ally ensure quality control of the respective products and/or services, which should include the right to demand samples prior to the start of production, the right to enter the licensee's or producer's premises, and other.[811] [812]

In the course of a sale or other transfer of the licenced trade mark or brand, the existence of the licence can be an impediment for the proprietor, as it does not automatically terminate upon sale of the licenced object.[813] Hence, the transferor of the respective trade mark or brand may get less in consideration than in case the trade mark or brand was not licenced. Whether this is effectively the case depends on the actual circumstances, such as the strategy of the transferee and the type of licence (exclusive or non-exclusive). It may well be that the transferee, acquiring a non-exclusively licenced brand, appreciates this already existing income stream.

This shows that it always depends on the concrete situation whether a licencing agreement – in whichever form – is beneficial or detrimental to the value of the brand in question. However, one can say that there are a number of

Ruhm.

811 *Groß*, Marken-Lizenzvertrag, pp. 8, 21; *Fammler*, Der Markenlizenzvertrag, p. 117 et seq.

812 There are situations in which this degree of control and extension of the brand does not suffice for the proprietor's purposes. He may want to make sure that the identity of the licensee completely comes second to the brand name and identity. In this case he will resort to a special form of licencing: franchising. In the course of an average franchise, the franchisor provides the franchisee with more than a right to use a certain mark or brand. For example, he provides the franchisee with physical items such as store signs and product displays. It is also common to give the franchisee access to the use of other IP rights such as designs and copyrights. All of this is necessary to reach the franchisor's purpose of tying the franchisee to his own (the franchisor's) products or services and the marketing identities built around these products or services. The benefit a franchisee derives from the franchising agreement is the ability to enter a certain market with relatively small effort in relatively short time due to the use of the franchisor's brand and corporate appearance. This will be the more financially viable the higher the recognition of the franchisor's brand is within the target audience (provided that the target audience is brand focussed at all). However, should the franchise come to an end and the franchisee decide to continue a similar business by himself, the franchise is likely to constitute a major stumbling block which will have a negative financial impact on him. There are two major rasons for this, the first of which being the fact that the former franchisee will have to carry out brand innovation, i.e. build a completely new brand, and make himself known in the market. However, this would also have been necessary if he had wanted to enter into the market before or without concluding a franchising agreement. The second reason why a terminated franchise may be detrimental is that the franchisor will have prudently made sure to insert a non-competition clause in the agreement, prohibiting the engagement of the franchisee in the same or similar business for a certain period of time after termination of the franchise. More on franchising e.g. in *Dvorak*, Der Lizenzvertrag im Franchising and *Flohr*, Franchisevertrag.

813 *Binder*, Lizenzierung von Marken, p. 534.

crucial factors to be taken into account. These are the degree of exclusivity of the licence, size of licence-based revenue streams (royalties) and scope and object of licence and their inter-relation with the parties' respective business strategies.

5.13.2 Delimitation or Coexistence Agreements

Coexistence or delimitation agreements[814] serve the purpose of resolving present and preventing future conflicts by clarifying the practical application of two or more conflicting trade marks.[815] Instead of solving the conflict in court, the parties have chosen the alternative of saving cost and time, giving up part of their initially envisaged trade mark scope and receiving legal certainty in return. This shows that such agreements cannot function without a – at least to some extent – positive attitute of all parties towards each other and each other's trade mark rights. Such attitude is likely to be fostered by the fact that a Community trade mark application can founder on just one conflicting national mark, Art. 42 CTMR.

Delimitation agreements typically stipulate that the younger mark may only be registered and used for a limited number of goods and/or services and that no rights arising from it may be enforced against the proprietor of the prior mark. In return, the latter tolerates the registration and use of the younger mark and withdraws a potentially filed opposition.[816]

The ECJ has recognised delimitation agreements as admissible and advantageous, provided they merely serve the purpose of avoiding confusion and conflicts and do not intend market allocation or other restraints of competition.[817]

Such contracts are of considerable practical significance. Experience has shown that in the case of approximately half of all German applications a delimitation agreement will be concluded at some stage.[818] Of the 12,208 closed opposition cases before OHIM, 7,782 were settled without an Office decision[819] and likely by delimitation agreement. The two-month cooling-off

814 Cf. Art. 43(4) CTMR.
815 *Degen*, Die Bewertung von Marken aus rechtlicher Sicht, p. 112.
816 *Harte-Bavendamm/von Bomhard*, GRUR 1998, 530, 530.
817 ECJ, judgment of 30 January 1985, Case 35/83, [1985] ECR 363, BAT Cigaretten-Fabriken GmbH v. Commission of the European Communities – *Toltecs/Dorcet II.*
818 *Harte-Bavendamm/von Bomhard*, GRUR 1998, 530, 531.