

Licensing

Contributing editors

Fiona Nicolson and Claire Smith



2018

GETTING THE
DEAL THROUGH

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Fiona Nicolson and Claire Smith

Bristows LLP

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This article was first published in February 2018

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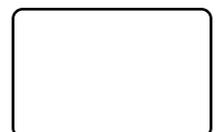


Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

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No photocopying without a CLA licence.
First published 2009
Tenth edition
ISBN 978-1-912377-42-8

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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Preface

Licensing 2018

Tenth edition

Getting the Deal Through is delighted to publish the tenth edition of *Licensing*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on South Africa, Thailand and Vietnam, and an updated global overview.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would like to thank the contributing editors, Fiona Nicolson and Claire Smith of Bristows LLP, for their assistance with this volume. We also extend special thanks to Bruno Floriani of Lapointe Rosenstein Marchand Melançon LLP, who contributed the original format from which the current questionnaire has been derived, and who helped to shape the publication to date.

GETTING THE 
DEAL THROUGH 

London
January 2018

Germany

Christof Karl

Bardehle Pagenberg

Overview

- 1 Are there any restrictions on the establishment of a business entity by a foreign licensor or a joint venture involving a foreign licensor and are there any restrictions against a foreign licensor entering into a licence agreement without establishing a subsidiary or branch office? Whether or not any such restrictions exist, is there any filing or regulatory review process required before a foreign licensor can establish a business entity or joint venture in your jurisdiction?**

A foreign licensor is not restricted in any way if he or she enters into a licence agreement without establishing a subsidiary or branch office in Germany. There are also no particular restrictions on the establishment of a business entity by a foreign licensor or a joint venture involving a foreign licensor. German law does not distinguish between Germans and foreign nationals regarding the establishment of business entities.

Kinds of licences

- 2 Identify the different forms of licence arrangements that exist in your jurisdiction.**

In general, three types of licence agreements can be distinguished: exclusive, sole and non-exclusive licence agreements. While an exclusive licence confers all the rights that subsist in the subject matter of the licence agreement to the licensee, a sole licence only gives exclusivity in the sense that the licensor will not grant licences to any other party, but he or she will retain the right to use the subject matter of the licence agreement for itself. A non-exclusive licence, contrary to an exclusive or sole licence, does not grant all the rights that subsist in the subject matter of the licence agreement to one particular licensee; the licensor may grant rights to several licensees. The rules applicable to exclusive or sole licences may be different from the rules that apply to non-exclusive licences. For example, unlike a non-exclusive licensee, an exclusive or sole licensee of a patent has standing to sue for infringement and may grant sub-licences.

In the patent field, there are also cases of compulsory licences. A compulsory licence to a patent must be granted (in rare cases) for public interest reasons, or when the licensee owns a dependent patent to an important invention that he or she cannot exploit without a licence to use the licensor's basic patent (German Patent Act, section 24(1) and (2)). An obligation to conclude a licence agreement also exists in the field of standard essential patents, where any third party who wishes to practice the standard can ask for a licence under the patent for such use. Certain compulsory licences are also known in the copyright field (see German Copyright Act, section 42a).

Any kind of intellectual property that allows its holder to exclude others from using the same, such as patents, utility models, copyright including copyright for software, industrial design, trademarks, topographies of semiconductor products, etc, can be the subject matter of a licence agreement. In addition, personality rights and confidential information (know-how, trade secrets) can also be the subject matter of a licence agreement. With regard to franchise agreements, see question 6.

Law affecting international licensing

- 3 Does legislation directly govern the creation, or otherwise regulate the terms, of an international licensing relationship? Describe any such requirements.**

Legislation does not directly govern the creation or otherwise regulate the terms of a licensing relationship. German intellectual property acts such as the Patent Act or the Trademark Act only specify that the respective intellectual property rights can be the subject of an exclusive or non-exclusive licence (German Patent Act, section 15(2); German Trademark Act, section 30), but do not contain any rules about the creation or the further terms of a licence.

In principle, parties are free to choose the content of the licence agreement, but this freedom is limited by antitrust law and general contract law, in particular the laws on standard terms and conditions, which impose certain requirements on the terms of a licensing relationship (see questions 5, 30, 31, 34 and 39). In the case of compulsory licences (see questions 2 and 27), royalty rates typically have to be fair and reasonable.

- 4 What pre-contractual disclosure must a licensor make to prospective licensees? Are there any requirements to register a grant of international licensing rights with authorities in your jurisdiction?**

The licensor does not have any specific pre-contractual disclosure obligations. However, the general obligation to act in good faith (see question 5) requires a party to a prospective licence agreement to disclose information that is so relevant for the decision of the other party that disclosure can reasonably be expected. For example, courts found a disclosure obligation to exist where the licensor was aware of prior art that was likely to render the patent to be licensed invalid (RG GRUR 41, 99, 101), or where the licensor was the inventor and owner of the rights to the invention whose use was to be licensed, but a third party, and not the licensor, was registered as the formal applicant of the corresponding patent application (LG München I, case No. 21 O 4559/08).

There is no requirement to register a grant of licensing rights, but a registration may have certain advantages for the licensee (see question 12).

- 5 Are there any statutorily or court-imposed implicit obligations in your jurisdiction that may affect an international licensing relationship, such as good faith or fair dealing obligations, the obligation to act reasonably in the exercise of rights or requiring good cause for termination or non-renewal?**

Good faith principles are applied, first of all, for the interpretation of the licence agreement. Second, where an issue has been left open in the licence agreement, for example, payment modalities or questions of liabilities, and the application of statutory rules of contract categories like purchase contracts or lease contracts does not seem to be appropriate or does not provide an answer, good faith principles are applied to determine what the parties would have agreed upon.

Where standard terms and conditions of one of the parties are used in a licence agreement, any provision that has not been individually negotiated between the parties must comply with the statutory rules on standard terms and conditions. Under these rules, any provision that,

contrary to the principles of good faith, places the other party (the party not using the standard terms) at an unreasonable disadvantage is void (German Civil Code, section 307(1)). In other words, fair dealing obligations apply when standard terms and conditions are used.

In a case where a royalty-free trademark licence agreement was not limited in term, and the right to terminate the agreement without good cause was not waived, the Federal Court of Justice found that the agreement could be terminated by the licensor with a notice period of six months (BGH, case No. I ZR 312/02). In fact, although not yet confirmed by case law, it can be argued that under the application of general civil law principles, any licence agreement unlimited in term can be terminated by either party without good cause if such a right to terminate is not explicitly or implicitly waived in the agreement (BGH, case No. X ZR 79/92). Where an agreement cannot be terminated without good cause, a modification of the agreement (eg, a reduction of minimum royalties) may be possible if the circumstances under which the licence agreement was concluded have changed after the conclusion of the agreement (BGH, case No. X ZR 137/99).

6 Does the law in your jurisdiction distinguish between licences and franchises? If so, under what circumstances, if any, could franchise law or principles apply to a licence relationship?

Although franchise is not one of the contract categories specifically dealt with by statutory law in Germany, franchise agreements are recognised by case law as a typical form of contract to which certain principles apply. A franchise agreement normally comprises licences to intellectual property rights like trademarks or trade names, and to know-how, which are used for the distribution of goods and services.

Franchise agreements generally contain vertical restraints with respect to the products being distributed, like selective distribution, non-compete clauses or exclusive distribution. The legality of franchise agreements under antitrust law is determined by the Block Exemption Regulation (Commission Regulation (EU) No. 330/2010) and the Guidelines (2010/C 130/01) on Vertical Restraints. Whenever an agreement qualifies as a franchise agreement under the Regulation and the Guidelines, different rules may apply than for 'mere' licence agreements.

Intellectual property issues

7 Is your jurisdiction party to the Paris Convention for the Protection of Industrial Property? The Patent Cooperation Treaty (PCT)? The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)?

Germany is a party to all these treaties.

8 Can the licensee be contractually prohibited from contesting the validity of a foreign licensor's intellectual property rights or registrations in your jurisdiction?

No-challenge clauses in licence agreements concerning patents and utility models are in general considered to be a violation of European antitrust law and therefore void (Technology Transfer Block Exemption Regulation (TTBER) article 5(1)(b)) (see question 31). The requirement is, inter alia, that the agreement is liable to affect trade among the member states of the EU. Exceptions exist where the licence is granted royalty-free or where the licensed technology is outdated (ECJ, Case No. 65/86).

It should be noted that after the amendments to the TTBER and the Commission Notice (TTBER Guidelines) in May 2014, a more strict approach has been taken on no-challenge clauses. First, although no-challenge clauses in the context of a settlement or non-assertion agreement are generally considered to be allowed under antitrust law even after the amendments (Commission Notice (TTBER Guidelines) 2014/C 89/03 at 242), the amended TTBER Guidelines stipulate that they may be prohibited under article 101(1) Treaty on the Functioning of the European Union (TFEU) under specific circumstances with mentioning, as one of those circumstances, the case where an intellectual property right was granted following the provision of incorrect or misleading information (TTBER Guidelines at 243). No-contest clauses in trademark or design licence agreements are judged according to the same criteria.

Second, although in the case of an exclusive licence, the licensor may continue to reserve the right to terminate the licence agreement

in the case of a challenge of the licensed intellectual property right by the licensee, regarding the case of a non-exclusive licence, whether the reservation of such right in the case of a challenge is considered to be a violation of European antitrust law has to be decided on a case-by-case basis (TTBER article 5(1)(b)). The same applies to a clause of automatic termination in the case of a challenge by the licensee.

9 What is the effect of the invalidity or expiry of registration of an intellectual property right on a related licence agreement in your jurisdiction? If the licence remains in effect, can royalties continue to be levied? If the licence does not remain in effect, can the licensee freely compete?

Expiry or a final decision of invalidity of an intellectual property right usually leads to the expiry of a related licence agreement if there is no provision about the term of the agreement. However, the agreement may be set to run beyond the lifetime of the intellectual property right, for example, for a fixed period of time. Such a clause is common in agreements that grant a licence to know-how in addition to a licence to intellectual property rights. In the case of a plurality of licensed intellectual property rights, parties typically set the term of the agreement to the period of protection of the intellectual property right that expires last.

For patents and utility models, the European Commission considers a clause that extends the licensee's obligation to pay royalties beyond the lifetime of the licensed intellectual property right as not being in conflict with antitrust law (TTBER Guidelines at 187). However, this issue has not yet been decided by a court. Where the licence concerns a plurality of intellectual property rights, the agreement should specify whether royalty payments are reduced accordingly if one of the intellectual property rights expires, or whether the same royalty amount is due until all intellectual property rights have expired. The rules mentioned are also applicable to trademark and design licences, whether Community rights or national rights.

It should be noted that in Germany, unless otherwise agreed by the parties, royalties already paid by the licensee do not have to be paid back in the case of an invalidation of the licensed intellectual property right, and outstanding payment obligations for royalties that become due prior to the invalidation have to be fulfilled.

After expiry or invalidation of the licensed intellectual property right, the licensee is free to compete unless the licence agreement comprises a non-compete obligation for a time period after the expiry or invalidation. The validity of such a non-compete obligation under antitrust law depends on the circumstances of the case, in particular the effect it may have on the competitive situation after the expiry of the intellectual property right.

10 Is an original registration or evidence of use in the jurisdiction of origin, or any other requirements unique to foreigners, necessary prior to the registration of intellectual property in your jurisdiction?

Germany does not have any such requirements.

11 Can unregistered trademarks, or other intellectual property rights that are not registered, be licensed in your jurisdiction?

Unregistered trademarks, as well as all other intellectual property rights that do not require registration (eg, copyrights), can be licensed in Germany.

12 Are there particular requirements in your jurisdiction: for the validity of an intellectual property licence; to render an intellectual property licence opposable to a third party; or to take a security interest in intellectual property?

There are no specific formal requirements in Germany for an intellectual property licence to be valid, or to take a security interest in intellectual property. In particular, since 1 January 1999 it is not necessary – although it is advisable – to conclude the licence agreement or the security interest in writing. It is also not necessary to register the agreement or security interest.

Statutory law regulates that a patent or utility model licence is always opposable to third parties that have acquired rights in the intellectual property right by assignment or licence (German Patent Act, section 15(3); Utility Model Act, section 22(3)). The same statutory

rule applies to German trademarks and designs (German Trademark Act, section 30(5); Design Act, section 31(5)). As regards Community trademarks and Community designs, a licence is unaffected by a subsequent transfer of the right or a subsequent licence if the licence has been recorded in the register of Community trademarks or designs, or if the subsequent assignee or licensee had knowledge of the licence (Community Trademark Regulation articles 23(1), 22; Community Design Regulation articles 33, 32). Where the trademark or design is acquired by merger or other universal succession, the licence remains valid in relation to the new holder.

13 Can a foreign owner or licensor of intellectual property institute proceedings against a third party for infringement in your jurisdiction without joining the licensee from your jurisdiction as a party to the proceedings? Can an intellectual property licensee in your jurisdiction institute proceedings against an infringer of the licensed intellectual property without the consent of the owner or licensor? Can the licensee be contractually prohibited from doing so?

An exclusive or sole licensee of a patent or utility model can institute proceedings against an infringer of the licensed intellectual property without the consent of the owner or licensor unless he or she has been contractually prohibited from doing so. Contrary to that, a non-exclusive licensee of a patent or utility model has no standing to sue, but the right to sue can be granted by the owner of the patent or utility model to the non-exclusive licensee. If the licensee then brings suit, the owner can no longer do so.

A licensee of a German trademark, be it a non-exclusive licensee, a sole licensee or an exclusive licensee, can institute proceedings against an infringer only with the consent of the owner (German Trademark Act, section 30(3)). As regards Community trademarks, a non-exclusive licensee always needs the consent of the owner, whereas an exclusive licensee has the right to bring an infringement action if the licensor, having been requested to bring the action, does not do so within a reasonable period (Community Trademark Regulation article 22(3)). The same rules apply for German or Community designs (German Design Act, section 31(3), Community Design Regulation article 32(3)). As the general rule is that a licensee can act only with the consent of the owner, a sole licensee might have to be treated like a non-exclusive licensee. However, there is no case law on the rights of the sole licensee in this regard as yet.

As a rule, the owner of an intellectual property right has standing to sue. Exceptions to this rule exist where the owner has granted an exclusive licence and is not affected by the infringement, because, for example, he or she receives no running royalty fees from his or her licensee, or where the owner has granted his or her right to sue to the licensee, at least if the licensee made use of that right. If the owner has standing to sue, he or she can institute proceedings without the licensee, even if the licensee has already instituted his or her own proceedings. Licensees may join in the action of the owner to recover their own damages. However, at least for patents, German case law acknowledges damages claims only for exclusive licensees, not for non-exclusive licensees (BGH, case No. X ZR 48/03). As regards damages caused by trademark or design infringement, German courts have decided that a licensee (be it a non-exclusive or an exclusive licensee) cannot claim his or her own damages, but only claims of the licensor (BGH, case No. I ZR 93/04).

14 Can a trademark or service mark licensee in your jurisdiction sub-license use of the mark to a third party? If so, does the right to sub-license exist statutorily or must it be granted contractually? If it exists statutorily, can the licensee validly waive its right to sub-license?

It is recognised that an exclusive licensee may sub-license the use of the trademark to third parties, unless the right to sub-license has been excluded in the licence agreement. In the case of a non-exclusive licence, the licensee is not entitled to grant sub-licences, unless such right was explicitly granted in the licence agreement.

15 If intellectual property in your jurisdiction is jointly owned, is each co-owner free to deal with that intellectual property as it wishes without the consent of the other co-owners? Are co-owners of intellectual property rights able to change this position in a contract?

The provisions of the German Civil Code, sections 741 to 758 apply to joint ownership of patents and trademarks. In contrast, joint ownership of copyright is governed by the special provision of section 8 of the German Copyright Act.

Each of the joint patent or trademark owners has the right to use the subject protected by the intellectual property (German Civil Code, section 743(2)). If one of the co-owners is not capable of exploiting the patent or trademark, he or she is at least entitled to compensation for the use by the other co-owners. However, compensation is due only for uses that occur after the date on which the non-using co-owner has demanded compensation (German Federal Court of Justice, case No. X ZR 152/03). Compensation may be calculated as reasonable royalties. Similarly, if one of the co-owners uses the patent or trademark to an extent which exceeds its share, the other co-owners can demand compensation. Co-owners of copyrights (co-authors) need to reach consent on the publication, exploitation or alteration of a copyrighted work (Germany Copyright Act, section 8(2), first sentence). However, a co-author may not refuse his consent to publication, exploitation or alteration contrary to the principles of good faith (Germany Copyright Act, section 8(2), first sentence).

Acts that affect an intellectual property right as a whole, such as a transfer of the intellectual property right, a licence to the intellectual property right, or using the intellectual property right as a security, require consent by all co-owners (German Civil Code, section 747, second sentence for patents and trademarks; German Copyright Act, section 8(2) for copyrights). On the other hand, each co-owner of a patent or trademark (but not of a copyright) is free to transfer his or her share to a third party (German Civil Code, section 747, first sentence), which will then give the third party the right to use the patent or trademark instead of the previous co-owner. A co-owner may also give a licence to a third party to use the patent or trademark in place of the co-owner, or use his or her share in the patent or trademark as security. A co-owner of a copyright may waive his or her share of the exploitation rights.

Co-owners of intellectual property rights are able to change this position in a contract. For example, they can decide that the right to use may be governed by a majority decision of the joint owners (German Copyright Act, section 8(4)), but they cannot transfer it to a third party.

16 Is your jurisdiction a 'first to file' or 'first to invent' jurisdiction? Can a foreign licensor license the use of an invention subject to a patent application but in respect of which the patent has not been issued in your jurisdiction?

Germany is a 'first to file' jurisdiction. A licensor can grant a licence for the use of an invention even before filing a patent application, or after the filing of a patent application but before grant of the patent (German Patent Act, section 15(2), (1)).

17 Can the following be protected by patents in your jurisdiction: software; business processes or methods; living organisms?

Only technical inventions can be patented in Germany (German Patent Act, section 1). As a consequence, software and business methods 'as such' are not patentable, but technical aspects of software and technical implementations of business methods can be protected by patents, provided that the technical aspects are novel and inventive.

Living organisms are not precluded from patent protection per se. However, there are a number of exclusions and restrictions. The recent amendment of the German Patent Act, section 2a decided a question that is still to be answered for the EPO (see pending cases No. G 2/13 – *Broccoli II* and No. G 2/12 – *Tomatoes II*): besides the exclusion of patentability of plant and animal varieties as well as of essentially biological processes for the production of plants or animals, plants and animals obtained exclusively via such processes are now also excluded from patentability.

18 Is there specific legislation in your jurisdiction that governs trade secrets or know-how? If so, is there a legal definition of trade secrets or know-how? In either case, how are trade secrets and know-how treated by the courts?

There are a number of provisions in German legislation that govern the protection of trade secrets or know-how, which can primarily be found in the Act against Unfair Competition. These provisions apply to employees and to third parties. There is no statutory definition of trade secrets. According to the notion developed by the German jurisprudence, a trade secret covers all information connected to the business that is not public knowledge, which the owner of the business seeks to keep secret for reasonable economic interests, and which according to the will of the company owner, which has expressly been made known or is recognisable, should be kept secret. Therefore, in order for information to qualify as a trade secret, it must fulfil four cumulative requirements:

- the knowledge must relate to the business;
- it must not be in the public domain;
- there must be an interest; and
- there is an intent to keep the information secret.

Even though trade secrets are not regarded as intellectual property rights in Germany in the sense of a granting its holder exclusive rights, and the remedies available for intellectual property rights in the EU Enforcement Directive (2004/48/EC) are not applicable to them, courts do grant injunctions and damages when information is used that was passed on in breach of trade secret law.

19 Does the law allow a licensor to restrict disclosure or use of trade secrets and know-how by the licensee or third parties in your jurisdiction, both during and after the term of the licence agreement? Is there any distinction to be made with respect to improvements to which the licensee may have contributed?

The licensor can restrict the disclosure and the use of trade secrets and know-how by the licensee or third parties during and after the term of the licence agreement. A liability of third parties arises only if they are also contractually related to the licensor. Otherwise, general law prohibiting the disclosure of trade or commercial secrets applies.

Secrecy obligations and use restrictions after the termination of the licence agreement are exempted from antitrust rules by article 2 of the TTBER (see question 30). However, if the know-how becomes publicly known after the date of the agreement or it proves to not have been secret at the date of the agreement, any restrictions lose exemption from antitrust rules, since only secret know-how can be the object of an agreement restricting competition. According to the German antitrust authority, the lawfulness of an absolute duration of such restrictions, for example, 20 years, is questionable. Therefore, licence agreements should limit disclosure for such time as the licensed trade secret continues to exist.

After the amendments to the TTBER and the TTBER Guidelines in May 2014 mentioned in question 8, any direct or indirect obligation on the licensee to grant an exclusive licence to the licensor in respect of any improvements to the licensed know-how made by the licensee, or to assign to the licensor the licensee's rights in the improvements is not exempted from antitrust rules (article 5(1) TTBER). Before the amendment, the subject not exempted from antitrust rules was limited to 'severable' improvements. Therefore, the permissibility of restrictions regarding improvements made by the licensee may be in conflict with antitrust law, depending on the circumstances of the case.

20 What constitutes copyright in your jurisdiction and how can it be protected?

Literary, scientific and artistic works are protected via copyright, which includes, in particular:

- literary works, such as writings, speeches and computer programs;
- musical works;
- works of pantomime, including choreographic works;
- works of fine art, including works of architecture and of applied art and plans for such works;
- photographic works, including works produced by processes similar to cinematography; or

- illustrations of scientific or technical nature, such as drawings, plans, maps, sketches, tables and three-dimensional representations.

Translations and other adaptations or modifications of a work may constitute copyrighted creations of the person having created the adaptation or modification. Collections of works, of data or of other independent elements, which, by reason of the selection or arrangement of the elements, constitute a personal intellectual creation, are also protected by copyright.

Copyright protection requires that a work is the author's individual creation, which requires a certain level of originality. Recent decisions of both the Court of Justice of the European Union (Case No. C-5/08) and the German Federal Court of Justice (case No. I ZR 143/12) show a tendency towards a lowering of this threshold and a more equal threshold for different work categories.

Works that can be subject to copyright are protected without registration; the mere act of creation already establishes the copyright.

21 Is it advisable in your jurisdiction to require the contractual assignment of copyright by the licensee to the licensor for any artwork, software improvements and other works that the licensee may have contributed to?

The licensee will own the copyright for any artwork, software improvements or other works created by the licensee. If the licensor is interested in exploiting such works himself or herself, it is advisable to require the contractual granting of the exclusive or non-exclusive right to use the works created by the licensee (the copyright itself cannot be assigned in Germany). However, it should be noted that the contractual granting of the exclusive right to use the software improvements created by the licensee is not exempted from antitrust rules by article 5(1) TTBER (see question 19), and as a result, its permissibility under competition law should be decided on the circumstances of the case.

Software licensing

22 Does the law in your jurisdiction recognise the validity of 'perpetual' software licences? If not, or if it is not advisable for other reasons, are there other means of addressing concerns relating to 'perpetual' licences?

Perpetual software licences are recognised as valid and are frequently used in Germany. In general, the law of sales is applied to them. As the German law of sales provides for rather strict liability in the case of defects of the purchased goods, the licence agreement should define what constitutes a defect, and the measures the licensor has to take to remedy the defects. Further, since the law of sales does not provide for a right to terminate the contract in the case of material breach of contract, the licence agreement should include a provision that allows termination of the licence in this case (eg, if the licensee installs the software on more devices or for more users than contractually allowed, see LG Köln, case No. 28 O 482/05).

23 Are there any legal requirements to be complied with prior to granting software licences, including import or export restrictions?

No particular legal requirements to be complied with prior to granting a software licence are known. Import or export restrictions may apply only in very specific situations, such as licences for military use of the software.

24 Who owns improvements and modifications to the licensed software? Must a software licensor provide its licensees bug fixes, upgrades and new releases in the absence of a contractual provision to that effect?

Unless otherwise agreed (see question 21), whoever makes improvements or modifications to the licensed software obtains the exclusive right to exploit these improvements (in the case of improvements made by an employee, the rights are automatically vested with the employer). However, if the licence agreement does not explicitly allow modifications to the software, the licensee is only allowed to modify the software to the extent that the modification is necessary for the intended use of the software, in particular, including bug fixes.

General contract law provides the licensee with a right to ask for bug fixes even in the absence of a provision to that effect in the licence agreement, but the licensee does not have a statutory right to obtain upgrades and new releases.

25 Are there any legal restrictions in your jurisdiction with respect to the restrictions a licensor can put on users of its software in a licence agreement?

The following acts of a licensee of a computer program may not be prevented by contract:

- the making of a backup copy by a person having a right to use the computer program if it is necessary to secure future use (German Copyright Act, section 69d(2));
- the observation, studying or testing of the functioning of the program in order to determine the ideas and principles that underlie any element of the program if this occurs while performing any acts of loading, displaying, running, transmitting or storing the program that he or she is entitled to do (German Copyright Act, sections 69d(3), 69g(2)); and
- decompilation, as far as it is indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs (German Copyright Act, sections 69e, 69g(2)).

26 Have there been any legal developments of note in your jurisdiction concerning the use of open source software or the terms of open source software licences?

The enforceability of the terms and conditions of open source licences has been acknowledged by several court decisions in Germany since 2004. In particular, courts have granted injunctions (eg, LG München I, case No. 21 O 6123/04; LG München I, case No. 7 O 5245/07; LG Halle, case No. 4 O 133/15;) in cases where the GNU public licence (GPL) was violated, for example, by including code originally distributed under the GPL in software distributed under a proprietary licence. In these cases, the courts found that the GPL did not provide the defendant with a right to distribute the code under the proprietary licence and, therefore, such distribution constituted a copyright infringement. Also damages have been awarded for infringement of open source licences. For example, a decision of 2011 makes clear that an infringement of the LGPL can entail damages claims even if the code was used only for test purposes (LG Bochum, case No. I-8 O 293/09). Damages have also been awarded in a decision of 2014 for licensing GPL source code under the LGPL (LG Köln, case No. 14 O 463/13) and for violation of the GPLv2 in a decision of 2016 (LG Bochum, case No. I-8 O 294/15).

Royalties and other payments, currency conversion and taxes

27 Is there any legislation that governs the nature, amount or manner or frequency of payments of royalties or other fees or costs (including interest on late payments) in an international licensing relationship, or require regulatory approval of the royalty rate or other fees or costs (including interest on late payments) payable by a licensee in your jurisdiction?

The nature, amount, manner and frequency of payments of royalties, fees or costs can in principle be freely chosen by the parties to the licence agreement. One exception to this principle concerns copyright licence agreements, where the German Copyright Act provides that the author can demand an adjustment of the agreement where the payment to the author is not fair and reasonable (German Copyright Act, section 32(1)). Another exception concerns the field of standard essential patents, where according to the case law, antitrust law requires that any third party who wishes to practise the standard can ask for a licence under the patent for such use under fair, reasonable and non-discriminatory conditions.

In the absence of regulation of the interest rate on late payments in the licence agreement, general civil law provides for an interest rate of 8 per cent above the basic interest rate, and in the case of consumer contracts, 5 per cent (German Civil Code, section 288).

No regulatory approval of the royalty rate or other fees or costs is required in Germany.

28 Are there any restrictions on transfer and remittance of currency in your jurisdiction? Are there any associated regulatory reporting requirements?

In Germany, anyone can make payments to foreign beneficiaries or receive payments from abroad without restrictions or a need for permission. However, companies or persons domiciled in Germany need to report to the central bank (Bundesbank) payments to or from abroad worth more than €12,500. These reports serve to provide statistical information about the degree and the structure of the trade between Germany and the rest of the world.

29 In what circumstances may a foreign licensor be taxed on its income in your jurisdiction?

A foreign licensor (ie, a licensor whose residence or registered office or place of habitual residence is not in Germany) may have limited tax liability in Germany for royalties from Germany (German Income Tax Act, section 50a). A German licensee may be required to withhold the tax and deduct it from the royalty payments and pay it directly to the tax office on behalf of the licensor. Double taxation can be avoided where respective treaties are in place (currently with approximately 90 states). Where they are applicable, exemptions from the licensee's duty to withhold the tax may be available if a corresponding request is filed in due time (at least three months before royalty payments are made to the licensor).

Competition law issues

30 Are practices that potentially restrict trade prohibited or otherwise regulated in your jurisdiction?

Practices that have the intent to or effect of restricting trade between EU member states are governed by articles 101 and 102 of the TFEU and by the corresponding provisions of the German Antitrust Act.

Article 101 TFEU covers, inter alia, horizontal and vertical technology transfer agreements. The TTBER (No. 316/2014) provides certain general exemptions from violation by a licence agreement concerning, for example, patents, know-how and copyright for software. Individual exemptions of restricted practices are possible if they meet certain criteria listed in article 101(3) TFEU and do not fall within the hardcore restrictions.

Article 102 TFEU forbids abuse of a dominant position. It does not directly govern licence agreements, but exclusive licence agreements between competing undertakings may produce a combined dominance, and where such dominance is abused by a restricted practice, it can be considered a breach of article 102 TFEU.

31 Are there any legal restrictions in respect of the following provisions in licence agreements: duration, exclusivity, internet sales prohibitions, non-competition restrictions, and grant-back provisions?

There are legal restrictions in respect of some of the above provisions in licence agreements. Exclusive licence agreements are in general permissible, but exclusivity in customer allocation is a hardcore restriction (see question 30), and thus such provisions are null and void. The same is true for an internet sales prohibition in a selective distribution agreement, which constitutes a restriction of competition 'by object' under EU law (CJEU, case No. C-439/09). Grant-back provisions for assignment of or an exclusive licence on improvements made by the licensee are excluded from the benefits of TTBER (see question 19) and, thus, must be assessed on a case-by-case basis to weigh up their pro- and anticompetitive effects. Non-competition clauses are generally not permissible if they hinder the licensee in the production, use or sale of unprotected items or products. The duration of the licence agreement may extend beyond the term of protection of the licensed intellectual property right (see question 9).

32 Have courts in your jurisdiction held that certain uses (or abuses) of intellectual property rights have been anticompetitive?

Since 2008, the European Commission has increasingly scrutinised agreements for patent dispute resolution. Inter alia, it has imposed fines in an amount totalling €146 million for infringement of article 101 TFEU (see question 30) in the case of an agreement between Danish

pharmaceutical firm Lundbeck and several generics companies. Under the agreement, Lundbeck had made substantial payments to the generics companies to delay their release of generic versions of a drug for which Lundbeck's product patent had expired, and to which it held only certain process patents, which provided more limited coverage. The decision of the Commission was upheld by the European General Court in September 2016 in a series of cases (T-472/13, T-460/13, T-467/13, T-469/13, T-470/13, T-471/13). The Court found that the Commission had correctly refused to apply the exceptions under article 101(3) TFEU in favour of the parties.

In a decision of 2009 (KZR 39/06 – *Orange Book*), the German Federal Court of Justice found that denial to grant a licence under a standard-essential patent (SEP) may be an abuse of dominant position under German and EU (article 102 TFEU) antitrust law. In this situation, seeking injunctive relief in a patent infringement lawsuit is likewise an abuse of dominant position. The conditions under which the owner of an SEP may nevertheless ask for an injunction were further limited in a decision of the Court of Justice of the European Union in July 2015 (C-170/13 – *Huawei v ZTE*). If an alleged infringer expresses his willingness to conclude a licence under fair, reasonable and non-discriminatory (FRAND) terms, the SEP owner may ask for injunction only after making a written offer for a licence on FRAND terms, if the defendant did not diligently respond to the offer, in particular by submitting a specific counter-offer that also corresponds to FRAND terms.

Indemnification, disclaimers of liability, damages and limitation of damages

33 Are indemnification provisions commonly used in your jurisdiction and, if so, are they generally enforceable? Is insurance coverage for the protection of a foreign licensor available in support of an indemnification provision?

Indemnification provisions are commonly used in Germany and are generally enforceable. For example, claims for product liability may arise against the licensor from the use of the licensor's trademark. The licence agreement may comprise a provision for indemnification of the licensor by the licensee with respect to such claims.

Insurance coverage for the protection of a foreign licensor may be available in support of an indemnification provision.

34 Can the parties contractually agree to waive or limit certain types of damages? Are disclaimers and limitations of liability generally enforceable? What are the exceptions, if any?

Parties can, in general, agree to waive or limit damages claims. Such disclaimers and limitations of liability are generally enforceable.

Exceptions exist where a party uses standard terms and conditions: in this case, for example, liability for damages caused with intent or by a grossly negligent act cannot be excluded or limited. The same is true for liability resulting from ordinary negligence in the event of the death or personal injury and for liability for damages that are typical and foreseeable.

Termination

35 Does the law impose conditions on, or otherwise limit, the right to terminate or not to renew an international licensing relationship; or require the payment of an indemnity or other form of compensation upon termination or non-renewal? More specifically, have courts in your jurisdiction extended to licensing relationships the application of commercial agency laws that contain such rights or remedies or provide such indemnities?

Parties are free to terminate the licence in accordance with the provisions as set out in the agreement. German law does not restrict the content of a termination clause (for the possibility to terminate the agreement in the absence of a termination provision in the agreement, see question 5). Therefore, German law does not generally impose conditions on or limit the right to terminate or not to renew a licensing relationship. An exception to this rule exists in the case of compulsory licences (see question 2), which owing to their nature cannot be terminated by the licensor without good cause. For restrictions of the right to terminate where the commencement of insolvency proceedings has been applied for by the licensee, see question 37.

In general, the payment of an indemnity or other form of compensation is not required upon a rightful termination of the licence agreement. However, there is at least one decision of an appeals court (OLG Celle, case No. 11 U 279/06), which ruled that if a franchisee is integrated into the organisation of the franchisor like a commercial agent and does not have the possibility to keep his or her customer base after termination or non-renewal of the franchise agreement, commercial agency law (German Commercial Code, section 89b) is to be applied by way of analogy and the franchisee has a right to compensation. Franchise agreements typically also comprise licence agreements (see question 6).

36 What is the impact of the termination or expiration of a licence agreement on any sub-licence granted by the licensee, in the absence of any contractual provision addressing this issue? Would a contractual provision addressing this issue be enforceable, in either case?

For copyright licences, the German Federal Court of Justice, in a series of three judgments between 2009 and 2012, decided that the termination of the licence agreement in general does not lead to the termination of sub-licences granted by the licensee (case No. I ZR 153/06, I ZR 70/10, and I ZR 24/11). In this case, the licensor has a claim against the licensee for the assignment of the right to collect outstanding royalty payments from the sub-licensees. Although the Federal Court of Justice left the issue open, it can be argued that in the case of the expiration of a licence agreement (eg, if a licence agreement has a limited term), a sub-licence granted by the licensee likewise expires because the sub-licensor cannot acquire a use right from the licensee that goes beyond what the licensee owns.

It is generally expected that the courts will also adopt this case law for other fields of IP, such as patents and trademarks, which will have the consequence that sub-licences normally remain in force even if the licensor rightfully terminated the licence. If a licensor wants to avoid this consequence, it is advisable to include a provision in the licence agreement that requires the licensee to include clauses in the sub-licence providing that the sub-licence ends when the licence ceases to exist. In order to be certain that this provision is correctly applied, the licensor's explicit consent to any sub-licence may be required in the licence agreement. Alternatively, the right to sub-licence could be granted in a way that is limited to sub-licences that end when the licence ceases to exist. Such a provision if ignored by the licensee is arguably enforceable in that the sub-licence granted without the licensor's right to terminate is beyond what the licensee owns and therefore either void or to be treated as if the licensor's right to terminate was included.

Bankruptcy

37 What is the impact of the bankruptcy of the licensee on the legal relationship with its licensor; and any sub-licence that the licensee may have granted? Can the licensor structure its international licence agreement to terminate it prior to the bankruptcy and remove the licensee's rights?

In the case of bankruptcy of the licensee, the insolvency administrator can choose whether or not he or she wants to continue to perform the licence agreement (German Insolvency Act, section 103). If he or she chooses not to continue the licence agreement, the agreement is terminated. On the other hand, if he or she chooses to continue to use the licensed intellectual property right, royalty payments due after the day the commencement of insolvency was applied for become debts of the estate, which are treated with priority over the debts to creditors in insolvency (German Insolvency Act, section 55(1) No. 2, section 53).

It is generally assumed – although some doubts have been expressed with respect to trademarks – that after the day the commencement of insolvency was applied for, the licensor cannot terminate the licence agreement on the ground that the licensee is in default of royalty payments due prior to that day, or that the financial circumstances of the licensee have deteriorated (analogous application of section 112 of the German Insolvency Act, which refers to lease contracts). Also a clause providing for termination or the right to terminate upon the commencement of insolvency proceedings is considered to be void.

However, a provision in the licence agreement that allows the licensor to terminate the agreement, before the commencement of

insolvency is applied for, on the grounds of payment default, indebtedness or a deterioration of the financial circumstances of the licensee is valid. Further, a provision that allows for the termination of the agreement in the case of late payments or where the licensee cannot meet an obligation for a certain minimum use of the licensed intellectual property right even after commencement of insolvency proceedings was applied for is generally considered to be valid.

With respect to sub-licences that the licensee may have granted, the principles laid out in question 36 are expected to apply also in the case of bankruptcy of the licensee, be it that the insolvency administrator chooses not to continue to use the licensed intellectual property right, or be it that the licensor terminates the agreement prior to or after the application for the commencement of insolvency proceedings.

38 What is the impact of the bankruptcy of the licensor on the legal relationship with its licensee; and any sub licence the licensee has granted? Are there any steps a licensee can take to protect its interest if the licensor becomes bankrupt?

Also in the case of bankruptcy of the licensor, the insolvency administrator can choose whether or not he or she wants to continue to perform the licence agreement, provided that the licence contract was not yet completely performed by the licensor or the licensee (German Insolvency Act, section 103(1)). This is the case at least where running royalties have been agreed upon. In a case of a royalty-free patent cross-licence agreement, a German appeals court found that the contract had already been completely performed and thus could not be terminated by the insolvency administrator (OLG München, case No. 6 U 541/12). If the insolvency administrator chooses not to continue the licence agreement, the agreement is terminated. In this case, the licensee has a claim against the licensor for breach of contract (German Insolvency Act, section 103(2), first sentence), but this claim is treated like any other debts to creditors.

In several decisions, the sub-licence granted by the licensee to its sub-licensee was found to remain unaffected by the termination of the agreement between the insolvent licensor and the licensee (Federal Court of Justice, case No. I ZR 153/06, I ZR 24/11, and I ZR 70/10). As a consequence, the licensee can mitigate the risk of a bankruptcy of the licensor by sub-licensing the licence (eg, to its affiliates who practise the licence).

In another decision, the Federal Court of Justice (case No. IX ZR 162/04) confirmed the validity of a clause in a software licence agreement by which the right to use the software was transferred to the licensee subject to the condition precedent that the licence agreement is terminated (including termination by the insolvency administrator). Thus, such a clause can provide another possibility in particular for the exclusive licensee to protect itself against the bankruptcy of the licensor.

Finally, it is widely recognised in the legal literature that charging an intellectual property right with a usufruct survives the bankruptcy of the licensor.

Governing law and dispute resolution

39 Are there any restrictions on an international licensing arrangement being governed by the laws of another jurisdiction chosen by the parties?

In principle, the parties to an agreement are free to choose the law that governs the agreement (Regulation (EC) No. 593/2008 (Rome I), article 3(1)). However, a German court would apply overriding mandatory provisions of German and European law, namely, provisions the respect of which is regarded as crucial for safeguarding Germany's or the EU's public interests (Rome I, article 9(2)). In particular, European antitrust law can be applied in order to assess the validity of the provisions of a licence agreement.

40 Can the parties contractually agree to arbitration of their disputes instead of resorting to the courts of your jurisdiction? If so, must the arbitration proceedings be conducted in your jurisdiction or can they be held in another? Can the parties agree to preclude collective (or class action) arbitration? If so, list the conditions for a contractual waiver to be enforceable.

Arbitration clauses are common in licence agreements and recognised by the German Civil Procedure Code (section 1029). A valid arbitration clause has the effect that a complaint brought before a German court has to be dismissed for lack of jurisdiction if the defendant so requests prior to the oral hearing (German Civil Procedure Code, section 1032(1)). This is true even if the place of arbitration is not in Germany (German Civil Procedure Code, section 1025(2)). Therefore, arbitration proceedings can be held in another jurisdiction. Popular arbitral bodies are the WIPO Arbitration and Mediation Center, the International Chamber of Commerce, and the Deutsche Institution für Schiedsgerichtsbarkeit.

41 Would a court judgment or arbitral award from another jurisdiction be enforceable in your jurisdiction? Is your jurisdiction party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Foreign judgments are, in general, enforceable in Germany. Enforcement requires that the foreign judgment has been declared enforceable by a German court.

For judgments from EU member states and from a number of other jurisdictions (Iceland, Norway and Switzerland, contracting parties of the Lugano Agreement), the procedure and the prerequisites for the declaration of enforceability is simplified, and basically only require that the judgment from the foreign jurisdiction is enforceable in that jurisdiction and that the interested party makes an application with the competent German court (see articles 38 and 39 of Council Regulation (EC) No. 44/2001 (Brussels I)).

For judgments from other jurisdictions, the interested party needs to sue the defendant at the competent German court for a declaration of the enforceability of the foreign judgment in Germany (German Civil Procedure Code, section 722). The German court will not review the lawfulness of the foreign judgment, but it will declare the foreign

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judgment enforceable in Germany only if the judgment from the foreign jurisdiction is final and the recognition of the foreign judgment in Germany is not excluded by law (German Civil Procedure Code, section 723). Recognition is excluded by law, for example, if it conflicts with German public policy (German Civil Procedure Code, section 328).

Foreign arbitral awards are recognised and enforced by German courts in accordance with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (German Civil Procedure Code, section 1061), to which Germany is a party.

Collective arbitration is rare in Germany although it is known in certain types of shareholder suits (see the 'DIS Supplementary Rules for Corporate Law Disputes'). Unless explicitly agreed upon by the parties, collective arbitration is not available. Therefore, a contractual waiver is not necessary.

42 Is injunctive relief available in your jurisdiction? May it be waived contractually? If so, what conditions must be met for a contractual waiver to be enforceable? May the parties waive their entitlement to claim specific categories of damages in an arbitration clause?

Permanent and preliminary injunctive relief is available in Germany. An injunction granted by a first instance court can regularly be immediately enforced, upon provision of a security bond, even if appeal is pending.

At least for patents, the right to injunctive relief cannot be waived with in rem effect (LG Mannheim, case No. 7 O 94/08), but the assertion of the right to injunctive relief can be waived contractually in an agreement with a third party. In this case, the third party has a defence against the claim for an injunction if the third party is sued for infringement (RGZ 153, 329, 331). Restrictions to enforceability of such a waiver exist where standard terms and conditions are used (see question 36).

Parties may waive their entitlement to claim (specific categories of) damages, such as loss of profits, in an arbitration clause or any other clause of an agreement. However, restrictions exist where standard terms and conditions are used (see question 34).

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