The hinge factor...

In 2004, Mr Brush invented a metal hinge which would never need oil; he invented a special lubricant and a process whereby it was applied to a standard metal hinge. Both the manufacturing process for the lubricant, and the process applying to the hinges, are protected by patents, owned by Mr Brush. Mr Brush formed Hopeful Hinge bv in Rotterdam as a vehicle to exploit his inventions.

In 2005, Hopeful Hinge bv established a manufacturing company in Switzerland, Hopeful Hinge (Schweiz) AG. Being unable to obtain expertise itself to manufacture the special lubricant on a large scale, Hopeful Hinge (Schweiz) AG entered in a supply agreement (governed by Swiss Code of Obligations) with an Austrian chemical company, Reckless Manufacturing GmbH. Under that supply agreement Reckless had a 7 year exclusive agreement to manufacture the lubricant under a licence with Hopeful Hinge bv, which was also exclusive, but subject to Dutch law. Reckless would then supply the lubricant direct to Hopeful Hinge (Schweiz) AG.

In 2006, Hopeful Hinge bv appointed distributors for the hinge in several European countries. Each distributor was intended to be exclusive in its defined territory. All these distribution agreements were subject to Dutch law.

Until 2008, business grew rapidly in most territories, but in particular in Spain and Portugal where the distributor, Los Buscadores de Oro SL had worked hard to obtain 25% of the Iberian market.

In January 2008, Sr. Velasquez, owner of Los Buscadores de Oro SL, decided to retire, and he sold his business to Demasiadas Preguntas SL. The first Hopeful Hinge bv knew of the sale was when Demasiadas Preguntas SL wrote to advise that they had now become Hopeful Hinge’s exclusive Iberian distributor.

Demasiadas Preguntas SL immediately sought to offset the cost of buying the business, by increasing prices and cutting back on the sales force; as a result sales in first half of 2008 fell by 20%, and with advent of the financial crisis, continued to decline. Hopeful Hinge bv has had many discussions and meetings with management of Demasiadas Preguntas SL, who maintain that Hopeful Hinge is itself charging too much, does not understand the Iberian market, and that sales are down due to poor economic conditions in general and not their actions. The agreement does not provide for a resale price maintenance clause, but only a clause obliging the distributor to follow Hopeful Hinge bv’s commercial guidelines. Hopeful Hinge bv circulates resale price tariffs annually to its distributors, which were followed by Los Buscadores de Oro SL.

Hopeful Hinge bv is now tired of Demasiadas Preguntas SL, and wants to appoint another distributor for the Iberian market. Demasiadas Preguntas SL has the contract which Hopeful Hinge bv signed with Los Buscadores de Oro, which clearly states that the appointment is exclusive, but of no stated duration. However, while the contract is signed, it is undated. Hopeful Hinge bv has destroyed commercial invoices and correspondence with Spain prior to 2006. The contract contains no wording as to changes in control or assignment.

Hopeful Hinge bv has just (October 2009) received a letter from a lawyer representing Demasiadas Preguntas SL, which, inter alia, threatens legal action if Hopeful Hinge bv appoints another distributor for the Iberian Market.

Meanwhile, in November 2008, Hopeful Hinge’s Austrian lubricant supplier, Reckless Manufacturing GmbH, suffered a major fire which destroyed its manufacturing facility. Under the manufacturing agreement, Reckless was to maintain a 4 month supply of finished product in stock. Hopeful Hinge’s insurers had prudently required that such stock was to be stored at a safe distance away from the manufacturing facility, which Reckless duly did. In September of 2008, a flood partially damaged the warehouse used for the stock and, without advising Hopeful Hinge, Reckless relocated half the stock to a temporary storage area within the manufacturing facility. As a result the fire also destroyed that stock too, leaving just two months supply.
Hopeful Hinge had to find an alternative supplier on short notice, and found a French company which had both the expertise and the capacity. Hobson’s Choice Chimique SAS drove a hard bargain, obtaining an exclusive supply commitment for 3 years with Hopeful Hinge (Schweiz) AG and a corresponding exclusive licence to manufacture from Hopeful Hinge bv., and demanding both agreements being subject to French law. By early January 2009, the French manufacturer was shipping lubricant to Hopeful Hinge (Schweiz) AG.

In March 2009, the Swiss plant started to receive complaints that some of the hinges appeared to be stiff or were sticking. Investigation revealed that the lubricant was now prone to failure in conditions where the ambient temperature exceeded 35°C. It was suspected that Hobson’s Choice Chimique SAS were at fault, but Hobson’s Choice Chimique SAS were adamant that they had followed the technical specification supplied to it by Hopeful Hinge bv. An analysis of the technical specification showed that one page was clearly incomplete in that a vital measure was overwritten by a fax transmission header line. Hopeful Hinge bv had obtained this in hard copy from Reckless Manufacturing GmbH, who had developed the specification itself, and sent it on to Hobson’s Choice Chimique SAS, also in hard copy.

This mistake was rapidly rectified, and manufacture got back to normal.

Hopeful Hinge estimated that the amount of faulty hinges sold before problem was rectified was relatively low, due to the economic crisis, speed with which the problem was solved, and the cyclical nature of hinge sales which were at their lowest in first quarter. It shipped extra quantities to all its distributors for replacement. While relatively few claims were received, the cost of replacement hinges alone exceeded €1.5 million.

The energetic lawyer for Demasiadas Preguntas SL, has also written to Hopeful Hinge (Schweiz) AG (with a copy to Hopeful Hinge bv) claiming €500,000 for claims which Demasiadas Preguntas SL has had to satisfy in respect of penalties, damages, costs and expenses arising out of the supply of faulty hinges to it by Hopeful Hinge (Schweiz) AG. The letter concludes that this claim should be satisfied in full by end of October 2009, failing which Demasiadas Preguntas SL will take such legal actions as necessary against Hopeful Hinge (Schweiz) AG and Hopeful Hinge bv, to recover the said sum.

Historically, Hopeful Hinge (Schweiz) AG, had sold the hinges according to its terms and conditions of sale. However, in 2007, due to a clerical error, the basis of sale ceased to be cited anywhere. Demasiadas Preguntas SL maintain they have never seen any terms and conditions of sale of Hopeful Hinge (Schweiz) AG, and that, clearly, their terms and conditions of purchase apply.

Hopeful Hinge believes that Demasiadas Preguntas SL’s claim is mainly spurious, due to the low turnover during the time when faulty hinges were supplied; it also suspects that Demasiadas Preguntas SL kept selling faulty hinges even when replacement hinges were available. As a result Hopeful Hinge (Schweiz) AG has formally responded to Demasiadas Preguntas SL denying any liability.

Hopeful Hinge (Schweiz) AG and Hopeful Hinge bv regard Hobson’s Choice Chimique SAS as having been negligent both in failing to realise the technical specification was defective, and in failing to take steps to correct it; both Hopeful Hinge companies want to know if they can recover the costs of rectifying the problem from Hobson’s Choice Chimique SAS. In addition, they want to know what chance they have of recovering costs from Reckless Manufacturing GmbH for failing to maintain the 4 months stock.

Reckless Manufacturing GmbH has almost restored its manufacturing facility, and has just discovered that Hopeful Hinge (Schweiz) AG had entered into an exclusive supply agreement with Hobson’s Choice Chimique SAS. Looking at its own agreement, Reckless sees that while there is a force majeure clause in the exclusive licence, there is no such clause in the supply agreement. Reckless now want to know how it should proceed to protect its interests.