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Abstract

The second edition of Exclusive Distribution is, quite frankly, an indispensable source when reviewing the compatibility of exclusive distribution agreements with Article 85 of the Treaty Establishing the European Economic Community (the "EEC Treaty"). Its indispensability lies, in part, in the fact that distribution issues comprise the vast bulk of an EEC competition practitioner's ongoing antitrust work. The provision of exclusive territories, or the promise to purchase on an exclusive basis are, in turn, the most popular forms of distribution arrangement used in the EEC. The indispensability also lies in the fact that the book manages to cover almost every conceivable problem area that could arise in practice. It is a constant source of satisfaction to the reviewer to be able to turn to the second edition of Exclusive Distribution and find that what he considered to be a novel question is already canvassed at length.

BOOK REVIEWS

EXCLUSIVE DISTRIBUTION AND THE EEC COMPETITION RULES: REGULATIONS 1983/83 & 1984/83. By Valentine Korah and Warwick A. Rothnie. Sweet & Maxwell, London, 2d ed. 1992. xxxvii + 377 pp. ISBN 0-421-458 70-4. UK £58 + P&P.

Reviewed by Peter Alexiadis *

Disproving the oft-touted notion that the dominant market player has a tendency to become "idle" if not challenged by new market entrants,[1] Professor Korah, the undisputed market leader in the world of European Economic Community ("EEC") competition law monographs,[2] has launched a new model. The new model replaces what had been her successful first edition of *Exclusive Distribution and EEC Competition Rules*[3] ("*Exclusive Distribution*"), published in 1984. The old model's success, however, was probably due as much to its early penetration of the market as to its quality. Indeed, the first edition of *Exclusive Distribution*, being the first of her monographs, was arguably the weakest product in Professor Korah's diverse product range.[4]

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1. Referred to as the "quiet life" in CHRISTOPHER BELLAMY & GRAHAM D. CHILD, COMMON MARKET LAW OF COMPETITION 87, § 8-063 (Supp. 3d ed., 1991). Accepted in part by implication in the treatment of public monopolies under EEC law; see Porto de Genova v. Siderurgica Gabriella, Case C-179/90 (Ct. First Instance, December 10, 1991) (not yet reported).

2. On the basis of the judgment of the European Court of Justice in AKZO Chemie v. Commission, Case C-62/86 (Eur. Ct. J., July 3, 1991) (not yet reported), a market share of 50% will usually be presumed to constitute a position of market dominance.

3. *Compare* VALENTINE KORAH & WARWICK A. ROTHNIE, EXCLUSIVE DISTRIBUTION AND THE EEC COMPETITION RULES: REGULATION 1983/83 & 1984/83 (2d ed. 1992) [hereinafter EXCLUSIVE DISTRIBUTION] *with* VALENTINE KORAH, EXCLUSIVE DISTRIBUTION AND THE EEC COMPETITION RULES (1984).

4. VALENTINE KORAH, EEC COMPETITION LAW AND PRACTICE (4th ed. 1990); VALENTINE KORAH, EXCLUSIVE DEALING AGREEMENTS IN THE EEC: REGULATION 1983/83 AND 1984/83 (1984) (2d ed. 1992); VALENTINE KORAH, FRANCHISING AND THE EEC COMPETITION RULES, REGULATION 4087/88 (1989); VALENTINE KORAH, KNOW-HOW LICENSING AGREEMENTS AND THE EEC COMPETITION RULES, REGULATION 556/89 (1989); VALENTINE KORAH & WARWICK A. ROTHNIE, R & D AND THE EEC COMPETITION RULES—REGULATION 418/85 (1986); VALENTINE KORAH, PATENT LICENSING AND EEC COMPETITION RULES: REGULATION 2349/84 (1985); ENCYCLOPEDIA OF COMPETI-

A wealth of administrative practice by the Commission of the European Communities (the "Commission") and a number of important judgments in the distribution field by the European Court of Justice (the "Court of Justice") in the intervening years meant that the first edition was seen by other potential competitors as a model that had outlived its "sell by" date. Consequently, a number of new market entrants appeared. With the release of her second edition, however, Professor Korah has regained her ascendancy as the primary source for EEC competition law relating to distribution practices. She has done so through a combination of factors, the most important of which has been her recruitment of the services of a joint venture partner, Warwick A. Rothnie. Mr. Rothnie has not only added valuable research & development ("R & D") to the second edition, but has also assisted greatly in the improvement of its argumentation, readability, and presentation.

Where the work of one joint venturer starts and that of the other ends is at times difficult to discern.[5] What is manifestly clear, however, is that the second edition of *Exclusive Distribution* is the most lucid, clear, and practice-oriented of all of Professor Korah's monographs. A decided improvement is that the second edition no longer has the "stream of consciousness" aura that characterized certain parts of the first edition. Indeed, the second edition of *Exclusive Distribution* has, in a very short time, established itself as the standard text on distribution practices for EEC competition law practitioners in Brussels. There is no doubt that EEC lawyers in the United Kingdom, in addition to U.S. lawyers with an EEC law practice, will hold similar views. The degree of innovation between the first and second editions of *Exclusive Distribution* may indeed cause difficulties for Professor Korah because the release of the second edition may be viewed in many circles as erecting insurmountable barriers to entry for Professor Korah's competi-

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TION LAW IN WESTERN EUROPE AND THE USA (contributing author on U.K. competition law).

5. The more astute reader will be aware that, for the purposes of EEC law, different legal regimes apply for the appraisal of joint ventures depending upon whether they are characterized as being concentrative or cooperative. Although this distinction is immaterial in the present context, the Korah/Rothnie collaboration would appear to be cooperative in nature, as neither of the joint venture partners has otherwise withdrawn from the market individually.

tors.[6]

The second edition of *Exclusive Distribution* is, quite frankly, an indispensable source when reviewing the compatibility of exclusive distribution agreements with Article 85 of the Treaty Establishing the European Economic Community (the "EEC Treaty").[7] Its indispensability lies, in part, in the fact that distribution issues comprise the vast bulk of an EEC competition practitioner's ongoing antitrust work. The provision of exclusive territories, or the promise to purchase on an exclusive basis are, in turn, the most popular forms of distribution arrangement used in the EEC. The indispensability also lies in the fact that the book manages to cover almost every conceivable problem area that could arise in practice. It is a constant source of satisfaction to the reviewer to be able to turn to the second edition of *Exclusive Distribution* and find that what he considered to be a novel question is already canvassed at length. To the extent that the book does not do so, Professor Korah would no doubt appreciate a short note indicating what point has not been covered.

At least so far as non-EEC specialists are concerned, perhaps a bird's-eye view of the relevant EEC competition rules that apply in a distribution context is advisable. An understanding of the basic manner in which these rules operate is, in the view of the reviewer, necessary to better appreciate the value of *Exclusive Distribution*. Article 85(1) of the EEC Treaty prohibits all manner of agreement the intention or effect of which is a restriction of competition.[8] Article 85(1) is the European Community equivalent to section 1 of the Sherman Act.[9] It is not, however, interpreted in a like manner to its U.S. counterpart. Pursuant to Article 85(2) of the EEC Treaty, an infringement of the prohibition in Article 85(1) results in the automatic nullity of the offending provision in a distribution

6. Although in Berkey Photo, Inc. v. Eastman Kodak Co, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), it was upheld that a market player with a large market share may be aggressive in its development of new products even though this may render smaller firms less competitive.

7. Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 1 (1958), *amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [treaty as amended hereinafter referred to as EEC Treaty].

8. *See* EEC Treaty, *supra* note 7, art. 85(1).

9. 15 U.S.C. §§ 1-7 (1890).

agreement and possibly even the agreement in its entirety (depending upon the respective national laws that determine whether or not the offending provision is severable). This means that a supplier cannot enforce a provision that falls foul of Article 85(1) in a national EC Member State court.

The sanction of nullity would not pose an intractable problem if Article 85(1) of the EEC Treaty were interpreted in a flexible manner similar to the rule of reason approach under U.S. antitrust law. Unfortunately, a policy toward vertical restraints similar to that taken in *Continental T.V. Inc. v. GTE Sylvania Inc.*[10] has not yet found favor with the EC Commission. Instead, the Commission has, by and large, adopted a very formalistic approach in determining what constitutes a "restriction" of competition. The inevitable consequence of this approach is that many obligations imposed by a supplier on its exclusive distributor constitute a technical infringement of Article 85(1), even though their net effect is the promotion of inter-brand competition. By way of example, the mere grant of exclusivity, save in exceptional circumstances,[11] is said to constitute a technical restriction of competition contrary to Article 85(1). The relevant restriction of competition is said to lie in the fact that a supplier has denied himself the ability to appoint further distributors.

The policy basis for such a prima facie counter-intuitive approach is twofold. First, the Commission's enforcement agenda in the field of distribution is as much influenced by its desire to forge a true internal market as it is by pure competition concerns. As was explained by the Commission in 1983,

> these various forms of distribution and the relationships they involve pose less problems in a large, integrated and highly competitive market like that of the United States than in a large market that has not yet attained a very high degree of integration of its commerce like the European Com-

10. 433 U.S. 36 (1977).

11. *See* Société Technique Minière v. Maschinenbau Ulm GmbH, Case 56/65, [1966] E.C.R. 235, [1966] C.M.L.R. 357 (exclusivity necessary to penetrate a new geographic market); Coditel SA v. Ciné Vog Films SA, Case 262/81, [1982] E.C.R. 3381 (absolute territorial protection permissible in relation to copyright in performing rights); Erauw-Jacquery SPRL v. La Hesbignonne SC, Case 27/87, [1988] E.C.R. 1919, [1988] 4 C.M.L.R. 576 (exclusivity granted in relation to plant breeders' rights in basic seed).

munity.[12]

The natural consequence of this concern is that the Commission devotes more time to the prohibition of restrictions affecting intra-brand competition than it does with respect to inter-brand competition. Secondly, the Commission was concerned in the formative stages of the Community to assert its antitrust jurisdiction, partially as a reflection of the fact that, aside from Germany, there were no effective domestic antitrust regimes operating in the EEC at the time. For better or worse, until the internal market has become a reality and until the principle of subsidiarity in competition law matters is fleshed out, these enforcement priorities will continue.

The rather formalistic approach taken by the Commission on the notion of a "restriction" of competition has been to some extent counterbalanced by the liberal use of its powers of individual exemption under Article 85(3) of the EEC Treaty.[13] Under Article 85(3) the Commission can, upon satisfaction of a number of pro-competitive factors, exempt agreements from the Article 85(1) prohibition.[14] Exempted agreements can thereafter be enforced in Member State courts. Article 85(3) reflects, for all intents and purposes, a truncated rule of reason approach that is applied only ex post facto upon an infringement of Article 85(1). In one of the greater contradictions of EEC law, the very obligation that is held by the Commission to be "not necessary," and hence a technical infringement of Article 85(1), can nevertheless be found to be "indispensable" and hence worthy of an individual exemption under Article 85(3).

The problem with this approach is that because only the Commission has the legal power to grant an exemption, all requests for exemption must be made to the Commission itself, rather than to the antitrust authorities or courts of a Member State. This process, given the limited resources of the Commission is, for all practical purposes, unworkable from a commercial point of view. Consequently, the Commission has

12. COMMISSION THIRTEENTH REPORT ON COMPETITION POLICY 25 (1983).

13. EXCLUSIVE DISTRIBUTION, *supra* note 3, at 35-36, § 2.1; *see* EEC Treaty, *supra* note 7, art. 85(3).

14. *See* EEC Treaty, *supra* note 7.

needed to adopt a series of "Block" Exemption Regulations.[15] Under these Block Exemptions, certain types of commonly used agreements are deemed to be *automatically exempt*, and hence do not require notification under Article 85(3) of the EEC Treaty, if they fulfill the formal requirements of these Block Exemption Regulations.

The most commonly used block exemptions relate to exclusive distribution agreements (where a supplier grants an exclusive territory to a dealer) and to exclusive purchasing agreements (where a dealer promises to buy the full amount of its requirements in the contract goods from the supplier, but has not been granted an exclusive territory).[16] The second edition of *Exclusive Distribution* focuses primarily upon these "Block" Exemption Regulations and explains how business people and their legal advisors can draft their agreements so as to fit within their terms.[17] As hardened EC counsel will explain, this is the *only* means by which commercial persons can be guaranteed a very high degree of legal certainty that their agreements are unimpeachable under EEC antitrust rules.

Exclusive Distribution is, then, first and foremost, a legal guide as to how to conform with the rigors of the relevant Block Exemption Regulations. In doing so, its authors embark upon an exhaustive analysis of the strict terms of the Regulations, as supplemented by the Commission's own interpretive Notice on both Regulations.[18] Wherever possible, recourse is made to informal Commission administrative practice that sheds light upon the interpretation of the Regulations. The presentation of the individual provisions of the Regulations side-by-side with the appropriate comment from the Commission's Notice is, in the mind of this reviewer, a particularly effective means for treating this area of the law. In what has now

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15. *See* EXCLUSIVE DISTRIBUTION, *supra* note 3, at 35-36, § 2.1, 59-60, § 3.1.

16. *See* Commission Regulation No. 1983/83, O.J. L 173/1 (1983) on the application of Article 85(3) of the EEC Treaty to categories of exclusive distribution agreements, *amended by* O.J. L 281/24 (1983); *see also* Commission Regulation No. 1984/83, O.J. L 173/5 (1983), *corrected version in* O.J. L 281/24 (1983), on the application of Article 85(3) of the EEC Treaty to categories of exclusive purchasing agreements.

17. *See* EXCLUSIVE DISTRIBUTION, *supra* note 3, at 59-97, §§ 3.1-3.27.

18. Commission Notice concerning Commission Regulations No. 1983/83, No. 1984/83, O.J. C 101/2 (1984) on the application of Article 85(3) of the EEC Treaty to categories of exclusive distribution and exclusive purchasing agreements.

become a "Korahesque" shorthand means of designating which types of provisions benefit from the terms of a Block Exemption Regulation, the notion of "whitelisted" and "blacklisted" clauses is used to designate what is acceptable and what is not.[19] This jargon has become so all-pervasive over the last decade that even the members of the Commission itself refer to these clauses by these *noms des plumes*. It should be noted that the Commission is not averse to creating its own jargon. In what must be the quintessence of compromise between the need to preserve the integrity of the internal market and commercial realities, the Commission has sought to differentiate between the notion of "passive" and "active" sales, and has determined that the restrictions, which may or may not apply to either type of sale, vary.[20]

So far, so good. What happens, however, if business people are not interested in straight-jacketing their distribution agreements to conform strictly to the terms of Regulations 1983/83 or 1984/83? The second function of *Exclusive Distribution* is to explore the fundamental thinking of both the Court of Justice and the Commission regarding distribution practices as a means of permitting business people to evaluate the risks of not falling within the terms of the appropriate Block Exemption Regulation. This is not a simple task, particularly when one considers that EEC competition law is ridiculously fragmented, with different legal regimes applying for selective distribution,[21] franchising,[22] agency, exclusive distribution, exclusive purchasing, and the special regime available for automobile distribution.[23] The degree of fragmentation is a reflection of the fact that the Commission has formulated its rules in the distribution field in an ad hoc manner in response to new

19. *See generally* EXCLUSIVE DISTRIBUTION, *supra* note 3, at 127-48, § 5.1-5.11.

20. *See id.* at 99-125, § 4.1-4.5.

21. *Id.* at 254-70, § 10.1-10.8. "Selective distribution" is the term used in Community law to describe distribution systems whereby the supplier, usually a brand owner, limits the number of kinds of dealers whom he will permit to resell his products and requires that his dealers should sell only to end users or other approved dealers.

22. *Id.* at 284-87, § 11.4-11.5; *see* Block Exemption Regulation No. 4087/88, O.J. L 359/46 (1988) on the application of Article 85(3) of the EEC Treaty to categories of franchise agreements.

23. Commission Regulation No. 123/85, O.J. L 15/16 (1985) on the application of Article 85(3) of the EEC Treaty to certain categories of motor vehicle and distribution and servicing agreements.

methods of marketing in the Community. Arguing by analogy with all these other legal rules may not provide absolute legal comfort to those whose agreements fall outside the four corners of a particular Block Exemption Regulation,[24] but it is nevertheless of invaluable assistance in lessening legal risks and diminishing the severity of any administrative fines that may be imposed by the Commission. It should not be forgotten that the pros and cons of these alternative methods of distribution are usefully compared with the principal focus of the book's attention—exclusive distribution.

Exclusive Distribution is also a very useful book because it differentiates clearly for the reader the nuances in legal interpretation as between the Commission and the Court of Justice.[25] The importance of this distinction in practice is often forgotten in other texts that tend to treat the jurisprudence of the Court of Justice and the administrative practice of the Commission as a unified whole, which clearly they are not.

The authors also provide an interesting critique of the Commission's administrative practice in the field of distribution generally.[26] This critique is useful for practitioners keen on defending their legal positions in the context of a Commission investigation. It is also instructive to members of the Commission itself. It is well known within the Commission that Professor Korah has a number of her admirers working within its walls and her line of argument occasionally surfaces in the text of a published Commission decision. The criticisms are found sporadically throughout the text, but the authors have seen fit to distill most of their trenchant criticisms through the combined effect of chapters one and nine. Pleas for a more *ex ante*, as opposed to an *ex post*, orientation in the Commission's thinking have fallen on deaf ears in the past.

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24. For example, it has become clear in the course of separate investigations into the agricultural machinery sector (Commission Press Release, IP (90) 917 (November 16, 1990)), and into the motorcycle sector (*Honda*, Commission Press Release, IP (92) 544 (July 3, 1992)) that distribution agreements in those sectors cannot benefit by analogy from the terms of Regulation 123/85. In Ford Agricultural, O.J. L 20/1 (1993) L 20/1, however, the EC Commission, in deciding to waive the imposition of administrative fines, did take into account the fact that the defendants were of the view that their interference with sales to authorized dealers was justified under Regulation 123/85.

25. *See* EXCLUSIVE DISTRIBUTION, *supra* note 3, at 51-53, § 2.9.

26. *Id.* at 243-50, § 9.1-9.6.

There are signs, however, that Professor Korah's exhortations are finding greater favor with those who shape policy decisions. In fact, if the Commission's avowed policy of decentralizing EEC competition law so that it is administered in the Member States rather than in Brussels is to have any meaning, much of the reasoning pioneered in *Exclusive Distribution* will need to be followed in the future, whether by design or by default. If national authorities are to play a constructive role in the enforcement of EEC competition rules, the system cannot go on indefinitely finding that everything contravenes Article 85(1) and requires Article 85(3) exemption. As mentioned earlier, it is only the Commission that has the power to grant an individual exemption.[27] Having said this, the reviewer notes with some satisfaction that, in putting forth his criticisms of the second edition of *Exclusive Distribution*, the more behavioralist hand of Mr. Rothnie has steadied some of Professor Korah's Chicago-school excesses of yore.

Finally, and not unimportantly, it should be noted that *Exclusive Distribution* is well produced, is accompanied by a useful index, and contains the text of the relevant Block Exemption Regulations[28] and the Commission's Interpretive Notice.[29]

It is perhaps at this time in the review that a criticism is appropriate. I can think of only one. I have not as yet been informed by the publishers of the estimated publication date of the third edition.

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27. *See supra* note 13 and accompanying text (discussing requirement that all requests for exemption must be made to Commission).

28. EXCLUSIVE DISTRIBUTION, *supra* note 3, at 309-50.

29. *Id.* at 351-65.

CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION. By Horacio A. Grigera Naón. Tübingen: Mohr, 1992. xii + 337 pp. IBSN 3-16-145636-X. DM 129.

*Reviewed by Joseph T. McLaughlin**

In Professor Grigera Naón's latest work, *Choice-of-law Problems in International Commercial Arbitration*,[1] he attempts to "analyze diverse aspects of international commercial arbitration so as to determine to what extent arbitral tribunals are willing to perform the independent role ascribed to them by *lex mercatoria* theoreticians, namely, the creation of an autonomous, anational and all-prevailing international commercial law."[2] This introduction is as broad as the scope of international arbitration itself. Professor Grigera Naón's lofty ambition is somewhat blunted, however, by the complexity of his thoughts and ponderous writing style. While the title of the book suggests a relatively discrete field of study, the author follows virtually every available detour onto complicated pathways of international law, policy, national court systems, and the theoretical bases for that "Alice in Wonderland" doctrine known as *lex mercatoria*.[3]

The book's strongest point is its description of choice-of-law methodologies in various countries throughout the world.[4] The author's analysis of these methodologies is quite extensive, spanning nearly 150 pages.[5] Professor Grigera Naón dissects the choice-of-law rules followed by some of the world's major commercial powers including the United States,[6] the United Kingdom,[7] the Federal Republic of Germany,[8] and, cu-

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1. HORACIO A. GRIGERA NAÓN, CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION (1992) [hereinafter CHOICE-OF-LAW PROBLEMS].
2. *Id.* at 1.
3. *Id.* at 26-37.
4. *Id.* at 153-284.
5. *Id.*
6. *Id.* at 168.
7. *Id.* at 161.
8. *Id.* at 210.

riously, Argentina.[9] He continues with a discussion of the Socialist systems, from (former) Soviet jurisprudence to the law of the People's Republic of China, particularly in the context of their commercial relations with non-Socialist countries.[10]

In his quest to make the point that parties should not be completely free to choose what law should apply to their commercial relations, Professor Grigera Naón examines a number of legal systems, including the law of the United Kingdom.[11] He begins by noting that "[i]f taken literally, the proper law doctrine [United Kingdom's prevailing choice-of-law doctrine] would embody a recognition of the absolute freedom of the parties to choose the applicable law even if the law so chosen has no connection with the transaction or the dispute."[12] The author's tone suggests a certain distrust of such freedom. He then analyzes the relevant U.K. law with a discussion of the seminal case of *Vita Food Products v. Unus Shipping Co.*[13] In *Vita*, Lord Wright held the parties' express statement as to choice-of-law conclusive "provided the intention expressed is *bona fide* and legal."[14] Professor Grigera Naón then points out that the "*bona fide* and legal" requirement requires reference to a legal order, possibly different than that chosen by the parties, in order to determine whether this requirement has been met.[15] From this the author concludes that compulsory limitations may be imposed on choice-of-law provisions in order to balance the interests of the contracting parties and "the concerns of third parties and of communities connected with the transaction."[16]

Absent examples, which the author does not offer, it is difficult to criticize his abstract conclusions. Surely most members of the international legal community would agree that the parties' contractual autonomy is limited in certain basic respects, for example, an agreement to bribe a public official is

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9. *Id.* at 187.
10. *Id.* at 179-87.
11. *Id.* at 161-67.
12. *Id.* at 162.
13. *Id.* (citing Vita Food Products v. Unus Shipping Co., 1 All E.R. 513 (Privy Council 1939).
14. Vita Food Products v. Unus Shipping Co., 1 All E.R. 513, 521 (Privy Council 1939).
15. CHOICE-OF-LAW PROBLEMS, *supra* note 1, at 164.
16. *Id.*

not enforceable. However, notwithstanding Professor Grigera Naón's fondness for abstract theories of choice-of-law limitations, the parties' choice-of-law should not be subjected to indiscriminate attack based upon unspecified "concerns of third parties" if there is to be the necessary predictability in the international business community.

Professor Grigera Naón, however, does point out a number of ways in which the U.K. courts have restricted the freedom of the contracting parties to choose the applicable law.[17] One such example is the courts' policy of holding a contract invalid if it would be invalid under the law of the place of performance when the place of performance is other than the United Kingdom.[18] The author concludes his discussion of the U.K. choice-of-law approach by noting that it is "compatible with emerging functionally-oriented methodologies in the field."[19]

The author's analysis of the choice-of-law rules of the United States includes a discussion of methodologies used to choose the applicable law when the parties have not agreed on what law would apply to any disputes.[20] This is the only instance where the author extensively discusses the issue of choice-of-law in the absence of an expressed intent by the parties to the contract. Here, also, in discussing U.S. law, Professor Grigera Naón makes what might well be his most telling point: that each forum, in cases of true conflict with competing policies of equal force, will apply its own law.[21] Such an observation should come as no surprise to international practitioners because judges and arbitrators are generally more familiar with the law of their home state and thus more likely to apply it, given any choice in the matter.

Professor Grigera Naón also discusses the sharp contrast between the classic socialist and capitalist positions on freedom to choose the applicable law:

> It is in the sector of relations between socialist and capitalist enterprises where socialist laws allow greater freedom

17. *Id.* at 165-66.
18. *Id.* at 166.
19. *Id.* at 167.
20. *Id.* at 168.
21. *Id.* at 171.

> to contractual autonomy and choice-of-law stipulations because there is a general consciousness of the differences in the social, political and economic systems to which the parties belong and the impossibility of insisting upon certain conceptions and institutions of the internal law of socialist nations in international transactions with capitalistic partners. In this sense, we seem to be confronted, although to a greater degree, with the same phenomenon observed when analyzing French and American law: the impossibility of extending the application of certain mandatory rules for domestic transactions to the sphere of international exchanges. This does not however imply a general willingness of socialist parties to submit their transactions with capitalist counterparts to a foreign law. Rather, on the contrary, they try to require through choice-of-law stipulations that their own special legislation, practices, customs and usages concerning international trade and economic relations govern their contracts.[22]

Thus, the prevailing (former) Soviet school of thought on choice-of-law attempts to promote (former) Soviet commerce, notwithstanding the fact that the legal analysis required may not always remain consistent.[23] Ironically, there appears to be a strong similarity between (former) Soviet law and that of the United States on choice-of-law. The U.S. Supreme Court recently held that "parties are generally free to structure their arbitration agreements as they see fit."[24]

In *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, the Court focused upon the parties' freedom to contract with complete autonomy, including agreements to submit any disputes to arbitration, to select a specific forum for the arbitration or to allow some claims to be decided by arbitration and some by judicial proceedings.[25] Ironically, (former) Soviet law also focuses upon the parties' freedom to contract as to choice-of-law. As Professor Grigera Naón notes, however, this is true only because in most cases

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22. *Id.* at 185.

23. Recent events in the former Soviet Union and Eastern Europe have outrun the author's ability to keep his extensive discussion of "Socialist Systems" current. This portion of the book already reads like a historical study rather than a topical analysis.

24. Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University, 489 U.S. 468, 478 (1989).

25. *Id.*

the parties have agreed that (former) Soviet law will apply and the arbitrators believe this will benefit (former) Soviet commerce.[26] The parties' freedom to contract would not be so easily upheld in a case where a different forum or a different law was chosen. This results in an inability to create an anational *lex mercatoria* or general principles of law superseding national law, as to which the author expresses his dissatisfaction.[27]

One might fairly question the support Professor Grigera Naón gives to either a *lex mercatoria* or a superseding general or anational law. These two amorphous doctrines are more conceptual myth than reality. Both provide arguments for undermining clear, unambiguous contractual choice-of-law clauses that, absent fraud, simply reflect the informed will of the parties. These mythical doctrines similarly allow one party to seek to avoid the application of the law freely chosen, despite the fact that the parties' intent was clearly expressed in their original contract.

It is precisely because the (former) Socialist systems have allowed a *lex mercatoria* to develop that non-Socialist parties can, or at least could in the past, freely contract with parties in these countries, because in so doing the non-Socialist parties could rely upon the contract's choice-of-law clause. This in turn allows the parties to plan for disputes that may arise, to consult legal advisors as to their obligations under the contract, and to take appropriate steps, if necessary, to protect their rights under the law applicable to the contract. By contrast, if, in Professor Grigera Naón's brave new world, the general principles of the *lex mercatoria* applied, the parties would be severely disadvantaged because they could not accurately assess their legal rights and obligations nor predict their ultimate exposure in the event of a dispute.

Professor Grigera Naón neatly summarizes the choice-of-law principles of Argentina, especially where the parties have not selected the applicable law in their contract.[28] In the case of "contracts already performed or to be performed outside of the place of contracting they will always be governed by the

26. CHOICE-OF-LAW PROBLEMS, *supra* note 1, at 187.
27. *Id.*
28. *Id.* at 189-90.

law of the place of performance."[29] The general rule in Argentina, however, is that the law of the place of concluding the contract will govern contracts made outside Argentina.[30] This provision in essence allows, as the author later points out, the parties to make a choice-of-law without including a specific clause in the contract denominated as such.[31] The author also advocates a practical method of determining the applicable place of performance.[32] This method looks to the facts of each contract as a whole on a case by case basis.[33]

After his discussion of Argentine choice-of-law principles, Professor Grigera Naón comments on the doctrines *fraude à la loi* and "abuse of rights," both of which limit the parties' autonomy in their choice-of-law.[34] Both doctrines are grounded in the notion that there are general principles of morality and justice that private parties cannot ignore when they enter into contractual relations. Once again, it is difficult to criticize the author's espousal of an abstract principle of general applicability, but it is difficult to assess the impact of such theories without specific examples which the author is not inclined to offer.

In the Federal Republic of Germany, the parties are granted fundamental freedom to choose the applicable law or forum.[35] However, in some cases German courts have required some contact between the law and the transaction.[36] Like Argentine law, there are limits in Germany that require the application of "public policy" and "*lois de police*" (international mandatory rules) limitations to the parties' freedom to make a choice-of-law.[37] As Professor Grigera Naón points out, these restrictions in Germany are similar to *fraude à la loi* doctrine as well as the "abuse of rights" doctrine in other countries.[38]

Professor Grigera Naón's discussion of French law in this area seems somewhat repetitive of his prior analysis of the

29. *Id.*
30. *See id.* at 189-97.
31. *Id.* at 195.
32. *Id.* at 197-204.
33. *See id.*
34. *Id.* at 203.
35. *Id.* at 210.
36. *Id.* at 211.
37. *Id.* at 212.
38. *Id.*

French choice-of-law rules.[39] In his analysis of a French statutory provision giving broad authority to the French courts to review arbitral awards (both foreign and domestic), the author notes that this scope of review will allow the parties or the arbitrators to choose *lex mercatoria* or general principles of law.[40] The author concludes that this freedom of choice "entitles arbitrators directly to designate the law they deem applicable without having to refer to a particular body of private international law which would justify that choice."[41]

Such an argument does not support the freedom of the parties to choose a particular law to govern their contract, nor does it provide comfort to those who, quite rightly, seek some certainty in their international commercial relationships. Sadly, the author does not consider these critical points, but rather resorts to the somewhat mythical *lex mercatoria* and general notions of "*ordre public international*" to explain his concept of freedom to choose an applicable law.[42]

After his discussion of choice-of-law principles, Professor Grigera Naón presents a section entitled "State Controls Over Arbitral Agreements, Proceedings and Awards."[43] This section explores the degree of control that states retain over international arbitration within their territorial jurisdiction. Once again, the analysis focuses upon a number of countries, including the United States, the United Kingdom, and France.

The author's discussion of U.S. law is particularly extensive and detailed, concluding with praise for the U.S. Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler—Plymouth, Inc.*, where the Court upheld the arbitration of an antitrust claim arising out of a transnational contract where the arbitration was to be held in Japan.[44] Professor Grigera Naón concludes that "the Supreme Court did weigh conflicting interests both for and against the arbitrability of certain disputes, thus observing a functional choice-of-law methodology for

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39. *Id.* at 155-61.

40. *Id.* at 229.

41. *Id.*

42. *Id.* at 230.

43. *Id.* at 219.

44. *Id.* at 235 (citing Mitsubishi Motors Corp. v. Soler Chrysler—Plymouth, Inc., 473 U.S. 614 (1985)).

finding a principled solution for the specific issue at stake."[45] His discussion analyzes a number of other cases integral to the development of U.S. law in this area, including *M/S Bremen v. Zapata Off-Shore Co.*[46] and *Scherck v. Alberto-Culver Co.*[47]

While Professor Grigera Naón's analysis of choice-of-law methodologies is extensive and detailed, his book suffers from some important flaws. The author's style at times becomes intolerably obtuse and complex. The author often combines many different and complicated ideas into a single sentence that runs on, and on and on.

To a certain extent, this text suffers from a lack of focus on a specific audience. The bulk of the book, an analysis of choice-of-law methodologies, provides useful background on the topic under the laws of major commercial countries. The forty-four page Table of Citations[48] is a useful collection of the relevant literature, legislation, and arbitral awards, although with two or three exceptions, the sources are all dated 1989 or earlier. However, in the end the author gives limited assistance to one who is looking to the book for what its title suggests, i.e., solutions, or at least a discussion of, the practical problems of choice-of-law in international commercial arbitration.[49]

The section of the book describing choice-of-law methodologies for international commercial arbitration is plagued with textual problems which drive the reader to multiple foreign language dictionaries and, ultimately, to distraction. The author makes extensive use of phrases and lengthy quotations in a number of languages (*e.g.*, Italian, German, Spanish, and French) other than English. Although an international law text should, by definition, be written for an international audience, an English language book should not require a multi-lingual translator to interpret the text for the presumably intended English-speaking audience.

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45. *Id.* at 240.
46. *Id.* at 233 (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972)).
47. *Id.* (citing Scherck v. Alberto-Culver Co., 417 U.S. 506 (1974)).
48. *Id.* at 293-337.
49. *Id.* at 285-91.