Distribution & Agency 2021

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LEXOLOGY®
Getting The Deal Through

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Lexology 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 Lexology 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 Netherlands, Portugal, Sweden and Switzerland..

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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.

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Germany

Benedikt Rohrßen and Martin Rothermel

Taylor Wessing

DIRECT DISTRIBUTION

Ownership structures

1 | May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

Yes. However, specific restrictions may apply if (foreign or domestic) investors do business in the defence, pharmaceutical or financial sectors.

2 | May a foreign supplier be a partial owner with a local company of the importer of its products?

Yes. There is no specific investment legislation and no minimum percentage of German shareholders required.

3 | What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

The types of business entities that are best suited are:

- limited liability companies (GmbH and UG);
- stock corporations (AG); and
- limited partnerships (KG).

The criteria for the choice of entity used are liability, taxation, financing, personal involvement and control, and flexibility. For larger companies, a GmbH or an AG are typically best suited. Their shareholders' liability is limited to the respective share capital.

The minimum share capital varies between €50,000 (AG), €25,000 (GmbH) and €1 (for the GmbH subtype, UG). The transfer of shares in a GmbH or a UG typically has to be approved by the other shareholders and notarised, whereas shares in an AG are freely transferable. However, the GmbH is a more flexible and procedurally less demanding form of entity than the AG.

GmbH, UG and AG entities are formed by one or more founding shareholders, who adopt the articles of association and appoint the managing directors, and additionally, in the case of an AG, a supervisory board (of at least three members) in a notarial deed. These entities exist upon registration at the commercial register. Alternatively, a supplier may purchase an existing, inactive shelf company and, as an advantage, start operating immediately.

Partnerships are often preferred for tax reasons, especially the KG, which – for reasons of limiting liability – is often combined with a corporation as a general partner (GmbH & Co KG or AG & Co KG). They require at least two partners.

The governing laws are as follows:

- the Limited Liability Companies Act for the GmbH and UG;
- the Stock Corporation Act for the AG; and
- the German Civil Code and the German Commercial Code for partnerships.

Restrictions

4 | Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

Generally, no. Foreign businesses operate under the same rules as domestic businesses. By way of exception, the Federal Ministry for Economy and Technology can restrict or prohibit acquisitions of or participations in domestic business entities by individuals or business entities seated outside the European Union, Iceland, Liechtenstein, Norway (together, the European Economic Area) or Switzerland. Preconditions to this are:

- the foreign investor acquires 10 per cent of the voting rights in a German company where the domestic business entity pertains to critical infrastructure sectors (eg, energy, information technology, telecommunications, transport, traffic, health, water, food, finance and insurance); or
- the foreign investor acquires 25 per cent or more of the voting rights of any other German company; and
- the acquisition endangers national public order or security (sections 55 to 59 of the Foreign Trade and Payments Ordinance).

Equity interests

5 | May the foreign supplier own an equity interest in the local entity that distributes its products?

Yes.

Tax considerations

6 | What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

A foreign supplier especially has to consider:

- whether the importer itself shall pay income tax or the supplier as owner, or both; and
- whether the supplier might be subject to double taxation (both in Germany and its state of origin) and whether it can be avoided.

To foreign businesses and individuals that operate in Germany, two levels of taxation apply, namely:

- trade tax, which applies to all businesses and individuals in Germany and is paid on taxable earnings (as a local tax, its rate differs from municipality to municipality); and
- income tax, which depends on the business entity.

Corporations are subject to corporate income tax (15 per cent flat rate) and their shareholders are subject to a tax on capital gains and dividends. The average overall tax burden for corporations in Germany is 30 per cent (corporate income tax and trade tax).

A partnership itself is not subject to income tax, but its partners are subject to either corporate (if business entities) or personal (if individuals) income tax.

Individuals pay personal income tax. The tax rate increases with the income (to a maximum of 45 per cent for an income of €250,000), but trade tax payments can be set off against it. Special tax rates apply for dividends and capital gains.

For dividends, capital gains, interest payments and licence fees, withholding tax may apply. It amounts to 25 per cent of the capital gain distributed to the owning business (plus a further solidarity surcharge of 5.5 per cent, which is added to the tax amount). These taxes may be refunded in the case of double taxation if a treaty with the country of origin of the owning business exists.

LOCAL DISTRIBUTORS AND COMMERCIAL AGENTS

Distribution relationships

7 What alternative distribution relationships are available to a supplier?

Any conceivable distribution relationship is available. The following distribution relationships are typically used.

- In-house sales force, which allows for direct influence on employees and an easy margin calculation but generally entails high labour cost (including social security).
- Self-employed commercial agents, who sell the products on the supplier's behalf. The supplier keeps direct contact with and sells directly to the customers, with a higher control over the activities of the agent and over the margins. Commercial agents have to provide detailed market reports. Unlike an employee's salary, an agent's commission can be exclusively profit-oriented (namely subject to successfully soliciting customers) and linked to the turnover. Within the EU, protective agency law applies, including minimum termination notice and indemnity provisions.
- Distributors, who buy and, thus, take ownership of the products and sell them on their own behalf, adding a margin to cover their own costs. They assume liability and, in return, gain profit from the margin, while the suppliers' margins are rather low. The distributor is obliged and motivated to market and distribute the products he or she purchases from the supplier and to safeguard the latter's interests. Distributors are subject to limited control by the supplier over their activities but are also less protected than commercial agents.
- Commission agents, who are midway between commercial agents and distributors. They sell products in their own name but for the supplier's account. The supplier bears the sales risk, even if the commission agents have products in a consignment stock to which the supplier retains the title. The supplier can influence the commission agent without observing the strict antitrust law that applies to distributorship agreements.
- Franchisees, who like distributors buy and sell products on their own behalf. A franchisee is entitled and encouraged to use the franchisor's trade name, trademarks, know-how and brands, based on the acquired licences of intellectual property rights, to market and sell the goods or services. Franchisors are typically already established within the marketplace, often already with a solid customer base. In return, the franchisee usually pays an initial fee and ongoing royalties. The franchisor, based on the experience acquired with the established business, has to disclose the key risks and issues linked to the franchise and often provides assistance and guidelines in the marketing and selling of the goods or services to maintain the brand identity.
- Private label products: these are products produced by the supplier under the trademarks of the retailer (in contrast to manufacturer brands).
- Trademark licences: these are especially used where the trademark owner has already introduced well-known brands but does not have its own manufacturing capacities or knowledge. To enter into a new product market, the licensor can grant licensees, who have the necessary technical and commercial know-how, a licence to produce and sell the products under the licensor's trademark. The agreement usually, but not necessarily, grants an exclusive licence for a certain territory, and it requires maintaining product quality and upholding the brand image.
- Joint ventures: these are joint projects between legally and economically independent companies in which the partners share management responsibility and financial risk. The setting up of a joint venture is based on a common interest of the partner companies that is expressed in a joint venture agreement, which also regulates the distribution of profits and joint control.
- Concession agreements: these aim to sell the supplier's products within sales areas in department stores, operated by the supplier, typically using the department store's payment system.

Legislation and regulators

8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

Employment contracts

Employment contracts with the in-house sales force are governed by sections 611 to 630 of the German Civil Code (BGB) and several laws on employees' protection.

Agency contracts

Agency contracts are governed by sections 84 to 92c of the German Commercial Code (HGB). The commercial agent is, like the employee, strongly protected, for example, by mandatory rules on minimum notice periods, commission payments and goodwill indemnity.

Distributorship contracts

Most EU member state's laws do not expressly regulate distributorship contracts. However, the legal vacuum was mostly filled by case law, for example, with respect to the supplier's duty to take back unsold stock upon termination of the contract. German agency law applies by analogy to the distributor if the latter is (1) integrated into the supplier's sales organisation and (2) obliged (contractually or factually) to submit the customer data during or upon termination of the contract.

Antitrust law also applies to distributorship contracts. Pursuant to article 6 (3a) of the Rome II Regulation, the antitrust regulation of any affected market must be complied with.

Franchise contracts

Franchise contracts are not explicitly governed by statutory law. They combine elements of licensing, sales and management of another's affairs. Generally, agency law applies by analogy (see the German Federal Court of Justice (BGH), decisions of 12 November 1986, on mineral water, and 17 July 2002, *Hertz*). Moreover, being standard form contracts (pre-formulated and provided by the franchisor for multiple

franchisees), franchise contracts have to comply with the quite strict German laws on standard form contracts (BGH, decision of 11 October 2018, *RE/MAX*; comment by Rohrßen, *ZVertriebsR* 2019, 325).

Industry self-regulatory constraints

Certain industry self-regulatory constraints exist, for example, in the automotive industry, where members of the European Automobile Manufacturers Association have agreed to a code of good practice, stipulating minimum notice periods and methods for the resolution of contractual disputes.

Contract termination

9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

The supplier's right to terminate without cause is restricted. No restriction applies to a decision not to renew the distribution relationship when the contract term expires unless antitrust law, in rare cases, demands continued delivery.

The principal and the agent's right to terminate the agency agreement without cause can be contractually agreed upon. However, there are mandatory notice periods to observe, in accordance with section 89(1) of the HGB, depending on the contractual term (similarly to article 15(2) of the Commercial Agency Directive): the period is one month in the first year, two months in the second year, three months in the third, fourth and fifth year and six months after five years. The notice periods are set by law and cannot be shortened. In the event of contractual extension, the supplier's notice period cannot be shorter than the agent's (section 89(2) HGB). The agreement can be terminated without a notice period only if there is cause (section 89a HGB), and the terminating party cannot reasonably be expected to carry on the contractual relationship until its ordinary termination (taking into account all circumstances of the single case and weighing the interests of both parties).

If a contract term was not agreed upon, a distributorship agreement can be terminated (sections 314, 573, 620(2) and 723 BGB). The length of the notice period depends on the case, considering also the distributor's investments. For example, one-year periods were deemed suitable in the automotive sector (BGH, decision of 21 February 1995, *Citroën*). In rare cases, a renewal of the relationship may be imposed by antitrust law.

Generally, agency law applies to the termination of franchise agreements (mutatis mutandis). However, longer periods may be deemed necessary in specific cases, for example, if the supplier's product forced the franchisee to make considerable investments.

10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

A commercial agent can claim indemnity if he or she has brought new customers or has significantly increased the business volume with already existing customers, resulting in benefits for the supplier, and if the payment of indemnity can be deemed equitable in the specific case (section 89b HGB). The relevant calculation is based on the commissions earned over the previous 12 months of activity, both with new customers and existing customers with whom the agent has substantially increased the business. The indemnity cannot exceed an amount equal to the past five years' average annual commission (section 89b(2) HGB). The indemnity claim cannot be waived before termination. To retain the indemnity, the commercial agent needs to notify the principal within one year from termination; otherwise, he or she loses the right to indemnity. Indemnity is not due if:

- the agent terminates the contract (unless owing to circumstances attributable to the principal or because of the agent's advanced age or illness);
- the principal terminates the contract owing to default attributable to the agent (which would justify immediate termination for cause); or
- the agent, upon agreement with the principal, assigns and transfers its rights and duties under the agency contract to a third person.

The right to indemnity cannot be excluded by the parties, unless the agent acts outside the European Economic Area (EEA) (section 92c HGB). This has been confirmed by the European Court of Justice in its ruling on the international scope of the Commercial Agency Directive (decision of 16 February 2017, *Agro Foreign Trade & Agency Ltd/Petersime NV*; cf. Rohrßen, *ZVertriebsR* 2017, 181 et seq). For details on the different levels of protection of commercial agents in various countries, see *Rothermel, Internationales Kauf-, Liefer- und Vertriebsrecht* (2021), with overviews of 65 countries in Chapter H.

Distributors can claim indemnity only by analogic application of agency law. A distributor's indemnity can amount to its average annual net margin. For a long time, it was disputed whether a distributor's goodwill indemnity could be excluded under German law in advance when the distributor operates outside Germany but within the EEA. The BGH has recently denied such exclusion, provided the preconditions for analogic application of agency law are given, arguing that agency law restrictions applied to distributorships as well by way of analogy, and hence in the distributor's favour (BGH, decision of 25 February 2016, *Convection-reflow Soldering Systems).*

Franchisees can likely claim indemnity based on analogic application of agency law, but this has not yet been ruled out (BGH, decision of 23 July 1997, *Benetton*). The Federal Court of Justice has denied the franchisee's indemnity claim in the single case, but it would quite likely affirm it in the case of distribution franchising, where the franchisee buys the products from the franchisor, arguing that where the franchisee has been entrusted with the distribution of the franchisor's products and, after termination of the contractual relationship, the franchisor alone is entitled to the customers newly acquired by the franchisee during the term of the contract, the situation is similar to distributorship and commercial agency situations (BGH, decision of 29 April 2010, Case No. I ZR 3/09, *Joop*). However, no indemnity can be claimed where the franchise concerns anonymous bulk business and customers continue to be regular customers on a de facto basis (BGH, decision of 5 February 2015) or production franchising (bottling contracts, etc) where the franchisor or licensor is not active in the sector of products distributed by the franchisee or licensee (*Joop*).

Commission agents may also claim indemnity based on analogic application of agency law (BGH, decision of 21 July 2016, *Thomas Philipps).* The claim can probably be avoided, in particular by excluding the commission agent's obligation to transfer the customer base to the principal (for details, see Franke and Rohrßen,*IHR* 2017, 62–70).

Transfer of rights or ownership

11 Will your jurisdiction enforce a distribution contract provision prohibiting or restricting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

A provision that prohibits the transfer of distribution rights will be enforced (section 399 BGB). Distribution rights are not assignable without the supplier's consent if the supplier has a reasonable interest in the distributor's or agent's personal performance (sections 613 and 664 BGB).

A transfer of ownership (change of control) cannot be hindered. However, the distributor can agree not to transfer ownership, and, in the event of a breach, the supplier is entitled to damages, including, if possible, retransfer of ownership (section 137 BGB). In addition, the parties can agree on a termination right in the case of change of control.

REGULATION OF THE DISTRIBUTION RELATIONSHIP

Confidentiality agreements

12 | Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

Limitations exist, especially regarding the draft of standard business terms. Confidentiality provisions shall clarify the scope of confidentiality (what, who and how long). Contractual penalties may only apply if the receiving party culpably broke confidentiality, and the amount of the penalty has to be reasonable (sections 310, 307 and 343 of the German Civil Code (BGB) and section 348 of the German Commercial Code (HGB)).

Competing products

13 | Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

Non-compete obligations towards distributors and franchisees are enforceable if they conform to antitrust law. Generally, agreements that aim at or result in restraints of competition are prohibited by antitrust law, namely by the German Act Against Restraints of Competition (GWB) and articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

Unless agreements contain hardcore restrictions, a safe harbour is provided by the De Minimis Notice of 30 August 2014 and the Vertical Block Exemption Regulation (VBER) (Regulation (EU) No. 330/2010). Agreements between non-competitors are safe if each party's market share does not exceed 15 per cent on any relevant market affected.

If one party's market share exceeds 15 per cent, but all market shares are below 30 per cent, the parties can agree upon a non-compete obligation during the contractual term for a maximum period of five years. This time limit does not apply if the products are sold on premises owned by the supplier or leased by the latter from third parties who are independent from the buyer. In any case, the non-compete obligation cannot exceed the term for which the buyer is entitled to occupy the premises. Upon termination of the contractual term, a non-compete obligation involving a party with a market share exceeding 15 per cent, but without market shares exceeding 30 per cent, is valid if it is necessary to protect the know-how granted to the distributor and limited to competing products, to the distributor's premises and to a one-year term.

If one party's market share exceeds 30 per cent, a non-compete obligation and any other restriction of competition can only benefit from the individual exemption under the strict criteria of article 101(3) of the TFEU (efficiency defence).

Restraints within franchisee agreements can be exempted. They are considered not to restrict competition in terms of EU antitrust law if they are essential for running the franchise system (similar to the ancillary restraints doctrine under US law) (cf. Court of Justice of the European Union, 28 January 1986, *Pronuptia*). This is particularly true for non-compete obligations.

Non-compete obligations towards agents are enforceable. As the principal bears all risks connected with the sale and purchase of the products or services, antitrust law generally does not apply (Guidelines on Vertical Restraints of 10 May 2010, paragraphs 12 et seq, 18 and 49). Only specific limits apply to post- contractual non-compete obligations that were stipulated before termination: they must be limited to a two-year period, to the agent's territory or customers, and to the contractual products or services, and they must be done in writing and delivered to the agent. The principal is obliged to pay indemnity for the non-compete obligation's term (section 90a HGB).

Prices

14 | May a supplier control the prices at which its distribution partner resells its products? If not, how are these restrictions enforced?

Generally, a supplier cannot control the resale price or price level of its distributors or franchisees (except for suppliers selling newspapers, magazines and books, section 30 GWB). A violation of this rule represents a hardcore restriction and is therefore generally void (see Guidelines on Vertical Restraints of 10 May 2010, paragraphs 48 and 223; practical tips: Rohrßen, *ZvertriebsR* 2020, 406 et seq.). By exception, the supplier can enforce the efficiency defence (eg, when introducing a new product or a coordinated short-term, low-price campaign). The supplier can also influence resale prices by recommending resale prices or setting maximum resale prices.

Suppliers can control the price at which they sell the products or services via agents because the antitrust law restrictions do not apply.

15 | May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

A supplier may recommend resale prices or set maximum resale prices if the parties' market shares do not exceed 30 per cent and if the recommendation or maximum resale price is not backed up by further negative (eg, pressure) or positive (eg, incentives) factors from one party (article 101(1) TFEU and article 4(a) VBER), such as announcing the supplier will not deal with customers who do not follow its pricing policy.

Establishing a minimum advertised price policy is exempt from antitrust law if it is regarded as a recommendation. Otherwise, it can – very rarely – be exempted under the efficiency defence.

If, on the other hand, a supplier announces it will not deal with distributors or franchisees refusing its pricing policy, it will be treated as fixing the selling prices.

16 | May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

A most favoured nation or customer clause can be enforced only if agreed between non-competitors and if the parties' market shares amount to a maximum of 30 per cent (otherwise, only the efficiency defence can be used to argue that the clause does not represent a prohibited restriction of competition).

17 | Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

Generally, based on freedom of contract, a seller can charge different prices to different customers. However, this general rule does not apply if a seller:

- holds a dominant or similarly strong market position (sections 19 and 20 GWB and article 102 TFEU); and

- differentiates on grounds of race or ethnic origin. The same is true for grounds of gender, religion, disability. A different treatment is allowed if it is based on objective grounds, especially where it serves to avoid threats, prevent damage, etc (sections 19 and 20 Anti-Discrimination Act).

Geographic and customer restrictions

18 | May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

Whether measures restrict competition and are prohibited is to be determined by the antitrust law of the country in which the measures have an effect (the effects doctrine). Within the European Union or the European Economic Area (EEA), a supplier is generally prohibited from restricting the territories in which or the customers to whom its intermediary sells; such restrictions are generally null and void (article 101(1)b, (2) TFEU and article 53 EEA Agreement). The following restrictions are, however, exempt from the ban owing to block exemption:

- active sales into an exclusive territory or customer group reserved to the supplier or another distribution partner;
- sales to end users if the distribution partner is a wholesaler;
- sales from members of a selective distribution system to unauthorised distributors within the system's territory; and
- sales of components, supplied for incorporation, to customers who would use them to produce analogous products (article 4(b) VBER).

Active sales refers to actively approaching actual or potential customers (eg, by direct, unsolicited mail, email, calls or visits) in a specific territory through specifically targeted promotions. Passive sales refers to the response to unsolicited requests from individual customers, including advertisements addressed to customers outside exclusive territories or customer groups, if done reasonably.

This also holds true for the internet: in principle, online sales may not be excluded. A supplier may only require its intermediary to meet specific quality standards, especially in selective distribution systems (Guidelines on Vertical Restraints of 10 May 2010, paragraphs 51 and 54). The European Court of Justice shed further light on internet resale restrictions within selective distribution systems during deliberation on the Higher Regional Court of Frankfurt's request to give a preliminary ruling on how to interpret European antitrust rules, namely article 101 of the TFEU and article 4(b) and (c) of the VBER (decision of 19 April 2016, *Coty Germany,* File No. 11U 96/14 (Kart)). According to the European Court of Justice's decision of 6 December 2017 *(Coty Germany,* Case No. C-230/16), manufacturers of luxury products may stop the distributors within their selective distribution network from selling the goods via third-party platforms if the contractual clause meets the following three conditions: '(i) that clause has the objective of preserving the luxury image of the goods in question; (ii) it is laid down uniformly and not applied in a discriminatory fashion; and (iii) it is proportionate in the light of the objective pursued.' If these *Metro*-criteria for selective distribution (referring to the *Metro* case of 25 November 1977, Reference No. 26/76) are not met, the clause may nevertheless benefit from an exemption under the VBER by reason of article 101(3) of the TFEU, because banning sales via third-party online platforms does not, at least according to the court, under a selective distribution system for luxury goods, constitute a hardcore restriction as listed in article 4 of the VBER, which would otherwise exclude applying the block exemption to the whole vertical agreement (cf. paragraph 47 of the Guidelines on Vertical Restraints of 10 May 2010). In particular, the third-party platform ban would not constitute a restriction of customers in terms of article 4(b) of the VBER, or a restriction of passive sales to end users in terms of article 4(c) of the VBER. The court left open whether this interpretation also applies to goods other than luxury goods and outside selective distribution. The German competition authority made the following declaration immediately via Twitter on 6 December 2017: 'The #ECJ has taken care to limit its findings to genuine luxury products. #Brandmanufacturers have not received carte blanche to issue blanket #platformbans. First assessment: Limited impact on our practice.'

The European Commission disagreed; in its Competition Policy Brief of April 2018, the European Commission stated that the European Court of Justice's argumentation in the *Coty Germany* case applies irrespective of the luxury character of the products marketed:

> *The arguments provided by the Court are valid irrespective of the product category concerned (i.e., luxury goods in the case at hand) and are equally applicable to non-luxury products. Whether a platform ban has the object of restricting the territory into which, or the customers to whom the distributor can sell the products or whether it limits the distributor's passive sales can logically not depend on the nature of the product concerned.*

The European Court of Justice's decision in the *Coty Germany* case provides good abstract arguments that manufacturers of both luxury and other brand-name products may ban their sale via internet platforms either according to the *Metro* criteria or according to the VBER. In this regard, see, also, the decision of the Higher Regional Court of Hamburg of 22 March 2018, which held that the ban a producer of food and cosmetics (ie, not luxury goods, but products 'qualitatively committed to a high (production) standard') imposed on its own distributor to sell via third-party internet platforms was valid (for details see Rohrßen, *ZVertriebsR* 2018, 277–285 (281)). With regard to resale restrictions, the EU Geo-blocking Regulation (Regulation (EU) No. 2018/302) prohibits traders from discriminating against customers within the European Union for reasons of nationality, place of residence or place of establishment with regard to the access to online interfaces (article 3) and the application of general conditions of access to goods or services (article 4). Within the range of means of payment accepted, traders shall not apply different conditions for payment transactions based on nationality, place of residence, place of establishment of the customer, location of the payment account, place of establishment of the payment service provider or place of issue of the payment instrument within the European Union (article 5). Where distribution agreements impose obligations to exercise any form of unjustified geo-blocking as laid down in articles 3, 4 and 5, those provisions shall be automatically void (article 6(2)). The Geo-blocking Regulation has been in application since 3 December 2018. However, article 6(2) will only apply to agreements on passive sales concluded before 2 March 2018 as of 23 March 2020 (for details see Rothermel and Schulz,*K&R* 2018, 444–449; Rohrßen, *ZVertriebsR* 2018, 277–285 (283–284)).

19 | If geographic and customer restrictions are prohibited, how is this enforced?

Geographic or customer restrictions of resale, to the extent permitted, can be enforced through private legal action, namely by way of an action for an injunction, requiring the distributor to refrain from such breach of contract. If urgent, suppliers can request an interim injunction.

Online sales

20 | May a supplier restrict or prohibit e-commerce sales by its distribution partners?

Yes, a supplier may restrict e-commerce sales by its distribution partners (especially distributors or franchisees) under German and EU antitrust law; however, suppliers may hardly impose a comprehensive prohibition on the online sale of goods (or services) because they are considered passive sales (cf. European Court of Justice, decision of 13 October 2011, *Pierre Fabre*, Case No. C-439/09, reaffirmed in *Coty Germany*; paragraph 52 of the Guidelines on Vertical Restraints of 10 May 2010; see also the *Asics* decision of the German Federal Court of Justice (BGH) of 12 December 2017, which states that a general ban on the use of price comparison tools is void, though setting up guidelines for the use of those tools may be valid (see Rohrßen, *ZVertriebsR* 2018, 277–285 (282–283)). Restrictions short of a total ban are commonplace, particularly the prohibition of sales via third-party online platforms (especially marketplaces), the ban of purely online sales by requiring the operation of brick-and-mortar shops (paragraph 52(c) of the Guidelines on Vertical Restraints of 10 May 2010) and setting quality criteria for internet sales regarding the domain name, the online store's appearance, the language, the services provided, etc (for details, see Rohrßen, *GRUR-Prax* 2018, 39–41 and *DB* 2018, 300–306). Such restrictions within a selective distribution system are allowed if they either meet the *Metro* criteria or can be exempt under the VBER, which requires that: the supplier's and the buyer's market shares do not exceed 30 per cent; and there are no hardcore restrictions listed in article 4 of the VBER or excluded restrictions under article 5 of the VBER.

A supplier may require that e-commerce sales by its distribution partners (not, however, by their customers) are not resold outside the distribution partner's assigned territory, but only with respect to active sales into the exclusive territory or an exclusive customer group reserved to the supplier or another distribution partner, and only provided that the supplier's and the distribution partner's market shares do not exceed 30 per cent. Passive sales over the internet, that is, upon unsolicited requests from individual customers, can, in principle, not be restricted.

An alternative is to use commercial agents or commission agents because they are, in principle, exempt from the competition law restrictions: 'Since the principal bears the commercial and financial risks related to the selling and purchasing of the contract goods and services all obligations imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal fall outside Article 101(1)' (paragraph 18 of the Guidelines on Vertical Restraints of 10 May 2010).

A supplier may require reports of e-commerce sales in the same way a supplier may require reports on any other sales from its distribution partner; however, care has to be taken that this does not result in resale price maintenance. Invasion fees or similar amounts, regardless of how they are named (contractual penalties, liquidated damages, etc) may be stipulated in the distributorship agreement for any breach of contract the distributor is responsible for, including active sales into territories exclusively reserved to the supplier or allocated to another distributor.

21 | May a distributor or agent restrict a supplier's sales through e-commerce intermediaries into the distribution partner's territory? May it require the supplier to obtain reports of such sales by territory and a payment of 'invasion fees' or similar amounts to the distribution partner?

A distributor or agent may restrict a supplier's sales through e-commerce intermediaries if this has been stipulated in the distribution agreement and only in the following cases:

- active sales into the exclusive territory or an exclusive customer group reserved to the distributor or the supplier itself;
- sales to end users if the e-commerce intermediary operates at wholesale level;
- sales from members of a selective distribution system to unauthorised distributors in the system's territory; and
- selling components, supplied for incorporation, to customers who would use them to manufacture the same kinds of products (article 4(b) VBER), provided that each party's market share does not exceed 15 per cent on any relevant market affected.

Refusal to deal

22 | Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

A supplier may refuse to deal with customers because of freedom of contract, unless restrictions by antitrust or anti-discrimination law apply.

A supplier may restrict its distributor's ability to deal with particular customers only if an exemption from antitrust law is given.

Competition concerns

23 | Under what circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

Typically, German or European rules on merger control do not apply to the conclusion of a distribution agreement because the agreement is a form of cooperation between companies that differs from a merger or acquisition. By way of exception, the conclusion of a distribution agreement may be subject to merger control under:

- German law if it is considered a 'combination of undertakings enabling one or several undertakings to exercise directly or indirectly a material competitive influence on another undertaking' (section 37 et seq GWB). However, this combination shall only exist if the parties are somehow affiliated; mere economic influence shall not suffice; and
- European law if it results in gaining direct or indirect control of the whole or parts of one or more other undertakings, including by contract (article 3(1b) of the Merger Regulation (Regulation (EC) 139/2004)). This control may also exist because of mere economic dependencies (which are to be measured on the circumstances of the case).

24 | Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

Generally, agreements that aim at or result in restraints of competition are prohibited by antitrust law. Certain hardcore restrictions are generally prohibited regardless of the parties' market shares, for example, price-fixing and restricting the geographic areas or categories of customers. Other hardcore restrictions apply in particular to selective distribution (eg, no restriction of cross-supplies between distributors within a selective distribution system).

Unless there are hardcore restrictions, a safe harbour is provided by the De Minimis Notice and the VBER. However, if one of the parties' market share exceeds 30 per cent, an agreement or concerted practice that restrains competition can only benefit from the efficiency defence of article 101(3) of the TFEU.

Antitrust law is mainly enforced by the authorities (the European Commission and the German Federal Cartel Office), especially through fines. However, it can also be enforced by private action, aiming to remove the infringement of antitrust law or claim damages (section 33 et seq GWB).

Parallel imports

25 | Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

Distributors or agents cannot directly prevent parallel imports. Instead, they can only demand that their supplier use its rights, if existent, to prevent parallel imports. As a general rule, the trademark proprietor of an EU trademark is entitled to prevent all third parties that do not have his or her consent from using any sign that is identical or similar with the EU trademark in the course of trade, in relation to goods or services (article 9 of the Trademark Regulation (Regulation (EU) No. 2017/1001)). Such rights are exhausted 'in relation to goods which have been put on the market in the EEA under that trademark by the proprietor or with his consent' (article 15 (1) of the Trademark Regulation). Trademark proprietors must present and prove only one of the elements of the infringement provided for under article 9 of the Trademark Regulation, and not the missing exhaustion (cf. Higher Regional Court of Munich, decision of 19 July 2018; Rohrßen and Tenkhoff, *GRUR-Prax* 2018, 578). Moreover, the rights are not exhausted if a legitimate reason to prohibit the grey market sales exists, namely because the use of the trademark threatens to damage the good's reputation (as decided by the Court of Justice of the European Union, *Dior/Evora*, Case No. C-337/95). In recent years, a court decision confirmed that this is especially true for the image of brands that have a luxury and prestige character, as also reflected in how they are advertised. The right to prevent such sales is, however, limited to cases with 'a risk of damage to the reputation', especially where the trademark used by the reseller 'substantially damages' the trademark's reputation. The court found that the use of a distribution channel that did not comply with the selective distribution system caused damage to the reputation of the luxury cosmetics to be distributed, namely by presenting the products amid other very standard products for daily use, low-priced products and special deals, all of which did not require any need to give advice to the customers (Higher Regional Court of Düsseldorf, decision of 6 March 2018; for details, see Rohrßen and Tenkhoff, *GRUR-Prax* 2018, 235).

Advertising

26 | What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or require them to share in its cost of advertising?

When advertising and marketing products, the parties generally have to observe the Unfair Competition Act, avoid misleading advertising and adhere to the Ordinance obliging sellers to mark goods with prices, as well as further provisions that regulate market behaviour in the interest of market participants (eg, labelling of textiles or food products). The parties are free to agree on the cost of advertising.

Intellectual property

27 | How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology transfer agreements common?

A supplier may safeguard its intellectual property by registering its patents, trademarks, utility models and designs in the territory where the products shall be distributed now or in the future. Thus, the supplier can exert the respective rights in the case of infringement. In addition, a supplier may stipulate indemnity clauses in their distributor contracts to cushion the consequences of possible infringements.

Technology transfer agreements are common and governed by the Technology Transfer Block Exemption (Regulation (EU) No. 316/2014).

Consumer protection

28 | What consumer protection laws are relevant to a supplier or distributor?

Consumer protection laws apply at the end of the distribution chain. German statutory law grants a two-year warranty that products are free from defects from the moment of delivery. If a defect is detected during this period, the buyer can claim subsequent performance (ie, choosing between the remedy of the defect and the delivery of a new, defect-free product), a price reduction or withdrawal from the contract (all regardless of fault) and damages if the seller acted with fault (sections 437 and 280 et seq BGB). Although fault is generally assumed by law, the seller can exculpate itself, especially if it was not the manufacturer of the defective product. These consumer rights can neither be waived by the buyer or contracted out by the supplier (sections 474 and 475 BGB).

If the product proves to be already defective when delivered, each seller within the distribution chain has a right of recourse against its own supplier (sections 445a, 445b and 478 BGB). To be able to enforce this right, the buyer (unless it is a consumer) has to inspect the product at the time of delivery and inform the seller if any defect is detected (section 377 HGB).

In addition, special information duties towards consumers apply in the following cases:

- over-the-phone sales (section 312a(1) BGB);
- over-the-counter sales, except everyday sales (section 312a(2)2 BGB and article 246(2) Introductory Act to the Civil Code);
- e-commerce (section 312j BGB); and
- selling off-premises and distance contracts (section 312d BGB).

Statutory law also provides a limit to the fees that can be charged to a consumer for using certain means of payment, consumer hotlines, etc (section 312a(3–5) BGB). Finally, the consumer has a right of withdrawal in the cases of distance and off-premises contracts (sections 312g and 355 BGB).

These consumer rights are harmonised throughout the European Union because they were aligned by EU Directive 1999/44/EC on the sale of consumer goods and EU Directive 2011/83/EU on consumer rights. However, there are differences relating to whether certain rules also apply in business-to-business relationships (eg, as regards the seller's obligation to give customers the opportunity to identify and correct input errors before placing their electronic orders), among other things.

Product recalls

29 | Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and bearing the cost of a recall?

There are generally no specific requirements set by statutory law in regard to product recalls. Instead, according to case law, manufacturers must keep their products under surveillance and, when detecting risks concerning legally protected goods (such as healthcare products), they must promptly adopt the necessary preventive or corrective measures. The extent and time of these measures depend particularly on the product concerned and on the extent of the possible damage (BGH, decision of 16 December 2008).

The distribution agreement can identify which party shall be responsible for a recall and the relevant costs. No specific limits apply to individual agreements; however, in court, standard business terms are strictly reviewed: they can be void and unenforceable if they are incompatible with essential statutory principles or entail an unreasonable disadvantage, if they limit essential contractual rights and duties or if they are surprising or ambiguous (sections 310(1), 307 and 305c BGB). Therefore, standard business terms should be drafted while taking into account who would typically be responsible for recalls and relevant costs, depending on the product (eg, whether it is ready-made).

Warranties

30 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

A supplier may limit the warranty rights granted by statutory law towards its distribution partners, subject to a few limits concerning individual agreements. The agreements must not breach statutory prohibitions (section 134 BGB) and public policy (section 138 BGB). Further, they must not limit or exclude liability for wilful intent, fraudulently concealing defects (where a guarantee has been given) or product liability law (sections 202, 276, 444 and 639 BGB). If a consumer detects a defect in the product and the defect already existed upon the passing of risk to the distribution partner, a limitation of warranty can only be enforced if the supplier provides another compensation of equal value (section 478(2) BGB).

In standard business terms, statutory law can hardly be derogated from, even in business-to-business contracts (sections 310 (1) and 307 BGB).

It is possible to:

- modify the details of subsequent performance (namely the time, place and number of attempts);
- exclude liability for slightly negligent breaches of non-cardinal duties; and
- limit liability for slightly negligent breaches of non-cardinal duties to the typical damages foreseeable at conclusion of the contract.

The same applies to warranties provided to each downstream customer, unless the latter is a consumer as consumer's statutory rights cannot be waived or contracted out.

Data transfers

31 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end users of their products? Who owns such information and what data protection or privacy regulations are applicable?

The exchange of information about customers is restricted by the Federal Data Protection Act (BDSG), which implemented EU Directive 95/46/EC, repealed by Regulation (EU) No. 2016/679 (the General Data Protection Regulation (GDPR)). The collection, processing and use of information on customers is only allowed if permitted by law (eg, owing to the performance of a contract) or with the customer's consent (article 6 GDPR (formerly section 4 BDSG); see also section 51 BDSG). Details on commercial collection and data storage for the purpose of transfer are laid down in article 5 et seq of the GDPR (formerly section 28 et seq BDSG).

The owner of customer information, if contained in a database, is the person who produced the database, provided that its assembly, verification or presentation required a substantial qualitative or quantitative investment (section 87a et seq of the German Copyright Act).

Data transfer between the EEA and the United States can currently only take place on the basis of standard contractual clauses. Both the Safe Harbour Agreement and the subsequent Privacy Shield Agreement have been declared void by the European Court of Justice *Schrems* and *Schrems II* decisions (6 October 2015 and 16 July 2020). It is now recommended to save the data in the EEA. Where this is not possible, companies need to obtain an approval of the customers and employees affected to transfer the data to the United States. This can (only) be made by using so called standard contractual clauses which – according to the European Commission – offer sufficient safeguards on data protection for the data to be transferred internationally. However, this approach is not free of any risk. Customers or employees having doubts whether their data is really sufficiently secured could contact the competent local data protection authority, which could under certain circumstances prohibit data transfers.

32 What requirements apply to suppliers and their distribution partners with respect to protecting the security of customer data they hold?

Whenever a supplier or its distribution partner acts as a controller or a processor of personal data, they have to implement appropriate technical and organisational measures to ensure an appropriate level of data security. These measures include:

- the pseudonymisation and encryption of personal data;
- the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident; and
- a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing.

Both controllers and processors of data also have to ensure that any natural person acting under their authority does not process the data, except on instruction from the controller or unless required by EU or national law (article 32 GDPR).

Employment issues

33 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

A supplier may generally approve or reject managers if the agent or distributor has to render the services in person. However, the distribution partner is free to employ assistants unless the parties have agreed on a veto right for the supplier.

A supplier may terminate the relationship with notice (if the agreement is of an indefinite term, or agreed), or without notice, but for cause. However, termination for cause requires a more concrete cause than dissatisfaction with the management (unless individually agreed). It may suffice if culpable mismanagement has resulted in a strong decrease in turnover.

34 Are there circumstances under which a distributor or agent, or its employees, would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

An agent may be considered as a supplier's employee if the agent is not independent. An agent acts independently if, based on the contractual framework and tasks, he or she freely organises his or her working

time and activities (section 84(1)2 HGB). This also holds true – mutatis mutandis – for other types of distribution partners, especially distributors and franchisees.

If they are classified as employees, they will be entitled to:

- employee protection, entailing, for example, a limited right of termination under the Dismissal Protection Act;
- continued payment of salary during public holidays, sick leave and holidays;
- minimum wage (in accordance with the Minimum Wage Act of 11 August 2014); and
- exclusive competence of labour courts if the employee has, over the previous six months of working activity, earned an average monthly salary not exceeding €1,000.

If they are classified as employees, the suppliers will also have to:

- pay social security contributions;
- pay income tax on salary; and
- adhere to worker participation and compliance with collective bargaining agreements, if applicable.

A supplier generally does not need to protect against responsibility for potential violations of labour and employment laws because the supplier is not required to respond to those violations unless it has contributed to them. However, the supplier can advise the distribution partner in the distribution agreement of the partner's sole responsibility.

Commission payments

35 | Is the payment of commission to a commercial agent regulated?

Yes, the agent has a right to:

- 'del credere commission' if the agent assumes liability for fulfilment of contracts procured by the agent (section 86b HGB);
- commission as soon as the principal has executed the transaction (section 87a, paragraph 1 HGB);
- calculation of commission on a monthly basis, which can be extended to a maximum of three months (section 87c (1) HGB); and
- commission irrespective of delivery and payment, unless the principal is not liable for such failure (section 87a (3) HGB).

The agent also has a right to request information, statements of account, an excerpt from the books and inspection of the business records or analogous documents by an auditor (section 87c HGB).

The above-listed rules are mandatory and cannot be waived or contracted out. Further details on the payment of commission (unless otherwise agreed) are provided under section 86b et seq of the HGB. If a contract procured by the agent is partially not executed, the principal's obligation to pay the commission depends on the concept of 'reason for which the principal is to blame' as laid down in article 11 of the Commercial Agency Directive and interpreted by the European Court of Justice (decision of 17 May 2017, *ERGOPoist'ovňa*). In that case, the agent may be required to refund a part of his or her commission, under the conditions that the partial amount is proportionate to the extent to which the contract has not been executed and that the non-execution is not due to a reason for which the principal is to blame (for details, see Franke and Rohrßen, *IWRZ* 2018, 107–111).

Good faith and fair dealing

36 | What good faith and fair dealing requirements apply to distribution relationships?

The parties to distribution relationships have to safeguard each other's interests (sections 86, 86a and 90 HGB and section 242 BGB).

In particular, the commercial agent is obliged to:

- check customers' creditworthiness;
- promptly inform the supplier about any business procured;
- keep any information obtained during his or her activity confidential; and
- refrain from acting for the supplier's competitors.

Similar obligations, except non-competition, also apply to distributors, commission agents and franchisees.

The supplier is obliged to assist and take care of its distribution partner subject, however, to the supplier's economic freedom.

Registration of agreements

37 | Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

No.

Anti-corruption rules

38 | To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

German anti-bribery and anti-corruption laws may also apply to the relationship between a supplier and its distribution partner, especially to practices such as:

- taking and giving bribes in commercial practice;
- restricting competition in the context of public invitations to tender; and
- taking or giving bribes to public officials, including inducing or assisting to those acts (section 298 et seq and section 333 et seq of the German Criminal Code).

Any underlying agreement to such practice can and typically will be declared void as a breach of law (section 138 BGB); for example, an agency agreement that aims to bring about a bribe agreement with public officials (Higher Regional Court of Stuttgart, decision of 10 February 2010).

Prohibited and mandatory contractual provisions

39 | Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

No, except for mandatory provisions provided by the relevant statutes and case law. The respective statutory law will apply even if the contract is silent.

GOVERNING LAW AND CHOICE OF FORUM

Choice of law

40 | Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

The parties are generally free to choose the law governing their contract (article 3 of the Rome I Regulation). However, if all elements relevant for the choice of law at the time of the choice are located in a country other than that of the chosen law, the choice of the parties shall not prejudice the application of provisions that cannot be derogated from by agreement (article 3(3) and (4) of the Rome I Regulation).

Further, overriding mandatory provisions of the law of the forum cannot be excluded by choosing another law. Similarly, the courts may also apply overriding mandatory provisions of the country where the contractual obligations have to be performed (article 9 of the Rome I Regulation). One typical example of laws that the courts qualify as overriding mandatory rules within distribution agreements are the provisions of commercial agency law because they are based on the EU Commercial Agency Directive of 1986. Accordingly, the agent's claim for goodwill indemnity cannot be waived or contracted out where the agent acts within the European Union. This is true even if the parties choose the law of a non-EU country as was decided by the European Court of Justice on 9 November 2000 (*Ingmar*) on the former Rome Convention on Law Applicable to Contractual Obligations of 1980. Arguments for applying the same principles under the Rome I Regulation exist; however, a clear confirmation by the courts has yet to be reached.

Choice of forum

41 | Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

The parties are generally free to choose a court, especially if:

- the other party is domiciled outside Germany in an EU member state, and the parties have agreed that a court or the courts of a EU member state shall have jurisdiction (article 25 of the Brussels Ia Regulation);
- the other party is domiciled in Iceland, Switzerland or Norway, and the parties have agreed that the courts of one of these states or of Germany will take jurisdiction over any disputes (article 23 of the Lugano II Convention); or
- both parties are merchants, legal persons under public law or special assets under public law, or the other party is domiciled outside Germany (section 38 of the Code of Civil Procedure (ZPO)).

As an alternative, the parties may choose arbitration (section 1029 et seq ZPO, article 1(2)d of the Brussels Ia Regulation and article 1(2)d of the Lugano II Convention). However, the choice of court proceedings or arbitration can hardly avoid overriding mandatory provisions. This has been confirmed by the BGH (decision of 5 September 2012, following a decision of the Higher Regional Court of Munich of 17 May 2006).

Litigation

42 | What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

Suppliers and distribution intermediaries can make use of all means of dispute resolution, including out-of-court negotiation, mediation, arbitration or litigation. Restrictions exist only insofar as the application of overriding mandatory provisions cannot be excluded by means of dispute resolution. Fair treatment in German courts is to be expected because the judges are independent and impartial, well trained and determined beforehand, and the parties are entitled to a due process under the Constitution (articles 101 and 103). The advantages of resolving disputes in Germany are, inter alia, that court rulings are quite foreseeable and trials are fairly quick (8.2 months on average in the district courts, according to the latest statistics). Moreover, more and more courts are establishing English-speaking court bodies, such as the Chamber for International Commercial Disputes of the Landgericht Frankfurt am Main; others have, for example, been installed in Hamburg and Cologne. The Chamber shall be an attractive forum for cross-border disputes of English-speaking parties, providing the benefit from Germany's reliable public dispute resolution mechanisms at no extra cost.

Alternative dispute resolution

43 | Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

Yes, an agreement to mediate or arbitrate disputes will be enforced in Germany (section 1029 et seq and section 278a ZPO). Arbitration may be disadvantageous if only small sums are concerned (the costs for German courts are typically lower than the costs for arbitration if the amount in dispute is less than €5 million).

Limitations on an agreement to arbitrate with respect to the arbitration tribunal, the location of the arbitration or the language of the arbitration do not exist.

Typical advantages of arbitration are that proceedings are confidential and lead to a final decision without the opportunity to appeal, and the award is enforceable in far more countries than court judgments (because of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards).

UPDATE AND TRENDS

Key developments

44 | Are there any proposals for new legislation or regulation, or to revise existing legislation or regulation? Are there any other current developments or trends that should be noted?

Brexit

Brexit is on everyone's lips, especially as the transition period in 2020 has passed by. The unpredictable legal environment after Brexit (more precisely after the end of the transitional period on 31 December 2020) also had an impact on distribution and agency issues, especially with regard to the associated product compliance matters. The United

Kingdom left the European Internal Market, therefore challenges arise when transferring goods or services between the UK and the European Economic Area (EEA) and regulatory roles had to be reallocated as, for example, an importer for the United Kingdom and the EEA is necessary since the Exit Day, 1 January 2021. As none of the economic operators dared to hope for a 'good' end to the Brexit negotiations, they took action:

- Supply contracts were adjusted, and goods designated for the EEA will frequently no longer be delivered to the UK for onward transport to the EEA – also because of the delays in transport between UK and EEA since 1 January 2021.
- Responsibilities within the supply chain were reallocated: importers according to product safety law are now located in the UK and the EEA. This was accompanied by the relabelling of many products (new authorised representative, newly introduced UKCA mark).

Franchising

From franchise contractual perspective, a recent judgement by the Higher Regional court Munich (dated 7 November 2019, Case No. 29 U 4165/18 Kart) has found that franchisors may advertise the products, to be sold by the outlets, at low prices as long as the franchisees are not prevented from charging lower prices than those advertised; in this situation, the low prices only have the effect of a permissible maximum price fixing in relation to the franchisees.

Moreover, the same court decision promotes reviewing clauses regarding advertising fees because the court established that the franchisor is likely subject to a fiduciary duty regarding the capital earned by advertising fees if the respective advertising fee clause stipulates that the franchisor becomes active for its franchise system. Accordingly, the franchisor's use of an advertising contribution by the franchisor contrary to this clause may breach the franchise contract. However, such breach does not generally give rise to a contractual or legal claim for the franchisee to prohibit such other use.

Cross and omnichannel distribution

There is an ongoing trend in distribution to move from single or multichannel distribution to cross-channel or even omnichannel distribution. This trend has had a further boost owing to the restrictions implemented as a result of the covid-19 pandemic. The trend combines all channels to provide customers with a seamless shopping experience, integrating services such as click and collect, click and reserve, click and deliver, and in-store touchpoints.

To avoid friction within the distribution system, omnichannel distribution strategies require clear communication as well as stipulation between the supplier and its distribution partners regarding the use of online stores, social media, local mobile marketing and the coordination and integration of all these services (especially because restrictions on online sales have been under scrutiny by the antitrust authorities in recent years).

Coronavirus

45 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programs, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In November and December 2020, gastronomy businesses and other companies affected by the lockdown were paid up to about 70 per cent of the previous year's sales in support aid. This measure is in addition to other rules such as (the already in June 2020 expired) chance to a moratorium in cases of the non-payment of rent, lease or loan interest-led, under certain additional conditions.

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However, German law (especially the German Civil Code (BGB)) addresses this issue even without special covid-19 rules: claims might become unenforceable for being impossible to fulfil (cf. section 275 of the BGB), and the contractual partner can then, for example, withdraw from the contract. Besides that, it has not yet been fully clarified whether the special situation caused by covid-19 entitles contractual partners to a right to demand the adaption of contracts under the concept of frustration of contract (cf. section 313 BGB). This is the case as regards significant restrictions on the usability of commercially used buildings and properties due to covid-19: a new provision in the German Introductory Act to the Civil Code (EGBGB, article 240 section 7) states that such restrictions do in principle meet the requirements of frustration of contract. However, the law is applicable to rental contracts only and does not explicitly state any legal consequences for other covid-19 related breaches of contract.

Force majeure clauses can help to overcome pandemic supply shortages without having to pay damages. If these clauses have been included in the context of general terms and conditions (ie, standard form contracts), the strict standards of German law on general terms and conditions must be taken into account. However, most important in managing pandemic-related issues is partnership-based cooperation between the parties to the contract: the best results are often achieved when legal and contractual provisions are not rigidly insisted upon, especially in the interest of further, profitable cooperation.

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