

# TRANSATLANTIC BUSINESS TRANSACTIONS: SOME QUESTIONS FOR THE LAWYERS<sup>¶</sup>

*Andreas F. Lowenfeld\**

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## I. INTRODUCTION

In this introduction to the symposium, I want to try to relate the respective topics—choice of law, jurisdiction of courts or arbitral tribunals, and recognition of foreign judgments—to a common type of transaction in international commerce. My choice of such a transaction is a distribution contract—a producer in one country or region and an importer in another country or region. Over the years I have sat as arbitrator in eight or ten disputes arising from such contracts, involving European manufacturers, growers, or investors and North American importers, and North American producers and European or Latin American importers, licensees, or franchisees. The products have ranged from machine tools to

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\* Herbert and Rose Rubin Professor of International Law, New York University School of Law.

contraceptives, from wines to cell phones. In some instances the contracts have included patent or trademark licenses; some contracts have included minimum quotas; some have contained non-compete provisions; many have contained termination clauses with several types of ambiguities. By definition, the contracts that I have seen have contained arbitration clauses, but that is itself a topic for discussion.

The typical controversy involves a producer that concludes some years after the arrangement is commenced that it could market the product more profitably without sharing the revenue with the importer/middleman, or a distributor that sees what it thought was an exclusive franchise being undercut by rivals encouraged by the originator of the product. Other controversies turn on the producer falling behind in deliveries, or the importer failing to meet its purchase quota—with a variety of causes that may or may not justify termination or extension of deadlines. In some instances one breach of contract—for instance failure to meet a deadline or a quota—is a pretext or rationalization for the action the other party really wants to take—for instance terminating a relationship that has several years to run or renegotiating the price or royalty to be paid.

Most distribution contracts work out—if that were not true, the volume of international commerce would be much lower than it actually is. But the persons who draft or negotiate the arrangements governing such transactions must know that controversies can be expected. Whether they proceed under form contracts, from a prior contract, or in an ad hoc exercise, the parties or their advisers need to consider the contingencies—what one might call the “what if . . .?” provisions. That does not mean that the parties must provide for every contingency. A good lawyer knows when to insist on a clause even if it might kill the deal, and when to have the client take the deal and take his chances. For example, a choice-of-law clause, while it may be desirable, is rarely worth fighting hard for in a commercial context; a contract with a state or parastatal enterprise without a forum clause and waiver of sovereign immunity is risky. In all events, the more the lawyer is familiar with the questions addressed in this symposium and with the differing answers to be expected from different legal systems, the more smoothly the

transaction is likely to proceed, and the more soundly the controversies that do arise will be resolved.

## II. PARTY AUTONOMY

Not so long ago, except in England, party autonomy was a real problem.<sup>1</sup> Could parties by contract oust the jurisdiction of a court by agreeing on adjudication in another court? Could parties agree before a dispute had arisen to oust the jurisdiction of all courts by agreeing to arbitration? Could parties agree on the law to be applied to their contract or their dispute, or is it only law made by sovereign states that can give effect to the expressed intent of parties?

Half a century ago, the answer to these questions could not be given comfortably and uniformly—at least in the United States, and I believe, in a number of countries represented in the symposium.<sup>2</sup> Today, in the early years of the Twenty-first Century, I think everyone here, if given 30 seconds to reply, would answer “yes” to each of the three questions. If given ten minutes to reply, the answers might change to “Yes, but. . .” or “Yes, unless. . .” or some similar qualification. The following variations—eight in all—are designed to illustrate the continuing puzzles, all built around a prototype case of a controversy between an American manufacturer and a Spanish importer/distributor.

(1) Could the American manufacturer grant an exclusive distributorship to the Spanish importer, with a condition that the right to resale shall apply in Spain and Portugal, but not to exports to Italy or France? As I understand it, such a restriction would be contrary to the competition law of the European

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1. English courts began to honor contractual choice of law and choice of forum at the end of the eighteenth century. The first reported case was *Gienar v. Meyer*, 2 Hy Bl 603, 126 Eng. Rep. 728 (Ex. Ch. 1796) (remitting Dutch seamen to the courts of the Netherlands on a claim for their wages).

2. For a discussion of the U.S. law on party autonomy in the mid-Twentieth Century, see, e.g., GEORGE WILFRED STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 269–71 (3d ed. 1963); Note, *Conflict of Laws: “Party Autonomy” in Contracts*, 57 COLUM. L. REV. 553 (1957). For the attitude towards party autonomy in the civil law, see 2 ERNST RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 359–431 (2d ed. 1960); MARTIN WOLFF, PRIVATE INTERNATIONAL LAW 416–21 (2d ed. 1950). See also Hessel E. Yntema, “Autonomy” in *Choice of Law*, 1 AM. J. COMP. L. 341, 351 (1952).

Union.<sup>3</sup> But suppose the contract provides that it shall be governed in all respects by the law of California? I believe a Spanish court, subject to the oversight of the European Court of Justice, would hold the territorial restraint unlawful, notwithstanding the choice-of-law clause.<sup>4</sup> I don't know enough to answer with confidence the follow-up question, whether the whole contract would be declared void, or only the restraint on resale.

(2) Is the answer the same if the contract contains a clause choosing the U.S. District Court in New York as the exclusive forum? In my capacity as a professor of international law—public and private—I would say yes, the answer should be the same; law applicable in the market where the restraint is supposed to take effect should be applied either directly, on the ground that restraints on competition cannot be avoided by the parties' choice of law, or by way of *renvoi*, on the ground that the law of California—in my example—would look to the law applicable in the relevant market. As an observer of the real world, however, I am not so sure.

(3) Suppose now the contract contained an arbitration clause, as I believe is true in a large majority of contracts of this kind, and indeed in international commercial contracts of all kinds. The manufacturer seeks to terminate the contract for cause, claiming that the distributor violated the prohibition against re-export. If the arbitrators were sitting in the United States, they could not, I am fairly sure, decline to consider the defense under E.U. competition law for lack of jurisdiction or want of arbitrability of issues of competition law generally. That much, I think, follows from the famous *Mitsubishi* case,<sup>5</sup> though the parallel is not exact. If the arbitrators, having rejected a

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3. See Joined Cases 56 & 58/64, *Etalissements Consten, S.A.R.L. v. Commission*, 1966 E.C.R. 299.

4. I have not explored this question thoroughly. My belief stems from the fact that Spain is a party to the Rome Convention on the Law Applicable to Contractual Obligations, and to the assumption that as among parties to the Convention, competition rules would be regarded by a Spanish court as mandatory rules for purposes of Articles 3(3) and 7(2). If that is true as among the parties to the Convention, I assume it would be true a fortiori when the law chosen by the parties was that of a non-member state.

5. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

defense based on Article 85 (now 81) of the Treaty of Rome on jurisdictional grounds, went on to find for the manufacturer, I think a court in the United States would set aside the award, probably on the famous non-statutory ground “manifest disregard of the law.”<sup>6</sup> But if the arbitrators—still sitting in the United States—held that they were required to apply California law, and that while this extended to U.S. federal law (including the Sherman Antitrust Act), it did not include the Treaty of Rome or regulations thereunder, I do not believe the defendant would be able to mount a successful challenge in a U.S. court. (If the award came to be enforced in Spain against the distributor, it might be rejected on grounds of public policy (*orden público*) under Article V(2)(b) of the New York Convention, but I am not sure it should be. We return to that part of the puzzle hereafter.)

(4) The next variation is like the preceding one except that the contract provides for arbitration in Geneva. In the well known case of *G., S.A. v. V., S.p.A.*,<sup>7</sup> a dispute arose between a Belgian and an Italian firm, and came before arbitrators in Geneva. *G*, the Belgian firm, claimed that the Italian firm *V* had breached the contract between them, and *V* defended on the ground that the contract violated Article 85 of the Treaty of Rome. The arbitrators held, quite plausibly, that they had no jurisdiction under the competition rules of the European Community (EC), but the Swiss Supreme Court (Tribunal Fédéral) set aside the award in favor of *G* and ordered the arbitrators to render an award covering all the issues, including the competition law issues under EC law.

Would a fair inference from that case be that the arbitrators in Geneva in our case would have to consider the validity of the restraint on re-export under the Treaty of Rome? Article 137 of the Swiss Private International Law Statute (PIL), in the chapter on obligations addressed to Swiss courts, states: “Claims of restraint of competition are governed by the law of the country in whose market the restraint directly affects the

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6. For a critique of using this ground for setting aside an award, rendered in a wholly domestic dispute by one of the United States’ leading jurists, see *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994) (Posner, C.J.).

7. 118 BGE/ATF 193, Swiss Federal Tribunal April 28, 1992, translated in 18 Y.B. COM. ARB. 143 (1993).

damaged or injured party.”<sup>8</sup>

On the other hand, Article 187 of the PIL, in the chapter on arbitration, provides: “The arbitral tribunal shall decide the case according to the rules of law agreed upon by the parties. . . .”,<sup>9</sup> California law in the hypothetical. I think Article 187 of the PIL takes precedence, and I can cite several commentaries in support.<sup>10</sup> But I have found no decision on point, and once again one cannot be sure of the outcome.

(5) In the next variation everything is the same except that the arbitration clause refers to the Netherlands Arbitration Institute, with headquarters in Rotterdam—that is, within the European Union. We know from the *Eco Swiss* case that an arbitral award inconsistent with the competition rules of the European Community is to be regarded as contrary to public policy.<sup>11</sup> It is not clear from the decision of the Court of Justice in *Eco Swiss* whether the arbitrators are supposed to raise the competition law issues on their own, or address them only if raised by the parties, or indeed whether the arbitrators have jurisdiction over competition claims or defenses at all.<sup>12</sup> If not, are they supposed to decide the other issues, as was the usual American practice before *Mitsubishi*?<sup>13</sup> This is another question I cannot answer.

(6) As one might expect, the variations are becoming more complicated. This time the distribution agreement contains a license to use a patented product. The American manufacturer claims that the European distributor has failed to use his best efforts to market the product, that the reason is that the

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8. Federal Code on Private International Law art. 137 (Switz.).

9. *Id.* at art. 187.

10. See, e.g., A. HEINI, M. KELLER, K. SIEHR, F. VISCHER, P. VOLKEN, IPRG KOMMENTAR 1558, 1560 cmt. A(II) (1993); P. LALIVE, JF PLOUDRET, C. REYMOND, LE DROIT DE L'ARBITRAGE INTERNE ET INTERNATIONAL EN SUISSE 387, 397 cmt. 16 (1989).

11. See Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton Int'l NV*, 1999 E.C.R. I-3055, 3090–94, June 1, 1999.

12. See Allan Philip, *The Eco Swiss Judgment and International Arbitration*, in LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 527 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002).

13. See, e.g., *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 723 F.2d 155, 163 (1st Cir. 1983), *rev'd*, 473 U.S. 614 (1985).

distributor is pushing his own competing product, and that the competing product infringes the manufacturer's patent. The distributor counters that his own invention is an improved product, that he did not copy the claimant's design, and that in any event the claimant's patent is invalid because it was not sufficiently innovative compared to an earlier patented product.

I had exactly this case as chairman of an arbitral tribunal, except that the distributor was German, not Spanish. The distribution contract called for arbitration in New York under the rules of the International Chamber of Commerce (ICC), except for issues going to validity or infringement of the patent. The claimant brought suit in federal court in Texas, the defendant moved for a stay pending arbitration, and the court—consistent with U.S. law and the New York Convention—granted a stay except for the patent issues. After appointment of the arbitrators and signature of the Terms of Reference, counsel for the parties concluded that they might as well seek resolution of the whole controversy in one proceeding, and with the tribunal's assistance, submitted an amended agreement to arbitrate—including among the issues to be decided the challenged validity and alleged infringement of the patent.

Arbitration of patent controversies, which had previously been regarded in the United States as an impermissible intrusion of private adjudication into issues of public law, has been permitted in the United States by statute since 1982.<sup>14</sup> Would it be permitted if the arbitration clause pointed to Geneva or to Rotterdam, as in our previous variations, or if it pointed to Barcelona? Would that be an issue of arbitration law at the situs or of substantive law dependent on the law of the state that had granted the patent—here the United States? Again, would a choice-of-law clause provide a solution to the question?

Coming back to the actual case, would a decision by the arbitrators sitting in New York that defendant had infringed claimant's patent and owed damages be enforceable under the New York Convention—say in Spain?

Once more, an interesting question, with no clear answer.

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14. 35 U.S.C. § 294 (2000).

### III. JURISDICTION TO ADJUDICATE

Thus far, I have touched on choice-of-law issues, including what I call the public law taboo and what Europeans call mandatory rules; I have treated party autonomy—both on choice of law and on choice of forum, and I have touched upon limits on the authority of arbitrators, which looks different depending on where a party stands and where a court sits. I have not yet touched upon where perhaps I should have started—jurisdiction to adjudicate absent any forum selection by the parties.

Contracts without forum selection clauses are more common than one might think, though not because lawyers are not involved, which is unlikely in our paradigm contract between a manufacturer in one country and a distributor in another country. The party that thinks it more likely that it will be the defendant rather than the plaintiff has no incentive to provide an assured forum; one or both parties may reject arbitration on various grounds, and each side may be reluctant to agree in advance on adjudication in the other party's courts. If the parties want the deal—in our case the manufacturer needs a distributor in Spain and Portugal and the distributor needs a line of imported merchandise—haggling about a forum clause may not be worthwhile. Both sides may say: "Let's cross that bridge when we come to it."

I had in mind moving the distributor in my model contract from Spain to Portugal to focus on Article 65 of that country's Code of Civil Procedure,<sup>15</sup> which provided, among other bases, for jurisdiction of the Portuguese courts when the plaintiff is a Portuguese national and the defendant is an alien where, in the reverse situation, the Portuguese national could be summoned before the courts of the state of which the defendant is a national.

I could have had fun with that provision. Imagine that the Portuguese distributor came to New York to negotiate and sign the contract, and subsequently he wanted to sue the manufacturer in Lisbon. How should the words "in the reverse situation" (*em situação inversa*) be interpreted? Could the

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15. CÓDIGO DE PROCESSO CIVIL art. 65(1)(c) (1961) (Portugal).

Portuguese plaintiff try to explain the “transacting business” provision of New York’s long-arm statute<sup>16</sup> to the court in Lisbon, arguing that if “the manufacturer could sue me in New York, I can sue him in Portugal”? Or would the interpretation of “reverse situation” be limited to the case of a Portuguese manufacturer and an American distributor? A professor’s dream, but alas, the dream was shattered when Portugal repealed Article 65(1)(c) after it was condemned by the European Community.<sup>17</sup> Thus, I am obliged to make do with less intriguing, but still challenging hypotheticals, and to bring the importer back to Spain.

(7) The manufacturer in New York wants to sue the distributor—say for a declaration that the contract is terminable because the distributor has not met his quota for three months, or as in our earlier examples, because the distributor breached his promise not to re-export outside of Spain and Portugal. Can the manufacturer bring this suit in New York? Under New York state law informed—and to some extent policed—by the U.S. Supreme Court, the answer is “yes,” or better “probably yes,” if the Spanish distributor came to New York and: (a) negotiated there with the manufacturer, (b) inspected the manufacturer’s facilities and products, and (c) signed the contract in New York. These three elements, added together, would probably satisfy the transacting business test of the New York long-arm statute that I have already mentioned.<sup>18</sup> If we remove some of these elements—for instance if there were no inspection of the plant and most of the negotiations were conducted in Spain, but the distributor came to New York to sign the contract—the answer

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16. N.Y. C.P.L.R. 302(a)(1) (McKinney 2001).

17. See *Reports on Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 29 I.L.M. 1470 (1990) (reporting on the accession of Spain and Portugal to the Brussels Convention); see also Rui Manuel Moura Ramos, *A Reforma do Direito Processual Civil Internacional*, 130 REVISTA DE LEGISLAÇÃO E DE JURISPRUDÊNCIA 162, 168 (1967) (stating that the possibility that an alien defendant could bring suit in his own country against the plaintiff in Portugal is irrelevant from the point of view of international competence).

18. For example, see *George Reiner & Co. v. Schwartz*, 363 N.E.2d 551, 554 (N.Y. 1977), as well as the many cases cited in the commentary to this section in McKinney’s Consolidated Laws of New York Annotated (2001 & Supp. 2003), each with slightly different fact patterns.

is unclear, though American courts have placed more emphasis on the place of signature of a contract than have the European courts, and certainly more than the Brussels–Lugano regime.<sup>19</sup> But what if negotiations took place both in New York and in Barcelona, each party inspected the other’s facilities, and the final contract was concluded by mail? Does it matter who signed last? What if rather than mail, the contract was concluded by fax or telex, with only confirmation copies exchanged by mail afterwards?<sup>20</sup> Or what if the negotiations, or the final stage of the negotiations, had been conducted by e-mail? Once more I have no clear answer, which means that the defendant—the Spanish distributor in our case—may well have reason to litigate the question of jurisdiction.

(8) For the time being, I omit the possibility that the defendant will choose, or be advised to choose, to default—that is to make no response whatever to the New York action even after having received valid service of process. But how about bringing a counter-suit in Spain? I do not refer to an antisuit injunction, which would require an extensive diversion.<sup>21</sup> But suppose the distributor applies to the Spanish court for a declaration that the contract remains in effect and for an order preventing the manufacturer from appointing a different

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19. *Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 29 I.L.M. 1413, 1419 (1990), 33 O.J. EC C189/35 at 189/43, 28 July 1990; see also Council Regulation 44/2001, art. 5(1), 2001 O.J. (L 12) 1, 4. In matters relating to contract, this Article provides for special jurisdiction only at the place of performance of the obligation in question, and makes no reference to the place of contracting. *Id.* I note, however, that according to the Spanish LEY ORGÁNICA DEL PODER JUDICIAL [L.O.P.J.] art. 22.3, if the place of contracting or the place of performance was in Spain, Spanish courts appear to be competent to adjudicate a claim under the contract.

20. For the answer in England, see *Entores, Ltd. v. Miles Far East Corp.*, [1955] 2 Q.B. 327, 327–28, 331 (Eng. C.A.), holding that communication by telex is like a face-to-face meeting, so that the place of acceptance rather than the “mailbox rule” would determine the place of contracting, and because that was in England, jurisdiction in England would be upheld.

21. For my own rather negative attitude to antisuit injunctions, see Andreas F. Lowenfeld, *Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AM. J. INT’L L. 314 (1997), and Andreas F. Lowenfeld, *Forum Non Conveniens and Antisuit Injunctions: An Update*, 92 AM. J. INT’L L. 41 (1998).

distributor for Spain and Portugal. Can the distributor persuade the Spanish court to exercise jurisdiction over the American manufacturer?

The answer ought to be “yes” if the manufacturer has carried out an act in Spain that gives rise to the claim, or if Spain is deemed to be the place of performance of the contract.<sup>22</sup> But in our hypothetical the manufacturer has stopped sending merchandise, or announced that he would suspend further shipments as of July 1. Is that enough to support jurisdiction of the Spanish court? What about the many shipments made during the period when the manufacturer and the distributor were on good terms? Does the place where payment was made determine the answer? Is the place of passage of title or property decisive? Do the decisions of the European Court of Justice on this issue<sup>23</sup>—rendered before Spain was a member of the Community and under a treaty not here applicable—determine the jurisprudence of the Spanish court vis-à-vis an American defendant? And what about the fact that the suit in New York was filed first?

#### IV. SOME FINAL THOUGHTS

Perhaps it is unfair to throw out so many questions, and offer so few answers. But I have not, as students often suspect, withheld the answers sitting in my desk drawer. Nor should one expect this symposium, or any individual decision of a court or arbitral tribunal, to supply definitive answers.

One can expect that as our countries and our continents grow closer together, the litigation problems will become more intense and more frequent. My hope is that by understanding how others view the same problems that we have difficulty solving, tensions and defiance will abate. We will continue to litigate, and indeed litigate about litigation. I do hope, however, that the end-game is not focused on denial of recognition of each others' judgments. Even if U.S. judgments based on

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22. See L.O.P.J. art. 22.3 (Spain).

23. See, e.g., Case 12/76, *Industrie Tessili Italiana Como v. Dunlop AG*, 1976 E.C.R. 1473, Oct. 6, 1976 (referring the question of place of performance to the forum state in accordance with that state's rules of conflict of laws).

questionable jurisdiction are not easily enforced in Europe, and European judgments in the circumstances discussed are not easily enforced in the United States, a decision not to appear at all in the other's forum may be the instinctive answer, but it will often not be a wise one. I believe that disputes should be heard with all parties participating, and that the results—even if sometimes startling—should be given effect and the controversies terminated.