CAPÍTULO 63

THE APPLICATION OF "NO-CHALLENGE CLAUSES" IN INTERNATIONAL INTELLECTUAL PROPERTY LICENSING CONTRACTS

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INTRODUCTION

Intellectual property (IP) assets present, as a primordial trait, the fact that they may be translated into information[588]. The contents that may be subject to protection are diverse, as an example, a musical work may be protected by copyright, a distinctive mark used in commerce may be safeguarded through trademark, and technical information related to a patented technological solution. Whatever the incorporeal asset under analysis, its own nature as information makes this asset readily understandable and appropriable with no relevant costs by anyone, anywhere[589].

In contrast, while information may freely move between national borders, the protection of intellectual property assets is granted individually by each State[590] and, as such, submitted to rigid geographical national limitations. In this connection, whereas the protection of intangible assets is predicated in a singular location, commercial relations involving such assets may be, and frequently are, occurring in a plurality of places. In this connection, the persistence of the geographically contained paradigm causes a disparity between the reality of international commerce and the inflexible barriers imposed by territoriality requirements.

Thus, being aware of the territorial containment of the protection of intellectual property assets, as well as the international commercial reality intensifying the transit of products and services subjected to IP protection, one arrives at a situation in which: *(i)* titleholders are incentivised to protect their assets in the largest possible number of countries; and *(ii)* market agents that seek to exploit such assets are incentivised to acquire licenses in all countries in which they intend to conduct business.

The tendency towards "plurilocalisation" in the licensing of intangible assets is particularly perceptible in global licensing contracts[591], agreements allowing the licensing

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[588] BARBOSA, C. R. **Propriedade Intelectual. Introdução à Propriedade Intelectual Como Informação**. 1. ed. Rio de Janeiro: Elsevier, 2009.

[589] DE AZEVEDO TINOCO, J. E. Reformulando Promessas: das Teorias e Objetivos dos Sistemas de Propriedade Intelectual. **Revista FIDES**, Natal, v. 12, n. 1, p. 908–926, 2021. Available at: http://www.revistafides.ufrn.br/index.php/br/article/view/587. Accessed on: 4 November 2023.

[590] While there are international instruments destined towards the international harmonisation of substantive law in IP (e.g., the World Trade Organisation's Agreement on Trade-Related Aspects of Intellectual Property Rights – WTO/TRIPS; the Paris Convention for the Protection of Industrial Property – CUP), it is certain that there is no centralised international system for protecting intangible assets.

[591] An example of a global licensing agreement is found in the contract struck between Via Licensing (an association of patent owners known as a "patent pool") and Siyata Mobile Inc. (company manufacturing and commercialising mobile communication devices).

of intangible assets in all jurisdictions in which they are protected. In this connection, and considering the commercial practice, it is visible that some technological fields are especially willing to license globally instead of locally – such is the case in the telecommunication market for instance[592].

Nevertheless, considering the tendency towards the acquirement and maintenance of IP assets in multiple jurisdictions, licensors may need to take measures to safeguard the validity of their IP portfolio throughout the world.

From this context, it is possible to ascertain that there is an interest in avoiding the nullification of such assets in a scenario of growing transnationalism. This is especially relevant, as, during the licensing relationship, licensees frequently gather information and know-how that may allow, if they so desire, to conduct a more effective attack towards a licensor's intellectual property[593]. It is in this context that the contracts may contain a "no-challenge clause" – a rule through which the licensee compromises not to contest the validity and/or scope of a licensed IP asset's protection[594].

In this sense, there are some nuances that must be considered. In the European Union, for an example, there is relevant Case Law affirming the incompatibility of no-challenge clauses and notions of incentive to competition in European Law[595-596]. In Japan

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Through this contract, 13 patent owners licensed 821 patents that are in force in over 26 countries. VIA LICENSING. **AAC Patent License Agreement**. Washington DC, 2018. Available at: https://www.sec.gov/Archives/edgar/data/1649009/000121390020023370/ea125930ex10-9_siyatamobile.htm. Accessed on: 8 November 2023.

592 DE AZEVEDO TINOCO, J. E.; TROJAN, V. de M.; VALLEJOS, B. Efeitos Internacionais em Disputas Envolvendo Patentes Essenciais: Uma Análise a Partir do Caso Unwired Planet v. Huawei. *In*: MENEZES, W. (org.). **Direito Internacional em Expansão**. 1. ed. Belo Horizonte: Arraes Editores, 2023. v. 24, p. 324–343.

593 In this sense, it is worth to highlight the considerations brought forth by Cheng (2016) in the patent context: "*Licensees also have an informational advantage over potential third party challengers. They may have gained special knowledge about the patented technology through the license negotiation process, and commercialization of the technology. This is, in no small part, because the licensees will have physical possession of the patented invention, which significantly aids in their understanding of the technology. Licensees will likely also have a good understanding of the prior art based on their experience with the industry in general, and will likely have dealt with similar technology or products in the past. Therefore, licensees should be better positioned to furnish evidence to challenge patent validity*". CHENG, T. K. Anti-trust Treatment of the No-Challenge Clause. **New York University Journal of Intellectual Property and Entertainment Law**, New York, v. 5, n. 2, p. 437–512, 2016. Available at: https://jipel.law.nyu.edu/wp-content/uploads/2016/06/NYU_JIPEL_Vol-5-No-2_5_Cheng_AntitrustTreatmentNoChallengeClause.pdf. Accessed on: 8 November 2023.p. 479.

594 Although it is possible to comprehend the existence of a no-challenge clause in general licensing contracts, such clauses are notably more common in patent licenses.

595 It is worth highlighting the following snippet from the CJEU's decision in Bayer AG and Maschinenfabrik Hennecke GmbH v. Heinz Süllhöfer: "*[T]he answer to the national court's question must be that a no-challenge clause in a patent licensing agreement may, depending on the legal and economic context, restrict competition within the meaning of Article 85 (1) of the EEC Treaty*". EUROPEAN UNION. Court of Justice of the European Union. 61986J0065. Complainants: Bayer AG and Maschinenfabrik Hennecke GmbH. Respondent: Heinz Süllhöfer. Rapporteur: Lord Mackenzie Stuart, 27 September 1988. **EUR-Lex**. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli%3AECLI%3AEU%3AC%3A1988%3A448. Accessed on: 22 October 2023.

596 The following snippet of the CJEU's decision in Windsurfing International Inc. v. Commission of the European Communities also merits attention: "*The Commission, however, takes the view that even where a licensee is only able to challenge a patent because of the information which has become available to him as a result of his privileged relationship with the licensor, the public interest in ensuring an essentially free system of competition and therefore in the removal of a monopoly perhaps wrongly granted to the licensor must prevail over any other consideration*". EUROPEAN UNION. Court of Justice of the European Union. 61983CJ0193. Claimant: Windsurfing International Inc. Respondent: Commission of the European Communities. Rapporteur: G. Bosco, 25

and South Korea, contrastively, there is more receptivity to the enforcement of no-challenge clauses[597].

Due to this inconsistency on an international scale, questions arise regarding the opportunity of utilising no-challenge clauses as a device seeking the mitigation of risks by the holder of IP assets[598]. Furthermore, considering the international scope ever more frequent in licensing contracts allied to the national nature of IP assets, it is certain that no-challenge clauses may be raised in many jurisdictions[599], and, considering the lack of harmonisation in what pertains to their applicability in different legal systems, seeking the enforceability of such clauses may lead to widely varying results[600].

Under the same perspective, to submit the contract (and its respective no-challenge clause) to the rules of a foreign Law may also give rise to relevant challenges pertaining to the application of an alien set of rules by the national judiciary[601] and the possible inefficiencies stemming from such choice[602], as well as issues of public order eventually applicable.

Hence, this study aims to contribute towards the attainment of a deeper understanding of the possibility of enforcing no-challenge clauses in international licensing contracts under the light of conflict of laws. The subject of study is a matter of relevance to the mitigation of risks related to the invalidation of intellectual property owned by industrial players – both foreign and domestic – relating directly to the Sustainable Development Goals (SDG) number 8 (decent work and economic growth) and 9 (industry, innovation, and infrastructure).

To the development of this study, the elected methodology adopts the logic-deductive method and the procedures of literature review of many national, international and foreign sources (e.g., legislation, legal doctrine and case law). Through the procedures described, we aim: *(i)* to define, conceptually, what is the nature and the purpose of no-challenge clauses within international contracts; *(ii)* to explore what are the rules applicable

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[598] BRENNER, M. Slowing the Rates of Innovation: How the Second Circuit's Ban on No-challenge Clauses in Pre-Litigation Settlement Agreements Hinders Business Growth. **Boston College Law Review**, Chestnut Hill, v. 54, n. 6, p. 57, 2013. Available at: https://bclawreview.bc.edu/articles/753. Accessed on: 15 October 2023.

[599] As previously discussed, territoriality is an indispensable trait of industrial property. As an example, one may realise the prestigious role attributed to territoriality when examining two norms contained within the Paris Convention for the Protection of Industrial Property (CUP). The first is article 4 *bis* (1) in the patent context: "*Patents applied for in the various countries of the Union by nationals of countries of the Union shall be independent of patents obtained for the same invention in other countries, whether members of the Union or not*"; and the second is article 6 (3) in what pertains to trademarks: "*A mark duly registered in a country of the Union shall be regarded as independent of marks registered in the other countries of the Union, including the country of origin*".

[600] e.g., a licensor may find success in barring a licensee from challenging the validity of a Japanese patent, but find difficulty in doing the same for an European patent.

[601] GARCIA, M. A. F.; COSTA, J. A. F. Contraditório e Aplicação de Ofício do Direito Estrangeiro no NCPC. **Revista de Processo**, São Paulo, v. 286, n. 12, p. 159–184, 2018.

[602] e.g., possible back-and-forth related to the adversarial proceedings relating to proving the contents of foreign law, diverging opinions from legal experts and consultants in foreign legal matters, etc.

to international contracts including no-challenge clauses; and *(iii)* to determine if the enforceability of no-challenge clauses imposes challenges to the national public order.

ON THE RIGHT TO BE PROTECTED: THE LEGAL DEFINITIONS AND ESSENTIAL NOTIONS PERMEATING THE NO-CHALLENGE CLAUSES

No-challenge clauses incorporate into Contract Law the doctrine of "licensee estoppel"[603], a doctrine developed within the United States of America (USA) and still existing in Trademark Law, while being rejected in Patent Law after the United States' Supreme Court decision in Lear v. Adkins[604].

However, differently from the licensee estoppel, the contractual notion arising from the "no-challenge clauses" emanates from the autonomy of the private parties – from the will to enter into a contract. Nevertheless, it is notable that this will, *per se*, does not create legal effects[605], no matter how clear or informed it may be, therefore being necessary to submit the wants of the will to the reception of the legal order.

The traditional notion of a no-challenge clause, as the name suggests, indicates an obligation of specific performance: an obligation not-to-do substantiated in the abstention from making use of the right to legal action to question the validity of the licensed intellectual property assets. This abstention from the act of seeking the judiciary (or administrative[606]) authority is heavily inspired by the roman notion of *pactum de non petendo* – a promise to not pursue a given claim before a judicating authority[607]. This is a procedural prerogative[608] related to the exercise of the right to postulate a claim, not affecting the substantial law in which the claim is based (i.e., the [in]validity of an intellectual property asset).

In this sense, this chapter aims to exploit the contents of the promise not to claim the invalidity of the intellectual property licensed in any of the territories in which such assets

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603 In this sense, it is important to highlight the definition brought by Justice Stanley Mosk, of California's Supreme Court in the paradigmatic case Adkins v. Lear, Inc.: "*[O]ne of the oldest doctrines in the field of patent law establishes that so long as a licensee is operating under a license agreement he is estopped to deny the validity of his licensor's patent in a suit for royalties under the agreement. The theory underlying this doctrine is that a licensee should not be permitted to enjoy the benefit afforded by the agreement while simultaneously urging that the patent which forms the basis of the agreement is void*". UNITED STATES OF AMERICA. California Supreme Court. 67 Cal.2d 882. Appellant: John S. Adkins. Appellee: Lear, Inc. Rapporteur: Justice Stanley Mosk, 14 December 1967. **SCOCAL/Stanford Law School**. Available at: https://scocal.stanford.edu/opinion/adkins-v-lear-inc-27395. Accessed on: 22 October 2023.

604 SCHECHTER, R. E.; THOMAS, J. R. **Intellectual Property: the Law of Copyrights, Patents and Trademarks**. 1. ed. Saint Paul: Thomson West, 2003. (Hornbook Series). p. 786–787.

605 VICENTE, D. M. **Direito Comparado: Obrigações**. 1. ed. São Paulo: Almedina, 2018. v. 2, p. 340.

606 It is worth calling attention, in the context of no-challenge clauses, that the Judiciary is not the only authority capable of nullifying an intellectual property asset. Many jurisdictions allow administrative authorities to nullify rights previously granted. Examples of such authorities with the power of undoing assets previously granted include: the National Institute of Industrial Property (INPI, Brazil), the United States Patent and Trademark Office (USPTO, USA), and China's National Intellectual Property Association (CNIPA, China).

607 TRIGO, A. L. A. da C. Pactum de Non Petendo Parcial. **Revista de Processo**, São Paulo, v. 43, n. 280, p. 19–39, 2018.

608 CABRAL, A. do P. Pactum de Non Petendo: a promessa de não processar no direito brasileiro. **Revista do Ministério Público do Estado do Rio de Janeiro**, Rio de Janeiro, v. 28, p. 19–44, 2020. Available at: https://www.mprj.mp.br/documents/20184/2026467/Antonio_do_Passo_Cabral.pdf. Accessed on: 8 November 2023.

may be protected. Likewise, we will also engage with the possible consequences arising from the breach of said pact.

THE CHALLENGES OF PLURILOCALISATION: WHAT ARE THE RULES APPLICABLE TO LICENSING CONTRACTS INCLUDING NO-CHALLENGE CLAUSES?

As discussed previously, international intellectual property licensing contracts imply the establishment of a plurilocalised transactional relationship, while the rights stemming from the licensed assets are linked necessarily to the legal order of the State in which they were granted.

From the dichotomy between the localised nature of immaterial assets and the international quality ever more present in licensing contracts, some questions may arise, such as: *(i)* what is the law applicable to such contracts, and, more specifically, to the no-challenge clauses? *(ii)* are these contracts subjected to *dépeçage*? *(iii)* would it be possible to discuss the contractual matters and the issues connected to it before a single forum or would it be necessary to bring multiple actions before different jurisdictions?

These questions are intrinsically linked to the safety, risk, and efficiency of international transactions involving intellectual property rights. In this connection, one should consider the challenges that the interpretation of Foreign Law[609] may bring to the national judge, as well as the choice of foreign jurisdictions[610] in such contracts.

In what pertains to the no-challenge clauses, this situation is even more apparent, as the no-challenge compromise in international contracts must be upheld in how many jurisdictions there are licensed assets. In other words: the eventual incompatibility of such clauses with national legal systems causes some intellectual property assets to be covered by the no-challenge pact whereas other not – safeguarding, thus, only part of the licensed portfolio.

This chapter aims, thus, to analyse, under the lens of Conflict of Laws (or "International Private Law"), which rules must apply to international licensing contracts that elect the utilisation of no-challenge clauses. Specifically, the analysis shall be made seeking to evaluate the obstacles imposed by the dichotomy between the territorial nature of immaterial assets and their plurilocalisaton as incorporeal assets negotiated and transacted between entities located in different countries.

"*THE ELEPHANT IN THE ROOM*": THE TENUOUS RELATIONSHIP BETWEEN PUBLIC ORDER AND THE NO-CHALLENGE CLAUSES

While intellectual assets establish property rights freely transactable by their holders, it is certain that intellectual property rights also refer to a market reserve that

[609] Garcia; Fontoura Costa, 2018.

[610] COSTA, J. A. F.; DOS SANTOS, R. A. Contratos Internacionais e a Eleição de Foro Estrangeiro no Novo Código de Processo Civil. **Revista de Processo**, São Paulo, v. 253, n. 3, p. 109–128, 2016.

creates distortions in the parity conditions of free competition. Therefore, the establishment of a no-challenge pact aims to assure that this market reserve shall remain unquestioned.

Hence, the practical and immediate effects generated by no-challenge clauses bring forth a very well-known friction in the international context between Antitrust Law and Intellectual Property Law[611]. Faced with this context, one is led into an inevitable questioning: does the enforcement of a no-challenge clause necessitate the violation of public order?

It is known that, in the United States of America, the decision in Lear v. Adkins upheld the amplification of the possibility of nullifying patents, as the public holds an interest in seeing unduly granted patents being nullified[612]. Still, further precedents from the United States Supreme Court reiterate considerations conducive to an acceptance (even if implicit) of no-challenge clauses[613]. The Court of Justice of the European Union, in its turn, has developed precedents approximate to the "Lear standard" in situations in which it was called to decide on the matter[614-615].

Faced with this scenario, this section aims to determine whether the act of safekeeping the no-challenge pact necessitates a violation of public order. The results reached in this analysis seek to subsidise reflections on the possibility of submitting foreign decisions on no-challenge issues to the recognition and homologation of foreign judgments.

CONCLUSIONS

The bibliographic review to be conducted seek to build a solid understanding pertaining to the international efficacy of no-challenge clauses inserted into international licensing contracts referring to intellectual property assets.

Hence, the hypothesis permeating this work may be expressed in the following manner: "*would it be possible, to the holders of intellectual property rights, to make use of no-challenge clauses in international licensing contracts to internationally safekeep their immaterial property?*".

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[613] GOLDSTUCKER, R. W. Stop the Bleeding: Medimmune Ends the Unjustified Erosion of Patent Holders' Rights in Patent Licensing Agreements. **Journal of Intellectual Property Law**, Athens, v. 16, n. 1, p. 137, 2016. Available at: https://digitalcommons.law.uga.edu/jipl/vol16/iss1/7. Accessed on: 3 February 2024.

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