

International Agency,
Distribution and
Licensing Agreements

4th Edition

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International Agency, Distribution and Licensing Agreements

Fourth edition

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International Agency, Distribution and Licensing Agreements

To my wife Anastasia without whose encouragement
this book would not have been written

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Preface to the First Edition

The purpose of this book is to provide a practical guide to the negotiation and drafting of international agency, distribution and manufacturing agreements for the supply of goods. The book is structured around five main precedents covering agency, distribution outside the EEC, distribution inside the EEC, selective distribution systems, and manufacturing licences. The precedents on agency, selective distribution and manufacturing cover areas both inside and outside the EEC, by means of alternative clauses where necessary. Also, the chapter on selective distribution contains detailed provisions on technical support, warranties, spares and after-sales service, which can be used in any distribution agreement relating to technically complex goods, inside or outside the EEC.

Additional chapters then cover generally applicable clauses, and auxiliary agreements relating to software, escrow and consultancy. Although this book is intended primarily for the lawyer practising in the areas of international commercial law, it will also prove of interest to those with commercial negotiating responsibility for such agreements. If it is important for lawyers to understand the commercial requirements of their clients, it is also equally important for their clients to have some idea of the legal framework within which they have to work. Although written by an English lawyer, this book is not intended only for English lawyers, and it can be of particular help to lawyers practising outside the EEC who are called upon to deal with agreements affecting the EEC.

No apology is made for the fact that this book has a reasonably high proportion of its contents devoted to the impact of EEC competition law on such agreements. The Common Market now covers twelve of the states of Western Europe, and it is no longer possible for businessmen, or their legal advisers, to proceed with such agreements without understanding the opportunities and pitfalls to which EEC competition law gives rise.

The plan of the book is to provide a precedent for each clause followed by a commentary drawing attention to the relevant legal and commercial aspects of its drafting, application and use. When using this book for the first time it is suggested that Chapter 1 be read initially, followed by the chapter for which it is desired to draft an agreement. Not until the chapters have been read, so that the implications of the clauses can be fully considered, should drafting begin. It is not possible in these types of agreements to provide blanket precedents which are applicable in every case without

intelligent adaptation and selection. The form of the book permits the selection of desired clauses and the draftsman should not hesitate to mix and match clauses from the various chapters as required, once their significance has been understood from a study of the relevant commentary.

As initial assistance, Appendix 1 gives references to sets of clauses that would be suitable in many cases for specimen agreements on the subjects covered by this book.

In each chapter there is an introductory section which gives both commercial and legal background to the agreement concerned. In the commentary as well, emphasis is placed on the commercial environment in which these agreements are implemented. No draftsman can produce a satisfactory agreement of this type or advise properly on its anticipated and desired effects unless he understands its commercial as well as its legal significance.

Appendices 2, 3 and 4 are specifically referred to in the text, and should be consulted as necessary. The remaining Appendices contain full texts of relevant EEC legislation.

It cannot be overemphasised when dealing with agreements affected by EEC law that it is not enough to have a bare knowledge of its provisions. Although the relevant provisions are quoted in the commentary in the chapters concerned, it is useful to read the whole text of any piece of this legislation, when considering drafting an agreement affected by it, with particular reference to the lengthy preambles setting out the purposes of the Regulations. Both the EEC Commission and the European Court interpret EEC competition law very much by reference to its intended purpose, and do not rely, to the same degree as a lawyer versed in the common law would, on the strict interpretation of the wording of statutes.

The quotation from the cases, in the commentary and the printing of the texts of the legislation, are intended to enable the draftsman to get the feel of this method of interpretation, and understand how the Commission and the Court react, in the light of this interpretation, to the particular economic and commercial effects generated by the provisions of the agreements that come before them for consideration.

R Christou
London
May 1986

Preface to the Fourth Edition

Since the 3rd Edition of this book appeared in 1996 the world has changed drastically both economically and politically. In 1996 one looked forward to a period of growth and stability. In 2003, overheated Stock Markets have collapsed, the world has been shaken by political changes, war and the prospect of terrorism, and most of the major economies, far from looking forward to growth, are now more likely to be in danger from deflation.

Nevertheless, in this changing economical and political scene the importance of trading relationships which deliver real value remains undiminished. Because of this, use of agency, distribution and licensing agreements to trade across national boundaries is of increasing importance, particularly given the enlargement of the European Union (by a further ten states in May 2004) which will create a single market covering Western and most of Central Europe.

So far as the subject matter of this book is concerned, the major area for new developments is that of competition law. The whole framework of European and UK competition law has been drastically changed; the first through legislation providing for the direct application of Arts 81 and 82 of the EC Treaty by the Courts and Competition Authorities of the European Union Member States, and the second by the passing of the Competition Act 1998 and the Enterprise Act 2002 which have repealed the old framework for competition and control of monopolies and mergers, that was in force in the UK for the last 50 years, and replaced it with a system based on the principles of EC Competition Law.

In this new and difficult environment, robust, clear and comprehensive agreements, a real understanding of the commercial principles on which they are based and a sound grasp of the impact of competition law is more vital than ever. I have thus taken the opportunity in this 4th edition not only to update the text and precedents to take account of general developments in applicable laws, but also substantially to revise the text and some of the precedents to deal with these major issues.

The changes in competition law described above, with their emphasis on assessing the competitive effects of any agreement not in relation to its terms but by its impact on the market, has necessitated a new approach to the core chapters of this book, namely Chapters 5, 6 and 8. I have also taken the opportunity, given the complexity of the subject, to add a number of flow charts to guide the reader through the current position on the application of

Preface to the Fourth Edition

UK and EU competition law in relation to commercial agreements.

Another major area of development has been in relation to the Agency Directive (Council Directive 86/653) which has now been the subject of many important decisions in the UK Courts. It has therefore been possible to re-write Chapter 3 with considerably more authority as to the way in which the Agency Directive is to be interpreted.

Finally, given the increased importance of international trade with the new accession countries for EU membership in 2004, besides updating the current international chapters I have also included further chapters dealing with the law as it stands in the Czech Republic, Cyprus, Hungary, Poland and Romania.

The other major development that has taken place since the last edition of this book has been the extent to which legal sources are now available over the internet. Rather than the reproduction of lengthy appendices containing relevant legislation I have therefore taken the opportunity to remove much of the appendices containing material which is readily available over the Internet and to use the space for further text and commentary on the precedents. Thus, unlike previous editions, the appendices are kept to an absolute minimum. However the reader's attention is drawn to Appendix 4 which sets out a list of relevant websites on which the legislation referred to in this book can be found.

The law in this book is in general stated as that in force at the end of April 2004.

R Christou
London
July 2003

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