

Licensors Bankruptcy – View from the Licensee

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Introduction



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About me

Partner, Patent Attorney at HGF

NL, BE, EP Patent Attorney, UPC Representative

A European IP firm with 25 offices in 7 countries

Today, we are going to be talking about...

AQT, Abound Solar, Advent Solar, Ampulse, Applied Solar, Arise Technology, BP Solar, CSG, Centrosolar, Day4 Energy, ECD, EPV Solar, Evergreen Solar, Flexcell, G24i, Global Solar Energy, GlobalWatt, GreenVolts, HelioVolt, Hoku, Inventux, Konarka, LG, Meyer Burger, Odersun, OptiSolar, Panasonic, Pramac, REC Solar, Ready Solar, Sanyo Solar, Panasonic Solar, Scheuten Solar, Schott Solar, Senergen, Siemens Solar, Sharp, Signet Solar, Solar Millennium, SolarMax (Sputnik Engineering), SolarWorld, Solon, Soltecture, Solyndra, Sovello, SpectraWatt, Stirling Energy Systems, SunPower, Sunfilm, Suntech Power, Suntree, Sunworks, Toledo Solar, Uni-Solar, Wakonda Technologies, Zhejiang Akcome....

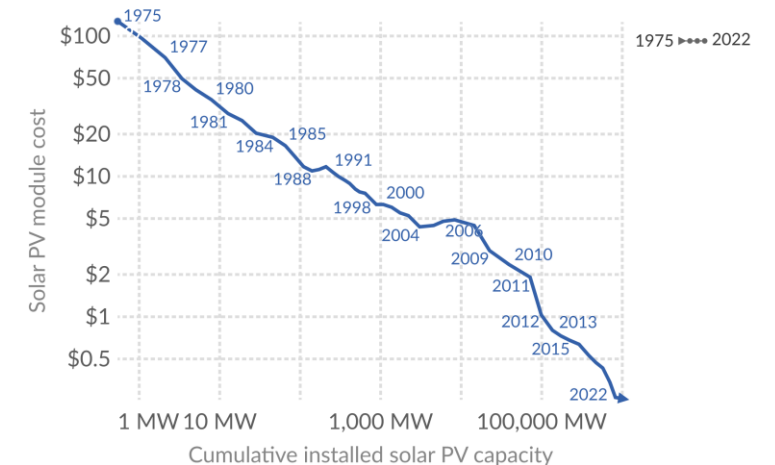
Bankruptcy – Experiences from the Licensee side

Why should I care if my Licensor goes bankrupt?

Solar panel costs have fallen by around 20% for every doubling of global cumulative capacity

Our World in Data

Costs are measured in US dollars per Watt, adjusted for inflation.



Data source: IRENA (2023); Nemet (2009); Farmer and Lafond (2016)
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Introducing – The Licensor

- Company A:
- Manufacturer of solar glass, Location: Germany
- Patented (proprietary) AR coating process, optimizing light transmission of solar glass and increasing efficiency of solar panels.
- Thin glass expertise: The company pioneered development of ultra-thin, yet mechanically strong solar glass (from 2.3 mm upwards), essential for the production of lighter, more durable glass-glass solar panels.

Introducing – The Licensee

- Company B, located in Belgium (B).
- Repurposed and modernized industrial glass ovens originally used to produce light bulbs.
- Company B specialized in producing ultra-thin (2 mm), tempered, and textured glass specifically for the photovoltaic industry.
- Textured surface was designed to increase energy yield by capturing more sunlight.

The Situation (I)

- A was acquired by B.
- Acquisition to combine A's expertise in ultra-thin glass (2mm) with B's specialized anti-reflective (AR) coating technology.
- A licence agreement was drafted, discussed, and closed under Belgian law concerning the background IP of A.
- Agreement included IP management clauses, and usual terms such as change of control, bankruptcy, etc., i.e. Rights *in Rem*.
- A coating line was purpose-built at Company B's site for applying A's coatings to B's glass.
 - The line was specifically optimized for producing anti-reflective (AR) coatings.
 - Produced solar glass could improve solar module energy efficiency by approximately 4%.
 - The acquisition was part of a larger investment strategy into solar-glass manufacturing, tempering, and processing lines...
- Company B started operating its coating line...

And they lived happily ever after? Not quite...

The Situation (II)

- Key Details of the acquisition of A by B:
- Parent Company of A sold A (according to published data):
 - for a symbolic purchase price plus a share of future profits
 - financial liabilities of above €10 million.
- Shortly after the acquisition, A faced separate insolvency proceedings.
- Licences were not recorded yet (if at all possible for non-exclusive licence...).

Quick Excursion into the depths of German insolvency law

Insolvency grounds:

- Zahlungsunfähigkeit (§ 17 InsO); Drohende Zahlungsunfähigkeit (§ 18 InsO) and Überschuldung (§ 19 InsO)
- Opening decision (§ 27 InsO): Appointment of Insolvenzverwalter (Curator, Administrator)
- All assets form the insolvency estate (§ 35 InsO)
 - Include registered IP and unregistered know-how; existing licence agreements do not remove IP from estate.
 - Licence agreements are typically mutual, unperformed contracts, and classified under § 103 InsO
 - Administrator has election right (Erfüllungswahlrecht) – **and can cancel licence at will!**

Administrator's Election Rights (§ 103 InsO)

- Performance:
 - Either Licence is continued, but Royalties are payable as Masseverbindlichkeiten (§ 55 InsO)
 - Or: Cancellation:
 - Licence ceases immediately;
 - No continuation right under German law
 - Damages claim = unsecured insolvency claim (§ 38 InsO); Licensee is limited to damages claim (§ 103(2) InsO)
 - No priority or segregation right.
- A real and serious business disruption risk!



Administrator's Other Rights (§ 159 InsO)

- Administrator may sell IP (§ 159 InsO)
- Buyer acquires IP free of contractual obligations
- Licences do not bind purchaser unless *in rem*

- Limits of Contractual Insolvency Clauses:
 - Ipso-facto clauses generally unenforceable (§ 119 InsO)
 - Termination solely due to insolvency often invalid
 - Contractual protections insufficient without property-law effect

In Rem Usage Rights (Dingliche Nutzungsrechte)

- Pure contractual licences are obligatory rights
- *In rem* rights may survive insolvency, but high threshold; rare in practice
- Requires registration/structuring up front (even if difficult to negotiate)

- Structuring & Mitigation Techniques
 - Exclusive licences with strong economic position
 - Escrow arrangements (source code, know-how)
 - Sublicensing rights
 - Step-in or call options
 - Security interests where possible

Key differences Insolvency: DE vs NL & BE – IP Licences

- Germany (InsO):
 - Licence agreements = executory contracts (§ 103 InsO), hence administrator may perform or reject
 - Licensee at risk; only damages
 - Strong emphasis on insolvency estate; *ipso-facto* clauses generally unenforceable
- Netherlands (Faillissementswet):
 - Licence may be continued if administrator performs
 - Rejection possible; licensee claims treated as ordinary creditors
 - Some protection via statutory transfer rules for IP contracts
- Belgium (Faillissementswet / Wetboek van Economisch Recht):
 - Licences are part of the estate; administrator may continue or terminate
 - Licensee has claims as ordinary or preferential creditor depending on type
 - Certain *in rem* rights may survive insolvency
- Takeaway: DE law is creating a higher licensee risk, NL and BE provide somewhat more continuity options.

The Situation (III)

- B had to resolve the issue (e.g. close a new licence, or outright purchase relevant patent rights) to be able to continue its operation (adding Insult to Injury)!
- A and B continued to operate independently for a period but got eventually scooped by the solar panel Industry shake-out.
- Industry records confirmed late that the products of B incorporating the A coatings were a significant technological milestone, basically used in almost every modern PV panel.

Key Take away and biggest pitfalls?

- Licensor insolvency exposes licensee to § 103 InsO risk
- Little space for avoiding risk by contractual clauses
 - German law strongly favours insolvency estate
 - Administrator discretion is central
 - Legal structuring is decisive – Escrow, Register, Transfer relevant rights
- Avoid stipulative non-performed language (which is common in English language agreements!)
- Do not trust that agreed applicable law according to licence would actually bind parties; Curators do not care!
- Suing a bankrupt party for damages is not a great option!



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Thank you!

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