

## commercial contracts

Your business is likely to have a range of relationships with other commercial organisations.

You will buy goods and services which you use to provide goods and/or services to others and you might enter into far more complicated collaborations and joint ventures. In law each of these transactions will be a “contract” whether or not it is in writing. Some of these relationships will be vital to your business. These will need to be in writing and properly drafted.

### 1 Why?

“A verbal agreement isn’t worth the paper it’s written on” Samuel Goldwyn

- o Can you remember what was said?
- o Can you prove it?
- o Can you prove that it was meant to be a binding contract at all?

### Duration

Your business may be dependent upon the continuation of certain contracts. For example, a customer may have committed to purchase minimum amounts of stock from you over a number of years, or a supplier may have guaranteed to supply you with vital components at fixed prices. In either case you need to be sure that you can count on the continuity of those contracts or that you can sue if they are not performed.

### Clarity, certainty and liability

- o How much will you pay/be paid?
- o When?
- o What happens if there is a failure to perform?
- o What exactly is to be done under the contract?
- o What are the goods, equipment, software supposed to do?
- o Is there any limit on your liability if things go wrong?
- o Could you be liable for loss of profits?
- o If there are limits on liability are these enforceable?

### Implied terms/statutes

There are about 250 statutes and statutory instruments that regulate commercial contracts together with EC treaties and other international conventions. The effect of these is that, even if a contract is written in unambiguous terms, it may not be legal, may not be enforceable or may mean something else. In the last two years there have been Acts dealing with:

- o late payment of debts – in contracts for the supply of goods or services you might be liable to pay interest on late payments even if there is no clause in the contract;

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- o anti-competitive practices – you could be fined a percentage of your annual turnover for anti-competitive practices or contractual terms;
  - o human rights – rights of privacy and free speech can be relevant in agreements between companies as well as enforceable against public bodies; and
  - o rights of third parties – in some circumstances where third parties are intended to get a benefit from a contract they can sue under that contract even though they are not a party to it.
- 2 **Agreements you are likely to use include:**
- o terms and conditions of sale;
  - o terms and conditions of purchase;
  - o distribution agreements;
  - o agency agreements;
  - o franchise agreements;
  - o joint ventures;
  - o manufacturing agreements;
  - o equipment leases;
  - o hire agreements;
  - o conditional sale agreements;
  - o contracts for provision of services;
  - o software licences; and
  - o confidentiality agreements.

Each of these will have some unique practical features that need to be considered. For example a distribution agreement (where you appoint an individual or company to distribute your goods in a specific territory) will involve the following considerations:

- o Are export consents needed?
- o What is the creditworthiness of the distributor?
- o If there is an existing distributor can the arrangement be terminated without giving rise to claims?
- o Is the distributor to be “sole” (in which case you can continue to sell the goods in the territory) or “exclusive”?
- o Do the terms of the appointment fall foul of the UK Competition Act or the EC Treaty?
- o What is the territory?
- o What are the products? How can they be identified and distinguished for such products? Can other products be added?
- o Can you cease to supply or alter the products?
- o Do you want a retention of title clause so that you may be able to reclaim the goods if payment is not made?
- o Who bears the risk of loss or damage in transit?
- o Are there any exclusions of implied terms as to the quality of the goods?
- o Who is to obtain any import licences?
- o What is the price?
- o What is the discount (if any)?
- o How is payment to be made?
- o How much stock should the distributor hold?
- o What about after sales service?
- o How will the introduction of the euro affect your invoicing and payment arrangement?

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Some of these will apply to many other commercial contracts but in each case the practical considerations need to be considered in the light of the statutory and common law framework. So, for example, in joint ventures special emphasis will need to be placed on the way in which power is shared and how the fruits of the project are realised and divided. In equipment leases and hire agreements the tax legislation will be of particular importance and so possibly will consumer credit. In manufacturing agreements the intellectual property must be protected as well as the conformity of supply.

The identity and size of the contracting parties may also be important.

- o If one party has a large market share you may not have the benefit of certain exemptions under both domestic and EC competition law.
- o If one party is a public body it may be subject to the public procurement regime.
- o Certain restrictions or exclusions are likely to be construed against the larger and more powerful of two contracting parties.

## Competition law

When entering into commercial arrangements with other businesses, you will need to be aware of both EU and UK competition law. EU competition law prohibits:

- o agreements between undertakings which prevent, restrict or distort competition and which may affect trade between member states of the EU; and
- o conduct by undertakings which amounts to an abuse of a dominant position in a market which may affect trade between member states of the EU.

Under UK competition law, there are similar prohibitions in respect of the same types of agreement or conduct which affect trade within the UK.

For these purposes, an "undertaking" can be any of the full range of business entities, including sole traders, partnerships, companies and groups of companies.

The consequences of breaching competition law are extremely serious:

- o An agreement which breaches competition law will be unenforceable.
- o The parties to an agreement which breaches competition law may face heavy fines (in the case of breaches of EU competition law, fines may be as high as one million euros or 10 per cent of the worldwide turnover of the company concerned in the previous year, whichever is higher).
- o Third parties which have suffered loss as a result of an anti-competitive agreement may be able to sue the parties to that agreement for damages.
- o Individuals who are dishonestly involved in the most serious types of "cartel" activity (price-fixing, bid-rigging, limitation of production or supply and market-sharing) may face criminal prosecution.
- o The directors of companies which breach competition law may be disqualified.

However, many commercial arrangements fall outside of the scope of the competition law prohibitions because of certain limitations to the application of those provisions or because of the various exemptions available. For example, agreements which prevent, restrict or distort competition will only breach UK competition law if they **appreciably** restrict competition and, subject to certain exceptions, an agreement is only likely to have an appreciable effect on competition where the market share of the parties to the agreement exceeds 25 per cent of the relevant market. In addition, agreements between parties on different levels of the supply chain (known as "vertical agreements") will not breach UK competition law unless they contain price-fixing restrictions.

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Similar exemptions exist in EU competition law.

A key point to remember, both in respect of EU and UK competition law, is to avoid provisions under which the supplier directly or indirectly attempts to impose a fixed or minimum resale price on its customer. Such a price-fixing restriction will take the agreement outside of the exemptions relating to vertical agreements and is likely to cause competition law problems. Suppliers may, however, impose a maximum resale price or recommend a resale price, provided these do not amount to setting the resale price or fixing a minimum resale price as a result of pressure from, or incentives offered by, the supplier.

## Contact

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