

IBT Essay Answer Outlines Fall 2008

The following are outlines of model answers in narrative form. They indicate what issues were reasonably raised by the questions, but do not contain the level of detail that an answer would ideally include.

Essay Question II.A. (70 points)

To avoid problems under Article 81 of the EC Treaty, the parties would want to fit within the Vertical Agreements Block Exemption (VABE). The VABE is potentially applicable because the parties operate at different levels in the production-distribution process—Jean's (J) manufactures and Koper (K) distributes—and J has less than 30% of the German market.

With respect to paragraph 1, territorial exclusivity is permitted under the VABE but the clause is ambiguous about whether J may sell into the territory. Territorial restrictions are permitted only on active selling into territories reserved to the manufacturer or other distributors so the last sentence should be redrafted, for example by replacing "sell" with "market."

Under the VABE, any obligation to buy more than 80% of the contract goods from the manufacturer, like the purchase obligation in paragraph 2, is considered a non-compete obligation. Non-compete obligations that are indefinite or exceed 5 years are not enforceable. Although the term of this agreement is only 4 years, the fact that J may renew it unilaterally would make it tacitly renewable beyond 5 years. To fix this provision, paragraph 4 could be changed to require the express consent of both parties for renewal or the purchase obligation could be reduced to 80%. Paragraph 6 extends the non-compete obligation after termination, but this must be limited to 1 year to be enforceable.

Paragraph 3 has two problems. First, F.O.B. must be used with a port, so the agreement should use a different Incoterm. Second, the last sentence constitutes minimum price fixing, which would cause the agreement to lose the benefit of the VABE. J may fix a maximum price or recommend a sales price.

Paragraph 5's termination provisions and paragraph 7's waiver of compensation are permitted. German law implementing the Council Directive on Commercial Agents will not apply because K is not negotiating sales on behalf of J.

Paragraph 8's arbitration clause is missing the place of arbitration, which should be in a New York Convention country. Denver would probably be most convenient for J. The contract also needs a choice of law clause. Because the parties have their places of business in different countries that have joined the CISG, its rules will apply in the absence of such a clause. J should propose a law it is familiar with like Colorado law, but

if it wishes to opt out of the CISG it must do so expressly since the CISG is Colorado law under the Supremacy Clause.

To limit parallel imports by K, J can rely on the redrafted territorial restriction, which will prohibit active (but not passive) selling in the United States. There is little that J can do to prevent parallel imports by third parties. Because the clothes are made in the United States, they are not of “foreign manufacture,” so U.S. trademark rules for grey-market goods would not apply. The facts do not state that the clothes are protected by U.S. patents or copyrights.

Essay Question II.B

(50 points)

The Second Circuit has developed two tests for the extraterritorial application of Rule 10b-5: (1) substantial conduct; and (2) substantial effects. Here there was no substantial conduct in the United States because all the misrepresentations were made in Toronto. Neither were there substantial effects in the United States. True North’s shares are not listed on an American exchange and no fraudulent communications were sent to the United States. Effects on an American company (even one whose shares are listed on an American exchange) are not sufficient to satisfy the effects test.

Even if the substantial effects test were met, it is not certain that this test remains good law. The answer depends on whether Hartford creates a narrow exception to the presumption against extraterritoriality based on precedent or whether it creates a broader exception whenever there are effects in the United States. If it is the latter, the effects test should survive. But if it is the former, the effects test would not because there is no Supreme Court precedent holding that Rule 10b-5 applies extraterritorially on the basis of effects.

The share purchase agreement’s choice of forum and choice of law clauses would waive Yankee’s 10b-5 claim in any event. U.S. courts will enforce a choice of forum clause unless there was fraud or overreaching or unless enforcing the clause would deprive a party of a meaningful day in court. Although Yankee alleges that the transaction was induced by fraud, there is no indication that the choice of forum clause itself was so induced. And Canadian courts are sufficiently convenient to give Yankee its day in court. In the Lloyds cases the U.S. Courts of Appeals unanimously held that clauses choosing English courts and English law precluded 10b-5 claims, and the same result should obtain here.

Still, there are significant differences between a 10b-5 claims and a fraud claim under Ontario law. Canadian courts do not recognize the concept of a fraud on the market, which would relieve Yankee of the burden of showing that it relied specifically on True North’s misrepresentations (although in this case it clearly did). The U.S. also allows securities class actions (though again that would not be relevant here). More significantly for this case, Yankee could take advantage of the United States’ broader discovery rules and would have the right to a civil jury trial.