Exercise: Data provision - Identifying problems in a license agreement

Notice: The example is based on a real case, but the license agreement was shortened and reduced to essential paragraphs.

Discuss the following questions in small groups:

1. Discuss why the paragraph assigned to you might be critical.

Assignment: Paragraphs - Groups	
Group 1	Preface + No. 2
Group 2	No. 3
Group 3	No. 4
Group 4	No. 5+6
Group 5	No. 7
Group 6	Preface + No. 2
Group 7	No. 3
Group 8	No. 4
Group 9	No. 5+6
Group 10	No. 7
Group 11	Preface + No. 2
Group 12	No. 3
Group 13	No. 4
Group 14	No. 5+6
Group 15	No. 7
Group 16	Preface + No. 2
Group 17	No. 3
Group 18	No. 4
Group 19	No. 5+6
Group 20	No. 7

2. Would you recommend that researchers sign these contracts?

   - No! But that should be obvious.

Example:

A professor is interested in receiving data for an automated analysis from an international financial services provider. At her request, she receives a contract proposal including the following paragraphs.

ACADEMIC RESEARCH AGREEMENT

This Academic Research Agreement (the ***"Agreement"***) is entered into as of date noted below by and between Data Unlimited Ltd. (the ***"Data provider"***) and the undersigned individual, on behalf of himself and any research assistants individually identified and approved in writing by the data provider (collectively, ***"Researcher"***). Data Provider and Researcher (each a **"Party"** to this Agreement) agree as follows:

There are pros (as well as cons) when the university, rather than the researcher, acts as a contractual partner:

- With the university as the contractual partner, all members of the university are entitled to use the content unless narrower access rights are expressly defined, such as here. This can also be beneficial for the researcher in terms of potential liability.
- The researcher can only sign the contract in her own name. If she is signing on behalf of the university, she is acting as a representative without authorization to legally represent the university. However, this is different if, for example, an authorized representative from the library signs the contract
- Projects cannot sign contracts in their own name due to a lack of legal status.

1. Background: Researcher wishes to use the Data provider financial data identified in Exhibit A (the ***"DU Content"***) to engage in an academic research project (***"Project").***

2. License: Data Provider hereby grants to Researcher, for the Term of this Agreement, a non-exclusive, non-transferable, right and license to: (i) receive the DU Content through XML access; (ii) store the DU Content for the duration of the Project; (ii) analyze the DU Content, in conjunction with an application for automated or algorithmic analysis, strictly and exclusively for deriving material for Researcher's planned article/treatise/paper ***("Derived Data"***).

- It is unclear whether data delivery or data access on the server of the provider is covered here.
- Very limited rights of use: storage and data analysis. It is possible, however, that limitations of copyright such as those in §§ 60c and 60d of German copyright law also apply, which override a contractual agreement (§ 60g of German copyright law). Potential problem: Are German copyright limitations even applicable (see below)?

3. Terms of use of DU Content: Any Paper generated as a result of the Project (a ***"Paper"***) may be published and made available to academic audiences in the form of conference presentations, web pages, seminars and journal publications, provided that Researcher shall give the Data provider at least 30 days to review the results of any Project prior to publication of any Paper. The Data provider may make reasonable use of such Papers to promote the DU Content. No product derived from a Project, whether tangible or intangible, which utilizes the DU Content may be sold for profit or commercialized

in any way without the Data provider's prior written approval.

- Right of the data provider to review scientific publications. It is unclear whether this results in a right of veto (according to the text, most likely not). Probably ineffective under German general terms and conditions law (surprising paragraph that even threatens to compromise scientific freedom).
- In this case, the data provider is granted unspecific rights of use to scientific publications. This may be in conflict with the transfer of rights to a publisher, resulting in a potential conflict of obligations for the scientist, which could hinder publication or even make it impossible. Generally, commercial publishers want exclusive rights of use!
- Last but not least, researchers are probably concerned if their research is used for the advertising purposes of a commercial provider in a way that they cannot foresee or control.

4. Restrictions: Researcher shall not use the DU Content other than for the Project or as expressly permitted herein and shall not reproduce, modify, distribute, transmit, display, perform, publish, transfer, create derivative works from, broadcast or circulate any or all of the DU Content to anyone without the express prior written consent of the Data provider. Researcher shall give the Data provider the opportunity, on at least a quarterly basis, to inspect the use made by Researcher of the DU Content and the results to date of such use, and the security measures Researcher employs to ensure compliance with this Agreement.

- Extremely restricted rights of use - in particular, any form of modification is explicitly excluded, not only editing. It is even unclear whether, for instance, a change of the file format would be permitted.
- Right of the data provider to inspect: Hardly any researcher will want to allow the data provider regular access to their storage and computing systems for the purpose of control. As far as this hardware is provided by the research institution, it cannot legally commit to this obligation without further action. Contract at the expense of third parties!

5. Return of Materials: Upon expiration or termination of this Agreement for any reason, Researcher shall return to the Data provider or destroy the DU Content.

- This is in a striking contradiction to the intention and obligation of every researcher to keep their results reproducible and documented!

6. Content: Data Providers reserves all right, title, interest and ownership in the DU Content and any work deriving therefrom.

- At least incompatible with German copyright law. The data provider does not obtain any copyright on modifications, but can merely refuse to grant permission to distribute them.
- Possibly this can be interpreted as an agreement to assign the exploitation rights for modifications?
- However, in my opinion, it is more likely that the regulation is ineffective (General Terms and Conditions Control: surprising regulation) - provided, however, that German law on General Terms and Conditions is applicable at all!

7. Warranties: DU Content is provided on an "as is" basis without warranty of any kind, either express or implied, including, but not limited to, the implied warranties of merchantability and fitness for a particular purpose.

- Guarantee rights are completely excluded. This may mean that if the data is unusable for the research purpose, there is no entitlement to a judicial remedy.
- According to German general terms and conditions law, this paragraph would be ineffective due to §309 No. 8 lit. B BGB. A (comprehensive) exclusion of guarantee is not possible under German law in general terms and conditions.

8. Applicable law and jurisdiction: This Agreement shall be interpreted and construed in accordance with the laws of England and Wales and the Parties submit to the exclusive jurisdiction of the courts in London.

- Choice of law clause in general terms and conditions are generally possible. However, it should be noted that consumers (§ 13 BGB) may not be deprived of the protection of mandatory provisions of their home country (Art. & para. 2 Rom I Regulation). While the university as a legal entity under public law does not have the status of a consumer, this is less clear for researchers who are predominantly working in salaried employment/employment relationships - but at the same time act mostly independently in their research. According to the wording of § 13 BGB, in my opinion there is a strong argument for classifying researchers as consumers when they license data in their own name.
- Court of jurisdiction: According to § 38 ZPO, a choice of the parties is only effective if they are traders or legal entities under public law.