From cannonballs to water pistols

The endogenous challenges in the treatment of IP licences in European insolvency proceedings and the need for further harmonisation notwithstanding the forthcoming 2026 Directive

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Executive summary

The increasing reliance on intellectual property licensing within the knowledge-based economy has made the stability of such arrangements an issue of growing importance in insolvency law. Within the European Union, the expanding role of patent licensing in cross-border innovation networks has rendered the treatment of IP licences in European insolvency proceedings increasingly significant for the promotion of cross-border innovation and investment. An issue that has acquired renewed prominence with the Commission's 2022 Proposal for a Directive harmonising certain aspects of insolvency law, which contained the first EU legislative provision expressly addressing the treatment of these agreements in insolvency. That provision was intended to protect the non-insolvent licensee against the termination of the licence agreement upon the licensor's entry into insolvency proceedings. During the legislative process, however, that initial harmonising ambition was substantially diluted. Although the forthcoming Directive 2026 acknowledges the importance of licence continuity, it ultimately leaves Member States free to decide whether to provide such protection. At the same time, the introduction of the European patent with unitary effect in 2023 is expected to increase the practical significance of these supranational IP rights.

Research question

These developments occur in a context of persistent divergence in national distributive policy choices concerning the treatment of IP licences in insolvency, particularly as regards both the degree of protection afforded to licensees and the contractual or proprietary basis on which that protection is constructed. In light of these developments, this paper asks:

- How responsive is the applicable-law framework of the EIR to divergent national distributive policy choices in the treatment of IP licences in insolvency?

The paper makes two principal contributions. First, it provides comparative analysis of the legal nature of exclusive and non-exclusive patent licensed rights in Austria, France, Germany, and Spain. It argues that the characterisation of the licensed right, whether contractual, proprietary, or quasi-proprietary, is decisive for insolvency treatment, since it is directly linked to the resilience of licensed rights in insolvency proceedings. Secondly, the paper shows that the EIR gives rise to a fragmented and unsatisfactory framework, in which certain national distributive policy choices radiate unevenly across European insolvency proceedings. This stems from the EIR's structure, which combines a general rule based on the lex loci concursus with specific exceptions, most notably, for present purposes, Article 8 on rights in rem and Article 15 on EU intellectual property rights.

Methodology

For the comparison of Austria, France, Germany and Spain as selected EU Member States jurisdictions, the paper adopts a comparative functionalist approach. The inquiry proceeds from a common practical problem, namely the treatment of IP licences in insolvency. Because the paper takes a conflicts-based perspective, the *extra-concursus* characterisation of IP licences is central. The analysis therefore compares how different legal systems characterise licensed IP rights and examines the consequences of those characterisations under the EIR, using ius standi, third-party enforceability, and transferability as operative comparative indicators. Finally, the functionalist approach is enriched by attention to systemic context and to the non-equivalence of proprietary categories across legal systems.

Main findings

The main findings of the paper are:

1. The forthcoming Directive 2026 weakens the protection originally envisaged for non-insolvent licensees. Whereas the 2022 Proposal pointed towards a stronger harmonising intervention, the final text reduces that protection to a facultative option for Member States. Even within the limited scope of pre-pack proceedings, this dilution is significant, because it leaves the treatment of licensees without minimum mandatory harmonisation.

2. The legal nature of the licensed right is decisive for the insolvency treatment of IP licenses. The paper shows that the resilience of the licensee's position depends not only on the contractual treatment of the licence agreement, but also on whether the licensed right comprised within that agreement is characterised as a contractual right, a right *in rem*, or a quasi-right *in rem*. That prior *extra-concursus* characterisation strongly affects the treatment of the licence in European insolvency proceedings and, therefore, the resilience of the licensee's position in insolvency.

3. The comparative analysis reveals a marked divergence in the legal nature of exclusive licensed rights, whereas non-exclusive licensed rights remain broadly contractual across the selected jurisdictions. In Germany, there is a strong doctrinal consensus that exclusive licensed rights, particularly in patent law, may be characterised as quasi-rights *in rem*. In Austria, the position remains more open and the debate more mixed, with some support for a quasi-proprietary understanding, but without the same degree of doctrinal consolidation. By contrast, in France and Spain, even exclusive licensed rights are generally treated as contractual in nature and are not recognised as rights *in rem* or quasi-rights *in rem*. As regards non-exclusive licensed rights, the comparative picture is substantially more uniform: across Germany, Austria, France, and Spain, they remain, generally, contractual.

4. The EIR produces a triple fragmentation in the treatment of IP licences in insolvency. First, licensed rights relating to national IP rights are characterised by reference to the *lex loci protectionis* and may trigger Article 8 EIR where the licensed right qualifies as rights *in rem* under the EU autonomous characterisation of such right, thereby operating as an exception to Article 7(2)(e) and to the application of the *lex loci concursus*. Secondly, licences relating to EU trademarks and designs are generally treated as contractual in nature and are therefore governed by the *lex loci concursus*. Thirdly, licences relating to the European patent with unitary effect occupy a distinct position, since their legal nature depends on the applicable national law. Nevertheless, under Article 15, where they are characterised as rights in rem or quasi-rights in rem, their protection does not depend on the application of Article 8, but rather on the protection afforded through the conflict-of-law rules of the *lex loci concursus*.

5. The structure of the EIR is essentially binary and pigeonholed. For the purposes of the Regulation, national licensed rights either falls within the Article 8 exception for rights *in rem*, in which case it limits the reach of the *lex loci concursus*, or it remains outside that category, with the result that the licence agreement is governed by the ordinary contractual regime of the *lex loci concursus*. The EIR does not recognise an autonomous intermediate category between these two positions.

6. National distributive policy choices shape European insolvency proceedings unevenly. Where a Member State protects licensees through the proprietary characterisation of the licensed right, that policy may irradiate into the European insolvency proceedings. Where protection exists only at the level of the contract, it may be displaced once the *lex loci concursus* of the main proceedings applies. Functionally similar licensed rights with different *lex loci protectionis* may therefore receive materially different treatment. This, in turn, creates strategic incentives in the structuring of licences, the localisation of rights, and the selection of insolvency fora.

7. The intra-European Brussels effect paradox. The interaction between the property regime of the Unitary Patent, the conflict-of-law structure of the EIR, and the internalisation of European private international law solutions into national legal systems produces an ambivalent result. Article 15 EIR is intended to prevent the direct application, in the field of European IP rights, of the same proprietary solution that may protect licensed rights relating to national IP rights under Article 8, and instead to subject the matter to the law of the forum, whose conflict-of-law rules determine the legal nature of the licensed right and the extent to which any proprietary dimension will be recognised in insolvency. Yet where Member States have internalised into domestic private international law solutions modelled on the logic of Article 8, proprietary solutions developed within particular national systems may nevertheless re-enter European insolvency proceedings indirectly and acquire systemic influence. Where Member States retain distinct approaches within the space left open by Article 15, however, the treatment of licences relating to the Unitary Patent is further fragmented. The paradox, therefore, is that a framework intended to avoid the direct transposition of Article 8-type solutions into the field of European IP rights may nevertheless either reproduce those solutions indirectly through the law of the forum or risk further fragmentation between national approaches.

8. The criteria for determining the national law applicable to the Unitary Patent as an object of property may structurally magnify the German approach to exclusive licensed rights. From a comparative perspective, the German recognition of exclusive licensed rights as quasi-rights *in rem* is exceptional. Yet while the primary connecting factor for the Unitary Patent is the applicant's place of business in a participating Member State, the regime uses the location of the European Patent Office in Munich as a residual criterion where the applicant is not established in such a State. German law may therefore govern the proprietary aspects of a significant amount of Unitary Patents and thus project a comparatively minority national solution into European insolvency proceedings with disproportionate frequency.

9. Private international law alone is insufficient. The overall conclusion of the paper is that the current framework does not secure adequate coherence, legal certainty, or sufficient support for cross-border investment and innovation. In light of the weakened final text of the forthcoming Directive 2026 (despite its already limited material scope) and the growing practical relevance of the Unitary Patent, further substantive harmonisation of the treatment of IP licences in insolvency remains necessary to promote cross-border invest and European innovation.

1 Introduction

The treatment of intellectual property ('IP') licences in insolvency has become an increasingly important issue within the European Union. In innovation-driven sectors, licences often structure long-term commercial relations, facilitate access to technology, and support substantial investment by licensees.[1] When the licensor enters insolvency proceedings, however, the continuity of those arrangements may become uncertain, particularly where the insolvency framework permits termination of the licence in the interest of the estate.[2] The issue is especially acute in cross-border cases, since the European Union ('EU') has increasingly recognised that fragmented national insolvency laws create obstacles to capital markets integration, cross-border investment, and European innovation.[3]

This question acquired renewed prominence during the legislative process initiated by the Commission's 2022 Proposal for a Directive harmonising certain aspects of insolvency law.[4] For the first time, the European legislator addressed expressly the position of IP licences in insolvency and proposed a specific mandatory rule designed to protect the non-insolvent parties. That proposal raised significant expectations, particularly because it appeared to recognise that licence continuity may be critical to innovation, cross-border investment, and the broader objectives of the internal market and the Capital Markets Union ('CMU'). During the legislative process, however, the initial harmonising ambition was progressively diluted. Although the forthcoming 2026 Directive reflects a more nuanced understanding of the licensor-debtor scenario,[5] it does not impose a uniform rule. Instead, it leaves Member States free to decide whether to adopt specific protection against termination where the licensor is the debtor.[6] The final outcome therefore acknowledges the importance of licence continuity, yet stops short of mandating a minimum substantive harmonisation on the matter.

In such context, this paper examines the treatment of IP licences as executory contracts within the framework of the EIR and asks whether that framework is capable of responding coherently to divergent national policy choices on licensee protection. It argues that the present position is unsatisfactory for two reasons. First, the treatment of licences is shaped by extra-concursus legal characterisations, especially through the distinction between contractual rights and rights, or quasi-rights, *in rem* in the licensed rights conferred under the agreement. Those *extra-concursus* characterisations may decisively affect the reach of the *lex loci concursus*. Where protection is granted at the level of the contract, it may fail to irradiate the European insolvency proceedings. By contrast, where the licensed right is characterised as quasi-right *in rem*, the national distributive policy embedded in that characterisation may project its effects into the European procedure. Secondly, in relation to European IP rights, and

[1] Nola Hewitt-Dundas and Stephen Roper, 'Knowledge Stocks, Knowledge Flows and Innovation: Evidence from Matched Patents and Innovation Panel Data' (2015) 44 Research Policy; Petra Moser, 'How Do Patent Laws Influence Innovation? Evidence From Nineteenth-Century World Fairs' (2003) 95 American Economic Review 1214; Kendall Artz and others, 'A Longitudinal Study of the Impact of R&D, Patents, and Product Innovation on Firm Performance' (2010) 27 Journal of Product Innovation Management 725.

[2] Guillem Gabriel-Pizarro, 'Mirroring the American Bankruptcy Code? IP Licences in the European Insolvency Harmonisation Project' (2024) 73 GRUR International 128, 132 and references.

[3] Draghi's report, 'The Future of European Competitiveness' (2024) 283, 292.

[4] European Commission, Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law 2022/0408 (COD) 2022 (2022/0408 (COD)).

[5] See further below in Sections 2.2 for context, and particularly the trialogues procedure in Section 2.3.

[6] Recital 47 and article 30 of the European Parliament legislative resolution of 10 March 2026 on the proposal for a directive of the European Parliament and of the Council harmonising certain aspects of insolvency law (COM(2022)0702 – C9-0410/2022 – 2022/0408(COD)) (Ordinary legislative procedure: first reading).

particularly the European patent with unitary effect ('Unitary Patent'), the current framework gives rise to what this paper describes as an 'intra-European Brussels effect paradox.' Although the EU framework seeks to promote coherence, the design of the Unitary Patent as an object of property allows national legal solutions to retain, and in some cases project, systemic influence within European insolvency proceedings. In that respect, whilst divergence concerning national IP rights may be an unfortunate by-product of legal pluralism, the persistence of comparable fragmentation in relation to supranational European rights (particularly the Unitary Patent) is both undesirable and should have been remediable.

The paper develops this argument in three stages. It begins by explaining why IP licences matter in insolvency, with particular attention to the licensor-debtor scenario and the distributive tensions created by termination. It then examines the legal nature of licences over national and European IP rights. The comparative analysis focuses on four Member States, namely Austria, France, Germany and Spain, whose approaches provide the comparative framework for the discussion. Finally, it analyses the operation of the EIR, showing how the interaction between Articles 7, 8 and 15 allows certain national distributive policy choices to shape the European insolvency procedure in a manner that sits uneasily with the objectives of the Regulation. On that basis, the paper concludes that the current reliance on private international law mechanisms is insufficient and that further substantive harmonisation remains necessary to enhance legal certainty, support cross-border investment, and foster European innovation.

2 The importance of IP licences in EU Insolvency procedures

2.1 An overview of the interests at stake

The increasing reliance on IP licensing within the knowledge-based economy has created complex technological and commercial interdependencies that frequently extend across national borders. Licensing agreements, particularly patent licences, play an important role in enabling technology transfer, facilitating research collaboration, and supporting the commercial exploitation of innovation. In many sectors, access to the licensed technology is not merely commercially advantageous, but integral to the licensee's productive activity and market position. When one of the parties enters insolvency, however, the stability of these arrangements may become uncertain. Several jurisdictions, including the United States ('US'), Japan and Canada, have adopted specific legislative safeguards designed to protect licensees in the event of the licensor's insolvency.[7] These regimes seek, in different ways, to ensure that licensees may continue to access the licensed technology notwithstanding the opening of insolvency proceedings. In contrast, no EU Member State has historically enacted a comparably specific and general legislative solution on this matter, and the treatment of IP licences has continued to depend largely on the divergent domestic laws of the Member States. In the absence of specific legislative provisions, many national systems apply, *by inertia*, the

[7] See in this regard US, Canadian, and Japanese law: section 365(n) of the US Bankruptcy Code; section 34.1 of the Companies' Creditors Arrangement Act (CCAA), and sections 65.1(1) and 65.1(2) of the Bankruptcy and Insolvency Act (BIA) in Canada; and, in Japan, Article 99 of the Patent Act and Article 63-2 of the Copyright Act. After the Tempnology case (*Mission Product Holdings, Inc v Tempnology, LLC, 139 S Ct 1652 [2019]* (US Supreme Court)), the protection in the US is, functionally speaking, similar to all major IP rights, as well as in Canada, the only exception is in Japan as the legislation only covers patents and copyright licensed rights.

general rules governing executory contracts in insolvency proceedings, a framework that may leave the position of the licensee exposed.[8]

The particular sensitivity of this issue derives from the structure of licensing relationships and, in particular, from the role played by termination powers within those agreements. Licensing arrangements are typically negotiated with a long-term perspective and frequently involve substantial sunk investments by the licensee.[9] Such investments may include upfront licence fees, the adaptation of production processes, the acquisition of complementary technologies, regulatory compliance costs, staff training, or the development of infrastructure necessary to exploit the licensed technology.[10] In many sectors, especially those characterised by dense patent landscapes, cumulative innovation, or interoperability requirements, the licensee's business model may become structurally dependent on continued access to the licensed rights.[11] Within this context, the licensor's insolvency creates a particularly acute risk for the non-debtor licensee. If the licensor-debtor retains, from a functional perspective, the capacity to terminate the licence agreement as executory contract and dispose of the IP free of existing licences, the licensee may lose both access to the technology and the investments made to implement it, while being left only with an unsecured claim in the insolvency estate.[12] This dynamic may create hold-up incentives for the licensor-debtor or the insolvency practitioner, who may seek to terminate the licence in order to increase the value of the IP asset for resale or relicensing. At the same time, the licensee may face significant barriers in replacing the licensed technology, owing to the nature of IP rights, the technological specificity of the licensed input, and the overinvestment costs associated with switching. These dynamics explain why the licensor-debtor scenario has traditionally been regarded as the most critical scenario in the treatment of IP licences in insolvency. A more detailed examination of the interests of licensors, licensees and insolvency estates in this context has been developed elsewhere and will not be repeated here.[13] The issue, therefore, is not merely one of contractual inconvenience. It concerns the allocation of insolvency risk between the collective interest of creditors, the estate's interest in value maximisation, and the reliance interest of a party whose commercial activity may have become dependent on the continuity of the licence. In that setting, the legal treatment of the licence agreements becomes critical.

[8] See below in Section 4.3.
[9] Mark Reutter, 'Intellectual Property Licensing Agreements and Bankruptcy' in Jacques de Werra (ed), *Research Handbook on Intellectual Property Licensing* (Edward Elgar Publishing 2013) 309.
[10] Gabriel-Pizarro (n 2) 133–134.
[11] See further e.g. Carl Shapiro, 'Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting' in Adam Jaffe, Joshua Lerner and Scott Stern (eds), *Innovation Policy and the Economy*, I (MIT Press 2001); Timothy Simcoe and Cesare Righi, 'Chapter 12. Standards, Patents and Innovation' in Richard Hawkins, Knut Blind and Robert Page (eds), *Handbook of innovation and standards* (Edward Elgar Publishing 2017) 254. E.g. smartphones sector, Pheh Hoon Lim and Louise Longdin, 'The Smartphone Wars: Patents and Copyright as Swords and Shields' (2016) 38 European Intellectual Property Review 280, 280–281; Simcoe and Righi 254. E.g. chemicals, automobiles and steel, Mark Dodgson and Roy Rothwell (eds), *The Handbook of Industrial Innovation* (Edward Elgar Pub 1996) 151, 177.
[12] See below Section 4.3, for a broader comparative overview on this matter see Jason Chuah and Eugenio Vaccari, *Executory Contracts in Insolvency Law* (2nd edn, Edward Elgar Publishing 2023).
[13] Gabriel-Pizarro (n 2).

2.2 The EU political momentum: the substantive harmonisation project and CMU

The current initiative to regulate IP licences in insolvency can only be understood against the broader evolution of EU insolvency policy, and in particular against the progressive shift from coordination towards substantive approximation. Early harmonisation efforts were confined largely to jurisdiction, conflict-of-law rules, recognition and coordination. The EIR 2000[14] and its 2015 recast[15] established a private international law framework for cross-border proceedings, yet deliberately abstained from interfering with domestic rules on contract performance and termination. The substantive treatment of executory contracts therefore remained embedded within the applicable national law. A different orientation emerged in the context of the CMU. Fragmentation of insolvency regimes was increasingly portrayed as a structural impediment to cross-border investment and capital mobility.[16] Directive (EU) 2019/1023 introduced minimum standards on preventive restructuring and discharge. Although limited in scope, it marked a decisive step towards convergence in areas previously regarded as closely tied to domestic legal culture.[17] The forthcoming 2026 Directive harmonising certain aspects of insolvency law would extend this movement into the pre-pack procedures.[18] These procedures are conceived as transfers of the debtor's business negotiated prior to the formal opening of proceedings, with confirmation following swiftly thereafter in order to preserve going-concern value.[19] Within this framework, the Commission aimed, in its 2022 Proposal, to introduce specific provisions regarding the treatment of IP licences in insolvency, particularly upon their termination and assignment.[20]

The decision to legislate on this matter was notable. The Commission's Proposal constituted an unprecedented intervention in an area previously left to national discretion. Yet it was introduced without any prior or sufficiently developed analysis of licensing structures or of the economic function that such agreements perform in innovation-driven sectors.[21] As a result, the substantive provisions did not fully reflect the role of IP licensing within the internal market. Nor did the legislative materials articulate a fully developed justification for the proposed asymmetry. While the recitals alluded to the importance of safeguarding access to technology, the Proposal offered no explanation as to why these considerations warranted displacement of ordinary insolvency principles, nor why the interests of the non-insolvent licensee should prevail over the collective interest in relieving the estate of burdensome obligations.[22] That absence of reasoning was particularly striking given that insolvency law has

[14] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings 2000 (OJ L).
[15] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) 2015 (OJ L).
[16] Draghi's report (n 3) 283.
[17] Reinout Vriesendorp, Stephan Madaus and Ignacio Tirado, 'CERIL Report 2024-1 on the Transposition of the EU Preventive Restructuring Directive 2019/1023' [2024] in Europe conclusions.
[18] As approved by the EU Parliament, in particular Article 30, European Parliament legislative resolution of 10 March 2026 on the proposal for a directive of the European Parliament and of the Council harmonising certain aspects of insolvency law (COM(2022)0702 – C9-0410/2022 – 2022/0408(COD)) (Ordinary legislative procedure: first reading) (n 6).
[19] Detailed explanation of the specific provisions of the proposal, page 16 Proposal.
[20] Article 27.
[21] Nothing can be found in the different drafts of the Directive, nor in the *travaux préparatoires*.
[22] It highlights IP licenses as 'usual[ly] key components of the operations of the business being sold' (recital 28). Yet this rationale justifies protecting public interests against creditors, not the reverse. No reason is given why the interests of the state and creditors should yield to those of the licensor's counterpart, or why an asset should be sold for less to protect licensees who remain ordinary creditors.

traditionally subordinated bilateral expectations to the logic of *pari passu* distribution and value maximisation.

The structure of the provision further accentuated this difficulty. The Proposal appeared to echo US Bankruptcy Code section 365(n),[23] under which rejection of an IP licence constitutes a breach and allows the licensee to retain the exploitation rights upon continued payment of royalties.[24] The US model, however, permits the estate to shed future duties while preserving the licensee's access to the licensed rights. No comparable distinction was embedded in the Commission's text.[25] Licensed rights and ancillary duties, including maintenance, updates or technical assistance, were not taxonomically disentangled. Moreover, as it will be discussed below,[26] in civil law systems, where termination generally, from a functional perspective, operates with *ex-nunc* effects and selective performance lacks a stable doctrinal foundation, this generates serious difficulties.[27] The licensor-debtor may be compelled to continue performing onerous obligations without a corresponding mechanism for adjustment. The US case is important because it exposes the conceptual weakness of the Commission's initial design. It shows that protection of the licensee does not necessarily require the continued performance of the entire contractual relationship in all its dimensions, but may instead be structured around preservation of the core usage right.

During the trialogues, a series of nuances reoriented the initial design. Whereas the Commission's Proposal had proceeded on the implicit assumption that licensee protection required direct legislative intervention, the Council draft articulated that premise explicitly.[28] Recital 28 states that safeguarding the licensee, where the licensor becomes insolvent, is necessary to preserve incentives to invest. Protection is thus framed as serving an economic function. In parallel, the termination ban is narrowed. The focus is confined to termination by the licensor-debtor, thereby excluding the licensee as debtor scenarios. This refinement reflects a better understanding of the innovation dynamics and of the asymmetry of risk within licensing relationships, where the more vulnerable party in insolvency is generally the non-debtor licensee in the licensor's insolvency, rather than the licensor in the licensee's insolvency. This clarification of purpose, however, came accompanied by a striking legislative choice. The Council text rendered the prohibition optional, leaving its adoption to the discretion of Member States.[29] The measure was no longer conceived as a mandatory element of harmonisation, but as a facultative option within national legislative autonomy. The tension is evident. The recitals characterise licensee protection as critical to investment, yet the operative

[23] Gabriel-Pizarro (n 2). For further understanding of the US approach, Peter S Menell, 'Bankruptcy Treatment of Intellectual Property Assets: An Economic Analysis' (2007) 22 Berkeley Technology Law Journal 733; Warren E Agin, 'Assuming Intellectual Property Licenses' (2012) 46 American Bankruptcy Institute Journal; Eric E Bensen and Harold Einhorn (eds), 'Patent License Agreements in Bankruptcy' *Bensen on patent licensing transactions* (Matthew Bender & Company 2023).
[24] Menell (n 23); Agin (n 23); Bensen and Einhorn (n 23). See e.g. *Mission Product Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652 [2019]* (n 7) paras 12–13.
[25] Article 27.
[26] See below Section 4.3.1
[27] In the Austrian case, not without doctrinal debate, Stefan Perner, '§§ 19–22' in Christian Koller, Elisabeth Lovrek and Martin Spitzer (eds), *IO - Insolvenzordnung : Mit EuInsVO und EKEG* (2019). In Germany, Gabriele Koziol, *Lizenzen als Kreditsicherheiten* (Mohr Siebeck 2011) 121–123. In France, Inbal Heliot, 'Les droits de propiété intellectuelle à l'épreuve des procédures collectives' (Aix-Marseille Université 2014) 164–165. In Spain, Juana Pulgar Ezquerra, 'De la resolución en interés del concurso' *Comentario a la Ley Concursal 3.ª edición* (3rd edn, La ley 2023) 3–4 and fn. 5.
[28] General Secretariat of the Council, Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law - General approach 2025 [9257/25].
[29] Article 27 in the ibid.

provision refrains from imposing a uniform rule. The compromise reached between the Council and the Parliament on 5 December 2025 follows this recalibrated structure,[30] as does the version approved by the Parliament on 10 March 2026,[31] which is likely to constitute the final text of the forthcoming 2026 Directive.

That legislative outcome is significant because, while it confirms at EU level the economic importance of licence continuity for investment and, in this paper's view, also for innovation and technology markets, it stops short of resolving the central cross-border problem created by divergent national distributive choices. The burden of coordination therefore continues to fall on the EIR. In such context, the introduction of the European Patent with unitary effect in 2023 may sharpen rather than resolve the problem. Rather than reducing fragmentation within the internal market, the legal configuration of the Unitary Patent as an object of property may reproduce, and in some respects intensify, the difficulties already encountered in relation to national IP rights in insolvency.[32]

3 Legal nature of IP licence agreements and IP licensed rights

3.1 Introduction

The treatment of IP licences in insolvency cannot be examined solely through the law governing executory contracts. It also requires attention to the legal nature of the rights conferred by the licence itself. This distinction is essential. In other words, the licence agreement, as a contractual relationship between licensor and licensee, must be distinguished from the legal status of the licensed rights arising under that agreement. In insolvency, and particularly in cross-border insolvency under the EIR, the resilience of the licensee's position may depend not only on the contractual regime applicable to the agreement, but also on whether the rights conferred are regarded as contractual, right *in rem* or quasi-right *in rem*. Before that question can be addressed, however, a prior clarification is needed. It is first necessary to identify what is meant by a licence agreement as such from an EU perspective, since the subsequent analysis depends on distinguishing the contractual instrument from the legal status of the rights granted under it.

At EU level, no comprehensive statutory definition of the IP licence agreement has been adopted. Nevertheless, the case-law of the European Court of Justice ('ECJ') provides a more structured basis for its European conceptualisation. In the *Falco case*, the Court held that the mere grant of a licence, absent further active performance by the licensor, does not amount to a 'service', since the provision of services presupposes active conduct in return for remuneration.[33] In doing so, the Court described the licence agreement, in its minimum form, as a contract under which 'the only obligation which the owner of the right granted undertakes

[30] Council of the EU, 'Proposal for a Directive Harmonising Certain Aspects of Insolvency Law, 5 December 2025, Final Compromise Text' (2025) Interinstitutional File: 2022/0408 (COD) <https://data.consilium.europa.eu/doc/document/ST-16459-2025-INIT/en/pdf> .

[31] See, in this regard, the position approved by the European Parliament on 10 March 2026, in particular recital 47 and Article 30, European Parliament legislative resolution of 10 March 2026 on the proposal for a directive of the European Parliament and of the Council harmonising certain aspects of insolvency law (COM(2022)0702 – C9-0410/2022 – 2022/0408(COD)) (Ordinary legislative procedure: first reading) (n 6).

[32] See below Sections 3.3.2 and 4.3.2.

[33] *Judgment of the Court (Fourth Chamber) of 23 April 2009 Falco Privatstiftung and Rabitsch* [2007] ECJ Case C-533/07.

with regard to its contractual partner is not to challenge the use of that right by the latter'.[34] Read in isolation, that language reflects a negative conception of the licence, centred on the licensor's forbearance and the contractual permission to use the protected subject matter. Yet the Advocate General's formulation, according to which the owner grants a right to use the IP and undertakes to permit the licensee to exploit it freely, already points towards a broader understanding.[35] That broader understanding is confirmed by the *Optiek case*,[36] where the Court stated that, by granting a licence, the proprietor confers on the licensee, within the limits set by the clauses of the licensing contract, the right to use the relevant IP right.[37] Taken together, these judgments suggest that the concept and characterisation of licences within the EU *acquis communautaire* reflect a broadly defined and flexible approach, responsive to both legal and economic realities. Licences are conceived as agreements by which the licensor confers upon the licensee a right, within the limits of the contract, to use or exploit the relevant IP right. In that sense, they are framed not merely in negative terms, as the licensor's forbearance from interference, but also in positive terms, as a grant of authorisation to carry out specified acts of exploitation, such as manufacture, use, or commercialisation. At the same time, these judgments clarify that licensing, in its core form, remains a primarily passive juridical act of conferring rights rather than an active provision of services, even though that passivity does not preclude a positive construction of the licence as a legally delimited entitlement to exploit the protected subject matter.

Once the notion of the licence agreement has been clarified, it becomes necessary to return to the licensed rights arising under that contractual relationship and to examine their legal nature. To this end, the inquiry proceeds in two steps. First, it is necessary to clarify the legal nature of the rights conferred by licences under selected national legal systems, since national IP rights remain governed by the *lex loci protectionis* and their proprietary or contractual classification depends on domestic law.[38] Secondly, it is necessary to examine how licences over European IP rights are configured within the EU legal framework, with particular attention to the contrast between European trademarks and designs, on the one hand, and the Unitary Patent, on the other.

In order to conduct this analysis, the discussion that follows applies three principal criteria. The first concerns the *ius standi* of the licensee, namely the extent to which the licensee may assert and defend its position in legal proceedings. The second concerns enforceability against third parties, that is, whether the rights conferred by the licence can be opposed beyond

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[34] ibid 31.

[35] ibid; *Case C-533/07 Falco Privatstiftung and Rabitsch [2009] ECR I-03327, Opinion of AG Trstenjak* [58].

[36] *Judgment of the Court (Second Chamber) of 19 July 2012 Pie Optiek SPRL v Bureau Gevers SA and European Registry for Internet Domains ASBL* [2012] ECJ Case C-376/11.

[37] ibid 47.

[38] See in this regard the approach taken in the key international treaties, Paris Convention for the Protection of Industrial Property (adopted 20 March 1883, entered into force 7 July 1884) 828 UNTS 305; Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, entered into force 5 December 1887) 828 UNTS 221; Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299. This solution is the one applied, for example in Spain, both outside insolvency and, by extension, within the insolvency framework, albeit through a technically refined use of conflict-of-law s methodology, see article 10.1 on rights *in rem* and article 10.4 of the Spanish Civil Code. Upon the technical complexity of the provision see Miguel Virgós Soriano, 'Comentarios a Los Artículos 9.9; 9.10; 10.4; 10.5; 10.6; y 10.10 Del C. Civil' *Comentario del Código civil* (Ministerio de Justicia ed., 1991) 115 et seq; Antonio Remiro Brotóns, 'Artículo 10. Apartado 4' in M Albaladejo (ed), *Comentarios al Código civil y compilaciones forales*, vol 1 (1978) 257–261; Pedro Alberto De Miguel Asensio, *Contratos internacionales sobre propiedad industrial* (2nd edn, Civitas 2000) 148 et seq; María del Pilar Jiménez Blanco, *El derecho aplicable a la protección internacional de las patentes* (Comares 1998) 72–77.

the immediate contractual relationship. The third concerns transferability, namely whether the licensee may assign or otherwise transfer its legal position without requiring the licensor's consent in the ordinary course of transactions and outside insolvency. These criteria do not exhaust the conceptual richness of the proprietary debate, but they capture the core indicators through which the selected legal systems differentiate between merely personal entitlements and rights enjoying a stronger, more absolute, or quasi-absolute legal quality. The choice of those criteria also responds to the comparative-law difficulties in the field. The distinction between contractual and proprietary rights is not drawn uniformly across legal systems,[39] and the meaning of any claim that a licence gives rise to a right *in rem* cannot simply be assumed to be identical from one jurisdiction to another. One central axis of divergence concerns the applicability and intensity of the *numerus clausus* principle. In jurisdictions such as Germany, where this principle occupies a prominent position,[40] the recognised categories of property rights are limited in principle to those expressly acknowledged by law.[41] Within such a framework, the creation of new proprietary forms by private agreement is restricted, and any attempt to classify a licensed right as proprietary must confront the constraints imposed by legislative taxonomies.[42] Yet even in Germany the issue is more nuanced in the field of IP, since IP rights do not fit easily within the conceptual categories developed for tangible property and are instead governed by special statutory regimes.[43] For present purposes, however, the decisive point is functional as much as doctrinal. The defining feature of a right *in rem* is not simply its placement within a system of property law, but its capacity to bind third parties[44] and to operate beyond the limits of contractual privity. Contractual rights, by contrast, are ordinarily enforceable only against the counterparty to the agreement. Between those two poles lie a number of intermediate constructions, including rights that, whilst not fully proprietary display opposability, transferability, or litigation powers that resemble proprietary protection.[45]

[39] Regarding the divergent understanding of property law, and consequently of absolute and relative rights (or, as termed herein, rights *in rem* and contractual rights), generally JM Smits, *The Making of European Private Law: Towards a Ius Commune Europaeum as a Mixed Legal System* (Intersentia 2002); Annette Kur and Vytautas Mizaras (eds), *The Structure of Intellectual Property Law* (Edward Elgar Publishing 2011); Michele Graziadei and Lionel D Smith (eds), *Comparative Property Law: Global Perspectives* (Edward Elgar Publishing 2017). And for Common law and English law specifics, generally FH Lawson and Bernard Rudden (eds), *The Law of Property* (Oxford University Press 2002); Christian von Bar and Jason Grant Allen (eds), *Foundations of Property Law: Things as Objects of Property Rights* (Oxford University Press 2023); Andrew Burrows (ed), *English Private Law* (3rd ed., University Press 2013).

[40] Particularly for the French (and Spanish) or the German (and Austrian) cases, Smits (n 39) 249.

[41] In German law, there is also a *numerus clausus* system, which distinguishes between two principles: 'Typenzwang', meaning that only the categories of property rights explicitly defined by law can be created and 'Typenfixierung', which indicates that these categories are substantively restricted by legislation, at least in their fundamental features, ibid.

[42] See with interest the early twentieth-century debate concerning IP rights, exemplified by the work of Marcel Planiol and Fritz Machlup, both of whom contended that the immaterial character of ideas warrants distinct treatment within the framework of property law theory, further in Sabrina Praduroux, '3. Objects of Property Rights: Old and New' in Michele Graziadei and Lionel D Smith (eds), *Comparative property law: global perspectives* (Edward Elgar Publishing 2017) 69.

[43] *ibid 70.*

[44] William Swadling, 'Property: General Principles' in Andrew Burrows (ed), *English Private Law* (Oxford University Press 2013) 174.

[45] *ibid 178.*

3.2 National perspectives

3.2.1 The exclusive licensed rights

In Germany and Austria, exclusive licences are often regarded as conferring a quasi-absolute legal position. In German law, this is especially so in the case of exclusive patent licences.[46] The prevailing view frequently characterises the exclusive licensee's position as a form of quasi-right *in rem*, supported by features such as transferability, protection against third parties, sublicensing powers, and standing to bring infringement claims.[47] At the same time, the construction of an exclusive licensed right as a right *in rem*[48] under German law remains both theoretically and practically challenging.[49] The difficulty lies not only in the challenge of justifying such a classification on doctrinal grounds, but also in the fact that German property law subjects rights *in rem* to demanding structural requirements, particularly those derived from the principles of *numerus clausus*, publicity, and type constraint.[50]

The *numerus clausus* principle limits proprietary rights to those expressly recognised by law. As a result, an exclusive licensed right cannot simply be treated as a right *in rem* by force of party autonomy or doctrinal preference alone, unless the legislature has provided an adequate legal basis for such recognition. The publicity principle creates a further obstacle, since rights *in rem* are ordinarily expected to be ascertainable by third parties, typically through some form of public notice or registration.[51] Yet, in the general law of licensing, no overarching requirement exists that licences be registered in order to be valid or effective, which weakens any straightforward assimilation to classical property rights.[52] A third difficulty arises from the principle of type constraint. Rights *in rem* must conform to recognised legal forms, whereas licences are structurally flexible and highly variable. The diversity of licensing arrangements, and of the rights of use they may confer, sits uneasily with the predefined categories characteristic of traditional property law.[53] The legal nature of the licensed right therefore cannot be deduced abstractly, but often requires a more context-sensitive analysis. Notwithstanding these obstacles, the statutory treatment of IP licences in German law also reveals why exclusive licensed rights have so often been understood in quasi-proprietary terms. In particular, patent law provide mechanisms capable of supporting a stronger legal position, including standing to sue infringers, protection against subsequent assignees of the underlying right, and in some contexts the possibility of transfer or sublicensing.[54] In addition, where registration is required for certain effects to arise vis-à-vis third parties, a measure of publicity is introduced that partly answers one of the classical objections to proprietary characterisation.

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[46] As in the meaning of article 15(2) *Patent law 1936, version of BGBl. 1981 I S. 1.* ('German PatG')

[47] Mary-Rose McGuire, *Die Lizenz* (Mohr Siebeck 2012) 51, 102; Reto M Hilty, *Lizenzvertragsrecht: Systematisierung und Typisierung aus schutz- und schuldrechtlicher Sicht* (Stämpfli 2001) 112–113.

[48] E.g. as an easement ('Dienstbarkeiten') in sections 1018-1093 of the BGB. Further reference to Rasch's work in McGuire (n 47) 327, 329.

[49] E.g. the 'Abspaltungstheorie' (spin-off theory) in which by licensing, the licensee acquires a partial transfer of the IP rights. Alternatively, the 'Belastungtheorie' (theory of burden) by which the owner keeps the right, but it is burdenend with exclusive rights (of the licensee), ibid 44, 186; Hilty (n 47) 113.

[50] E.g., McGuire (n 47) with interests 227 et seq and 256 et seq; Koziol (n 27) 73–74.

[51] McGuire (n 47) 279, 287.

[52] ibid 288–289.

[53] ibid 287.

[54] In this regard, section 30(4) German PatG for patents and section 30 German MarkenG, in which there is no explicit mention, but it is to be assumed by the prevailing doctrine. Further in relation to the later, Koziol (n 27) 105.

Even if these features do not suffice to establish a full right *in rem* in the strict sense of the BGB, they help explain why German doctrine has long treated the exclusive licensed rights as occupying an intermediate category between purely contractual rights and fully proprietary rights. The resulting picture is therefore not one of conceptual certainty, but of gradual adaptation: licensing practice and IP legislation have progressively pressured the traditional categories of German property law, producing a legal position that could be portrayed as quasi-rights *in rem*.[55]

Austrian law presents a comparable, though less extended, debate. Austrian scholarship has engaged with the possibility that exclusive licensed rights may deserve recognition as quasi-rights *in rem*, particularly in light of their potential enforceability against third parties and their functional proximity to stronger forms of legal entitlement.[56] In this respect, Austrian discussions broadly mirror those found in German legal literature. Yet, unlike in Germany, the issue remains less clearly settled at the level of case-law. Moreover, the Austrian Supreme Court has not, to date, definitively resolved whether an exclusive licensed right should be understood as conferring a quasi-proprietary legal position.[57] Accordingly, the Austrian position remains more open and less doctrinally crystallised.

The position in France and Spain stands in marked contrast. In both jurisdictions, exclusive licensed rights are generally denied the status of rights *in rem* or quasi-rights *in rem*. The starting point is the civil law principle of the relativity of obligations, codified in Article 1199 of the French Civil Code and Article 1257 of the Spanish Civil Code, according to which contracts produce effects only between the parties and do not bind third parties. On that basis, even an exclusive licensee is ordinarily understood to hold no proprietary interest in the underlying IP right, but only a contractual entitlement enforceable against the licensor, unless the legislation expressly provides otherwise.[58] This does not mean, however, that the exclusive licensee is left without any legally significant protection. In France, Article L.613-9 of the French Intellectual Property Code[59] requires registration in order for the exclusive licensee to bring infringement proceedings.[60] Likewise, under Article 117.2 of the Spanish Patent Law,[61] registration enables the exclusive licensee to sue. Yet in neither case does registration transform the licensed right into a proprietary right. Rather, registration performs a limited function of

[55] E.g. the historical doctrinal debate and, with interest, Kohler's approach in McGuire (n 47) 44–46, 52–53.
[56] Despite differing opinions, there is a common sense upon the possibility to have a licensed right as a right *in rem*, Koziol (n 27) 66–70. Alternatively, more nuanced is Burgsteller stating that only when there is no direct obligation to exploit the license by the licensee, there might be a right *in rem*, Peter Burgstaller, 'Urheber- und Patentlizenzen in der Insolvenz' [2016] Ecolex 57.
[57] *106 Oberster Gerichtshof (OGH) 10 of February 2004*. as cited in Konstantin Wölkhart, 'Thesis Immaterialgüterrechte in Der Insolvenz' (2023) 36.
[58] In Spain, Alberto Bercovitz Rodrígrez, 'Patente de Invención' *Nueva enciclopedia jurídica*, vol 19 (Francisco Seix, SA 1989); Pilar Martín Aresti, 'Cesión y licencia de patente y marca' in Alberto Bercovitz Rodríguez-Cano and María Ángeles Calzada Conde (eds), *Contratos mercantiles*, II (Thomson Reuters Aranzadi 2007); José Massaguer, 'Licencia de Marca' *Enciclopedia Jurídica Civitas* (Civitas 1995); José Massaguer, 'Licencia de Patentes' *Enciclopedia Jurídica Civitas* (Civitas 1995). In France, Jean-Jacques Burst, *Breveté et licencié: leurs rapports juridiques dans le contrat de licence* (Librairies techniques 1970) 138–141; Paul Mathély, *Le droit français des brevets d'invention* (Journal des notaires et des avocats 1974) 388; René Joliet, 'Le Contrat de Licence de Brevet En Droit Belge et Français' 35 Revue Trimestrielle de Droit Commercial et des Obligations 1982.
[59] *Intellectual Property Code 1992.*
[60] Inbal Heliot, 'Les droits de propiété intellectuelle à l'épreuve des procédures collectives' (Aix-Marseille Université 2014) 188 and references, particularly J.P. Martin fn 525.
[61] Patent law 24/2015, BOE No. 177, 25/07/2015. ('Spanish Patent Law').

publicity and facilitates the licensee's ius standi, without displacing the fundamentally personal character of it.[62]

3.2.2 The non-exclusive licensed rights

Unlike exclusive licensed rights, which in some legal systems may be regarded as displaying proprietary or quasi-proprietary features, non-exclusive, or simple, licensed rights are not ordinarily characterised in such terms. As a general matter, they remain contractual rights. Even so, some legal systems have adopted mechanisms designed to protect non-exclusive licensees against the loss of their position, particularly where the licensed rights play an economically significant role and where the licensee's legitimate expectations would otherwise be seriously undermined.[63] In Germany, this protective tendency has emerged most clearly through insolvency case-law. The German position is especially significant. Recent case-law[64] has strengthened the position of non-exclusive licensees in insolvency, not by recasting such rights as proprietary rights, but by focusing on the structure of the contractual relationship and, more specifically, on the requirements of section 103 of the Insolvenzordnung (InsO).[65] The decisive question has been whether reciprocal obligations remain outstanding at the time insolvency proceedings are opened. In particular, in copyright-related cases, the prevailing view has been that once the licensed right has been granted and the agreed remuneration has been paid, the principal obligations of the agreement have been performed. In such circumstances, the insolvency practitioner's power to elect whether to continue the contract is significantly curtailed.[66] In Austria, the position of non-exclusive licensed rights

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[62] In France, Jérôme Passa, *Droit de la propriété industrielle*, vol 2 (LGDJ 2013) 578; *Cass com, 7 juill 2004, n° 02-18384*. In Spain, Massaguer, 'Licencia de Marca' (n 58); Massaguer, 'Licencia de Patentes' (n 58); Martín Aresti (n 58). In contrast to the general view, Raul Bercovitz, 'Contratos Sobre Bienes Inmateriales' in Rodrigo Bercovitz (ed), *Tratado de Contratos*, IV (Tirant lo Blanch 2013) 5254–5255.

[63] This is reflected, for example, in the resilience of licensed rights upon a change of ownership in Germany (outside the insolvency context). See, in this regard, Article 15(2) of the German Patent Act for patents, Article 30(1) of the German Trademark Act for trademarks, and Article 31(3) of the German Copyright Act for copyright.

[64] For a historical overview (before the *Ecosoil* case explained in the footnote 66), Marie-Madeleine Pieger, *Die nicht-exklusive Patentlizenz in der Insolvenz des Lizenzgebers* (2012) 91–112.

[65] E.g. McGuire analysis where non-exclusive licences remain within the domain of obligatory law, where the licensee's rights are less autonomous, McGuire (n 47) 101.

[66] The German Federal Court of Justice ('BGH') decision commonly referred to as *Software usage right* introduced the notion of purchase-like licences, describing situations in which the licensee's position is regarded as resilient to insolvency where the principal obligations of the agreement, namely the grant of the licence and the payment of the agreed fee, have been fulfilled (*Softwarenutzungsrecht BGH GRUR 2006, 435*.). This line of authority was subsequently reinforced in the BGH decisions commonly known as *M2Trade* and *Take Five*, which addressed the treatment of sublicences when the licensor enters insolvency proceedings. In *M2Trade*, the court considered whether non-exclusive sublicences should survive the termination of the principal licence agreement. It held that such sublicences remain effective unless explicitly overridden by the contractual terms. The court grounded this conclusion in the principle of reliance-based protection, reasoning that licensees who rely on the licence for the ongoing conduct of their business must be safeguarded against arbitrary revocation resulting from insolvency (Mary-Rose McGuire and Jens Kunzmann, 'Sukzessionsschutz Und Fortbestand Der Unterlizenz Nach „M2Trade" Und „Take Five" – Ein Lösungsvorschlag' [2014] Gewerblicher Rechtsschutz und Urheberrecht 28, 28.). The *Take Five* decision further elaborated upon this reasoning by affirming that the reliance interest of the sublicensee prevails over the licensor's discretionary termination rights, in the absence of express contractual stipulation. The court stated that the protection of the sublicensee's reliance interest takes precedence unless explicitly contradicted by contractual provisions. (*BGH: Fortbestand von Unterlizenzen beim Erlöschen der Hauptlizenz - Take Five GRUR 2012, 914* [18].) This judgment underscores the importance of precise contractual drafting to define or preserve sublicensing rights in the context of insolvency. Further clarification was provided by the *Ecosoil* judgment (*BGH, 21102015 - I ZR 173/14*.), which addressed the interpretation of full performance within the meaning of section 103 of the Insolvenzordnung ('InsO'). The BGH concluded that a licence agreement is to be considered fully performed if the mutual principal obligations, that is, the grant of the licence and the

also appears to remain, in principle, contractual, even if some doctrinal views have suggested that, under particular circumstances, such rights may display features capable of approximation to quasi-rights *in rem*.[67] The Austrian discussion is therefore relevant not because it displaces the prevailing contractual classification, but because it indicates that the practical protection afforded to the non-exclusive licensed right may, in certain cases, extend beyond what a purely formal contractual characterisation might suggest.[68] Following the reasoning set out above in relation to France and Spain, non-exclusive patent licensed rights should likewise be characterised as contractual.

In sum, the analysis shows that the legal characterisation of licensed IP rights remains heterogeneous across the selected Member States. This is especially significant in insolvency, since that characterisation may determine the degree of protection enjoyed by the licensee against the debtor's effective power to terminate the licence agreement. While Germany, and to a lesser extent Austria, remain notable exceptions in recognising a proprietary dimension to exclusive licensed rights, the broader comparative picture suggests that non-exclusive licensed rights, and often exclusive licensed rights as well, continue to be treated primarily as contractual in nature across most Member States.[69]

3.3 EU perspectives

For the existing transnational IP rights within the European Union, such as EU trademarks, designs, and the Unitary Patent, the legal nature of the rights conferred by licences is not expressly defined in positive EU law. Their characterisation must therefore be inferred from the wording, structure, and objectives of the relevant instruments, read in the light of the case-law of the ECJ.[70] The issue is whether such licensed rights should be understood as purely contractual, or whether they may in some circumstances display features capable of approximation to rights *in rem*. For the purposes of that inquiry, it is first necessary to clarify the meaning of a right *in rem* under EU law.[71] Two conditions are generally required. First, the

payment of the corresponding fee, have been executed. In such circumstances, the insolvency administrator is precluded from exercising a right of termination. The court stated that where the mutual main performance obligations have been exchanged, the contract is fully performed within the meaning of section 103 of the InsO (ibid.).

[67] Koziol (n 27) 36, 55, 66–71, 112, 128, 145; Burgstaller (n 56) 57.

[68] Koziol (n 27) 36, 55, 66–71, 112, 128, 145; Burgstaller (n 56) 57.

[69] An issue recognised by the German doctrine, Eugen Ulmer, *Intellectual Property Rights and the Conflict of Laws* (Springer Netherlands 1978) 87. In line with it, but more sceptical Hilty [Swiss doctrine], Hilty (n 47) 121 [69]; McGuire (n 47) 489–490. However, if some prior comparative law studies are examined, despite their practical focus and compilatory nature, a predominantly contractual character can be observed. See, for reference, the chapters related to Member States in Sarah Matheson and others, *General Report: Intellectual Property Licensing and Insolvency* (AIPPI ed, AIPPI 2014); Marcel Willems, Matthias Nordmann and Ulrich Reber (eds), *Licences and Insolvency: A Practical Global Guide to the Effects of Insolvency on IP Licence Agreements* (Globe Law and Business 2015).

[70] Regulations concerning Community trade marks and designs: Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification)(Text with EEA relevance.) 2017 (OJ L); Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs 2001 (OJ L). In line with this criticism, Hilty (n 47) 17.

[71] The construction of an EU right *in rem* is autonomous, and we can see the following requirements also followed and requested by the ECJ in other case outside insolvency, e.g. *Judgment of the Court (First Chamber), 11 November 2020, Ellmes Property Services Limited v SP, Case C-433/19*. The judgment concerns rights *in rem* (in the context of real estate) and contractual claims. It affirms that, for a right to qualify as a right *in rem* in matters relating to real estate, it is essential that the obligation underpinning the claim be enforceable *erga omnes*. See further in Rafael Arenas García, 'Competencia en materia de derechos reales sobre bienes inmuebles y

right must be directly and immediately attached to the asset itself, irrespective of the identity of its holder. Secondly, it must be enforceable erga omnes.[72] The discussion that follows proceeds on the basis of this twofold criterion.

3.3.1 EU trademarks (and designs by extension)[73]

In the case of EU trademarks, and by extension EU designs, the starting point is Article 25(3) of the Regulation,[74] which concerns the *ius standi* of the licensee. As a general rule, the licensee may bring infringement proceedings only with the consent of the proprietor, unless otherwise agreed in the licence. An exception is made for the exclusive licensee, who may bring such proceedings independently where, after formal notice, the proprietor fails to do so within a reasonable period. It follows clearly that non-exclusive licensees enjoy no independent standing. The more difficult question concerns the significance of the exclusive licensee's standing and, in particular, whether the language of the Regulation supports the inference of a stronger, possibly proprietary, legal position.

Some commentators[75] have argued that the wording according to which 'the holder of an exclusive licence may bring such proceedings' points towards an absolute right.[76] That reading may appear to gain some support from the fact that the ECJ has recognised the licensee's right of action even in the absence of registration, in the interest of legal certainty.[77] Yet the opposing view remains more persuasive. On that view, Article 25(3) is merely declaratory rather than constitutive.[78] It does not create a proprietary entitlement in favour of the licensee, but simply organises the conditions under which the licensee may exercise enforcement powers derived from the contractual relationship with the proprietor. Any stronger proprietary reading would require additional mechanisms of procedural coordination and opposability which the legislative framework does not provide.[79] The licensee's standing

competencia en materia contractual en la jurisprudencia del tribunal de Luxemburgo' [2021] La Ley Unión Europea 1.

[72] In this regard Miguel Virgós and Etienne Schmit, 'Report on the Convention of Insolvency Proceedings' (1996) 6500/96 paras 103, 138–157. Further literature aligned with this view and citing the prior sources include Michael Dahl and Justus Kortleben, 'Article 8 Third Parties' Rights in Rem' in Moritz Brinkmann (ed), *European Insolvency Regulation: Article-by-Article Commentary* (Beck C H 2019); Richard Snowden, 'Chapter I: General Provisions - Article 8 Rights in Rem' in Reinhard Bork and Kristin van Zwieten (eds), *Commentary on the European insolvency regulation* (Oxford University Press 2016) para 8.23-8.25.

[73] A joint analysis is warranted by the extent of legislative harmonisation within the European Union and by the similarity of the legal principles governing the protection of trademarks and designs, as evidenced by EU legislation, academic commentary, and EUIPO practice.

[74] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification)(Text with EEA relevance).

[75] Particularly in the German literature.

[76] Jan Felix Hoffmann, 'Die Lizenz des europäischen Immaterialgüterrechts zwischen relativem und absolutem Recht' (2017) 14 Zeitschrift für das Privatrecht der Europäischen Union 120; Mary-Rose McGuire, 'Article 22' in Gordian N Hasselblatt (ed), *Community trade mark regulation (EC) No 207/2009: a commentary* (CH Beck 2015) para 29 et seq; See references in McGuire (n 45) 488.

[77] Beyond whether the registration of the licence was necessary to bring claims against third parties, as in the case of Spain, or whether, on the contrary, such standing to sue did not require registration, see, in this regard, how the ECJ endorses the latter position, *Judgment of the Court (Seventh Chamber) of 4 February 2016, Youssef Hassan v Breiding Vertriebsgesellschaft mbH, C-163/15*; Kur Annette and Martin Senftleben, 'Trade Marks as Objects of Property' in Kur Annette and Martin Senftleben (eds), *European Trade Mark Law* (Oxford University Press 2017) s 1.2.1.1; Hoffmann (n 74) 123.

[78] Interestingly, see examples in McGuire beyond the current selected units of comparison, McGuire (n 76) 501.

[79] See both the reasoning and the comparative law examples from English law, Irish law, and the Benelux Convention deployed in both works Annette and Senftleben (n 77) s 1.2.1.1; McGuire (n 76) 500.

therefore arises not from an autonomous right *in rem*, but from a contractually grounded entitlement to act in relation to the underlying right.[80] The absence of any general registration requirement for the exercise of such standing reinforces this conclusion. If the proprietor may sue without registration, the same is true of the licensee where the Regulation permits action.[81] This is difficult to reconcile with the notion that the licensee is asserting an independent proprietary interest *ab initio*. Rather, it suggests that the Regulation is concerned with facilitating enforcement within the framework of the licensing relationship, not with conferring an *erga omnes* right upon the licensee.[82] This reading is further supported by the *travaux préparatoires*[83] and by EU competition law, both of which consistently conceptualise exclusive licensed rights in contractual terms.[84]

A different argument has nevertheless been advanced in relation to registration. It has been suggested that registration may strengthen the licensee's position to such an extent as to produce proprietary effects.[85] That possibility should not be overstated. No such proprietary effect arises *ab initio*. At most, registration may improve the licensee's position in specific contexts, particularly in relation to third-party conflicts. Yet even then, the register appears to perform a function of negative publicity directed towards legal certainty, rather than a constitutive function associated with the creation of a right *in rem*. To treat registration as transforming the legal nature of the licensed rights would risk importing into EU law a proprietary logic foreign to the structure of the relevant instruments.[86] This becomes clearer in cases of conflicting transactions. As McGuire notes, a prior registered licence prevails over subsequent transfers or incompatible licences, whereas, if the prior licence is unregistered, the priority of the subsequent transferee may depend on registration or actual knowledge.[87] This distinction highlights the conceptual separation between licence contracts and licensed rights. McGuire contends that this issue is resolved by viewing the licence as such (rather than merely the licence agreement) as the transferable object, based on several textual and doctrinal grounds. In this respect, Articles 25(2) and 25(3) presuppose that licences are contractual in origin, since they depend upon a relationship between proprietor and licensee and remain bounded by the terms of that relationship. Use beyond the limits of the licence constitutes infringement, which confirms the contractual delimitation of the licensee's entitlement. Likewise, a transferee of the trademark remains bound by the licence for certain purposes, including the collection of fees, not because the licensee holds a proprietary interest in the trademark, but because the licensing arrangement continues to structure the legal position attached to the transferred asset.[88]

The prevailing view in the literature is therefore that licensed rights under EU trademark law are contractual rather than proprietary in nature. At most, they may amount to a *sui generis* contractual entitlement, but they do not satisfy the conditions required for their

[80] McGuire (n 76) 493.
[81] ibid 503.
[82] ibid 501; McGuire (n 47) 488.
[83] For an overview of the different compilatory elements, from the Memorandum of the Commission over the creation of an European trademark, to the EUIPO Guidelines, McGuire (n 47) 489 fn 58.
[84] ibid 490.
[85] Article 27 of the Trademarks Regulation.
[86] McGuire (n 47) 488 citing Hacker in Strobele and Hacker, MarkenG (2009) 9, section 30, para. 109.
[87] McGuire (n 76) 508.
[88] ibid.

characterisation as rights *in rem* under EU law. This conclusion is also coherent from a comparative perspective as the proprietary treatment remains exceptional and contested.[89]

3.3.2 The European Unitary Patent as an object of property

After decades of debate, the European patent with unitary effect became a reality in 2023.[90] With it, a new transnational IP right entered the European legal landscape. Yet, notwithstanding its supranational dimension, the territorial scope of that right remains limited to the participating Member States, since its creation rests upon the mechanism of enhanced cooperation. Amongst the jurisdictions selected for comparison in the present paper, Spain does not participate in the system.[91] Building on the broader *acquis communitaire* concerning licences over European IP rights, it might initially be assumed that the principles and characterisations applicable to EU trademarks should also govern licences over the Unitary Patent. On that view, the rights conferred by such licences, whether exclusive or non-exclusive, would likewise be understood as contractual in nature. At first sight, that interpretation appears plausible. The Unitary Patent is conceived as an autonomous European right and might therefore have been expected to provide a more coherent and unified framework for the treatment of licensing rights, even if territorially confined by the conditions of its creation.

A closer examination, however, reveals that the final architecture of the Regulation moves in a different direction. The *travaux préparatoires*, as well as earlier drafts of what became the unitary patent regime, support the view that a more autonomous and internally coherent solution was contemplated.[92] By contrast, the final version of the Regulation adopts a markedly different legislative technique. Most significantly, Article 7 delegates the characterisation of the Unitary Patent as an object of property to the applicable national law of the relevant Member State.[93] Such choice has considerable implications for the legal nature of licensed rights. As commentators have noted, it displaces onto national legal systems questions that are central to the transnational functioning of the right itself, including the nature, transferability, and opposability of licensed rights.[94] This reliance on private international law

[89] An issue recognised by the German doctrine, Ulmer (n 69) 87. In line with it, but more sceptical Hilty (Swiss doctrine), Hilty (n 47) 121 [69]; McGuire (n 47) 489–490. However, if some prior comparative law studies are examined, despite their practical focus and compilatory nature, a predominantly contractual character can be observed. See, for reference, the chapters related to Member States in Matheson and others (n 69); Willems, Nordmann and Reber (n 69).

[90] Henry P Yang, 'Inauguration of Unified Patent Court Held Today in Luxembourg' (*The IPKat*, July 2023) <https://ipkitten.blogspot.com/2023/05/inauguration-of-unified-patent-court.html>.

[91] Beyond Spain, Poland and Croatia are also not part of it. Furthermore, Cyprus, Czech Republic, Greece, Hungary, Ireland and Slovakia are Signatory States, but the UPC is not yet in force. See the list of Member States in 'UPC Member States | Unified Patent Court' <https://www.unified-patent-court.org/en/organisation/upc-member-states>.

[92] Research conducted by Tochtermann indicates that the original proposals surrounding the Unitary Patent sought to establish licensing provisions analogous to those applicable to other EU IP rights, such as trademarks. See in general Lea Tochtermann, 'Die Lizenzierung Des Einheitspatents Aus Kollisionsrechtlicher Perspektive' [2016] Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil 721 particularly 725. Notably, a 2009 Council amendment to the draft explicitly proposed the inclusion of territorial restrictions on Unitary Patent licences, together with provisions allowing licences to be structured as either exclusive or non-exclusive, article 19 of the Revised Proposal for a Council Regulation on the Community Patent, 13706/09 PI 92 of 29.9.2009, S. 15 ff. These proposals indicated a legislative inclination to formalise and align the licensing regime of the Unitary Patent with that of existing transnational rights governed by EU law.

[93] Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection 2012 (OJ L).

[94] In this regard, Reto Hilty and others, 'The Unitary Patent Package: Twelve Reasons for Concern' [2012] Max Planck Institute, working paper 1 <https://doi.org/10.2139/ssrn.2169254>; Hanns Ullrich, 'The Property Aspects

mechanisms sits uneasily with the aspiration to legal uniformity that underpins the creation of the Unitary Patent. It introduces a degree of fragmentation that is difficult to reconcile with the supranational logic of the right. Although it may be argued, through a generous reading of the Regulation, that licences over the Unitary Patent should be understood as contractual, that conclusion finds no clear or express basis in the text. The Regulation neither codifies the contractual nature of such rights nor lays down an autonomous framework governing the legal position of exclusive licensees. Instead, by referring its characterisation as an object of property to the applicable national law, it leaves unresolved its legal nature and permits further fragmentation across participating Member States.[95]

The consequences of that legislative choice are significant. Since the Regulation does not establish a definitive characterisation of the licensed rights over the Unitary Patent, whether as contractual, sui generis, quasi-proprietary, or proprietary, uncertainty necessarily follows. Article 7, although framed as a conflict-of-laws rule, does not eliminate substantive divergence.[96] As Ullrich has observed, it operates by elevating national law to the level of a supranational regime and thereby substitutes domestic legal solutions for a genuinely autonomous EU framework governing the Unitary Patent as an object of property.[97] The result is a system in which a formally unitary right remains dependent, in matters of legal character and proprietary structure, upon the divergent legal traditions of the participating Member States. This outcome is especially problematic in relation to the licensed rights. This legislative approach leaves the licensed rights' nature over the Unitary Patent, particularly exclusive ones, in an ambiguous state, falling short of the level of legal certainty that should be expected of an autonomous European legal regime. The discrepancy between the apparent legislative ambition of unitary protection and the actual technique adopted in the Regulation is therefore difficult to ignore. Although the ECJ and Advocate General Bot have emphasised the uniform effect of the Unitary Patent within each participating jurisdiction, such statements do not solve the underlying difficulty.[98] So long as the substantive structure of the licensed rights remains dependent on national law, the regulatory coherence of the Unitary Patent is weakened and fragmentation is reproduced within the very framework designed to overcome it.[99]

The position of the Unitary Patent therefore differs materially from that of EU trademarks and designs. In the latter context, their nature remain contractual, even if certain issues of registration and standing may give rise to limited complexity. In the case of the Unitary Patent, by contrast, the legislative technique chosen by the EU leaves the legal nature of licences substantially open to national determination. The broader consequence is a fragmented outcome within the law of European IP rights itself. Whereas EU trademarks and

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of the European Patent with Unitary Effect: A National Perspective for a European Prospect?' (15 April 2013) <https://papers.ssrn.com/abstract=2347921>; Josef Drexl, 'The European Unitary Patent System: On the "Unconstitutional" Misuse of Conflict-of-Law Rules' (1 January 2015) <https://doi.org/10.2139/ssrn.2553791>; Karen Walsh, *Fragmentation and the European Patent System* (Hart Publishing 2024) 48 referencing Ullrich; Tilman Müller-Stoy and Florian Paschold, 'European Patent with Unitary Effect as a Property Right' (2014) 9 Journal of Intellectual Property Law & Practice 848.

[95] Ullrich (n 94) 14–15.

[96] Reading Recital 9, the idea of this being a rule of private international law is reinforced, 'including its provisions defining the scope of that right and its limitations, and national law, including rules of private international law, should apply.'

[97] Ullrich (n 94) 15. In the same line, Tochtermann (n 92) 724; Alfredo Ilardi, *The New European Patent* (Bloomsbury Publishing 2015) 42; Walsh (n 94) 48.

[98] See particularly *Opinon of the Advocate General, Bot, 18 November 2014, Spain v European Parliament, Council, C-146/13* [93]. and the dismiss by the ECJ, further in Walsh (n 94) 49.

[99] In this regard, Walsh's title book is, indeed, evocative, Walsh, *Fragmentation and the European Patent System* (n 93).

designs tend towards a predominantly contractual understanding of licensed rights, the Unitary Patent permits divergent constructions depending on the applicable national law. This not only entrenches inconsistency amongst participating Member States, but also raises more fundamental questions about the integration of supranational IP rights into a genuinely coherent system of European private law.[100]

4 The EIR and its operativity

4.1 The general rule: *lex loci concursus*

Until the forthcoming the 2026 Directive, IP licence agreements had not been expressly addressed by the European legislator in the context of insolvency. From a private international law perspective, the EIR[101] therefore contains no specific provision governing such agreements as a distinct contractual category. The Regulation does, however, provide special connecting rules for certain contracts whose nature or importance is considered to justify differentiated treatment, including contracts relating to immovable property[102] and employment contracts.[103] It also lays down specific jurisdictional rules in relation to the European IP rights.[104] Since licence agreements are not subject to any specific regime under the Regulation, they fall, in principle, within that general framework. They are ordinarily treated as current contracts,[105] with the result that the law governing the effects of insolvency proceedings upon them is the *lex loci concursus*. The term 'current contract' was adopted in order to accommodate the heterogeneity of national legal approaches and was retained in the recast.[106] While the characterisation of a licence agreement as a contract raises little difficulty, particularly in light of the broad understanding reflected in the case-law of the ECJ,[107] the characterisation as 'current' has remained contested. For that reason, it is important to understand its characterisation as an autonomous EU law concept.[108]

For some authors, a contract remains current as long as its contractual purpose has not yet been fully achieved.[109] For others, classification depends upon the existence of materially

[100] See below Sections 4.2.2 and 4.3.2.
[101] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) 848.
[102] Article 10.2 of the EIR.
[103] Article 13 of the EIR.
[104] Article 15 of the EIR.
[105] Article 7(2)e of the EIR, Jan Felix Hoffmann, 'Executory Contracts, *Ipso Facto* Clauses and Licensing Agreements in Cross-Border Insolvencies' (2018) 27 International Insolvency Review 300, 312; Gabriel-Pizarro (n 2).
[106] Regulation 848/2015 did not change the concept.
[107] The ECJ requires an 'obligation freely assumed by one party towards another party', Case C-26/91*Judgment of the Court of 17 June 1992 Jakob Handte & Co GmbH v Traitements Mécano-chimiques des Surfaces SA Case C-26/91*.
[108] Snowden (n 72) 224.
Offering an alternative view already jumping into the national legislation, see Patrick Wautelet, 'Applicable Law' *The European Insolvency Regulation and Implementing Legislations* (Edward Elgar Publishing 2024) 158.
From an interdisciplinary perspective, see Jan Engberg, 'Chapter 10: Autonomous EU Concepts: Fact or Fiction?' in Susan Šarčević (ed), *Language and culture in EU law: multidisciplinary perspectives* (Ashgate Publishing 2015); in more general terms, see Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials UK Version* (8th edn, Oxford University Press 2024) 386–387.
[109] Andreas Piekenbrock, 'Article 7' in Moritz Brinkmann (ed), *European Insolvency Regulation: Article-by-Article Commentary* (Beck & Hart 2019) 104 and references provided.

outstanding obligations.[110] Both broadly converge in accepting that performance still due on one side may suffice for the contract to remain current. In this respect, the EU understanding is broader than certain domestic insolvency regimes, which reserve special treatment for contracts in which reciprocal obligations remain unperformed on both sides.[111] At the same time, although the effects of a current contract in insolvency are governed by the *lex loci concursus*, the prior characterisation of the agreement as contractual remains, in principle, a matter for the *lex contractus* under the Rome I framework.[112]

The starting point under the operativity of the EIR is clear, it is the *lex loci concursus* that governs the effects of insolvency proceedings upon licence agreements. The real difficulty lies not in identifying the applicable law in principle, but in determining the reach of the term 'effects'.[113] The Regulation does not define that concept, and its boundaries are debated.[114] From a systematic perspective, it should be understood as referring to the legal consequences that flow from the opening, conduct, and closure of insolvency proceedings in so far as they bear upon the contract.[115] Yet the boundaries of that notion remain contested, and it therefore becomes necessary to clarify both the character and the limits of the *lex loci concursus* in this context. The reference to the *lex loci concursus* is a substantive one.[116] It does not operate as a *renvoi* to the forum's own private international law rules, but directs the court to apply the insolvency law of the forum as such.[117] The starting point is thus the application of *lex loci concursus* to both the procedural and the substantive dimensions of the insolvency.[118] That, however, gives rise to a further question. Does that substantive reference extend to all matters touching upon the contract, including matters external to insolvency law, or is it confined to rules specifically concerned with insolvency? The structure of the Regulation,[119] read together with the territorial principles governing IP rights, indicates that some matters necessarily remain outside the reach of the *lex loci concursus* and must instead be governed by the *lex loci protectionis*. This is so, in particular, for questions concerning the validity of the licensed right, its capacity to be transferred, and the limits within which such a transfer may occur.[120]

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[110] Snowden (n 72) 224; Wautelet (n 108) 159.

[111] Interestingly, some authors refer to the current contracts section as a section dealing with 'current reciprocal contracts', thus contracts into which 'mutual obligations are still to be (fully) performed by both parties', Bob Wessels, *International Insolvency Law Part II European Insolvency Law*, II (4th edn, Wolters Kluwer 2017) 345.

[112] Thomas Pfeiffer, 'Article 4' in Burkhard Hess and others (eds), *European insolvency law : the Heidelberg-Luxembourg-Vienna Report : on the application of Regulation No. 1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4)* (CH Beck ; Hart Publishing ; Nomos 2014) 174; Reinhard Bork and Kristin Van Zwieten, *Commentary on the European Insolvency Regulation* (Oxford University Press 2016) 224. Pedro Alberto De Miguel Asensio, 'The Law Governing International Intellectual Property Licensing Agreements (a Conflict of Laws Analysis)' in Jacques De Werra (ed), *Research Handbook on Intellectual Property Licensing* (Edward Elgar Publishing 2013) 13–17; Paul Torremans, 'License and Assignments of Intellectual Property Rights under the Rome I Regulation' *Intellectual property and private international law* (Edward Elgar Limited 2015) 452–459.

[113] Article 7.2.e.

[114] Wessels (n 111) paras 10677, 10679.

[115] Article 7.2.

[116] Reinhard Bork and Renato Mangano, 'Law Applicable' in Reinhard Bork and Renato Mangano (eds), *European Cross-Border Insolvency Law* (Oxford University Press 2016).

[117] *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings* (Oxford University Press 2016).

[118] Miguel Virgós Soriano and Francisco J Garcimartín Alférez, 'El Derecho concursal europeo: un ensayo sobre su racionalidad interna' [2002] Revista Española de Derecho Europeo 67, 78.

[119] ibid 77–82.

[120] Jiménez Blanco (n 38) 240 et seq; De Miguel Asensio (n 38) 181 et seq.

A latter concern arises in relation to the contractual relationship itself.[121] Because the *lex contractus* continues to matter (it is displaced not overruled), it becomes necessary to delineate the respective spheres of each law. Some authors adopt a restrictive reading of the *lex loci concursus*. On that view, it governs only the core insolvency question whether the contract is to continue or not,[122] sometimes extended to include an insolvency-specific power of termination where such a power is recognised by the forum law.[123] Other authors defend a broader approach, under which the *lex loci concursus* also governs matters such as assignment and the consequences of the election not to perform.[124] In the end, a reading that confines the *lex loci concursus* too narrowly, however, risks depriving it of practical substance and thereby undermining both legal certainty and the Regulation's objectives. The more persuasive view is therefore that the power to determine whether the licence agreement is to continue, and where appropriate to bring it to an end within the insolvency process, falls within the effects of insolvency proceedings governed by the *lex loci concursus*. That conclusion does not eliminate the *lex contractus*. It merely displaces it to the extent required by insolvency, while leaving it to govern the contractual relationship beyond that sphere.

4.2 Exceptions to the general rule

The EIR establishes a number of exceptions to the application of the *lex loci concursus*. Amongst the most significant for present purposes is Article 8, concerning rights *in rem*.[125] The rationale of that provision is to protect the legitimate expectations of a party who has acquired a proprietary interest under the *lex loci protectionis*, even where insolvency proceedings are subsequently opened in another Member State.[126] Two issues arise immediately from the text of Article 8: its legal nature, and the scope of the protection it affords. Of these, the latter has proved the more controversial. Regarding its legal nature,[127] Article 8 is best understood as a substantive rule. It limits, and in that respect displaces, the application of the *lex loci concursus*, yet it does not establish a new conflict-of-laws rule.[128] Regarding its scope, the interpretation that has gained the widest acceptance, and which is also adopted here, treats Article 8 as a 'hard and fast' rule. On that reading, where a right falls within the

[121] De Miguel Asensio (n 38) 164–165; Dieter Pfaff, *Conflict of Laws Aspects as Licence Contracts in Germany and the Socialist Countries* (Springer 1977) 38–39; K Kreuzer, 'Internationales Immaterialgüterrecht' *Münchener Kommentar zum BGB* (2nd edn, CB Beck 1990) 100–102.
[122] Reinhard Bork and Renato Mangano, *European Cross-Border Insolvency Law* (Second edition, Oxford University Press 2022) 135–136. See for example the capacity of the foreign creditor to repudiate a contract in Dutch law, Wessels (n 111) 347.
[123] Piekenbrock, 'Article 7 Applicable Law' in Moritz Brinkmann (ed), *European Insolvency Regulation: Article-by-Article Commentary* (Beck C H 2019) 13.
[124] Rick Chesley, Oksana Koltko Rosaluk and Joe Riches, 'The Protection of Intellectual Property Rights in Insolvency Proceedings' (INSOL International 2017) 10.
[125] Bob Wessels, *International Insolvency Law Part II European Insolvency Law* (1st edition, Wolters Kluwer 2022) s 11.6.
[126] Recitals 22 and 68 of the EIR, as well as Virgós and Schmit (n 72) 70 et seq.; Dahl and Kortleben (n 72).
[127] Upon different approaches to the nature of Article 8, particularly as a negative conflict of laws rule, see *Opinion of Advocate General, Mazák, 26 January 2012, ERSTE Bank Hungary, Case C-527/10* [36]; Bork and Mangano (n 116) 142. Nevertheless, this debate is currently outdated, see in this regard Wessels (n 125) para 10639a; Reinhard Bork, *Principles of Cross-Border Insolvency Law* (Intersentia 2017) para 4.22. As well as the *Jugdment of the Court (First Chamber), 5 July 2012, ERSTE Bank Hungary, Case C 527/10* [40–42]; *Judgment of the Court (First Chamber), 16 April 2015, Hermann Lutz v Elke Bäuerle, C-557/13,* [27].
[128] *Ibid*.

autonomous EU concept of a right *in rem*, the exclusion of the *lex loci concursus* is, in principle, comprehensive rather than merely relative.[129]

4.2.1 IP licensed rights as rights *in rem*

As noted above,[130] the EIR does not define the notion of a right *in rem*. Before assessing the operation of Article 8 in relation to IP licences, it is therefore necessary to address a prior question, namely whether licensed rights can be characterised as rights *in rem* for the purposes of that provision. The wording of Article 8 does not confine its protection to tangible assets. On the contrary, it expressly refers to rights over assets, whether tangible or intangible, movable or immovable.[131] Moreover, although the ECJ has insisted upon a strict interpretation of the exception, it has clarified that the illustrative list contained in Article 8(2)(a) to (d) is not exhaustive. A closed reading would risk undermining legal certainty and producing unequal treatment amongst holders of proprietary interests.[132] The decisive issue is therefore one of subsumption. As described above,[133] for a right to qualify as an European right *in rem* two conditions are generally required. First, the right must be directly and immediately connected to the asset itself, independently of the identity of its holder. Secondly, it must be enforceable *erga omnes*.

The technique of characterisation has nevertheless generated significant debate.[134] In light of the ECJ case-law,[135] the approach most consistent with the structure of the Regulation is a two-stage analysis. It is necessary, first, to determine whether the right is regarded as proprietary under the applicable national legislation. It is then necessary, independently, to assess whether that domestic characterisation satisfies the requirements of the autonomous EU concept of a right *in rem*.[136] Reliance solely on the *lex causae* would risk producing an unduly expansive and fragmented understanding of Article 8, thereby undermining the uniformity of the EU standard. Since Article 8 is not itself a conflict-of-laws rule, recourse to private international law in the classificatory process depends ultimately on the approach adopted by the relevant court. In the field of IP this question has long being contested,[137] however, the dominant solution remains the application of the *lex loci protectionis*.[138] That approach reflects both the territorial character of IP rights and the principle of national treatment. Accordingly, where the licensed right concerns a national IP right, the question whether it is capable of amounting to a right *in rem* must in principle be examined by reference to the *lex loci protectionis*. It is at that point that the analysis developed in Section 3.2 becomes decisive.

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[129] See further in Royston Miles Goode, *Goode on Principles of Corporate Insolvency Law* (Fifth edition., Sweet & Maxwell/Thomson Reuters 2018) s 15.83; Wessels (n 125) para 10635. See also *Jugdment of the Court (First Chamber), 5 July 2012, ERSTE Bank Hungary, Case C 527/10* (n 127) para 41 et seq; *Judgment of the Court (First Chamber), 16 April 2015, Hermann Lutz v Elke Bäuerle, C-557/13,* (n 127) para 38 et seq; *Opinion of Advocate General, Maciej Szpunar, 26 May 2016, SCI Senior Home, Case C-195/15* [42–43].

[130] See above Section 3.3.

[131] Article 8.1.

[132] Wessels (n 125) s 10639b.

[133] See above Section 3.3.

[134] Dahl and Kortleben (n 72); Snowden (n 72) para 8.23-8.25. References to Spanish, French and Italian doctrine in this matter Juana Pulgar Ezquerra, 'Del procedimiento principal' *Comentario a la Ley Concursal 3.ª edición* (3rd edn, La ley 2023) 4 fn 11.

[135] *Jugdment of the Court (Fifth Chamber), 26 October 2016, SCI Senior Home, Case C-195/15* [16 et seq].

[136] See further in Pulgar Ezquerra (n 134) 5 and references.

[137] The debate has been historically around the lex origins and the *lex loci protectionis*, see further in Jiménez Blanco (n 38) 72–73.

[138] See above fn 36 as well as Virgós Soriano (n 38) 115 et seq; Remiro Brotóns (n 38) 257–261; De Miguel Asensio (n 38) 148 et seq; Jiménez Blanco (n 38) 72–77. [REVIEW IF IT IS STILL FN 36]

Where the relevant legal system treats, for example, an exclusive licensed right as conferring a right *in rem* or quasi-right *in rem*, Article 8 may become capable of limiting the reach of the *lex loci concursus*. Where, by contrast, the right remains purely contractual, the exception does not apply.

Taking together the comparative analysis above,[139] it may be concluded that, from the perspective of national IP rights, the German position comes closest to supporting the subsumption of exclusive licensed rights within the autonomous EU notion of rights *in rem*. The very features underlying that characterisation, namely the strengthened enforceability of the licensee's position, its opposability vis-à-vis third parties, and its functional attachment to the protected asset itself, correspond closely to the criteria through which rights *in rem* are generally identified at EU level. A similar, though less settled, observation may be made in relation to Austrian law, where exclusive licensed rights have also been discussed in quasi-proprietary terms, albeit without the same doctrinal consolidation or judicial certainty. By contrast, the French and Spanish positions point in the opposite direction. In both systems, the exclusive licensed right remains, as a rule, a contractual entitlement whose effects do not extend beyond the parties, save where legislation confers limited procedural or publicity-related consequences, such as standing to sue following registration. The comparative picture therefore suggests that, within the selected jurisdictions, German law provides the clearest basis on which exclusive licensed rights may, in principle, fall within the Article 8 exception, thereby limiting the reach of Article 7(2)(e) EIR. The following Sections therefore take the German case as their principal point of reference. By contrast, where the exclusive licensed right is characterised in purely contractual terms, as in the French and Spanish models, it is subject to the ordinary effects of the *lex loci concursus*.

4.2.2 The EU IP rights exception

The 2015 recast of the EIR introduced a specific provision addressing European IP rights, including the then anticipated Unitary Patent. The central purpose of Article 15 is to ensure that such rights are administered exclusively within the main insolvency proceedings. In that respect, the provision performs an important jurisdictional function. The rule thereby clarifies the competent forum for intangible assets, whose localisation is often problematic, and precludes their inclusion in territorial proceedings.[140] Notwithstanding that primarily jurisdictional character, the dominant view in the literature attributes to Article 15 broader significance in its relationship with Articles 7 and 8. On that reading, Article 15 operates as a limitation upon the protection otherwise afforded to rights *in rem* under Article 8. Support for this interpretation is commonly found in Recital 39, which links Article 15 to the determination of proprietary rights. Such a reading also accords with the objective of ensuring unitary treatment of European IP rights in insolvency proceedings[141] and extend, in principle, to licensed rights even though they characterise as rights *in rem* from the European perspective.

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[139] See above Section 3.2, particularly 3.2.1.

[140] Zeno Crespi Reghizzi, 'European Patents with Unitary Effect and Community Trade Marks' in Gilles Cuniberti and Antonio Leandro (eds), *by Gilles Cuniberti and Antonio Leandro* (Edward Elgar Publishing 2024) s 15.013 with interest fn 15.

[141] Wessels (n 125) para 10715; Burkhard Hess, Paul Oberhammer and Thomas Pfeiffer, *European Insolvency Law: The Heidelberg-Luxembourg-Vienna Report : On the Application of Regulation No. 1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4)* (CH Beck 2014) paras 827–830; Miguel Virgos and Francisco Garcimartin, *The European Insolvency Regulation: Law and Practice* (2004) para 166(c); Reinhard Bork and others (eds), 'European Patents with Unitary Effect and Community Trade Marks'

This construction also resolves a genuine structural difficulty. Consider a debtor whose centre of main interests is located in a Member State that does not participate in the unitary patent system. If Article 8 were applied in isolation, a licensed right characterised as a right *in rem* under a foreign law might escape the effects of the main proceedings, while Article 15 would simultaneously preclude the opening of secondary proceedings merely on the basis of the existence of a European IP right. The practical result would be that the licensed right (and by extension maybe the licence agreement) could become insulated from insolvency control in a manner difficult to reconcile with the logic of the Regulation. For these reasons, the mere fact that a proprietary right has been created under a law other than the *lex loci concursus* does not, in the case of European IP rights governed by Article 15, automatically trigger the full exclusionary effect of Article 8.[142] This conclusion does not imply that the right ceases to be proprietary in nature. Rather, its character and degree of protection remain matters for the relevant national law. The point is instead that, for European IP rights falling within Article 15, the operation of Article 8 cannot simply be transposed without adjustment. Spanish law offers an illustrative comparison. Article 723(1) of the Spanish Insolvency law[143] pursues an objective analogous to that of Article 8, namely the protection of foreign rights *in rem* against the automatic application of the *lex loci concursus*. Unlike Article 8, however, Article 723(1) has been interpreted as a true conflict-of-laws rule.[144] In the absence of any comprehensive statutory definition of rights *in rem*, the criteria developed in relation to Article 8 remain informative. The resulting position is that foreign proprietary rights are not subject to an absolute and unconditional exclusion, but may still be affected by the proceedings, with their ultimate treatment depending on the *lex loci protectionis* and the protection that it affords.

The interaction of Articles 7, 8 and 15 therefore produces a differentiated landscape in the treatment of IP licences in insolvency. The applicable regime depends largely on the nature of the underlying right and on the manner in which the right is characterised. In the case of national IP rights, the decisive question is one of classification under the *lex loci protectionis*. Where it is characterised as conferring a right *in rem* or quasi-right *in rem* and satisfies the autonomous EU criteria embodied in Article 8, it may in principle limit the reach of the *lex loci concursus*. Where, however, it is characterised as purely contractual, no such enhanced protection arises, even if the domestic legal system of the protected right affords the licensee specific safeguards as a matter of national insolvency policy. In the case of EU trademarks and designs, the position is different. These rights operate within an autonomous EU framework and their licensed rights are, for the reasons set out above,[145] best understood as contractual in nature. Their treatment in insolvency therefore falls within the ordinary regime governing current contracts and remains subject to the *lex loci concursus*. The most complex position is that of licensed rights over the Unitary Patent. Their legal nature depends on the national law governing the patent as an object of property. Yet even where such licensed rights are regarded as quasi-right *in rem*, their treatment in insolvency does not follow automatically from Article

Commentary on the European Insolvency Regulation (Oxford University Press 2022) s 15.05; Reghizzi (n 140) s 15.014.

[142] Virgos and Garcimartin (n 141) s 166(c).

[143] Real Decreto Legislativo 1/2020, de 5 de mayo, por el que se aprueba el texto refundido de la Ley Concursal (Spain) BOE No 127, 7 May 2020, BOE-A-2020-4859.

[144] Pulgar Ezquerra (n 134) 2. This was already present before the latest reforms, Luis Fernández de la Gándara and Alfonso-Luis Calvo Caravaca, *Derecho mercantil internacional* (Tecnos) 678; Jose Blas Fuentes Mañas, 'Las Excepciones a La Lex Fori Concursus Principalis: Ley Aplicable a Los Derechos Reales y Las Reservas de Dominio En Los Procedimientos Internacionales de Insolvencia' (2003) 3 Anuario Espanol de Derecho Internacional Privado 209, 217–218.

[145] See above Section 3.3.1.

8. Because Article 15 intervenes in relation to European IP rights, the ultimate position depends upon the recognition and protection afforded under the *lex loci concursus* and the conflict-of-laws structure through which that law operates. The result is a framework in which the treatment of national rights, EU trade marks and designs, and Unitary Patents diverges in both technique and effect.

4.3 Assessing the consequences of the EIR operativity

4.3.1 The undesirable consequences of the *extra-concursus* characterisation under the EIR

In relation to the treatment of current contracts in insolvency, the selected national legal systems (Austrian, French, German and Spanish) converge at a general level. In each of them, the insolvency practitioner or the court is, functionally speaking, granted the power to determine whether the contract is to be continued or not in the interest of the estate,[146] with effects of not continuing those contracts operating, from a functionalist perspective, as *ex-nunc*.[147] That apparent convergence, however, conceals significant differences in emphasis, conditions, and intensity.[148] In Spain, Germany and Austria, the predominant criterion remains the interest of the estate. Under French law, especially in restructuring proceedings, termination must not only serve the estate, but must also avoid disproportionate prejudice to the counterparty.[149] Austrian law adds a further nuance. If, depending on its precise configuration, a licence agreement qualifies as a lease, termination is expressly prohibited by law.[150]

Within the internal market, that heterogeneity may generate significant practical effects. The divergence becomes highly pronounced in relation to functionally equivalent exclusive licensed rights over national IP rights. Under German law, an exclusive licensed right benefits from segregation-like protection and thereby resist the effects of the proceedings to a

[146] See for example, how in the Spanish regime there is no consideration for the *in bonis* counterpart, Aurora Martínez Flórez, 'Artículo 61' in Angel Rojo and Emilio Beltrán (eds), *Comentario de la ley concursal, tomo I* (Thomson Civitas 2005) 1147; Antonio Monserrat Valero, 'Los efectos generales de la declaración de concurso sobre los contratos bilaterales' [2008] Anuario de derecho concursal 73, 88–89. A situation that persists after the latests reforms, Pulgar Ezquerra (n 27) 3–4 and fn 5 in particular.

[147] In Austria see section 21 of the Austrian Insolvency law (IO), see further in G. Koziol, *Lizenzen als Kreditsicherheiten*, op. cit., p. 127. In Germany see section 103 of the German Insolvency law, see further in Ecosoil, BGH *ZIP* 2016, 40 [43] and in general Florian Jacoby, 'Vorbemerkungen zu §§ 103–109' in Florian Jacoby and Richard Giesen (eds), *InsO Band 4 §§ 103-128* (De Gruyter 2022). In Spain see article 165.3 of the Spanish Insolvency law.

[148] In some legal systems, this power is vested in the court, whereas in others it is entrusted to the insolvency practitioner. By way of example, that power is conferred on the insolvency practitioner in Germany (s 103 InsO) and Austria (s 21 IO), unlike in the French context (arts L622-13 and L641-11-1, in liquidation, of the French Commercial Code). Moreover, prior to the reform of the Spanish Insolvency Act, the divergence also extended to the nature of the claim arising from such termination. At present, however, that claim is classified as an ordinary claim. Under the current wording of art 165.3 Spanish Insolvency law, that divergence no longer exists, since the claim is now treated as an ordinary claim. See further in this latter regard, the Spanish Supreme Court Decision, 15 December 2020, 4011/2012, ECLI:ES:TS:2012:4011.

[149] In restructuring proceedings, see art L622-13 of the French Commercial Code, and in liquidation proceedings art L641-11-1 of the same Code. For liquidation, see also the case-law, Com 7 October 2020, No 19-10.685. Case-law seen for the first time in Emilie Ghio, 'Executory Contracts in Insolvency: The French Perspective' *Executory Contracts in Insolvency Law* (2nd edn, Edward Elgar Publishing 2023) para 17.046.

[150] See for reference Burgstaller (n 56) 57–8.

greater extent.[151] A functionally equivalent exclusive licensed right under French law does not enjoy comparable resilience. In this way, national proprietary conceptions embedded in domestic law may project their distributive policy choices to the European cross-border procedure through the operation of the EIR. Thus, in a Spanish main insolvency proceeding, a German exclusive licensed right may prove more resilient than a French one, not because the EIR itself explicitly differentiates between them, but because their legal nature under the relevant *lex loci protectionis* interacts differently with Article 7 and, where applicable, Article 8. Moreover, a similar contrast emerges at the level of the licence agreement itself. In relation to non-exclusive rights, French and Austrian law both attach certain limits to termination in insolvency, albeit in different forms. Under French law, termination may be barred where it would disproportionately prejudice the counterparty.[152] Under Austrian law, it is excluded where the licence agreement is treated as a lease.[153] Yet those qualifications may be displaced where a main insolvency proceeding is, for example, opened in Spain and the agreement falls to be assessed under the *lex loci concursus* in accordance with the EIR. From a functional perspective, the result is that the same French or Austrian licence agreement may be terminated as an executory contract, notwithstanding the greater degree of protection it would enjoy under the domestic insolvency law.

Despite the strategic incentives that these situations can create, from the perspective of the objectives of the EIR, such differentiated outcomes are not entirely incoherent. National IP rights remain territorially confined and are organised around the principle of national treatment. To that extent, legal diversity is an unsurprising reflection of the structural characteristics of those rights. Moreover, the divergence rarely derives from an explicit statutory prohibition of termination, as in certain non-European jurisdictions.[154] More commonly, it arises from differences in the interpretation of the powers conferred upon the insolvency practitioner or the court. The framework therefore produces variation rather than direct contradiction, and does not necessarily undermine mutual recognition.[155] The difficulty becomes more acute, however, in relation to licences over European IP rights, and in particular licences over the Unitary Patent. Unlike licensed rights over EU trademarks and designs, which

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[151] Berberich, 'InsO § 108 Fortbestehen Bestimmter Schuldverhältnisse' in Fridgen, Geiwitz and Göpfert (eds), *BeckOK Insolvenzrecht* (31st edn, 2023) ss 81–82 particularly references to Wimmer, Hirte/Knof and Fischers' work; McGuire (n 47) 232; Rainer Bausch, 'Patentlizenz Und Insolvenz Des Lizenzgebers' [2005] Neue Zeitschrift für das Recht der Insolvenz und Sanierung 289, 294; Nicola La Corte, 'La Corte: Zur Patentlizenz' [2021] Gewerblicher Rechtsschutz und Urheberrecht 285, 287.

[152] Article L. 622-13 French Comm. C. after the Ordonnance n° 2008-1345, 18/12/2008.

[153] Burgstaller (n 56) 57–59; Perner (n 27).

[154] See, by contrast, the clear and express prohibitions found in US, Canadian, and Japanese law: section 365(n) of the US Bankruptcy Code; section 34.1 of the Companies' Creditors Arrangement Act (CCAA), and sections 65.1(1) and 65.1(2) of the Bankruptcy and Insolvency Act (BIA) in Canada; and, in Japan, Article 99 of the Patent Act and Article 63-2 of the Copyright Act.

[155] See, in this regard, the Qimonda case in the US, in which the American courts held that the protection of non-debtor licensees, in the context of non-exclusive patent licences, was a matter of public policy, thereby precluding the application of German law, which would have resulted in the termination of those contracts with *ex-nunc* effect, *In re Qimonda AG* [2011] United States Bankruptcy Court, ED Virginia, Alexandria Division No. 09–14766–SSM. See also, from an American perspective, Robert L Eisenbach Iii, 'Bankruptcy and Intellectual Property: Trademark Licenses, Chapter 15, and Pending Legislation' 19, 30 <https://www.jdsupra.com/legalnews/bankruptcy-and-intellectual-property-tr-56895/>. From an Australian perspective, Jason J Kilborn, 'Technology and Regulatory Black Holes: Issues in Protecting IP Rights in Insolvency for Both Licensors and Licensees' (2019) 18 QUT Law Review 290, 300. From an European private international law perspective, Elina Moustaira, *International Insolvency Law: National Laws and International Texts* (Springer International Publishing 2019) 82–85.
Upon the public interest exception in the EU see, Reinhard Bork and others (eds), 'Public Policy' *Commentary on the European Insolvency Regulation* (Oxford University Press 2022).

would qualify as contractual regardless of their exclusivity, licensed rights over Unitary Patents require an individual assessment of their legal nature. Once the application of Article 8 is excluded, the *lex loci concursus* governs their treatment in insolvency, including the extent to which any proprietary element is recognised. In that respect, the decisive outcome does not arise from European insolvency law alone, but from the way in which the Unitary Patent is configured as an object of property under the applicable national law.

The interaction between these elements reveals a structural tension and may also create strategic incentives. The connecting factors used to determine the law governing the patent as an object of property may frequently lead to the application of German law. This is so in particular where no applicant has a residence, principal place of business, or place of business in a participating Member State, since the default rule then points to the State in which the European Patent Organisation has its headquarters. Given the location of the European Patent Office in Munich, German law may therefore become applicable where the patent applicant is established in a non-participating Member State or in a third country.[156] As a result, a substantial number of licences over Unitary Patents may end up being shaped by German law, thereby amplifying the systemic influence of its approach to exclusive licensed rights in insolvency.[157] A framework intended to secure coherent treatment of European IP rights may thus operate in a manner that allows certain national distributive policy choices to irradiate into the European insolvency procedure in relation to European rights themselves. It is this tension that the 'intra-European Brussels effect paradox' appears.

4.3.2 The intra-European Brussels effect paradox

The notion of the 'Brussels effect' was developed by Anu Bradford to describe the capacity of European Union regulation to shape legal and regulatory environments beyond the territorial boundaries of the Union.[158] In fields such as competition law, data protection, and product regulation, European rules may exert practical influence far beyond the formal reach of EU law through processes of regulatory diffusion. The literature has focused predominantly on this external dimension.[159] Yet a similar dynamic may also operate internally, where Member States adopt or replicate European legislative solutions even in situations lying outside the formal scope of the relevant EU instrument. By intra-European Brussels effect, this paper refers precisely to that internal dynamic in the field of private international law. Member States, in pursuit of coherence with European legislation, may internalise the conflict-of-law solutions adopted at EU level and extend them to situations lying beyond the material scope of the relevant European instrument. The result is that connecting rules originally designed for intra-European situations may also govern cases involving third countries, or situations in which the EU regulation itself does not apply.

This form of legislative emulation may often be rational. Alignment of domestic conflict rules with European solutions may promote consistency, reduce interpretative

[156] Article 7.3 of the Regulation 1257/2012.
[157] See the most updated data in https://www.epo.org/en/about-us/statistics/statistics-centre#/unitary-patent, Tochtermann (n 92) 725; Müller-Stoy and Paschold (n 94) 852.
[158] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).
[159] Florian Hoppe, 'A Green Brussels Effect?: CBAM and the Hidden Strength of EU Green Diplomacy in Global Climate Policy' (European University Institute 2025); Elif Korkmaz Tümer and Josephine Van Zeben, 'The Brussels Effect in Ankara: The Case of Climate Policy'. From a more critical perspective on its negative side, Marco Almada and Anca Radu, 'The Brussels Side-Effect: How the AI Act Can Reduce the Global Reach of EU Policy'.

uncertainty, and simplify the task of national courts confronted with cases containing international elements. Comparable dynamics may be observed where both the European Union and the Member States participate in the same international conventions, such as the Hague Convention on the Civil Aspects of International Child Abduction[160] or the Hague Evidence Convention,[161] where convergence between domestic and European frameworks may simplify the broader legal architecture. Yet the internalisation of European solutions may also produce unintended consequences. Where national legal systems abandon autonomous conflict rules in favour of the European model, they may lose the flexibility previously available to address situations lying outside the regulatory design of the EU instrument. In such cases, the extension of European solutions beyond their intended scope may generate tension rather than coherence.

A useful illustration of this internal dynamic may be found in the evolution of the Spanish national interest exception in matters of legal capacity. As a general rule, a person's capacity is governed by their personal law, usually their nationality or habitual residence. In cross-border situations, however, that rule may create uncertainty, since a person may be considered capable under the law of the place where the contract is concluded yet incapable under their personal law. For that reason, many legal systems introduce corrective mechanisms designed to preserve transactional security. Comparative law reveals a variety of techniques. Some systems modify the connecting factor. Others rely on alternative or cumulative criteria. For example, Czech law refers to habitual residence, Lithuanian law to domicile, while English law may look to the *lex contractus*, the place of conclusion, or the domicile of the contracting party. Certain States in the US likewise adopt alternative or cumulative connecting factors.[162] Spanish law traditionally adopted a particularly broad formulation of this exception. Prior to the 2021 reform, Article 10.8 of the Civil Code operated, in non-European issues, autonomously from the rule later reflected in Article 13 of the Rome I Regulation. Article 13 allows a natural person who would otherwise be considered incapable under the applicable law to rely on their capacity only where both parties were in the same country and the other party neither knew nor could reasonably have known of the incapacity.[163] The former Spanish rule was considerably broader. It was not confined to natural persons, did not require both parties to be in the same country, did not depend upon good faith, and extended even to agreements concerning immovable property.[164] As Arenas García observes, following the 2021 reform, Article 10.8 was aligned with Article 13 of the Rome I Regulation. The Spanish provision now mirrors the European solution and its autonomous field of operation has become largely residual.[165] The example illustrates how a domestic conflict rule may be reshaped in order to conform to the European model even in situations lying outside the material scope of the Regulation itself. In that way, the European solution becomes the default reference point of the domestic legal system.

In the context of the Unitary Patent, the dynamics just described generate a paradox within the European insolvency framework. The paradox becomes particularly visible from the perspective of Spanish private international law. The hierarchy of connecting factors governing

[160] Convention on the Civil Aspects of International Child Abduction (25 October 1980).
[161] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (18 March 1970).
[162] Rafael Arenas García, 'La excepción de interés nacional en el DIPR español actual' (2024) 16 Cuadernos de derecho transnacional 101, 104–105 and references provided.
[163] Carlos Esplugues Mota and Guillermo Moreno Palau, *Derecho internacional privado* (17th edn, Tirant lo Blanch 2023) 677–678; Francisco Garcimartín Alférez, *Derecho Internacional Privado* (6th edn, 2021) 301–302.
[164] García (n 163) 111–112.
[165] ibid.

the law applicable to the Unitary Patent as an object of property makes disputes concerning exclusive licences likely to recur.[166] At the European level, the legislative framework sought, through Article 15 of the EIR, to secure a coherent treatment of IP rights in insolvency. Spanish law, however, alters the operation of that framework at a structural level. As already noted in relation to Article 723(1) of the Spanish Insolvency law, the mechanism inspired by Article 8 EIR is not received in Spanish law as a mere exception to the *lex loci concursus*, but as a true conflict-of-laws rule.[167] Its function is therefore no longer simply to shield certain pre-existing rights from the effects of the insolvency proceedings, but to designate the law governing their treatment. Once transposed in those terms, the European solution is capable of operating beyond the material and personal scope of the EIR itself, including in cases involving third-country elements or situations otherwise excluded from the European instrument (as in the present case). The difficulty is that the solution devised within the EIR for a specific systemic context is thus transformed into a general conflicts technique of the domestic legal order. Precisely for that reason, the most problematic cases may arise not where Spanish law diverges from the European model, but where it follows it too closely. By adopting that mechanism as its own ordinary response, Spanish law may deprive itself of the doctrinal autonomy needed to deal with situations that the EIR was not intended to govern.[168]

Within the case of the Unitary Patent, this dynamic may also reinforce particular national approaches. Where the applicable law governing the patent as an object of property recognises the proprietary character of exclusive licensed rights, that national solution may become decisive within insolvency proceedings, even though only a minority of Member States attribute such status to exclusive licensed rights. The consequence is that a national property-law choice may acquire systemic significance within a European insolvency framework that was ostensibly designed to produce coherent treatment of European rights. This configuration may also generate strategic incentives. Significant differences between national legal systems may influence decisions concerning the structuring and licensing of patents with unitary effect. In the context of a Spanish main insolvency proceeding, for example, the treatment of an exclusive licence may vary considerably depending on the law governing the patent as an object of property. If the *lex loci protectionis* is the German one, termination may not be possible as the licensee can segregate the licensed right.[169] By contrast, if French law applies, termination may remain available in the interest of the estate.[170] In this way, the conflict-of-law mechanism may elevate the protection afforded by a particular national legal system to the level of the European insolvency procedure, even though that was not the regulatory intention underlying the European framework. At the same time, this reveals the second side of the paradox, namely the potential for renewed fragmentation. Article 15 leaves room for different legislative responses at national level. Member States may adopt solutions corresponding to Article 8, introduce modified versions of that approach, or retain distinct domestic rules governing the treatment of proprietary rights in insolvency. In the latter cases, the protection afforded to patent licensees, and the insolvency practitioner's ability to terminate such licences, may vary substantially across jurisdictions. The framework therefore risks producing precisely the sort of legal uncertainty that the creation of a European IP right might have been expected to reduce.

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[166] See further above in fns.156-157.
[167] See above Section 4.2.2.
[168] As described at the end of Section 4.2.2.
[169] See further regarding the segregation scope and the German debate in Berberich (n 152) ss 81–82 particularly references to Wimmer, Hirte/Knof and Fischers' work; McGuire (n 47) 232; Bausch (n 152) 294; Corte (n 152) 287.
[170] See above Section 4.3.1.

In the end, the interaction between the property regime governing the Unitary Patent, the conflict-of-law structure of the EIR, and the internalisation of European private international law solutions within national legal systems thus produces an ambivalent result. On the one hand, where national legal systems have abandoned autonomous conflict rules in favour of the European model, proprietary solutions developed within particular Member States may be projected into European insolvency proceedings. In that way, national distributive policy choices embedded in domestic property law may acquire systemic influence within the European insolvency framework. On the other hand, where Member States retain or develop distinct national approaches within the space left open by Article 15, the framework risks reproducing fragmentation in the treatment of licences over patents with unitary effect. The protection afforded to licensees, and the powers available to the insolvency practitioner, may therefore differ significantly depending on the national law governing the proprietary aspects of the patent. The attempt to promote coherence in the treatment of European IP rights within cross-border insolvency proceedings may thus produce a genuinely paradoxical effect. Rather than eliminating national divergence, the interaction between property regimes, conflict-of-law rules, and legislative emulation may instead reinforce structural differences within the EU and between European insolvency procedures.

5 Conclusions

Considering the significant transformation of the Directive during the legislative process, together with the introduction of the Unitary Patent in 2023, this paper has stepped back to examine a more fundamental question, namely how responsive the applicable-law framework of the EIR is to differing national distributive policy choices in the treatment of IP licences in insolvency. As noted from the outset, the treatment of IP licences in insolvency, and in particular the capacity to terminate such agreements, has historically been shaped by national distributive policy choices. In this context, the 2022 Directive Proposal marked an unexpected development. For the first time, the European legislator proposed to regulate explicitly the treatment of IP licences in insolvency proceedings through mandatory provisions inspired by the approach adopted in the US under section 365(n) of the Bankruptcy Code. During the legislative process, however, that harmonising ambition was progressively diluted. The forthcoming 2026 Directive leaves the introduction of specific protections for licensees largely to the discretion of the Member States.

In this context, the paper has shown that the current architecture of the EIR, structured around the *lex loci concursus* as its general rule, produces a threefold fragmentation in the treatment of IP licences in European insolvency proceedings through its interaction with insolvency law, IP law, and private international law. First, in the case of licences concerning national IP rights, their legal characterisation depends upon the *lex loci protectionis*. Where national law treats the licensed rights as conferring rights *in rem* -under the EU autonomous concept-, the exception contained in Article 8 of the Regulation may become applicable. In such circumstances, the effects of the insolvency proceedings on the licence are limited, since the right may be affected only through territorial proceedings opened in the Member State in which the asset is protected. Secondly, in the case of licences concerning EU trademarks and designs, the rights within these agreements are generally regarded as contractual in nature. Their treatment in insolvency therefore falls within the regime governing current contracts and is determined by the *lex loci concursus*. Thirdly, in the case of licences relating to the Unitary Patent, the position is more complex. The legal characterisation of their licensed rights depends upon the national law governing the patent as an object of property. However, any proprietary dimension thereby recognised does not benefit directly from the protection afforded by Article

8 of the EIR, but only through the conflict-of-law rules of the *lex loci concursus* by virtue of Article 15.

In relation to national IP rights, the operation of this framework allows certain jurisdictions to influence the treatment of IP licences within European insolvency proceedings. In particular, where the *lex loci protectionis* does not coincide with the *lex loci concursus*, the distributive policies embedded in national legal systems may exert a greater or lesser influence upon the European procedure depending on the manner in which such protection has been configured. Where national legislation protects the non-debtor licensee through rules governing the treatment of the contract itself in insolvency, that protection will not necessarily extend to European insolvency proceedings. By contrast, where protection of the licensee is grounded in the proprietary characterisation of the licensed right, the distributive policy embedded in that classification may project its effects into the European insolvency procedure through the operation of Article 8 of the EIR.

With respect to European IP rights, the situation becomes more complex. While the treatment of licences over EU trademarks and designs is determined by the *lex loci concursus*, the treatment of licences relating to the Unitary Patent ultimately depends upon the recognition afforded by the law applicable to the patent as an object of property and upon its treatment within the forum. As a consequence, despite the legislative intention to promote coherence in the treatment of European IP rights in insolvency proceedings, the *extra-concursus* configuration of the Unitary Patent as an object of property complicates the achievement of a fully uniform regime across the EU. This interaction gives rise to what this paper has described as the intra-European Brussels effect paradox. The paradox lies in the fact that a European conflict-of-law solution designed for a specific regulatory context may, once internalised by national legal systems, be transformed into a general technique of domestic private international law and thus extended to situations lying beyond the scope of the EU instrument itself. In the context of the Unitary Patent, this means that the internalisation of the Article 8 EIR model may project into European insolvency proceedings proprietary solutions developed within particular Member States, allowing national distributive choices embedded in domestic property law to acquire systemic influence within the European framework. At the same time, where Member States retain or develop distinct approaches within the space left open by Article 15, the framework risks reproducing fragmentation in the treatment of exclusive licences over patents with unitary effect. The result is therefore paradoxical. A framework intended to promote coherence in the treatment of European IP rights may, through legislative emulation on the one hand and continued national diversity on the other, either amplify the systemic effects of particular domestic property-law choices or preserve the very legal divergence it was expected to reduce.

In this context, the expectations raised by the 2022 Directive Proposal, despite its already limited material scope, have ultimately resulted in a legislative framework that provides only facultative options for Member States, rather than mandatory provisions capable of supporting cross-border investment involving IP licences and European innovation. Given the growing role that the Unitary Patent is expected to play within the European innovation ecosystem, together with the structural challenges arising from the interaction between *extra-concursus* characterisations and the conflict-of-law framework of the EIR, the current situation reveals the limits of relying solely on private international law mechanisms. Further substantive harmonisation concerning the treatment of IP licences in insolvency proceedings therefore appears increasingly necessary in order to ensure legal certainty, support cross-border investment, and promote the internal market.