
# International Sales Agreements

# Lecture objectives

By the end of this lecture, you should be able to:

1. Critically review international sales agreements
2. Determine the clauses that need to be drafted and negotiated into the agreement
3. Draft and negotiate key terms more effectively
4. Manage key risks in such deals and advise on key terms

# Lecture overview

- Regulation of cross-border sales agreements
- Key clauses in international sales deals
- Workshop

# REGULATION OF CROSS-BORDER SALES AGREEMENTS

## Regulation of international sales agreement - Introduction

Governing law is selected by the:

- Contracting parties (in their choice of law clause); or
- Applicable conflict of laws rules (COL rules) if no selection is made & the dispute is international

Moves have been made to harmonise COL rules

- In non-binding instruments (soft law) or binding ones
- In the EU, Rome I – Applicable in UK (post Brexit)

## Regulation of international sales of goods – International law

- Moves have been to harmonise the substantive law governing international business transactions especially in the context of sale of goods transactions

Several mechanisms have been used in this context

- Non-binding instruments (soft law) e.g. PECL (Principles of European Contract Law), DCFR (Draft Common Frame of Reference), UNIDROIT Principles of Intl Commercial Agreements, Incoterms

- Binding instruments e.g. CISG (UN's Convention on Contracts for the Intl Sale of Goods), Hague Conventions 1964 (listed on later slide)

## Regulation of international sales of goods – International law

These mechanisms can be classified by reference to their scope of application

- **Generic** instruments e.g. CISG, UNIDROIT and PECL set out substantive contract law

- **Topic-specific** instruments e.g. Incoterms, UCP (Uniform Customs and Practice for Documentary Credits)

Model contracts have also been produced by the ICC for a range of international business deals including sales

# Regulation of international sales of goods – English law

Absence of dedicated body of law

- Such transactions are covered by common law & legislation
- UK Legislation incorporates the Hague Conventions
  - 1964 Convention Relating to a Uniform Law on the International Sale of Goods;
  - 1964 Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods

# Regulation of international sales of goods – English law

England is not a Contracting State to the CISG

- However the CISG may apply all the same, if the:
  - Governing law selected by parties is the CISG, or the law of a Contracting State to the CISG
  - COL rules result in an application of the CISG (in line with A.1(1)b CISG)

# KEY TERMS

# Goods

- Defined in the contract or a Schedule annexed to it
- Reference may be made to:
  - Specific goods
  - Lines produced by seller
  - Whole range of production of the seller

# Goods

- The agreement may allow for:
  - Goods to be added/removed/changed; or
  - New lines of goods to be added
- Goods may be tangible or intangible
- Goods may be supplied alone or with services

# Payment

- Remuneration may be monetary or not
- To address transactional risks, different methods have been devised internationally, including:
  - Documents against payment
  - Letters of credit
  - Escrow agreements

# Payment

Protection of the seller

- Cash in advance or in the alternative an irrevocable letter of credit
- Retention of title clause
- Provision for delayed payment or failure to pay including a right to:
    - Recovery of shipped goods;
    - Cancel or delay future orders/deliveries;
    - Sell goods which are the subject of any order; &
    - Charge interest on sums due

# Delivery (date and place)

The parties may agree on a precise date/set period for delivery of the goods

- If they do not and the agreement is governed by the CISG, the provisions of the Convention will address time and mode of delivery

Time of delivery

- Where the agreement is governed by the CISG, the seller must deliver goods (A33):
  - On the date fixed by the contract or determinable by it;
  - At any time within the period fixed by the contract or determinable by it
  - In any other case, within a reasonable time after the contract is concluded

# International sales agreements – Delivery (date and place)

**Premature delivery**

- If the seller delivers goods prematurely, the buyer wish to take delivery or not

**Protection of the buyer**

- Documents against payment
- Rights in re. to delayed delivery or non delivery including the right to:
    - Terminate the contract and sue
    - Sue for damages (without termination)
    - Right to liquidated damages for a set period along with right to terminate at the end of this period (ICC Model Contract)

# International sales agreements - Warranties

- Express warranties are set out in the agreement
- Implied warranties are inserted into the agreement by governing law:
  - Under CISG, the seller is obligated to deliver goods (A35, CISG):
    - Of the quantity, quality & description set by the contract
    - Fit for ordinary use (the purposes for which goods of the same description are ordinarily used)
    - Fit for a stated purpose (one made known at the time of contracting)
    - Possess the qualities of the goods held out as a sample
    - Packaged in the manner usual for such goods or one made known to the seller

# International sales agreements – Non-conformity

If the goods fail to comply with the warranties, provision should be made to protect the buyer

**Protection of the buyer in relation to non-conformity**

- Right to terminate the contract and sue
- Right to allow seller to rectify non-conformity by replacing damaged goods
    - Before or after due date for delivery

# International sales agreements – Licence and protection of IPRs

**Protection of the buyer (licensee)**

- Grant of rights in re to the IP of the seller
- Exclusive/non-exclusive licence
- In an assigned territory/worldwide

**Protection of the seller (licensor)**

- Ringfence the grant to certain uses (e.g. production, marketing)
- Obligation on buyer to help seller maintain validity & enforceability of IP
- Ensure buyer acquires no rights in re. to the seller’s IP by stating all rights and goodwill vested in seller

# International sales agreements – Termination

- Optional in one-off sales agreements (may arise in instalment contracts)
- Termination will then be
  - By notice
  - If certain events arise
- Protection of seller against competition by buyer
  - Exit rights

EXERCISE

**Drafting and negotiation workshop**

**Pre-negotiation**

- Please draft your proposed assigned clauses in your sub-groups and exchange these with the other party in your sub-group (time permitting)

- Please negotiate the terms allocated

**Post-negotiation**

  - The different agreements that people reached

  - The key drivers of success

  - Why some people reach agreement while others, in identical situations, do not

  - Our results and compare them to the results of others


# International Distribution Agreements

UNIVERSITY of DERBY

# Lecture objectives

By the end of this lecture, you will be able to:

1. Critically review international distribution agreements
2. Determine the clauses that need to be drafted and negotiated into the agreement
3. Draft and negotiate key terms more effectively
4. Advise on cross-jurisdictional concerns and key terms
5. Identify, apply and advise on the law governing the agreement

# Lecture overview

- Vertical integration – What is this? Pros? Cons?
- Distribution mechanics
- Key motives of the parties
- Deciding between a distributor and an agent
- Regulation of distribution agreements
- Key clauses in international distribution deals
- Workshop

# Vertical integration

- An entity engages in vertical integration if it controls/acquires the various steps in the distribution chain

- This practice is prevalent in the following sectors:

  - In the oil industry

  - In the technology industry think Apple and Dell

  - In the refreshment industry think Starbucks

**Advantages**

- **Absolute control** over integrated levels in supply chain (control over pricing and trade terms between different levels and third parties)
- All **margins** generated are enjoyed
- Single economic entities outside scope of Art 101 TFEU

**Disadvantages**

- **No sharing** of risk & outlay with third party
- Since different levels in supply chain are integrated, less of an **incentive** to take risks and win business

# Set-up

- Parties are independent and distinct entities
    - Manufacturer sells to the distributor, who sells on
- Distributor is effectively an intermediary
- Though the transaction is a straightforward sale there is a continuing substantive relationship

- Distribution through channel/s
  - Channel is defined as a ‘set of interdependent organisations involved in the process of making a product or service available for consumption or use’. (Christou 2003)
- Motivating channel members (targets, functional bonus, discounts linked to volumes)
- Support infrastructure
- No contractual relationship

# Key motives of the parties

# Motives of distributor

- Gain
- Reputation by association
- Exclusivity
  - No competition
  - Exclusivity of supply
  - Exclusive representative
- Training and support
- Return back clause (optional)

# Motives of principal

- Costs and risk
- Network of clients
- Manufacturing capacity
- Marketing capacity
- Knowledge of market and local law
- Non competing
- Payment
- Quality assurance > brand image
- Confidentiality

# Deciding between a distributor and an agent

Factors to be considered by a principal when choosing to opt for a distribution or agency arrangement:

- Control over:
  - **Goods** (less so with a distributer)
  - **Customer base** (limited to non-existent with distribution; restrictions may be governed by competition law)
  - **Pricing** (absolute with an agent, limited with a distributor; competition law restricts price fixing)
- **Monitoring** performance (harder with a distributor, easier with an agent)
- **Financial control** (far easier with an agent than a distributer)
- Competition law (genuine agency agreements outside scope of A101 TFEU)

# Regulation of distribution agreements

## English law

- In the absence of dedicated substantive law, these arrangements are governed by legislation if applicable and common law

## European Union law

- Distribution agreements impacting (actually/potentially) on trade within the EU market
- Fall within the scope of EU law
- Parties must give due consideration to EU regulation of the contractual relationship and the subject-matter of the agreement (goods, services etc)

## Draft Common Frame of Reference (DCFR)

- Drafted on behalf of the Commission
- Intended as inspiration tool for the resolution of PIL disputes
- Addresses:
  - General obligations in intl commercial relationships
  - Agreement-specific obligations

# Regulation of distribution agreements - EU competition law

- Agreements caught by A101(1) TFEU, which fail to meet the conditions in A101(3) are automatically void (A101(2))

- A101(1) prohibits

1) restrictive agreements, decisions of associations and concerted practice

2) that may affect cross-border trade

3) whose object/effect is prevention/restriction/distortion of competition

- The prohibition in A101(1) covers agreements between 2 or more undertakings that are ***independent market operators***
  - Whether the agreements are ***horizontal*** (e.g. cartels) or ***vertical*** (e.g. distribution or licensing agreements)
  - Genuine agency agreements are substantively precluded
- Non-exhaustive list of targeted agreements provided (e.g. agreements that fix prices/ control production/markets/R&D)

- A101(3) displaces A101(1) where the agreement etc

1) Contributes to improving production/ distribution/promotion of technical or economic progress

2) Allows the consumers a fair share of the resulting benefit

3) Does not contain provisions that:

a) Impose on the undertakings concerned restrictions which are ***not indispensable*** to the attainment of the aforementioned objectives (*indispensability*); and

b) Afford the undertakings concerned the possibility of eliminating competition in relation to a substantial part of the goods involved

- A101(3) provides a defence to undertakings against a finding of an infringement of A101(1)

- Agreements etc caught by the prohibition in A101(1) which satisfy the conditions set out in A101(3) are valid & enforceable ***without the need for a prior decision*** to this effect

  - Such agreements are effectively ‘valid and enforceable from the moment that the conditions of Article [101(3)] are satisfied and for as long as that remains the case.’

- A101(3) can be applied to:
  - Individual cases; or
  - Categories of agreements & concerted practices by virtue of the block exemption regulations (***block exemption***)
- Block exemptions effectively exempt agreements that are otherwise in breach of A101(1)
- If a restrictive agreement is covered by a block exemption, the parties to the agreement are relieved of their burden of showing that their individual agreement satisfies each of the conditions of A101(3)

# Regulation of distribution agreements - EU competition law - VRBER

- Vertical Restraints Block Exemption Regulation (VRBER 2010)
  - Upon the expiration of the VRBER 1999 in 2010 a revised legislative instrument was issued by the Commission
  - Dated 20 April 2010, this regulation came into force on 1 June 2010 and will expire 31 May **2022**
  - This Regulation was issued alongside accompanying guidelines (Guidelines accompanying the VRBER 2010)

- Pursuant to this Block Exemption, it is presumed that a vertical agreement will generally result in an improvement in production/distribution that permits the buying public a fair share of the resultant utility, when:

  – Each parties' market share on the specific market does not surpass 30% ('**30% threshold**'); and

  – There are no hardcore restrictions in the agreement

# Regulation of distribution agreements - EU competition law - VRBER (hardcore restrictions)

- VRBER states that vertical agreements containing certain categories of restrictions (‘**hardcore restrictions**’) will not be capable of being exempted (A4)
  - Such provisions cannot be severed & render the agreement itself void

- The VRBER won’t apply to vertical agreements that, in/directly, in isolation/in combination with other factors under the parties’ control, set out *inter alia* to:
  - **Price fixing**: Restrict buyer’s ability to set its sale price (without prejudice to supplier’s ability to set a maximum sale price or recommend a sale price, provided that they do not amount to a fixed/minimum sale price as a result of pressure from, or incentives offered by, any of the parties)
  - Restrict active or passive **sales** to end users by members of a selective distribution system operating at the retail level
  - Restrict the **territory** into which/the customers to whom, the buyer may sell the contract goods or services though certain restrictions will not be viewed as hardcore restrictions

# Regulation of distribution agreements - EU competition law - VRBER (excluded restrictions)

- A2 exemption won't apply to the following provisions in vertical agreements (A5):
  - In-term non-compete clauses - Duration of which is indefinite/exceeds 5 years
  - Post-term non-compete clauses – Causing the buyer, after termination, not to manufacture, sell or resell goods/services

# International distribution agreements – Key terms

# Territorial exclusivity

- Protection of distributor
  - When granted:
    - Manufacturer will typically not appoint another in the territory assigned
    - Sensible to address whether manufacturer can sell in the assigned territory

# Term

- Considerations for both parties
  - Definite or indefinite
  - In either case, worthwhile considering:
    - Termination by notice/ contingency termination
    - Induction period
- Protection of manufacturer
  - In a definite term agreement
    - Lack of motivation by distributor towards the end of the term should be addressed

# Licences

- Considerations for both parties:
  - When licences are granted to distributor, he will typically:
    - Assume responsibility for sourcing them
    - Be required:
      - To register the agreement (so he may import)
      - To obtain authority to market the goods

- Protection for manufacturer:
  - If there is a delay, manufacturer should consider:
    - Reserving a right to terminate
    - In a fixed term agreement, stating that the term start from the date of the agreement itself

# Verification

- Considerations for the manufacturer:
  - Used
    - To monitor quantities sold, implement a product recall and ensure the distributor is not competing
  - Inspections and/or reports
    - Regularity
    - Template of information required for reporting purposes
    - Failure to cooperate

# Termination

- Considerations for the manufacturer:
  - In an agreement with a minimum sales target requirement, the M will typically reserve the right to:
    - Terminate
    - Revoke the exclusivity awarded to the D

# EXERCISE

## Pre-negotiation

- Please draft your proposed assigned clauses in your sub-groups and exchange these with the other party in your sub-group