

**Conference on Transatlantic Business Transactions:
Choice of Law, Jurisdiction and Judgments**

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INTRODUCTORY ADDRESS

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I take it the task of a keynote speaker is not to answer all -or indeed any of the questions put before the Conference, but to whet your appetite for listening to the distinguished speakers who will address the particular topics assigned to them. I want to try, in this introductory talk, to relate the respective topics -- which are often addressed in somewhat abstract context -- 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 American (or North American) importers, and American producers and European or Latin American importers, licensees, or franchises. The products have ranged from machine tools to contraceptives, from wines to cell phones. In some instances the contracts have included patent or trade mark 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 quota -- with a variety of causes that may or may not justify extension of deadlines or termination. 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 every contingency must be provided for. 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 about 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 to be addressed at this conference 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.

I

I want to begin with the familiar topic of party autonomy, in the context of variations on the contract between the manufacturer in one country and the distributor in another that runs throughout my talk.

Not so long ago, except in England, party autonomy was a real problem. 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?

When I was admitted to the bar, not quite half a century ago, and even when I began to teach some dozen years later, 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 here represented. 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. I hope we will explore the qualifications over the next two days, and I propose to begin the process by running through some variations -- eight in all -- to the prototype case, let us say 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 Union. 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.¹ I

¹ I have not explored this question thoroughly. My belief

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.

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 Article 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.

(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 the EU 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,² though the parallel is not exact. If the arbitrators, having rejected a 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."³ 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 don't 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 publico*) under Article V(2)(b) of the New York Convention, but I'm not sure. We return to that part of the puzzle in a moment.)

(4) The next variation is like the preceding one except that the contract provides for arbitration in Geneva. We have the famous case of *G., S.A. v. V., S.p.A.*,⁴ a dispute between a Belgian and an Italian firm that 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, but the Swiss Supreme Court (Tribunal Federal) 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.

I started to say that means 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, but then I remembered Article 187 of the Swiss Private International Law Statute which says

² *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

³ For a critique of 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 at 706 (7th Cir. 1994, Posner, C.J.).

⁴ 118 BGE/ATF 193, Swiss Federal Tribunal April 28, 1992, English version in 18 Yearbook of Commercial Arbitration 143 (1993).

The arbitral tribunal shall decide the case according to the rules of law agreed upon by the parties....,

which you will remember, was California law. I think Article 187 of the PIL, in the chapter on arbitration, takes precedence over Article 137, in the chapter on obligations addressed to Swiss courts, which states

Claims of restraint of competition are governed by the law of the country in whose market the restraint directly affects the damaged or injured party.⁵

I began this talk by stating that my task is to raise questions, not to answer them. Here is one more that I cannot answer with confidence.

(5) In the next variation everything is the same except that the arbitration clause refers to the Netherlands Arbitration Institute, with headquarters in Rotterdam, i.e., within the European Union. We know from the *Eco Swiss* case⁶ that an arbitral award inconsistent with the competition rules of the European Community is to be regarded as contrary to public policy. 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 only if raised by the parties, or indeed whether the arbitrators have jurisdiction over competition claims or defenses at all.⁷ If not, are they supposed to decide the other issues, as was the usual American practice before *Mitsubishi*⁸ -- Another question I cannot answer.

(6) As you would 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 distributor is pushing his own

⁵ Accord, Heini, Keller, Siehr, Vischer, Volken, IPRG Kommentar, commentary A(II) to Article 187 (1993); Lalive, Poudret, Reymond, Le Droit de l'Arbitrage, commentary 16 to Article 187 (1989).

⁶ Eco Swiss China Time Ltd. v. Benetton International NV, Eur. Ct. of Justice Case C-126/97, [1999] ECR I-3055, June 1, 1999.

⁷ 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, (Nafziger and Symeonides eds. 2002).

⁸ See, e.g., Sam Reisfeld & Son Import Co. v. S.A. Etenco, 530 F.2d 679 (5th Cir. 1976); also the decision of the Court of Appeals in Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, 723 F.2d 155 (1st Cir. 1983), rev'd, 473 U.S. 614 (1985).

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 ICC, except for issues going to validity or infringement of the patent. Claimant brought suit in federal court in Texas, defendant moved for a stay pending arbitration, and the Court, consistently 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, is permitted in the United States by statute since 1982.⁹ Would it have been permitted if the arbitration clause pointed to Geneva, or to Rotterdam, as in our previous variations, or 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 that defendant had infringed claimant's patent and owed damages be enforceable under the New York Convention, say in Spain? Once more, I leave you with questions. I hope you will be enlightened about some or all of the questions during the Conference, but if the answers don't emerge clearly I hope that you will join me in continuing to think about them.

II

Thus far, I have touched on choice of law, 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 look different depending on where you stand and where you sit. I have not yet touched upon where I should perhaps have started -- jurisdiction to adjudicate absent any forum selection by the parties.

⁹ 35 U.S.C. § 294.

Contracts without forum clauses are more common than one might think, not because lawyers are not involved, which is unlikely in our paradigm contract between a manufacturer in one country and a distributor in another. The party that thinks it more likely that it will be defendant rather than plaintiff has no incentive to provide an assured forum; one or both parties may reject arbitration on various grounds; and each side may well 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 well say "Let's cross that bridge when we come to it." Well, here at this Conference, we have come to the bridge.

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,¹⁰ 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.¹¹

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 situaçao inversa*) be interpreted? Could the Portuguese plaintiff try to explain the transacting business provision of New York's long-arm statute¹² 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.¹³ 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, we'll keep him in New York, wants to sue the distributor -- let us say for a declaration that the contract is terminable because the distributor has

¹⁰ Portugal: *Codigo de Processo Civil* (1961 and amendments).

¹¹ *Id.* Art. 65(1)(c).

¹² New York Civil Practice Law and Rules (C.P.L.R.) §302(a)(1).

¹³ See the Report by Almeida Cruz, Desantes Real, and Jenard on the Accession of Spain and Portugal to the Brussels Convention, 33 O.J. ECC 189/35 at 189/43, 28 July, 1990.

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.¹⁴ If we remove some of these elements, for instance if there was no inspection of the plant and most of the negotiations were conducted here in Barcelona, but the distributor came to New York to sign the contract, the answer is unclear, though American courts have placed more emphasis on the place of signature of a contract than the European courts, and certainly more than the Brussels/Lugano regime.¹⁵ But what if negotiations took place both in New York and in Barcelona, each

¹⁴ See, e.g., George Reiner and Co. v. Schwartz, 41 N.Y.2d 648, 394 N.Y.S.2d 844, 363 N.E.2d 551 (1977), as well as the many cases cited in the commentary to this section in McKinney's Consolidated Laws of New York Annotated (2001 plus 2003 Supp.), each with slightly different fact patterns.

¹⁵ See Brussels Convention Article 5(1) (also EU Regulation No. 44/2001, Article 5(1), which in matters relating to contract, provides for special jurisdiction only at the place of performance of the obligation in question, and makes no reference to the place of contracting. I note, however, that according to the Spanish Ley Orgánica del Poder Judicial (LOPJ) Article 22(3), if the place of

side 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?¹⁶ Or, God forbid, what if the negotiations, or the final stage of the negotiations, were conducted by e-mail? Once more I leave the answers to those who follow me, confident only that the answer they give will contain the word "probably" or something like it, which means that the defendant -- the Spanish distributor in our case -- may well have reason to litigate the question of jurisdiction -- litigation about litigation.

(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 good service of process. But how about bringing a counter-suit here in Spain? I am not speaking of an anti-suit injunction. That is for another day. 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 distributor for Spain and Portugal. Can the distributor persuade the Spanish court to exercise jurisdiction over the American manufacturer?

contracting or the place of performance was in Spain, Spanish courts appear to be competent to adjudicate a claim under the contract.

¹⁶ For the answer in England, see e.g. Entores, Ltd., v. Miles Far East Corporation, [1955] 2 Q.13. 327 (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 since that was in England, jurisdiction in England would be upheld.

The answer ought to be "yes" if the manufacturer has carried out in Spain an act that gives rise to the claim, or Spain is deemed to be the place of performance of the contract.¹⁷ But in our hypothetical the manufacturer has (1) stopped sending merchandise, or (2) 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 in 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 issue¹⁸ -- 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, by the way, what about the fact that the suit in New York was filed first?

* * * * *

I think that even focusing only on one fairly common type of contract I have raised enough questions to keep us busy here for the next two days. I hope that those who follow me will try to answer some of the questions, even if that means departing from your prepared papers. I leave you only with one thought. Just as the judgment of the New York court can be enforced throughout the United States and for a long time, so the judgment of the Spanish court can be enforced throughout more and more of the European continent, including the offshore islands -- U.K. and Ireland. Even if American judgments based on 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.

. . . We have a lot to talk about.

¹⁷ See LOPJ Art. 22.3, note 15 supra.

¹⁸ See, e.g., Tessili v. Dunlop, [1976] E.C.R. 1973, 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.