INTRODUCTION TO THE LEGAL ASPECTS OF THE TRANSFER OF TECHNOLOGY.

INTRODUCTION

The transfer of technology has become a major part in the worldwide economic co-operation. There is a constant technology flux from one part of the world to another and the technological edge has become the basis of the competitive position of each country.

Technology transfer is thereby not limited to what are generally considered to be the high-technology markets like electronics, telecommunications or the chemical industry. All industries need a constant improvement of their productivity and without technological advances this cannot be achieved.

The search for new technologies offered on the market has become a major strategically element for each company. Of course, buying a new technology is not always the consequence of an independent boardroom decision. It can be a matter of sheer survival. If a competitor has patented a technology that you desperately need you will have to enter into negotiations for a licence on his patent.

This evolution has made of the technology transfer agreements one of the most important legal problems in the international trade. The legally binding texts for technology transfer are thereby surprisingly scarce. There are no internationally accepted general standards for the transfer of technology.

Negotiating agreements for the transfer of technology is therefore above all a question of experience and good negotiating skills. For those who have not this experience and for whom no external assistance is available a few guidelines should always be kept in mind.

This chapter has only the limited aim of giving these guidelines. We will not discuss all the legal aspects of the technology transfer within the framework of this contribution. I will try to give you a general overview of the most important legal documents that can be used while organising a co-operation based on transfer of technology.

As the possibilities of exploitation of a technology are very diverse, so are the different types of agreements. A licence agreement is the most typical basis for a transfer of technology but a distribution agreement or a joint venture agreement can be more efficient ways of co-operation. Another type of co-operation is the joint development of new technologies which has its own legal problems. All these different agreements will be discussed.

It can only be a brief introduction clearly not aimed at the legal professional. More complicated legal problems like the application of international competition legislation or of the product liability legislation, will therefore not be addressed. I only hope that this omission makes these guidelines the practical document they are intended to be.

STARTING NEGOTIATIONS

Negotiating an agreement for the transfer of a technology can be a long and difficult process. The different parties involved must get to know each other, they must be able to explore the possibilities offered by collaboration and they must find the right balance between the wishes of each party.

As such discussions are proceeding the risks that the parties are running will become clearer. Each party will have to transfer to the other party information that is highly critical and no party will ever be sure of the outcome of the negotiations until the final agreement is reached. It is therefore common practice for complicated negotiations to draft preparatory documents to limit the risks of each party.

In order keep information transferred to your partner secret for all third parties Confidentiality Agreements can be entered into. As a second preparatory document a Letter of Intent, laying down the intentions of the parties and the status of the negotiations can be signed. We will examine these two documents in more detail in this first paragraph.

CONFIDENTIALITY AGREEMENTS

The aim of a confidentiality agreement is to protect all information of a party entering negotiations. Before any concrete negotiations on the transfer of a technology can really start all parties involved must be able to evaluate the technology offered. Both the technological and the commercial possibilities of the offer will thereby be taken into account.
Before giving anybody access to your technology a Confidentiality Agreement should be drafted. We will discuss the main topics to be addressed in such agreement keeping in mind that all the standard clauses of an agreement should also be included (parties, term and termination, applicable law).
The first item in any Confidentiality Agreement should be a brief but clear description of the technology that will be transferred. What are the main specifications of this technology and what is its relevant application? In this same disposition of the agreement a reference to the property rights of the party offering can be made. Such disposition could read:
LEO Inc. has developed a new system for monitoring the heating of steel products. As the developer of such technology LEO Inc. is the sole owner of this development and has filed a patent application therefore on November 26th 1992.
It should now be defined what information will be made available and whether any special procedure should be followed. First a broad definition of what has to be considered confidential information should be given:
For the purpose of this Agreement, Confidential Information shall mean any information and data of a confidential nature, including but not limited to proprietary technical, developmental, marketing, sales, operating, performance, cost, know-how, business and process information, computer programming techniques, and all record bearing media containing or disclosing such information and techniques which are disclosed pursuant to this Agreement.
By making reference to "Confidential Information" in the following clauses this broad definition will give you sufficient protection, regardless the nature of the information disclosed. This definition can be followed by a procedure for transferring information. This procedure will be introduced if a party wants to keep track of all information of a confidential nature transferred to its partner. It can also be useful if a distinction between confidential and non-confidential information has to be made:
Information transferred to IRON Inc. will be considered to be Confidential Information if at the moment of transfer its confidential nature is confirmed in writing by LEO Inc. A list of all Confidential Information transferred will be attached to the minutes of each meeting held between the parties.
This should be followed by an obligation for the owner of the technology to give its partner access to the technology and an obligation for the receiver of the information to make only a limited use thereof:
LEO Inc. agrees to give IRON Inc. access to its Confidential Information for the sole purpose of evaluating the same to determine IRON Inc's interest in a mutually attractive business arrangement.
This Confidential Information will i.a. consist of:

- The above-mentioned patent application
- Test results achieved by LEO Inc.
- Results of the market study of November 11th 1992
- ....

All Confidential Information delivered pursuant to this Agreement:
(a) Shall not be distributed, disclosed, or disseminated in any way or form by IRON Inc. to anyone except its own employees who have a reasonable need to know said Confidential Information;
(b) Shall be treated by IRON Inc. with the same degree of care to avoid disclosure to any third party as is used with respect to IRON Inc.'s own information of like importance which is to be kept secret. IRON Inc. shall be liable for disclosure of Confidential Information of LEO Inc. only if such care is not used.
(c) Shall not be used by IRON Inc. for its own purposes, except as otherwise expressly stated herein, without the express prior written permission of LEO Inc.;
In a Confidentiality Agreement a clause on the return of all information transferred should also be included. This clause can contain two elements: the return of all information at the request of the owner and the obligation that all information will have to be returned to the owner if the negotiations have failed.
All Confidential Information shall remain the property of and be returned to LEO Inc. (along with all copies thereof) within thirty (30) days of receipt by IRON Inc. of a written request from LEO Inc. setting forth the Confidential Information to be returned.
If after 6 months, starting from the date of signature hereof, the parties have not reached a final agreement on their future collaboration, IRON Inc. will return immediately all Confidential Information to LEO Inc. IRON Inc. will not have the right to retain any copy of any part of the Confidential Information.
The confidentiality obligation contained herein will remain in force for a period of 5 years after the termination of this Agreement.

These elements can be used as a guideline for the draft of your confidentiality agreement. But such agreement can never replace the two elements on which each negotiation should be based: the good faith of all parties involved and the caution of the owner of a technology.

LETTER OF INTENT

Whereas a Confidentiality Agreement is a formal agreement where the parties involved take up certain obligations, the role of a letter of intent is more limited.

Parties have entered into a negotiation and they have been able to explain their own positions. They feel that an agreement between them can be reached but that this could take some time. However, in order to facilitate the further negotiations it can be helpful to write down the elements on which an agreement has already been reached.

But there remain other questions unsolved and of course, no party wants to engage itself until there is an agreement on every single topic. These are therefore the two parts of every letter of intent: laying down what has already been achieved but stating at the same time that no party can be bound by this limited agreement until all other problems have been solved.

A letter of intent can also contain certain obligations. It is common to introduce a general obligation to negotiate "in good faith" or a more specific obligation not to enter into negotiations with other parties as long as the discussions between the parties are continuing. But the drafting of such a document should be done very carefully. In order to avoid to be bound by all the elements of the letter of intent and not only by a limited number of them a clear distinction between these two types of dispositions should be made.

The aim of this paragraph will therefore be to look at the pitfalls of the letter of intent rather than to give a guideline to draft the different clauses thereof.

The clauses in a letter of intent will not be very different from the clauses in a normal final agreement. If e.g. parties agree already on the way a technology will be transferred, on the markets involved or on the definition of a preliminary study phase, this can be included in the letter of intent. But the main risk of a letter of intent is that a party that is not yet willing to bind itself takes up formal obligations towards its contracts partner because the letter of intent is not drafted carefully.

The first element to keep in mind is that a letter of intent can have different names but that the name does hardly influence the legal force of your document.

Whether you call it "letter of intent", "letter of understanding" or "memorandum of understanding", the content of the document and not the title will define its binding force. The title can give some indications on the interpretation of the documents but it will not be decisive.

As indicated above a clear distinction should be made between the different types of clauses in a letter of intent: the obligations, the partial agreement already reached and the future negotiations.

The structure of a letter of intent should therefore be:

"During their negotiations the parties hereto have already reached an agreement on the following:

They will continue to negotiate in good faith and will not start any discussions with any third party on the transfer of the technology offered.

Both parties hereto declare that this document does not constitute a binding agreement on the transfer of the technology and that only after having reached a complete agreement on all the remaining items they will be bound by this agreement".

This framework will have to be completed but each term should be carefully chosen.

If you are negotiating with a partner of based in continental Europe you should be even more cautious. Whereas under the Anglo-American legal system only the written document can bind the parties, the legal system in continental Europe will put more attention on the underlying will of the parties involved.

Under the legal system in continental Europe parties who have reached an agreement on the essential elements of a deal can be considered to be bound by it, even if there is not yet a written and signed document. The difficulty here is to proof that the agreement exists but a letter of intent could provide this proof.

If one does not want to be bound he should not sign any declaration whereby he accepts that the major elements of a deal have been agreed upon (e.g. price and delivery of a specific product) and that only a few minor points need clarification. This could certainly be interpreted as a binding agreement.

All reference to an offer made and acceptance of his offer can also be very dangerous: once an offer is made and it is accepted, even in different documents, the parties are bound by it.

For the same reason, the inclusion in the letter of intent of an obligation to pay a compensation if no final agreement can be reached should be strongly dissuaded. Said obligation could certainly be an indication that the aim of the document was to make it binding for the parties involved.

As a conclusion of this paragraph it is useful to stress that the letter of intent can be a valuable document. As all the elements discussed above try to preserve the letter of intent as a non-binding document one may wonder why any company should sign such a document or, the opposite, why should one be afraid to do so?

The value of a letter of intent is certainly more moral and commercial than legal. But this means that the sanction for the non-observance of a letter of intent will also be moral and commercial and such sanction can be more effective than a legal one. Losing a possible client, and probably not only for this one deal, and losing your own good name can have long-lasting consequences that may be much more important than winning a court case.

THE LICENSING AGREEMENT

The legal core of the transfer of technology is constituted by a licensing agreement. By signing this agreement the owner of a technology, the licenser, gives the right to another company, the licensee, to make use of this technology.
A licence does not alter the property rights of the owner: he remains the only proprietor of the technology. He could also sell his technology whereby the buyer becomes the owner and replaces the seller. But if an owner of a technology prefers to enter into an agreement with a licensee he will give him limited rights. The licensee cannot dispose of the technology but he can use it. This use will be more or less limited. A limitation in time, in geographical market, in product market or in the application can be introduced in a licence.
Needless to say that licensing agreements tend to be complicated documents. The licence will determine the relationship between the licenser and licensee for the whole duration of their co-operation and a lot of questions will have to be answered before this relationship can start. As it is better to solve the problems before they can occur it is certainly worthwhile to spend some time in drafting a coherent and balanced agreement.
In this paragraph I will discuss the different items that should be dealt with in a licence. No attention will be devoted to the clauses that are common to all agreements but only the specific problems of a licence will be treated. But even with this limitation it will not be possible to give an in-depth analysis of the legal aspects of licensing. The aim of this text can only be to make you aware of the main topics to be discussed, not to inform you about all the ins and outs of the licensing business.

THE LICENSED TECHNOLOGY

Before entering into the negotiations you should have defined clearly the technology you offer. If a patent is granted or if a patent application has been filed the references thereof should of course be listed (date of application, grant, number for each country). If any other form of protection (e.g. trademark, protection of integrated circuits) for your industrial property has been granted or applied for this should also be mentioned.
But this is often not sufficient for the successful transfer of a technology. Providing the patents to your partner will not enable him to exploit efficiently your technology. You should be able to transfer your relevant knowledge and this will require an extra effort. Anybody offering a technology should therefore have a clear scenario in mind on how he can enable an interested partner to make use of his this technology. For a simple product the transfer of a patent and a manual can be sufficient. But for more complicated processes a complete set of documents describing all aspects of the process should be prepared and a training session for employees of the licensee will have to be foreseen.
The definite way of transferring the licensed technology will of course be negotiated between the licenser and licensee. But any licenser should have a clear idea of the possibilities and difficulties of transferring his technology before entering the discussions with the potential licensee.
If you are licensing out a technology it is not necessary to have a patent therefore. A patent will be a great asset in your negotiations because it offers the licensee a great certainty on the commercial value of the licensed technology: the licensee will know that only the licenser is entitled to use this technology and he will be sure to get rights that are not freely available to everybody (that are not "in the public domain").
But also non-patented technology (commonly called "know-how") can be transferred. The licenser will have to proof that he is the owner of this technology (whereas a patent is an official proof of ownership) and he will have to convince his partner of the unique character of his technology but both parties may then enter into exactly the same contract negotiations as for the transfer of a patented technology.
Most licences will be mixed. If a patented technology is licensed all the expertise, practice, experience and technical knowledge of the licenser will also be licensed. This second element of the subject of the license is rarely part of the patent and a mixed licence will therefore be drafted.

THE RIGHTS GRANTED

The first major discussion of all licensing negotiations is the exact definition of the rights granted to the licensee. As stated earlier, a licensee will not become the owner of the technology. The licenser remains the owner who decides on the ways to exploit his technology. He can do this by using it himself but he may choose to give other parties, by granting them a licence, the right to use his property. The exact definition of these rights is then the first problem to be solved.

The variety of rights granted in a licence is almost unlimited.

First it should be decided whether the rights of the licensee will be exclusive or not. Will the licensee be the only person to whom the rights on the licensed technology are granted? If this is agreed upon the licence will be an exclusive licence. The licenser may not grant the same rights to any other party and he will not exploit the technology himself. If the licenser wants to retain the right to exploit his own technology but agrees not the give any other party the same rights as the licensee a sole licence will be signed.

As we will discuss later the compensation to be paid by the licensee to the licenser will of course be determined by the rights he has been granted. A higher compensation will be due for an exclusive licence compared to a non-exclusive one.

Granting an exclusive licence constitutes a risk for the licenser. If the licensee is not successful in exploiting the licensed technology the licenser remains linked to this exclusive licensee and may loose opportunities to have his technology exploited more efficiently. To avoid this situation the licenser can foresee escape clauses in the exclusive licensing agreement. These escape clause can be rather general by requesting from the licensee to use his "best efforts" to commercialise the subject of the licence but this obligation can be made more specific by giving a minimum turn-over to be achieved by the licensee.

To make this obligation of a minimum turnover effective a sanction for not reaching it can be foreseen. This sanction can of course be the right for the licenser to terminate the agreement but another solution can be the change the character of the licence. If an exclusive licensee does not reach the minimum turnover he will loose the benefit of the exclusivity and the licenser may appoint other licensees. The best situation for the licenser is of course to have the option: he can either terminate the agreement - and appoint other licensees who can be granted an exclusive licence - or he can make the existing licence non-exclusive.

The second element in the definition of the rights of a licensee is the exact market definition.

The geographical market should be looked at first. A licence can give rights to exploit the licensed technology in separate clearly defined markets. Whether a licence should be given for a separate market or whether worldwide rights should be granted is a strategically question to be answered by the licenser. If a licenser can find one major company that has a worldwide distribution net the licenser may enter into a worldwide licence with him. But more often a licenser will have to look for different licensees who are familiar with the specific situations in the different markets. In the second case separate licences should made.

The choice of a geographical market is related to the choice between exclusive or non-exclusive licences. If a licenser has a policy to grant only non-exclusive licences, it is not very important to make a careful market separation. But a licenser who decides to do so will probably have a difficult task in finding an interested major licensee. Licensees who want to invest heavily in the exploitation of new technology will request an exclusivity, at least for a separate market.

When defining the geographical market only exact definitions should be used. Definitions like "Western Europe" or "Central Europe" should be avoided. If there is no official internationally accepted definition, like "the European Community", a complete list of all the countries involved should be given.

A second part of the market definition is the product market. Not all licensing agreements will contain such definition but it can be a solution for a difficult situation for a licenser: if a technology can be used for the production of different products and the licenser is confronted with two potential licensees who both want an exclusive licence he can fulfil the wishes of both licensees. Each license can be granted an exclusive licence for his product market.

But defining a product market can be hazardous. The limits of a product market are seldom clear and the same product can be used in different markets. The only advice can therefore be to define the market as carefully as possible.

The rights of a licensee can also be limited by describing the ways in which he can make use of the licensed technology.

The use of the licensed technology can e.g. be limited to the use in the production process of the licensee and the number of plants where the technology can be used be also be limited. A classical example thereof is the clause in a software licence that limits the number of hardware systems that can be loaded with the licensed software.

A last element in the description of the rights of the licensee is whether the licensee can transfer the rights that have been granted to him to another party or whether he can grant sub licences to third parties.

Normally a licensing agreement will be non-transferable. Giving a licensee the right to transfer his rights to third parties makes any effective control by the licenser of the use made of his technology impossible. However for some markets the right to grant sub-licenses should be granted to the licensee. The best example thereof is the licensing of software. If a developer of software wants to commercialize his development by using a third party as licensee, said licensee should have the right to give third parties a sub-license on the software to enable the end-users to use the software legally.

ROYALTIES

The licensee will have to compensate the licenser for the rights he has been granted. Said compensation can be defined in one or more lump sum payments but is common practice in licensing agreements to link the compensation for the licenser to the commercial results achieved by the licensee. The rationale for this rule is clear: the licenser provides a technology to the licensee whose aim it is to improve his results by using this technology. If these better results are achieved the licensed technology has lived up to its promises and the licenser is entitled to participate in these profits.
The discussion on the concrete implementation of this rule is the second important topic to be negotiated between the parties in the licensing agreement.
But before looking at the problems encountered when drafting a royalty clause we should look at the elements that will influence the height of the compensation. The literature on the computing of royalties is very rich and diverse. Different rules have been suggested but experience learns that defining the royalty is above all a matter of commercial negotiation where the strongest party will strike the best deal.
The basis will always be the advantage for the licensee. Each party will try to find out what can be earned by exploiting the licensed technology. If a clearly defined product is licensed it is easy to provide some estimates on the market and on the possible penetration of this market by the licensee. But if e.g. a process technology is licensed the influence on the market position of the licensee will be more difficult to evaluate. There are therefore no strict rules of thumb than can be applied to any license situation but the following elements should always be taken into account:

How important is the advantage offered to the licensee by entering into the licensing agreement? Will he be able to improve his competitive position? This should of course be a prerequisite for any licensing agreement but nobody will escape the difficult exercise of quantifying his advantage.

Is the transferred technology mature? Is the licensee required to invest heavily before he can exploit it or can he go on the market with it immediately?

Is the license exclusive?

These, and other, elements will determine the bargaining power of the licensing partners. The height of the royalty percentage and the basis used for the calculation will then be discussed.
The basis used for the royalty calculation can be a pitfall for less experienced negotiators. One rule should be followed here: a licenser should never accept a royalty based on the profit of the licensee unless the content of the term "profit" is clearly defined. If this is not the case the parties should prepare for long discussions whereby the licenser will have the greatest chance to be on the losing side. If only a reference to "profit" has been made in the licensing agreement the licensee will try to have as much different cost items as possible (distribution costs, costs for advertisement, general overhead costs) included and the licenser will see the basis for his compensation eroded.
The basis for a royalty should therefore be clearly defined and a reference to the turnover of the licensee is thereby preferable.
The percentage to be applied will then be the next discussion item. The elements of this discussion have been given above. A rule that is sometimes applied is that the licenser is entitled to one quarter of the benefits of the licensee. This can certainly not be seen as a generally applicable rule and practices differ from industry to industry. A royalty between 3 and 6 % of the turnover is thereby common.
A royalty clause in a licensing agreement could read as follows:
The licensee shall pay to the licenser for the term of this agreement a royalty of .... percent of the net selling price (that is to say after deduction of purchase tax, normal trade discounts and costs of packing, insurance, carriage and freight) of all licensed products sold by the licensee.
This clause can only be used where the subject of the license is a product. If the licensed technology is a process technology that will be implemented by the licensee in his own production process the definition of the royalty basis will be much more difficult. This clause could than be modified as follows:
The licensee shall pay to the licenser for the term of this agreement a royalty of .... percent of the net selling price (that is to say after deduction of purchase tax, normal trade discounts and costs of packing, insurance, carriage and freight) of all products produced by the Licensee using the licensed technology.

This clause should certainly be adapted to the specific licensing situation to which it will apply.
Until now we have discussed a royalty calculated as a percentage from the royalty basis but it can sometimes be more practical to replace this type of royalty by a fixed amount to be paid for each product sold. This can be used when the licensed technology is incorporated in bigger systems and the added value created by the licensed technology is only a minor part of the total price of these systems.
The royalty obligation is sometimes completed by an obligation to pay a minimum royalty. To ensure the licenser of a minimum income from his license the licensee engages himself to pay each year a minimum amount. This will be useful in exclusive licenses. The licenser has no other possibilities of exploiting his technology and his revenue will depend on the success of the licensee. As a compensation therefore the licensee will have to pay a minimum royalty. The following clause can be introduced in the license:
Royalties payable under this agreement shall not be less than the sum of .... in the first year and of .... in the second year and of .... in the third year and each succeeding year or the sum of the royalties payable in respect of the licensee's annual sales in each year whichever is the greater.
If, at the end of each year, the above-mentioned amounts have not been paid the licenser will invoice the licensee for the difference between the amount already received and the above-mentioned minimum amounts.
Provisions for the payment of the royalties should also be included in the license. Two elements are thereby standard practice: the reporting obligation of the licensee and the right to control for the licenser. A common clause in a licensing agreement is therefore:
The licensee shall keep true and particular records of all royalties payable under this agreement and shall 28 days after the last day of December in each year during which this agreement shall remain in force deliver to the licenser a true account thereof (such account being certified by the licensee's auditors at the request of the licenser) in respect of the preceding year and shall at the same time pay to the licenser the amount of such royalties as may be shown to be due provided that if this agreement shall terminate otherwise than at the end of December the last account and payment under this agreement shall be rendered and made within 28 days after the termination of this Agreement.
The licensee shall permit any duly authorized representative of the licenser at all reasonable time to inspect and take copies of and extracts from the records kept by the licensee in respect of the manufacture and sale and distribution of the licensed products and shall produce to such representative all receipts and vouchers relating thereto.
These clauses are straightforward and their aim is clear: to provide the licenser with sufficient information to be able to control the amount to be paid by the licensee.
The inspection of the licenser can also have a broader aim than controlling the royalty payments. Especially where products with a high quality standard are licensed the licenser may be interested in controlling the production process of the licensee. This could be introduced in the licensing agreement with the following clause:
The licensee shall allow the licenser or their authorized representative at all reasonable times (or: once every year) to enter the works, warehouses or offices of the licensee to inspect materials, machinery, plant methods and standards of manufacture currently in use for producing the licensed product and the licensee shall at such intervals as the licenser may think fit supply the licenser with samples of currently produced products.
If in the sole opinion of the licenser or their authorized representative any licensed product made by the licensee does not conform in every respect with the current specifications and standards of quality laid down by the licenser then the licensee shall not thereafter sell such products under the said trademarks or dispose of them in any way except as the licenser shall approve.
This clause is no longer dealing with the problems related to the calculation and payment of the royalties. But it is a good link to the following problem we will discuss: the warranty obligation of each party.

WARRANTIES AND LIABILITIES

In each type of agreement the division of the warranty obligations is one of the most difficult items to be addressed and licensing agreements are no exemption to this. Warranties should be thought over carefully and no party should take up any obligation without having evaluated the possible consequences thereof. These consequences can be very onerous: the stories about product liability processes have become the most popular horror stories in many board rooms with stories about the costs of defending patents a close second.
There are indeed two types of warranty that are important in a licensing agreement. A licensee will want to be certain of the value of the technology offered by the licenser whereas a warranty for the quality of the products produced by the licensee should also be looked at. For each of these warranties a balance between the often very different positions of licenser and licensee will have to be found.
First the warranty for the technology offered. If such technology is patented this question is related to the value of the patent. The licensee will ask a warranty that the patent is valid or, if only a patent application

has been filed, that the patent will be granted. This implies that the licenser will i.a. ensure that the patent remains in force by paying the annual renewal fee. But the licensee may also request that the conditions of the licensing agreement are modified once a patent becomes invalid or if a patent is not granted. Those two elements can normally be accepted by the licenser.
However, a licenser should be cautious when requested to act against all third parties who are infringing his property rights or defend alone these rights against third parties alleging that they are infringing these third parties' rights. The costs of these procedures can be extremely high and the licenser should only accept to bear these costs if the profits he can earn by entering the licensing agreement are sufficiently important. If exclusive licenses for great markets are granted the licensee can be requested to bear part of these costs. The gains made by the licensee will be much more important than the gains of the licenser and the risk should therefore be divided between them. But once more, the specific licensing situation should be taken into account to find the best solution.
If such a solution is found the following text could be taken as a basis for the final draft:
If during the life of this agreement the licenser shall become aware whether by notification or otherwise of any infringement or attempted infringement of said patents the licenser shall notify the licensee within three months whether or not he intends to initiate proceedings to prevent infringement.
If the licenser notifies the licensee that it does not intend to do so or fails to give any notification whatsoever within the said period of three months the licensee may if he so desires take such proceedings to prevent such infringement or to defend the validity of the said patent as seems expedient to it and shall keep the licenser fully informed.
If the licensee takes any such proceedings as aforesaid the licenser shall render all assistance in its power to the licensee in connection therewith.
All costs and expenses in respect of such proceedings in so far as such costs and expenses relate to the infringement shall be borne by the licensee and in so far as they relate to the validity of the said patent shall be borne by the licenser.
Any such costs and expenses that cannot be apportioned in the aforesaid manner shall be borne equally by the parties hereto.
The second warranty is the warranty for the products sold by licensee. If the licensed technology is not sub-licensed by the licensee but will be used in the production process of the licensee to improve its efficiency, the licenser will normally not be responsible for the end products produced by the licensee. The following clause can then be introduced in the license:
The licenser does not warrant that the licensed technology is capable of industrial realization or commercial exploitation. The risks of such realisation and exploitation shall be assumed solely by the licensee.
The licensee agrees that the licenser shall not be held to any liability and shall indemnify the licenser with respect to any claim arising from or on account of licensee's use of the licensed technology. Licensee will therefore also be solely liable for the products produced with the licensed technology and will be solely liable for any obligation related to the producing or selling of these products.
The clause puts all the liability for the use of the licensed technology with the licensee. This includes the warranties he will give to his customers and the liability based on the product liability legislation.
If the licenser licenses a specific product that is produced and sold by the licensee a more balanced division of the liabilities will be included in the licensing agreement.
These were the main elements to be incorporated in any licensing agreements. A license will have to be completed by other clauses dealing with i.a. termination, choice of law, arbitration, and further collaboration between the parties. However, if a binding agreement on the above-mentioned items is reached you have taken the most difficult hurdles.

RESEARCH AND DEVELOPMENT AGREEMENTS AND EXCHANGE OF EMPLOYEES

Especially in Europe, co-operation in the field of research and development between competitors has increased considerably during the last decennium. The reasons for this evolution are manifold.
Probably the most important incentive to look for outside partners are the ever increasing costs of research and development. Even for the major transnational companies the costs of a new development has become prohibitive and they have to look for partners to share to burden with.
This process was certainly assisted by different initiatives on a European scale that provided government funds for international research and developments co-operation. The initiatives of the Commission of the European Communities and EUREKA are thereby the best known.
A third element is the greater awareness of the potential of the European universities and research institutes. A closer co-operation with these researchers can only improve the competitive position of the European industry.

This type of collaboration requests a specific legal agreement. Like all the documents we have discussed earlier we will look at the problems related to research and development co-operation that should be solved during the negotiations between the prospective partners.
One problem has been discussed earlier and is common to all legal documents: a clear and precise definition of the subject of your co-operation. This should take the form of a work-program indicating the aim of the research work, the exact role of each partner and a timetable. Drafting this document is not a lawyer's job but it will be the most important legally binding document for the partners.
But what can be the input of a lawyer during these negotiations whose character should be mainly technical?
He should first make sure that the parties have clearly defined ideas about the aim of their co-operation and that these ideas match. This can look like an obvious statement but is common in research and development programmes that parties start with different ideas. The most typical case is a collaboration between a company and an university laboratory. The company is only interested in a product that can be put on he market as soon as possible. The university is certainly willing to help the company but is not always interested in the difficult and long product development work that has less scientific interest. The specifications of the items to be delivered by the laboratory to the company should therefore be clearly defined and some detail is necessary.
For longer co-operation projects it can be helpful to foresee some phases in the project. At the end of these phases the partners may have the option to halt the project, a decision that can be made dependent upon the achievement of intermediate results.
Another problem that may occur during the execution of a longer research and development project is the need to adapt the initially foreseen work programme. A procedure for the adaptation of this programme could therefore be incorporated in this type of agreement.
The adaptation of the work programme could be one of the attributions of the programme committee that should be formed for the management of the project. This committee should be formed by the technically responsible employees who will do the day-by-day management of the programme. However, for the major decisions, like the adaptation of the work programme they should be replaced by representatives with decision-making power. During the meetings of his committee major decisions can be made and can be implemented immediately. The agreement should therefore have foreseen how a decision can be reached in this committee (quorum, majorities).
In order to avoid discussions on the content of the decisions of the programme committee minutes should be drafted carefully and should be signed by the representatives of the parties. As preparing the minutes is considered a rather dull job by most researchers, a rotation between the parties in the exercise of the function of secretary is sometimes included in the agreement.
Another topic in many R&D co-operation agreements is an obligation of confidentiality for the parties. This obligation is comparable with the obligation contained in the confidentiality agreements discussed earlier.
A more specific problem, once more in the relationship between industry and universities, is the right for university researchers to publish their results in scientific magazines. This right conflicts with the commercial interests of he industrial partner who will therefore request the right to approve any publication.
The financial aspects of the co-operation will form a part of the agreement. This can be limited to the declaration that no transfer of funds between the parties will occur because each party is responsible for financing its part of the development or it can give the amount to be paid by one party to another. As such these stipulations are straightforward. If a payment from one party to another party is foreseen this payment can be related to the acceptance of certain deliverables by the principal.
The most difficult discussions between the partners in a research and development co-operation will be on the industrial property rights of the results achieved.
If all partners have an equal contribution to the programme and if they have been able to finance their own work, the co-ownership of the results is the most logic solution. This will normally be completed by an arrangement for the commercialisation of these results. The parties who are co-owners of their results may be free to use them without any restrictions or a division of the markets between the parties may be convened.
The situation can be more complicated if the parties are not equal, and they seldom are. If a principal orders research and development work from a third party and he pays for it he will claim all industrial property rights on the results. However, the contractor may have put some of his own know-how in the execution of the order and may therefore claim some rights on the results achieved for the principal.
A solution is obvious: the contractor will request a technology fee as an extra compensation. The fee may be calculated as a royalty or as a lump sum or it can also be included in a higher price per man-year. But this may be insufficient. Access to the results achieved may be vital for the subcontractor in order to enable him to continue his research and development work and some division of the industrial property rights may be negotiated.

The last element to be taken into account is the liability of each partner involved in the programme. His liability towards third parties as well as towards his partners in the programme should be defined. What will happen if one partner does not reach the milestones described in the work programme? This should be discussed before starting the co-operation but taking into account that the subject of the co-operation is research and development work. This type of co-operation always has a degree of uncertainty and therefore no strict warranty can be requested from partners in an advanced research programme.

THE EXCHANGE OF EMPLOYEES

A special topic in many research and development projects can be the exchange of personnel between the parties. Also in other transfer of technology agreements will this possibility be foreseen as the most effective way of transferring a technology is to have employees of the receiver of the technology being trained at the premises of the owner of the technology whereas the assistance of employees of the licenser may be necessary for the implementation of a technology at licensee's premises.
This assignment of employees to the other party is not a very complicated legal matter but a few practical questions should be solved in the agreement. First, and this could well be a long and difficult administrative procedure, all labour legislation procedures and possibly the administrative procedure for the access of foreigners should be followed. Although it is normal for the employer to bear all costs related to these procedures, the assistance of the receiving party, who should be more familiar with the local procedures, may be requested.
The rights of the guests will also be described in the agreement. To which information will he have access, who will be his contact and which facilities will he have at his disposition (office, computer, telephone and fax but also the company restaurant)? The situation of the liability of the employer of the guests will have to unequivocal and the following clause will therefore be helpful:
The employees of the licensee assigned to the premises of licenser will follow the safety instructions of licenser and their research work shall be directed by the licenser.
Although the research executed by the assigned employee will be directed by the licenser, licensee shall continue to be his employer and the licensee shall provide him with all of those types of insurance coverage normally provided to licensee's employees. Said insurance coverage shall include, but not be limited to, civil liability, disability, health and hospitalisation, unemployment.
The licensee shall be responsible for paying the salary of the assigned employee, any relocation and housing expenses and any financial rewards as normally provided to its employees in similar circumstances. The licensee shall take the necessary arrangements to withhold from said salaries such contributions and income taxes as may be required by law.
The licensee shall advise its assigned employee of their privileges and responsibilities while at licenser's premises. Licenser will review such rights and responsibilities of each assigned employee upon his or her arrival at the licenser's premises.

DISTRIBUTION AGREEMENTS

When discussing licensing agreements we indicated that the aim of a license is to give the licensee certain limited rights to use and exploit a technology owned by the licenser. We could see a distribution agreement as a limited form of a licensing agreement whereby only one right is granted to the distributor: the owner of the technology gives him the right to sell his technology to end-users.
This type of agreement will only be used for the commercialisation of products. If the owner of a new process technology wants to transfer this technology to third parties he will not look for a distributor but he will negotiate with one, or more, producers who are interested in implementing this technology in his existing production process. No specific distribution channel is necessary for the exploitation of this type of technology.
If however the technology is incorporated in a product that has to be marketed and distributed and the owner of the intellectual property rights on this product is not able to provide these services himself he will look for external assistance and will try to conclude a distribution agreement.
In the introduction for this chapter it was stated that the aim of this contribution is to give practical guidelines for the negotiation of an agreement for the transfer of technology and some details of the specific legislations would not be dealt with. This warning has to be repeated here. Agency and distribution agreements have been the subject of different national and European legislation. The specifics thereof will not be discussed. (1)

The case we will discuss is an independent distributor (contrary to an employee who is acting as a commercial representative) who will negotiate and enter into the agreements in his own name (contrary to an representative who may try to identify customers but who will have to refer prospective customers directly to the principal who will enter into the agreement with the end-user). The case we will discuss is probably the most important from the point of view of the transfer of a technology but the owner of a new product should keep in mind that there are other possibilities for the distribution of his product.
Many of the problems related to the distribution of a product by a third party are similar to the problems we have met in the paragraph on the licensing agreements. The principal (the owner of the intellectual property rights) will have to decide whether he will grant exclusive rights to his distributors, the markets will have to be defined and the compensation for each party will be decided. This similarity is natural because, as mentioned above, the situation of a distributor is very similar to the situation of a licensee: a distributor has a license to promote and sell the products of the principal.
As a distribution agreement is normally used for products whose development is completed and that are ready to be sold to the end-user the definition of the subject of the distribution agreement will not difficult. A reference to a brand name and a type can be sufficient if it is combined with a clear description of the specifications of the product and its applications.
The main difference with the licensing agreements is that the distributor will not produce the products but will buy the products from the principal. The basis of the distribution agreement is therefore the relationship of seller (principal) and buyer (distributor). The distributor will have an obligation to sell these products to end-users and to make efforts to promote the products. These obligations can also be found in a licensing agreement but they may be more specific in a distribution agreement.
The following clauses will apply to this type of collaboration:
The Principal hereby grants the Distributor the right to sell the products set forth in Schedule A hereto (hereinafter referred to as the Products) in a Territory comprising Belgium, the Netherlands and Luxembourg (hereinafter referred to as the Territory). The Principal reserves the right to appoint other distributors with the same rights in the Territory if, in the opinion of the Principal, this will promote effective marketing and distribution of the Products.
This clause is of course dealing with a non-exclusive distributorship. If however an exclusive right to sell is granted the principal may request from his distributor an engagement that he will not sell competitive products:
Distributor agrees that, during the term of this Agreement and for two (2) years following termination for any reason, he will not sell or distribute in the Territory any goods or devices that compete directly or indirectly with the Products unless permitted by the Principal to so in writing, in Principal's sole discretion.
It should be followed be a clause organising the selling of the products to the distributor:
The Distributor will place orders for the Products with the Principal.
Sales to the Distributor will be at the indicated terms and discounts from the suggested price list for the Products set forth in Schedule B hereto, unless the parties hereto make other arrangements from time to time.
In this type of distribution agreement the benefits for the principal will come from the selling price to the distributor whereas the distributor will be able to apply a margin to this price when selling to end-users.
As we are dealing with the sale of goods the terms of sale should be agreed upon: the delivery time, the place of delivery, the payment terms etc.
As with a license a minimum quantity may also be included in the agreement.
In order to maintain the exclusivity of its sales rights granted herein, Distributor also agrees to purchase minimum quantities of the Products as follows, each year being measured from the effective date of this Agreement:

Period	**Amount of Purchases**
First year	....
Second year	....

In most agreements, minimum quantities should be linked with an exclusivity for the distributor.
It is common practice to request from a distributor to set up a reasonable marketing organisation for the products. This obligation can be described as follows:
The Distributor agrees to a technically qualified sales force for the Products in the Territory.
Distributor agrees to prepare an advertising and promotional campaign which will be budgeted at no less than .... This campaign will include participation by Distributor in at least one appropriate trade show during each calendar year of this Agreement, at which the Products will be prominently featured.
The Principal will make available to the Distributor, free of charge, a reasonable quantity of Product Literature and promotional material. Distributor is hereby authorised to reproduce or edit this literature and material, and to make the needed translations thereof, as may be appropriate in the Territory.

Special attention may also be devoted to the warranty policy and service requirements for the distributed products. It is in the interest of the principal that his products are sold in a way that is compatible with his own standards. The following text can be a guideline for the negotiation of such stipulation:
Principal's obligation with respect to the Products is strictly limited to Principal's Standard Warranty contained in Schedule C hereto. Distributor will be solely responsible for any warranty granted to his customers not included in Principal's Standard Warranty.
This text will at least ensure the principal that his warranty obligation is limited to his normal practice and that he will not be liable for warranties that are not under his control. In the same context another obligation for the distributor may be the organisation of an effective after sales service organisation or the duty to inform the principal of any major problems occurring with his products.
Two questions are directly related to the intellectual property rights of the principal. The first is whether the distributor will sell the products using principal's trademark or not. If this permission is granted the text of this article in the distribution agreement may be:
Principal hereby grants permission to Distributor to display the trademark "Leo" in relation to the Products at Distributor's place of business and otherwise as may be appropriate to market and sell the Products. Principal agrees to apply in his own name for registration of the "Leo" trademark in the Territory. Whether or not Principal succeeds in obtaining registration of said trademark in the Territory, Distributor hereby acknowledges Principal's proprietary rights therein and undertakes not to do anything during or after the term of this Agreement, which could adversely affect such proprietary rights or the distinctiveness of the aforesaid trademark.
A second question relating to the industrial property rights is whether the distributor has the right to modify the product or incorporate it in another product. The distribution of certain products (e.g. electronic components) may require the incorporation in other systems. This should then be foreseen in the agreement but the distributor should be cautious. It will not only become extremely difficult to control the distribution of his products but the product liability situation will become even more complex. The minimum protection for the principal should then be the acceptance by the distributor that he will be solely responsible for the incorporation of the principal's products and for the compatibility between the product and the system.
All items discussed until now are applicable to all distribution agreements regardless of the type of product distributed. But before concluding this paragraph it should be noted that specific products may require special provisions. As an example the case of software distribution could be mentioned. In this case special attention should be devoted to the rights of the distributor on the source code of the software and on the compatibility between the software packages of the principal and of the distributor. However, the scheme of the software distribution agreement will be similar to the general scheme given in this paragraph.

JOINT VENTURES

The term joint ventures covers a broad range of different co-operation forms and there is no generally accepted legal definition for joint ventures. A possible definition could be that a joint venture is an arrangement whereby two or more parties cooperate in order to run a business or to achieve a commercial objective. This definition implies that the co-operation between the joint venture partners will have a lasting character. (2)
Very roughly two forms of joint venture can be distinguished: joint ventures creating a different legal entity or the more limited joint venture organising a longer co-operation between two partners who do not create a new company.
The basis of this more limited joint venture will therefore be a contract between the partners whereby they decide to coordinate part of their activities. A typical example thereof has been described above: the co-operation in the field of research and development. For more important research and development programmes a more or less permanent structure will be constituted. The programme committee can be the centre of this structure. The parties involved hope to achieve a greater efficiency by coordinating their research aims and the activities of their research departments. But their co-operation remains limited. No separate legal entity is constituted and both parties remain totally independent from the other. Their contract is the only basis for their collaboration.
The transfer of a technology can also be the basis for such a type of joint venture. The licenser and licensee will try to consult on a regular basis and e.g. try to improve the technology at joint expense. This type of collaboration remains flexible and transparent but after a while the limits thereof may become obvious. For partners who want to broaden their co-operation an independent legal entity may become necessary and the second type of joint venture should be considered: an equity joint venture. There are different types of equity joint venture but they have in common that the partners constitute jointly a separate legal entity.
The best-known formula for this joint venture is the constitution of a new company whereby the joint venture partners are the shareholders. This formula will be the subject of this paragraph.

Although this advanced form of co-operation is often used for transnational co-operation the company will normally be founded under one national legal system(3) . The choice of this legal system can be very critical and parties should never take this decision precipitately. The different pro and cons of each legal system should be considered. The place of business will of course be the first element to be taken into account but tax considerations or investment incentives may finally be decisive for the choice of law. Before deciding on the legislation, the different types of companies existing under the different legal system should also be examined. Of course, the basic attributions of a limited company are the same in each legal system but there are differences that make one type of limited company better suited for your venture than another.
The structure of your negotiations will be the same, regardless of the legal system or the type of company chosen by the partners. They will have to agree on at least two documents: the Articles of Association of the newly founded company and the so-called Shareholders Agreement. The second document will lay down the agreement between the partners in the joint venture and the Articles of Association of the company will have to be in line with this Shareholders Agreement. This Shareholders Agreement will therefore be our main topic of interest in this paragraph.
But before starting the discussion of the Shareholders Agreement it should be noted that especially in the field of technology transfer other contracts will have to be drafted. Forming a joint venture for the common exploitation of a new technology will at least require a license between the newly founded company and the owners of the technology. As the owners of the technology will be members of the consortium forming the joint venture this license will have to be approved by all the partners involved. This is a sufficient indication of the complexity of joint venture negotiations which require experienced and skilful negotiators.

THE SHAREHOLDERS AGREEMENT

The purpose of a shareholders agreement is to lay down the rights and obligations of the partners with respect to the formation of a jointly owned company. These partners will be the shareholders of this new company and their relationship will be ruled by this contract. This will imply that the partners engage themselves to constitute a company and to accept that the principles of the shareholders agreement will be incorporated in the Articles of Association (or Statutes) of the new company. Moreover, they will have to implement certain stipulations of the shareholders agreement after the formation of the company and they will therefore have to vote in the organs of the company in line with the agreements contained in the shareholders agreement.
But not every legal system accepts that shareholders conclude binding voting arrangements between them. The freedom of each individual shareholder to vote in the general assembly of a company is in some laws a principle that cannot be overruled by an agreement between the shareholders. Before entering a shareholders agreement each party should therefore check of the binding force of the document it will sign.
The main elements of a shareholders agreement will now be discussed in some detail.
The first engagement taken up by the partners is to establish this company. The choice of the legal system and the type of the company has been made and will form the first clause of the shareholders agreement. This clause could read:
Promptly after the signature of this agreement the parties shall establish under the laws of Belgium a limited company called " LEO N.V.".
The head office of this company will be located at Vilvoorde, Belgium, Toekomststraat 1992.
The purpose of this company will be the production and selling of different types of local beer and other beverages.
The purpose described at the end of this clause is very precise. As a company can only act within the field described in this purpose it is advisable to have a broader purpose to avoid too stringent restrictions in the activities of the company.
The next major element is the capital. The capital should enable to company to function normally and its height should be defined in the business plan of the company. In the shareholders agreement different questions regarding the capital will have to be answered.
First the division of the capital between the partners. Each partner will have to subscribe part of the capital and the shares of the company will be divided between the partners in accordance with their respective subscriptions. As the number of shares will decide on the voting rights in the general assembly of the company and on the dividends distributed to each party this is a major decision to be taken.

Shares can only be given as a compensation for the contributions made by each party. Normally these contributions will be made in cash and there will be no discussion on the value thereof. But for a joint venture founded to exploit an existing technology of one partner the contribution of this partner may consist of his technology. Contributions in kind are accepted in most legal systems but for then the evaluation of the contribution may be a problem. The best way to solve it, and this is included in many legal procedures to be followed when contributions in kind are made, is to request an auditor's report on the value of the technology.

The following clause addresses these different questions:

The capital of the company will be two hundred fifty thousand EURO (€ 250 000) and will be represented by ten thousand (10 000) shares of 25 EURO (€ 25) par value per share.

The parties hereto will have fully subscribed the capital at the date of establishment of the company.

Golddigger N.V. will subscribe for a total of seventy five thousand EURO (€ 75 000) and will receive three thousand (3000) shares of the company. The contribution of Golddigger N.V. will be made in cash.

Belgian Beer will subscribe for a total of 75 000 EURO (€ 75 000) and will receive three thousand (3000) shares of the company. The contribution of Belgian Beer N.V. will be made in cash.

Local Beer N.V. will subscribe for a total of hundred thousand EURO (€ 100 000) and will four thousand (4000) shares of the company.

The contribution of Local Beer N.V. will consist of all industrial property rights of his newly developed brewing method described in Schedule 1 hereto (hereinafter called "the Brewing Method"). The value of this contribution has been established by the auditor's firm Young and Rich. A copy of this report has been transferred to all parties hereto and has been accepted by them.

It should be mentioned that the final document on the capital of a joint venture company will contain a number of other dispositions that have not been discussed here. But only if an agreement on the basic question of the division of the capital is reached can these other items be discussed between the partners.

The next element in the organisation of the company is the management structure. In order to be able to influence the management of the company a shareholder should try to be represented in the management structure of a company. This structure is typically a two-tier system: a board of directors, responsible for the strategic decisions, and the day-by-day managers.

The decision on the composition of these organs of the company are taken in general assembly of the company. As decisions in this general assembly will be taken by majority of votes it could well be that one major shareholder would not be represented in the management structure of his company. The shareholders agreement can organise it differently:

The Board of Directors of the company shall consist of three members. The parties agree to cause the election of one director nominated by each party.

The Board of Directors will be entitled to appoint one or more executive officers who will be responsible for the daily management of the Company.

Decisions on the appointment of these executive officers and on their attributions will be taken unanimously.

Requesting unanimous decisions may block the normal functioning of the company and should therefore by avoided as much as possible. However, the parties may decide that special majorities will be necessary for the major decisions of the company, both in the general assembly or the board of directors. This could create a more balanced situation between the influence of the different parties by giving more parties a decisive vote. This requirement should be limited to really important decisions where the approval of all parties can be crucial. Examples thereof can be added to this model clause (4):

The parties declare that all decisions affecting the affairs of the Company are expected to be made by the unanimous decision of the parties or of the directors of the Company and that only in exceptional circumstances where after all attempts have been made to reach unanimity and it transpires that unanimity is not possible will decisions be made by a simple majority of the relevant decision making body provided that the following matters will be undertaken with the sanction of a resolution approved by the holders of 75 % of the issued share capital of the Company namely:

....

Examples of decisions to be taken by this special majority are:

- Decisions on key-personnel
- All decisions related to the height and structure of the capital and the shares (foreseen in most legislations)
- Decisions on the introduction of new products
- Major investments
- Loans to shareholders

Special attention should also be devoted to the dividend policy of the joint venture. Will the company be willing to distribute its profits or will the management try to re-invest these benefits in the company? For many new companies who try to survive this question may seem premature but it should be made clear between the partners in a joint venture what the expectations of each of them on the distribution of the profits are. If a joint venture has been set up and one partner is only interested in a quick return on his investment, problems are lying around the corner.
The basis for this discussion should be the business plan of the joint venture. If this documents indicates that profits can be expected soon and that the financial needs of the company will remain limited, great hopes may be hold out to the shareholders. But be careful. Even the best business plan is only an estimate and the real world can be very hard to deal with.
As the aim of the partners in a joint venture is to increase their efficiency by a closer co-operation, this co-operation should also be clearly defined. Each partner has contributed to the capital of the company but other obligations towards the joint company may also be taken up. This will depend on the different partners of the joint venture but a typical composition of a joint venture for the exploitation of a technology can be as follows: the developer, and owner, of the technology, a major company active in a field related to the new technology and a venture capitalist.
The role of the venture capitalist will be the most obvious one. He will provide extra finances for the company and he will of course control the use made of his money by this newly founded company. He wants a seat in the board of directors and his management experience will assist the managers of the joint venture. But the venture capitalist will not have any other obligations towards the company.
The situation of the two other parties will be different. The owner of the technology will also act as a licenser of his technology to the joint venture who will be his licensee. All obligations of a licenser will therefore also be obligations of this partner in the joint venture and should be included in the shareholders agreement. This inclusion may be limited to a reference to the licensing agreement signed between the new company and the owner o the technology and approved by the other partners in the joint venture.
The third party in our example is a major industrial company that disposes of an important marketing network. As the joint venture is a young and small company assistance in its marketing effort may be very welcome. The big brother can provide this and he exact organisation of this assistance should be described in the shareholders agreement or in a separate agreement.
This is only an example and the concrete situation can be more complex or simpler. But to make the joint venture successful all the possible synergism between the partners should be exploited. The incentive for the partners to do so is crystal clear; if the joint venture succeeds they will reap the benefits of their risky investment.

Hans Bracquené - 21 June 1996

(1) I refer the interested reader to "Commercial Agency and Distribution Agreements; Law and Practice in the Member States of the European Community", by Guy-Martial Weijer, General Editor, Published in 1989 by Graham and Trotman, London, on behalf of the Young Lawyers International Association.
(2) This definition is taken from the Conference documentation from the conference "International Equity Joint Ventures" organised by Euro Conferences Ltd. on February 20/21 1992. The structure of the rest of this paragraph is also partially based on this documentation.
(3) Under European law the European Economic Interest Group has been created and a European Company may soon be a practical alternative.
(4) This text is taken from the document referred to in footnote (2)