for the licensor or insolvency practitioner to challenge this release unless it disputed whether the release event had actually occurred.

A licensee may reduce this risk by:

i. making the release events wider than insolvency and arising at an earlier stage;

ii. ensuring that fair market value has been paid to the licensor for the right to access and use the source code;

iii. not seeking a transfer of title to the source code on commencement of insolvency proceedings.

Conclusion

The insolvency of a licensor presents significant risks for a licensee of IP rights. However, contractual safeguards can be negotiated in advance to mitigate against such an event. Should insolvency occur, early action is key. The licensee will need to act quickly in order to benefit from the legal options available to them.

*This article was first published in the June 2025 edition of Corporate Rescue and Insolvency journal.

Mike Knapper is a partner and head of IP for the EMEA practice. Matthew Thorn is a partner, Nicole McKenzie is a senior associate, and Helen Coverdale is a senior knowledge lawyer and members of the firm's global restructuring group.

NORTON ROSE FULBRIGHT

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 3,000 lawyers and other legal staff based in more than 50 cities across Europe, the United States, Canada, Latin America, Asia, Australia, the Middle East and Africa.

nortonrosefulbright.com