

Change of Control:

Implications of the merger of a foreign party to a software licensing contract for the contractual relationship

This report explains the contractual implications of the merger between two German companies, one of which is the licensee in a software licensing contract that has been made subject to Swiss law by choice of law.

1. Acknowledgment of universal succession under Swiss law

- 1.1 Under articles 155 and 164b of the Swiss Private International Law Statute, the legal implications of company mergers are essentially governed by the law applicable to the companies concerned (company statute). This is German law in this case.
- 1.2 Since, under §§ 21 and 22 of the German Transformation Act, a merger involves universal succession, this is also acknowledged under Swiss law. From the Swiss legal perspective, therefore, the licensing contract is automatically transferred to the merged company at the time of the merger.

2. Extraordinary right of termination

- 2.1 The provisions of a licensing contract that are to be addressed primarily are those provisions that explicitly govern extraordinary termination for good cause. In particular, such provisions may specify – in the context of a “change of control clause” – that a merger, or disposal of the business, etc. on the part of one contracting party, entitles the other party to terminate the contract.
- 2.2 On the other hand, if the contract does not contain such a “change of control” clause as part of its rules relating to extraordinary termination, the merger of a contracting party shall then only constitute good cause for terminating the contract if it becomes unreasonable for the other contracting party to continue to adhere to the contract.
- 2.3 Under Swiss law, an inalienable right of extraordinary termination for good cause also exists for licensing contracts in cases where it becomes unreasonable for one party to continue to adhere to the contract.
- 2.4 Such unreasonableness may exist where there is a change of party, if the contract was concluded with the other contracting party specifically in person.

Such orientation of the nature of the licensing contract to a contracting partner in person is generally deemed to be possible for a case where there is a change of licensee, most probably in connection with licensing contracts in relation to copyright. However, this is not always the case. In particular, in this matter such an assumption is contradicted by the fact that the personal element is generally far less significant in the licensing of software than for contracts relating to works of literature, for example.

2.5 The judgment as to whether or not a contract is dependent on a contracting partner in person, however, ultimately always depends on the interpretation of the actual contract. In particular it is necessary to observe the following provisions, which are normally contained in licensing contracts:

- Licensing contracts often specify the reasons why the licensor wishes to conclude the contract with the licensee, for example because the licensee is a leading supplier in a particular market or because only the licensee can meet certain customer requirements.

However, these conditions often also continue to be fulfilled by the company taking over or merging with the licensee, with the effect that specifically personal characteristics are not actually relevant. Provided the licensor cannot provide concrete evidence that the conditions are no longer met by the company taking over or merging with the licensee, an extraordinary right of termination is to be denied.

- Provisions which make the contractual transfer of rights and obligations from the contract dependent upon the agreement of the other contracting party (except where otherwise expressly agreed in the contract) cannot be applied to a universal succession. However, if – in this connection – the contract contains a clause that entitles the parties to transfer their contractual rights to affiliated companies, this contradicts the personal nature of the contract to a certain degree. This applies in any event if the German contracting party is merged with an affiliated company (parent company, subsidiary or fellow group member), in which case no good reason for extraordinary termination exists.

3. Summary

To summarize, it is therefore established that, when the licensee in a software licensing contract merges with another company,

- the contract is transferred to the company taking over or merging with said licensee, and that
- the merger, provided the contract does not include any specific elements that make it dependent upon this contracting partner in person, does not constitute good reason for extraordinary cancellation.

Specific contractual clauses that include an explicit provision relating to the implications of a merger are excepted.

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