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THE EUROPEAN DREAM COME TRUE: WHAT WILL BECOME OF AMERICAN BUSINESS (BOEING) AFTER EEC '92

*Ronald Griffin**

I. INTRODUCTION

I have a fading picture of my grandfather. His world was a wilderness. Scarcity was a fact of life. Liberty was freedom from scarcity. The Wealth of Nations was everyone's prosperity manual. Mercifully, private institutions (with the help of government) improved everyone's lot. We have to thank businesses like General Motors and United States Steel for that. In the 1990's, as these institutions grow old, stodgy, and unwilling to change, one wonders what will replace them? After EC-92, for example, what will become of the Boeing Aircraft Company? Will it suffer the fate that has befallen the nation's automobile, textile, and steel industries? This article will sketch an answer.

II. OVERVIEW

In the beginning, America was defined by its towns and bucolic settings. Communities were held together by nostalgia. Citizens used the foibles of their neighbors to entertain themselves. The world was both defined and refined by what people saw and heard. The elderly used folksy sayings to teach children about civilization's harsh realities.¹ The world, they proclaimed, was a dying place. Folks and machines slowed down and eventually stopped operating. To cope with pain caused by loss (and it was most certainly that), youngsters had to gather happiness and entertainment in their lives.²

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1. Storytelling is one of the oldest ways known to mankind for imparting knowledge to children about the world. See, e.g., R. BRADBURY, DANDELION WINE 48-52 (Bantam ed. 1990); A. HALEY, ROOTS: THE SAGA OF AN AMERICAN FAMILY 6-8 (1974).

2. See R. BRADBURY, *supra* note 1, at 48-52, 180-184.

In an America held together with nostalgia, support of the market mechanism and competition were positive values. Contract law affirmed enterprises that produced things commanding economic value.³ Damages put people in positions they would have enjoyed if promises had been kept.⁴ Community disapprobation, as well as the criminal courts, kept the mavericks in check. Crime wasn't the ubiquitous thing it is today.

This version of the sentient world, at best isolationist, left Americans ill-equipped to deal with world problems. It didn't provide the people with a vocabulary to cope with unruly foreign governments, rapacious corporations, notions about citizenship, job dislocations and "foreigner."

America needed a new vision. Freud⁵ and Drucker⁶ provided inventors and tinkerers with the raw materials. The world, they wrote, had gone through a westernizing process.⁷ Decolonization—local control of events—had taken root in Africa and Asia. The agents of change, by and large Europeans, had retreated to their continent. Europeans nevertheless maintained a strong presence in North America, South America and the southern tip of Africa.

In this century, Europe's civil wars (World Wars I and II) failed to produce a clear winner. Outsiders like the United States and the Soviet Union were the apparent victors.⁸ The vacuum, hegemony to be won from decimated European powers, was filled by the aforementioned nations. With the passage of time, the United States and the Soviet Union got sucked into the great Commercial Basin.

The Basin's frontier began in the United States with the state of Washington, and extended east to the farthest European outpost in Russia.⁹ Like a Texas oil rig, observers can see the market mechanism pumping riches from the landscape. Lawyers have converted statutory language into intelligible expressions. Commercial discourse has been reduced to conversational English,

3. J. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 8-9 (1959).

4. Vernon, *Expectancy Damages for Breach of Contracts; A Primer and a Critique*, 1976 WASH. U.L.Q. 179-180.

5. Freud, *Thoughts for the Times on War and Death*, in *GREAT BOOKS OF THE WESTERN WORLD*, Vol. 54, at 755-66 (1982).

6. P. DRUCKER, *THE NEW REALITIES* 3-58, 115-72 (1989).

7. *Id.* at 27-30.

8. See P. KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS* 93-94, 286-90, 366-72 (1987).

9. P. DRUCKER, *supra* note 6, at 35-36.

French, Spanish, Russian, and German. America and Canada, England and France have been granted domains. Countries have formed economic unions, like the EEC, to free their people to compete with decolonized rivals like the City State of Singapore, Saudi Arabia, Iraq, and Japan.¹⁰

Basinites use commercial laws as conversation pieces to gather understanding and cooperation, from other basinites, in arenas strewn with cultural barricades and ancestral traditions.¹¹ Utterances and representations prompting detrimental reliance create obligations.¹² Utterers, actors and reacting parties are subject to a duty to act in good faith.¹³ Breach of the duty invested the injured party with the power to both modify an obligation and exact specific performance.¹⁴ When an obligation collapses, international conventions, the publication of the utterer's bad reputation, the law of obligations, reliance and balance theories have been invoked to secure an injured party's expectations.

That brings us to the task at hand. Having abandoned nostalgia for the basin concept the question is: what economic calamities will American businesses have to weather following EEC integration? A partial answer will be assembled from the activities of the Boeing Aircraft Company—the nation's largest employer and leading exporter.¹⁵ Section III will be an overview of the aircraft industry and Boeing's role in it. Section IV will survey legal matters like the Convention on the International Sale of

10. *Id.* at 131-32.

11. *See, e.g.*, G. ROY, *THE TIN FLUTE*, 297-99 (McClellan & Stewart ed., 1989). Ms. Roy (a brilliant Canadian author) recounts Quebec opposition to Anglo Canadian legal regimes which threatened French culture in Canada. There are other obstacles like rugged individualism, the American obsession with remaking other countries in its own image, and finally, the Western tendency to interpret the actions of other nations as if they were like us. F.L.K. HSU, *RUGGED INDIVIDUALISM*, 10-11, 407-18 (1983).

12. P. ATIYAH, *PRAGMATISM AND THEORY IN ENGLISH LAW* 173-74 (1987). Reputable American scholars have tinkered with Atiyah's notions. Goetz & Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1091, 1123, 1126, 1138-40 (1981); *see* Linzer, *Uncontracts: Context and the Relational Approach*, 1988 ANN. SURV. AM. L. 139.

13. Goetz & Scott, *supra* note 12, at 1138-40.

14. *See, e.g.*, Final Act of the United Nations Conference on Contracts for the International Sale of Goods, Apr. 10, 1980, U.N. DOC. A/Conf. 97/18, with Annex. United Nations Convention on Contracts for the International Sale of Goods, arts. 45(1)(a), 46, *reprinted in* J. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 764 (1982) [*hereinafter* Convention].

15. J. NEWHOUSE, *THE SPORTY GAME: THE HIGH RISK COMPETITIVE BUSINESS OF MAKING AND SELLING COMMERCIAL AIRLINERS* 37, 73 (1982); *EEC '92: What it Means to Boeing Sales*, PUGET SOUND BUS. J., May 1, 1990, Vol. 9, Sec. 1, p. 23.

Goods (CISG), contract terms, negotiating strategies and government subsidies affecting the Boeing business. Section V will sketch new arenas, like avionic innovations,¹⁶ where Boeing and Airbus will compete. Section VI will weigh and evaluate the observations made in the previous sections and draw some conclusions.

III. THE AIRCRAFT INDUSTRY AND BOEING'S CURRENT ROLE

The airplane business is both cyclical and quirky. The customer market is small. The demand for change is unending. Energy shortages, fanned by crises in the Middle East, fuel demands for efficient engines.¹⁷ Concern about noise pollution creates a demand for quieter propulsion systems. Politics, like the government's use of trade legislation to block Boeing's exportations of spare parts to Libya, eschews demand.¹⁸ Problem laden innovation makes aircraft manufacturing risky.¹⁹ Finally, the specter of Japan as a rival galvanizes competition between Europe's manufacturer and its American rivals.²⁰

Boeing, Airbus Industries, and McDonnell-Douglas produce most of the world's aircraft. Boeing controls 50% of the market.²¹ Airbus claims 30% of the market.²² McDonnell-Douglas and smaller firms preside over the rest.²³ Each company designs and sells airframes. The engines come from Pratt-Whitney, General Electric, Snecma, and Rolls-Royce.²⁴

Boeing views airplanes as a source of revenue to spend on new airframes.²⁵ It coddles its customers with a squad of engineers saddled with the mission "solve customer problems."²⁶ Its sales-

16. *E.g.*, Flannigan, *G.E., Pratt Signal Hope Beyond Budget Crisis*, L.A. Times, Oct. 14, 1990, at D1, col. 2; Stevenson, *Boeing and McDonnell Joining the Concorde Study*, N.Y. Times, May 24, 1990, at C2, col. 4; *cf.* J. NEWHOUSE, *supra* note 15, at 5.

17. J. NEWHOUSE, *supra* note 15, at 12.

18. *Id.* at 38-9, 42.

19. *Id.* at 3, 11.

20. *Id.* at 45.

21. *Id.* at 32, 37.

22. *Id.* at 32.

23. *Id.* at 5, 6, 26, 39.

24. *Id.* at 127. A consortium of foreign aircraft companies are a threat to today's engine manufacturers. *Id.* at 46.

25. *Id.* at 36.

26. *Id.* at 171.

persons blanket the globe. The company's large and varied inventory allows Boeing to meet the needs of most airplane purchasers. Its plants are located in the United States.²⁷ It has subcontracted work with firms in England, Canada, and China in the past. It has flirted with joint ventures in Japan.²⁸

Airbus Industries is a consortium.²⁹ It is funded by the governments of England, France, Germany, and Spain. Airbus sees airplanes as a source of employment.³⁰ Contributing governments see Airbus as an instrument of national policy, that is, an employer of last resort that has slowed the "brain drain" from Europe to the United States.³¹ Airbus has helped contributing countries establish favorable trade and payment balances.³² It sees itself as a builder of variant aircraft as opposed to a family of aircraft like Boeing. It services the needs of European, Far Eastern and Near Eastern airliners.³³ The firm's goals are stable production, delivery schedules, and market in America.³⁴

McDonnell-Douglas is the least competitive firm. It is the product of a merger of the McDonnell and the Douglas Aircraft Corporations. In the 1950's, Douglas was the leading commercial aircraft manufacturer in the world. After Boeing took the lead in the jet aircraft business, Douglas spent huge sums, both borrowed money and its own, to become Boeing's peer.³⁵ Debt and a slow return on investment ruined the company. To avoid complete ruin, the Douglas family accepted McDonnell's offer to buy the firm.³⁶ The purchaser installed its own management team imbued with the idea that Boeing's or Airbus's bad luck, or some ill-considered decision, would turn the acquired firm around.³⁷

27. *Id.* at 50.

28. *Id.* at 45-46, 138.

29. *Id.* at 33, 36, 193-95; AIRBUS TODAY 6 (1990) (Airbus Industries is a grouping of Europe's civil aircraft manufacturers: Aerospatiale of France, Duetche Airbus of West Germany, British Aerospace and Casa of Spain).

30. J. NEWHOUSE, *supra* note 15, at 34.

31. *Id.* at 33.

32. *Id.*

33. *Id.* at 37-39 (North America is its largest market); see AIRBUS TODAY, *supra* note 29, at 8; cf. J. NEWHOUSE, *supra* note 15, at 195.

34. J. NEWHOUSE, *supra* note 15, at 35, 55-56; see AIRBUS TODAY, *supra* note 29, at 8.

35. J. NEWHOUSE, *supra* note 15, at 134.

36. *Id.* at 135.

37. See *id.* at 136-37.

A. *The Interrelated Aircraft Industry*

In the airplane business the start-up cost is one billion dollars. Under most projects, manufacturers have to wait fourteen years for profits.³⁸ The learning curve—workers repeating production tasks without mistakes—can reduce labor costs by twenty percent.³⁹ Manufacturers have to cut their prices faster than competitors. They are obliged to coddle and cajole airline employees (engineers and management teams) to glean purchaser needs. They have to design planes with traffic growth patterns on long, middle and short range routes in mind. They have to be wary of the competitive maneuvers of engine suppliers.⁴⁰ They can wreak havoc upon the best laid airframe plans. They have to be mindful of the jockeying among airline companies.⁴¹ Their actions can affect a manufacturer's sales, profits and competitiveness.

Consider the following: Airline carriers will use their flight schedules to net their rivals' customers. Each will claim that it can transport customers from point to point in the shortest span of time, with or without stops, at attractive prices. If McDonnell-Douglas offers American Airlines an airplane that gives it a speed advantage over rival carriers, like Delta or United Airlines, these rivals will buy a similar aircraft from a competing manufacturer to force McDonnell-Douglas, which needs two airline orders, to withdraw from the field.⁴²

The behavior of engine suppliers can topple the best laid plans. The Lockheed fiasco is an example.⁴³ In the 1960's, a banking syndicate provided Lockheed with four hundred million dollars to finance the L-1011 project. The planes were to carry a specified amount of weight. Lockheed made a contract with Rolls-Royce to supply 544 engines bearing weights within the project's weight specification. There was a breakdown in the performance of this agreement. Rolls-Royce, the supplier, had to replace a composite

38. *Id.* at 21.

39. *Id.* at 19.

40. *See, e.g.,* Weiner, *Suppliers in Loan to Northwest: \$500 Million Given by Airbus and G.E.*, N.Y. Times, Sep. 21, 1990, at C1, col. 2; Betts, *Japanese to Share in G.E. Jet Engine Program*, Fin. Times, Oct. 4, 1990, § 1, at 5.

41. J. NEWHOUSE, *supra* note 15, at 3, 149; *see* Weiner, *Suppliers in Loan to Northwest*, *supra*, note 40.

42. Weiner, *Suppliers in Loan to Northwest*, *supra* note 40; Weiner, *Unusual Deal by America West Seen*, N.Y. Times, Sep. 25, 1990 at C5, col. 4.

43. J. NEWHOUSE, *supra* note 15, at 173-83.

carbon fibre and resin fan blade with a titanium blade which raised the engine weight. The change dropped the engine's fuel efficiency, increased the airframe's weight, and broke the guarantee Rolls-Royce made to Lockheed.

Technical problems, a poor estimate of the actual cost of the engines and other costs, forced Rolls-Royce into bankruptcy.⁴⁴ The British government purchased the supplier's military contracts. It made an agreement with Lockheed regarding the late delivery of the L-1011 engines. The Crown promised to perform the Rolls-Royce contract provided Lockheed shouldered half of the additional cost (\$288 million).⁴⁵

With this unfolding of events, Lockheed wandered into the vortex of increasing costs and irate customers who fretted about the timely delivery of their planes. The company could see lost sales, lost profits, shrinking market share or bankruptcy on the horizon. Lockheed had two choices. It could file a contract claim against Rolls-Royce in bankruptcy. It could modify its contracts with purchasers and creditors, hoping both would go along with the deals.

In time, Lockheed got its modifications.⁴⁶ The British government performed Rolls-Royce's contract. For consideration, liens in all of Lockheed's manufacturing assets and other compensation, the United States government provided the British Crown with a guarantee that Lockheed would make its payments.⁴⁷ After Lockheed completed its performance, installed its engines, paid its creditors, and brought the L-1011 project to a merciful end, the manufacturer got out of the commercial airline business. It left the market to firms like Boeing and McDonnell-Douglas.

B. Boeing Versus The Airbus Miracle

There is marketing. Airbus Industries' success is a modern day miracle. World War II decimated Europe's capacity to manufacture commercial aircraft. The world's airliners purchased American products. Around the world, American firms bore a reputation for efficiency. They, the airliners were told, produced safe aircraft

44. *Id.* at 175, 177.

45. *Id.* at 179, 181.

46. *Id.* at 182 (Lockheed's customers agreed to pay an additional \$640,000 for each of their L-1011 planes).

47. *Id.* (The government was granted a lien in Lockheed's assets).

in the sizes and volume needed. Nobody thought that the British or the French could compete with the Americans in development, manufacturing and marketing.

Airbus Industries was Europe's response. It is a multinational entity.⁴⁸ It is the titular manager of government owned and subsidized corporations.⁴⁹ In a complex business network, each company, like tentacles from a common body, performs acts to fulfill commitments made by Airbus.⁵⁰ Airbus makes design, production and marketing decisions.⁵¹ Contributing governments make investment decisions affecting new Airbus aircraft.⁵² Airbus services Air France, Lufthanza, Scandinavian and a few non-European carriers like Air India.

In 1976, Boeing made a number of discoveries. First, 70 percent of its airline business came from foreign countries.⁵³ Second, Airbus was its principal competitor. Third, because Airbus was subsidized by several governments, in a worldwide price war Boeing could lose a handsome number of customers. Fourth, Boeing could not rely upon military contracts, or higher priced domestic airline contracts, to subsidize lower priced aircraft sold abroad. In summary, Boeing had to do something about Airbus.

Since American manufacturers could not act collusively by contracting with one another to make aircraft in competition with Airbus, Boeing had to go abroad to find partners.⁵⁴ It adopted

48. *Id.* at 33, 49; see Letter from P. Cottle to Ronald Griffin & Teresa Machicao (Oct. 10, 1990) (letter to author from Airbus Industries' legal counsel, including booklet AIRBUS TODAY); AIRBUS TODAY, *supra* note 29 at 6, 7.

49. J. NEWHOUSE, *supra* note 15, at 33, 45.

50. *Id.* at 33, 193-94; cf. *European Ministers will Discuss Restructuring Airbus Consortium*, AVIATION WEEK AND SPACE TECH. 114 (Feb. 15, 1988).

51. J. NEWHOUSE, *supra* note 15, at 194.

52. *Id.* at 33.

53. *Id.* at 37, 138.

54. Under the Sherman Antitrust Act, 15 U.S.C. § 1 (1982), Congress has forbidden businesses to engage in collusive activity. SULLIVAN & HARRISON, UNDERSTANDING ANTI-TRUST AND ITS ECONOMIC IMPLICATIONS 71, 81-84 (1988). If arrangements suppress or destroy competition, they are condemnable under the Sherman Act. *Id.* at 82. The question is one of intent and effect. *Id.*; see *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933). The aforementioned cases advance a rule of broad discretion in favor of courts weighing competitive market factors before reaching an antitrust conclusion. SULLIVAN & HARRISON, *supra*, at 83 (efficiency and integration of productive capacity are acceptable antitrust inquiries and defenses).

Section 1, The Sherman Act, covers business activity inaugurated by joint ventures.

two strategies. First, Boeing flirted with Rolls-Royce and, later purchased its engines from this manufacturer, to weaken British ties to Airbus.⁵⁵ Second, Boeing incorporated both British aerospace wing technology and Rolls-Royce engines into aircraft it marketed in Europe.⁵⁶

There was a change in demand in the 1980's. Airliners urged manufacturers to make planes to replace the Boeing 727. At that time, Boeing could not build new planes without a foreign partner. McDonnell-Douglas could not keep pace with demand. Lockheed had withdrawn from the field creating a vacuum that was filled by Airbus.

Airbus took advantage of the situation. Using appealing loan agreements and credit contracts, Airbus targeted prestigious American airliners, enfeebled by government deregulation, then wooed them to its pen. It derided Boeing's campaign to recapture lost customers. Since Airbus used General Electric technology in its engines, Airbus marketed its airplanes in the United States by claiming that its planes were imbued with American reliability.⁵⁷

Airbus pressed its campaign in the 1990's. The agreements concluded with Northwest Airlines and America West Airlines corroborating the recent turn of events.⁵⁸ As of this writing, Northwest was swimming in debt.⁵⁹ To help the firm relieve itself of debt, Airbus, with the aid of General Electric, provided the airliner with millions of dollars in exchange for a promise to buy a billion dollars worth of Airbus airplanes.⁶⁰ In recent weeks, America West proclaimed an interest in buying one of Pan

United States v. Addyston Pipe, 85 F. 271 (6th Cir. 1898), *aff'd* 175 U.S. 1 (1904). Sullivan and Harrison call them entities assembled by two independent firms for research, production, and marketing activity. SULLIVAN & HARRISON, *supra*, at 100. By gaining skills, spreading risks, achieving certain economies of scale, the joint firms achieve efficiencies and an appetite for research and production which single firms are unwilling to undertake on their own. *Id.* Lamentably, there is a down side to joint venture activity. There is a potential for price fixing, out-put restrictions, market division, increased monopoly power, and other anticompetition activity. These are temptations faced by the airframe business. They are illegal under the Sherman Act.

55. *Id.* at 201.

56. *Id.* at 201-02; see O'Lone, *Airframe Manufacturers Seek Sales Opportunities in Eastern Bloc*, AVIATION WEEK & SPACE TECH. 112-13 (Feb. 15, 1988).

57. J. NEWHOUSE, *supra* note 15, at 192.

58. Weiner, *Suppliers in Loan to Northwest*, *supra* note 40, at C1, col. 2; Weiner, *Unusual Deal by America West Seen*, *supra* note 42, at C5, col. 4.

59. Weiner, *Suppliers in Loan to Northwest*, *supra* note 40, at C1, col. 2.

60. *Id.*

American's shuttle services. The price tag was 200 million dollars. If America West promised to either lease or purchase 100 Airbus planes, Guinness Peat Aviation, the world's largest aircraft-leasing company, and International Aero Engines, a consortium of engine manufacturers that includes Pratt-Whitney and Kawasaki, promised to lend America West the cash.⁶¹

Boeing has responded to this campaign by both attacking the Airbus funding scheme⁶² and marketing in Eastern Europe.⁶³ Thanks to a subsidy of 13.5 billion dollars (revalued at 29.5 billion) Airbus has become Boeing's principal competitor.⁶⁴ Boeing has asserted that the subsidy violates GATT.⁶⁵ If Boeing puts an end to the subsidy or gets it reduced, like Boeing, Airbus will have to both beg for money to fund new projects and worry about profits. With the assistance of the United States government, Boeing hopes that it can make Airbus play by its rules. If Airbus has to spend more time marketing for money, Boeing can recapture some of its lost customers.

In Eastern Europe, with the heightened demand for western aircraft, and the slumping demand for Soviet built planes, Boeing

61. Weiner, *Unusual Deal by America West Seen*, *supra* note 42, at C5.

62. See Field, *European Jet Giant Fights Charge It Unfairly Subsidized*, Wash. Times, Oct. 8, 1990, at D5.

63. O'Lone, *supra* note 56, at 112-13.

64. Field, *supra* note 62, at D5.

65. *EEC '92: What It Means to Boeing Sales*, *supra* note 15, at 23.

In 1944, representatives from 44 countries assembled at Bretton Woods, New Hampshire, to chart the world's post war economy. GALBRAITH, *THE AGE OF UNCERTAINTY*, 224 (1977); GALBRAITH, *MONEY: WHENCE IT CAME, WHERE IT WENT* 310-15 (Bantam ed. 1976). Different organizations emerged from the Bretton Woods conference: The International Monetary Fund (IMF), the General Agreement on Tariffs and Trade (GATT), and the World Bank. FOLSON, GORDON & SPANOGLE, *INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED COURSEBOOK* 17 (1986) [*hereinafter* SPANOGLE].

The GATT is now a major source of international trade law. It is an organization within which the United States, Japan, and the European Economic Community discuss their most important trading concerns. *Id.* Unlike the United Nations, the GATT does not have a court to which parties may take their disputes. Its regulatory role is accomplished through expected adherence by members to the rules in the General Agreement and other developed codes, often called "side agreements." *Id.* at 18. When a nation violates the GATT, the members hope that working panels, assembled under the GATT, and the GATT rulings will bring an end to the bad behavior. *Id.*

The scope of the GATT is extensive. In addition to most favor nation treatment, it covers customs classification, government procurement, customs valuation, subsidies and countervailing duties, dumping practices and antidumping duties, import injury and escape clause proceedings, export subsidies, and import quotas. It covers arrangements like customs unions, free trade associations, and generalized systems of preferences to help developing nations. *Id.*

has proposed a sale or a lease of its 767 aircraft to Poland's state owned airliner (LOT).⁶⁶ The company has made offers to Romania and Czechoslovakia.⁶⁷ It has picked up Hungary's proposal to lease aircraft from a western firm like Guinness Peat Aviation, provided the leasing firm has purchased aircraft from Boeing.⁶⁸

What Boeing sees in this strategy (or one hopes it saw) is a way to penetrate "Fortress Europe" in hopes of claiming and maintaining markets there. Across the Atlantic, in the Common Market, twelve nations have coordinated their political and economic policies in ways which threaten Boeing. In Eastern Europe, six liberated nations seek affiliation with the twelve. All have embraced policies that both (a) subsidize key industries and (b) limit off-shore manufacturing influences, to raise the European's standard of living.⁶⁹ This blend is to take place in 1992 and is commonly referred to as EC-92.

When Europe accomplishes some of the aforementioned goals, such as raising everyone's living standard, introducing a standard European currency, retiring old airplanes, and allocating air routes to sixteen nations, so that each nation's airliners can reach customers in neighboring states, there will be an explosion in demand for short range and long range aircraft that Boeing will service with a weaker Airbus competitor.

IV. INTERNATIONAL LEGAL MATTERS

Assuming EC-92 is at hand, it will create a large trading arena within the Great Basin. Governments will put refitted market mechanisms in different places. Entrepreneurs will queue on supply curves in accordance with the rules of competitive and comparative advantage. Demand curves will swing left and right. Movement will be dictated by the public consumption of goods, decisions to replenish depleted inventories, and patented inventions and subsidies. Personalty, realty and information will be labeled "property." Capital will be the aforementioned objects being managed by individuals and firms. People and firms will

66. O'Lone, *supra* note 56, at 112-13; cf. Flint, *Eastern Europe will Absorb Western Aircraft*, 27 *Air Transport World* 48 (No.3 March 1990).

67. O'Lone, *supra* note 56, at 112-13.

68. *Id.*

69. *The European Cake: Who Eats at the Table*, 7 *INT'L & FIN. L. REV.* 13 (1988).

become capitalists when they are freed of the obligation to spend themselves on the production of "new" capital. At that moment something wonderful will happen to the capitalist. He, she, or it will receive the power to influence others by imposing *any* condition upon someone's proposal to use, buy or rent their property. Contracts will become the concessions the capitalist extracts from the offerors.

Across the Basin, contract liability will be based upon a statute, bargain, benefit or reliance theories. A contract, for example, will be the sum of offer and acceptance.⁷⁰ Courts will find an agreement when the minds of the parties have met. Where a promise fetches consideration or reliance, there will be a contract.⁷¹ Where a promise fetches nothing, judges will be fitted with the discretion to determine whether a writing is valid.⁷² If the writing saddles the people with "rights" and "duties," the court will find implied promises.⁷³ If a writing proclaims an exchange of "comparable values," the court will treat it like a contract.⁷⁴ When a person confers a benefit upon someone else, who knowingly and willingly accepts it, the recipient will be saddled with the duty to pay for it.⁷⁵ Where businesses are building a long term relationship—and, in the negotiation, the seller has access to information which his customer cannot access—the seller will be under a duty to disclose all he knows. If he omits something from his report, that will be a misrepresentation. If the customer relies upon the report to his detriment, the seller will have to shoulder the damages.

Any speech, symbolic speech or writing, provoking reliance will create an obligation. The parties will be saddled with the duty to act in good faith and to follow statutes to the letter. Breach of this duty will invest the injured party with the option

70. P. ATIYAH, PRAGMATISM AND THEORY IN ENGLISH LAW 170 (1987) [*hereinafter* P. ATIYAH, PRAGMATISM]; *see, e.g.*, *Lucy v. Zehmer*, 196 Va. 493, 84 S.E.2d 516 (1954); *cf.* G. GILMORE, DEATH OF CONTRACTS 87 (1974); Levin and McDowell, *The Balance Theory of Contracts: Seeking Justice in Voluntary Obligations*, 29 MCGILL L.J. 25, 34-40 (1983); P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 716-17, 729, 771 (1979) [*hereinafter* P. ATIYAH, RISE AND FALL].

71. *See, e.g.*, *Hamer v. Sidway*, 124 N.Y. 538, 27 N.E. 256 (1891); Levin & McDowell, *supra* note 70; *see also*, RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981); P. ATIYAH, RISE AND FALL, *supra* note 69, at 731, 734, 764-79.

72. Levin & McDowell, *supra* note 69, at 25-26, 39.

73. P. ATIYAH, RISE AND FALL, *supra* note 69, at 735.

74. *Id.* at 734.

75. *See* C. FRIED, CONTRACTS AS PROMISE 17, 125 (1981).

to (a) modify the obligation, (b) sue for damages, or (c) petition for specific performance.⁷⁶

Damages will limit the use of traditional contract theory. Plaintiffs will have to sustain injuries cognizable in contract law. In a construction contract case, for example, "substantial performance" will count as a reason for recovering damages.⁷⁷ When a contractor has tendered "completed performance" that is "defect free," that will count as a reason for recovering damages.⁷⁸ If a contract's liquidated damages clause generates a sum that is twice, or less than twice, the profit the contractor sought from the bargain, the plaintiff (contractor) will have to content himself with actual damages.⁷⁹ If the plaintiff is a merchant, and the defendant is familiar with his business, the court will surmise that the defendant knew about the business risks (lost profits) to be borne by the plaintiff. If a writing bonding plaintiff to defendant creates an expectation that, in turn, provokes reliance, defendant must shoulder liability for direct and derivative reliance damage.⁸⁰

In America, we will see a contractual hierarchy. It will look like Figure A. At the base of the pyramid you will find the common law ($K=O+A$). On the next level, one above the bottom, you will find statutes (UCC). On the next level, you will find conventions like the Paris Patent Convention (PPC) and the Convention on the International Sale of Goods (CISG). At the apex, you will find the law of obligations.

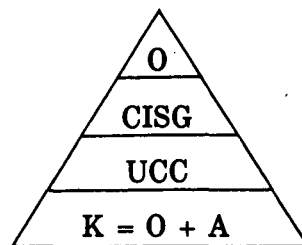


Figure A

If the contract is for construction or services, disputes will be resolved with the common law. If the agreement covers goods,

76. Convention, *supra* note 14, arts. 45(1)(a)-(b), 46.

77. See, e.g., *Jacob & Young v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921); *Shaeffer v. Keiton*, 95 N.M. 182, 619 P.2d 1226 (1980).

78. See E. FARNSWORTH, *CONTRACTS* 562 (1990); Waddams, *Restitution for Part-Performance*, in SWAN & REITER, *STUDIES IN CONTRACTS* 151, 152 nn.1-2 (1980).

79. See, e.g., *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284 (7th Cir. 1985).

80. See Swinton, *Foreseeability: Where Should the Award of Contract Damages Cease?*, in SWAN & REITER, *STUDIES IN CONTRACT LAW* 69-80 (1980).

disputes will be resolved with Article Two of the Code (UCC). If a buyer or a seller is trying to affix a lien to goods, disputes about attachment, perfection, and remedies will be resolved under Articles Two and Nine of the Code. If someone has pirated someone else's technology in a sister country, the dispute will be resolved under the General Agreement on Tariffs and Trade (GATT) PPC. If the parties come from different nations, disputes will be resolved under the CISG.⁸¹ If the parties are groping towards contract formation or pondering about a breach, the parties will use the law of obligations to soothe frayed nerves.⁸²

Across the Atlantic, we will find an established hierarchy. Patrick Atiyah has described it best. In England, the law comes from Parliament.⁸³ That law is glossed by the courts. The law itself is composed of history and experiences, precedent and the work of academics.⁸⁴ Contract law is a good example.

Contract law, he has said, is the work of pragmatic lawyers and academic economists.⁸⁵ It is erected to protect a person's bargained-for expectation.⁸⁶ We are told that contract law is both general and neutral.⁸⁷ It is unconcerned about the various types of contracts and the different sorts of people who enter into them.⁸⁸ If a court is presented with a signed writing, it will treat the document like a contract.⁸⁹ If the writing saddles the signatories with rights and duties,⁹⁰ the court will find implied promises. If the writing is executory, the parties are provided with an opportunity to escape their duties.⁹¹ If the writing proclaims the exchange of comparable values, the court will say the agreement is valid. If there is a breach, the court will award the injured party damages.

Assume for a moment that A wants to make a contract with B. A is an airplane manufacturer. B manufactures parts for

81. Convention, *supra* note 14, arts. 1, 6.

82. See Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANNUAL SURVEY OF AMERICAN LAW 139, 152-66; P. ATIYAH, PRAGMATISM, *supra* note 70, at 173-74.

83. P. ATIYAH, PRAGMATISM, *supra* note 70, at 150.

84. *Id.* at 93-96, 165-74.

85. *Id.* at 165-6.

86. *Id.* at 168.

87. *Id.* at 170.

88. *Id.*

89. P. ATIYAH, RISE AND FALL, *supra* note 70, at 733; see P. ATIYAH, PRAGMATISM, *supra* note 70, at 173-74.

90. P. ATIYAH, RISE AND FALL, *supra* note 70, at 735.

91. *Id.* at 734.

commercial airplanes. A provides B with an airplane plan and specifications for a nacelle (an aerodynamic structure that surrounds a jet engine) that is accompanied by a request that "B supply A with a price." B returns A's specifications with a price. A sends a modified specification to B with the inquiry, "Can I get these changes at your quoted price?" B says, "yes." On September 30th, A faxes B a letter, "Upon your agreement to ship a finished nacelle in six weeks you may begin work." On October 1st, B hired 12 employees and purchased several tons of raw material. On October 8th, A told B to "stop work." A had found a cheaper supplier in England. What are the issues? What is A's position on the issues? What is B's position on the issues?

The problem presents many issues. There are: price quotation, contract formation, breach, compensation and damages. In contract, courts refuse to treat price quotations as offers.⁹² If the quotation is accompanied by a positive statement which leaves nothing open for interpretation, a quote will be treated like an offer. In this case, the quote isn't escorted by anything. Given this observation about the facts, it follows that the quote won't be treated as an offer to make a contract.

In practice, however, a person can use both objective and subjective theories to make a contract.⁹³ The objective theory is composed of offer and acceptance ($K=O+A$). Since there was no offer in this case, of necessity, there could be no acceptance.

You could try to make a contract out of the correspondence between A and B. If the September 30th letter is treated like an offer, the question is: Did B communicate an acceptance? Generally speaking, offers are composed of promises, solicitations and some instructions about the communication of acceptance.⁹⁴ If the instruction is missing, the offeree (B) may either tender a performance or communicate a promise as acceptance.⁹⁵ The Restatement proclaims that the performance must be unique—

92. See *Owen v. Tunison*, 131 Me. 42, 158 A. 926 (1932). For a less strained interpretation of language of negotiation, see *Southworth v. Oliver*, 284 Or. 361, 587 P.2d 994 (1978).

93. There is a notion that the subjective theory should be confined to face-to-face negotiations. *Kabil v. Mignot*, 279 Or. 151, 566 P.2d 505 (1977); see G. GILMORE, *supra* note 70, at 41-43.

94. See RESTATEMENT (SECOND) CONTRACTS §§ 24, 32, 54, 58, 71 (1981); FARNSWORTH, CONTRACTS 135-36, 150 (1990) (consideration isolates what the parties sought from one another); see also G. Gilmore, *supra* note 70, at 19-21.

95. RESTATEMENT (SECOND) CONTRACTS §§ 32, 54(1)-(2) (1981).

unlike B's performance—to the proposal to make a contract.⁹⁶ Since B's performance was generic, we cannot treat it like an acceptance. Since there was an offer, but no acceptance, there was no contract between A and B.

You could assemble a contract with subjective theory ($K = M \times M$).⁹⁷ It appears that the minds of the parties met. In this case, however, subjective theory analyses must give way to statutory analyses. Since the subject matter is goods, and the disputants are respectively buyer and seller, the analysis must be done under the Uniform Commercial Code.⁹⁸

There is a contract between the parties under section 2-204. The buyer's expectation is a nacelle. The seller's expectation is payment.⁹⁹ The seller expected the buyer to act in good faith, that is, to do nothing that blocked or delayed the seller's receipt of payment.¹⁰⁰ In this case, the buyer breached his good faith duty. He (A) both broke his contract with B and made a contract with someone else. Given these observations about the facts, it would appear that B is entitled to damages.

Since the disputants are not from different countries, there is no reason to apply the CISG. Under the law of obligations, borrowing a bit from the English and the Canadians, B could use good faith as a roost to get damages for the employees he hired and the raw material he purchased.¹⁰¹ If A and B have an on-going relationship, and A is familiar with B's business, a court might surmise that "A knew about the business risks shouldered by B." If A created expectations upon which B detrimentally relied, A may have to shoulder the damages. In summary, A should hide under the objective theory. B should attack A with either the subjective theory or the U.C.C. Finally, A may be liable to B for consequential damages.

96. RESTATEMENT (SECOND) CONTRACTS § 50(2) (1981); see *White v. Corlies*, 46 N.Y. 467 (1871).

97. See, e.g., *Dickinson v. Dodds*, 2 Ch. 463 (1976); *Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (1864); cf. G. GILMORE, *supra* note 70, at 28-33, 39-42.

98. U.C.C. §§ 2-102, 2-104(1), 2-105(1), 2-106(1) (1989).

99. U.C.C. § 2-301 (1989).

100. U.C.C. §§ 1-203, 2-103(1)(b) (1989); see *Bak-A-Lum of America v. ALCOA Bldg. Prods. Inc.*, 69 N.J. 123, 351 A.2d 349 (1976); FRIED, *CONTRACTS AS PROMISE* 74 (1981); see also Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine*, 137 U. PA. L. REV. 335, 382-88 (1988).

101. See Swinton, *supra* note 80, at 69-80; see also P. ATIYAH, *RISE AND FALL*, *supra* note 70, at 460-61.

A. *An International Example*

Unfortunately, the previous hypothetical doesn't raise international issues. The next, and the last, hypothetical addresses that shortcoming. It is an attempt to put contract theory and modern airplane transactions in focus.

A is an American manufacturer of airplanes.¹⁰² B is a German purchaser. C is an American engine manufacturer. He makes Widget engines for A and B. In July, 1989, A made a contract with B. The airplane manufacturer promised to sell and B promised to buy "Seventy Bubble-1011" with Widget engines. In October, 1989, B initiated a conversation with C. B told C: "Send me the price list for two thousand units of 'knickknacks'... the spare part which goes into Widget engines." C sent B a price list which featured the "knickknacks." They were priced at \$200 per 100 units, F.O.B. Plant, Kansas City. Two days later, B sent C a Telex. "We order today Two Thousand (2000) units of Knickknacks for \$400,000 F.O.B. Kansas City for immediate delivery to Darmstadt, Federal Republic of Germany." On the same day, C responded by sending its Order Acknowledgement Form to B. In the form, C wrote: "We accept your order to buy Two Thousand units of Knickknacks for \$400,000 F.O.B. Kansas City. Goods sold as is and with all faults. This contract is governed by the laws of ___(blank)." The form was signed by C.

The Knickknacks were delivered to a Swedish vessel. It shipped the goods to Germany and presented them to B for acceptance. B accepted the goods and paid C. In April, 1990, B performed a minor repair on a Bubble plane. When he tried to install a Knickknack in a Widget engine, B discovered that the spare part did not fit that particular Widget engine or any Widget engine attached to a Bubble plane. B was outraged. A had told B that C was a reputable engine and spare parts manufacturer. After the lament, B secured spare parts with the right dimensions from a rival supplier. B is upset. He comes to you for advice. What do you tell him?

In this case, I would start with a long pause. My response would be preceded by a careful analysis of the issues. They are: battle of the forms (UCC),¹⁰³ choice of law,¹⁰⁴ German law,¹⁰⁵ EC-

102. This problem was assembled with parts from a problem in SPANOGLE, *supra* note 65, at 57-58.

103. U.C.C. § 2-207 (1989).

104. U.C.C. § 1-105 (1989); RESTATEMENT (SECOND) CONFLICT OF LAWS § 188 (1971);

Convention on Contract Obligations,¹⁰⁶ Convention on the International Sale of Goods,¹⁰⁷ warranty,¹⁰⁸ insurance,¹⁰⁹ and damages.¹¹⁰ As regards the U.C.C., I would use section 2-207 to analyze the correspondence between B and C. Generally speaking, a contract comes into existence when the correspondence of the parties match. Since B and C sent matching correspondence, within several days of one another, there's a contract between the parties.

The next issue is choice of law. Under U.C.C. section 1-105, the law for this contract is either (1) the one chosen by the parties or (2) the one illuminated by the "significant contact test."¹¹¹ Since the parties didn't choose a law, we must select one for them. In that regard, the language of section 1-105 accepts, or is broad enough to accommodate, Restatement ideas. Given this observation about the facts, we are free to use section 188 of the Restatement on Conflicts.

104. U.C.C. § 1-105 (1989); RESTATEMENT (SECOND) CONFLICT OF LAWS § 188 (1971); *Seaman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927) (outlining the reasonable relations list). Where a transaction bears a reasonable relation to a particular state or nation, section 1-105(1) permits the parties by agreement to make the law of that state or nation applicable to their transaction. Section 1-105(1) further provides that failing such an agreement, "this Act applies to transactions bearing an appropriate relation to this state." U.C.C. § 1-105(1) (1989).

The Code does not specify what constitutes an appropriate relation. Further, it does not indicate whether, and if so, to what extent the appropriate relations provision is intended to depart from traditional conflicts rules. It could be argued that a transaction does not bear an "appropriate relation" to a jurisdiction unless the law of that jurisdiction would be the proper one to apply under normal conflicts-of-law rules. Comment 3 to section 1-105 indicates that the drafters wanted to go further than this. It states that where a purely state statute would be inapplicable, application of the Code may be justified by its comprehensiveness, by the policy of uniformity, and by the fact that the Code reflects the understanding of a business community which transcends state and even national boundaries. BRAUCHER, *INTRODUCTION TO COMMERCIAL TRANSACTIONS*, 36-37 (1977).

105. See RUSTER, *BUSINESS TRANSACTIONS IN GERMANY (FRG)*, 10-19 (1983).

106. See NORTH, *CONTRACT CONFLICTS*, in SPANOGLE, *supra* note 65, at 137-38, 140-41.

107. Convention, *supra* note 14, arts. 1, 4, 14, 18, 19.

108. Convention, *supra* note 14, art. 35; U.C.C. §§ 2-313, 2-314, 2-315, 2-318 (1989). Paul Rasor wrote a brilliant essay on warranties. Rasor, *The History of Warranties of Quality in the Sale of Goods: Contract or Tort?—A Case Study in Full Circle*, 21 WASH. L. REV. 175 (1982). This might be a fitness for a particular purpose problem. *Id.* at 206-13.

109. U.C.C. § 2-319 (1989); see SCHMITTHOFF, *EXPORT TRADE* 27 (7th ed. 1980); LOWE, *COMMERCIAL LAW* 466 (6th ed. 1983).

110. U.C.C. §§ 2-714(2), 2-715(1) (1989).

111. See U.C.C. § 1-105 comment 3 (1989).

Where contract negotiation and performance occur in the same place, the law of "that place" governs formation, validity, interpretation, breach and damages. In this case, negotiations and performance occurred in the United States.¹¹² Given this observation about the facts, one might conclude that the applicable contract law is American law.

The EC-Convention on Contract Obligations says that the disputants must apply the law of the place where the defendant (seller) renders performance.¹¹³ Since performance occurs in the United States, Germany (as a member of the EC), and certainly its nationals must look to the United States law to address issues like validity, breach and damages.

The next topic is German law. What is B's position on the contract? In Germany a contract is a product of offer and acceptance.¹¹⁴ Further, under German law, acceptances should not be accompanied by either restrictions or exceptions. In this case, C's acceptance was accompanied by an "as is" restriction. Given this observation about the facts, there would be no acceptance and no contract under German Law.

The next issue is warranty. C can use the "as is" clause to restrict his liability.¹¹⁵ In America, B is under a duty to read a contract to catch clauses like this.¹¹⁶ If B is provided with an opportunity to read this contract, and he did nothing with the opportunity given to him, B is bound by the language he did not read. C can use the "as is" language to block B's recovery of damages.

By contrast, under German law, C would have to bring the disclaimer clause to B's attention and procure B's assent. Since German law is clear on that point, and C didn't do his duty under German laws, the "as is" clause is invalid. B could recover damages from C for breach of warranty.

The United Nations Convention on Contracts for the International Sale of Goods (CISG) might pull us out of the conflict of law quagmire. If America and Germany have signed the Conven-

112. See North, *Contract Conflicts* in SPANOGLE, *supra* note 65, at 61.

113. *Id.* at 60. The author cites Article 4(2) of the EEC Convention.

114. Ruster, *supra* note 105, at 10-19. Spanogle condenses the narrative to four pages. SPANOGLE, *supra* note 65, at 69-72.

115. U.C.C. § 2-316(3)(a) (1989).

116. See FARNSWORTH, *CONTRACTS* 263-64 (1990).

tion, the Convention will resolve all disputes.¹¹⁷ There may be a problem, however, under the offer and acceptance provisions.¹¹⁸ If C's acceptance alters the terms of the offer—what was solicited by the offeror (B)—there may be no acceptance and no contract between the parties.¹¹⁹

In summary, I would tell B the following. First, B's dispute with C is governed by the UCC. Second, American conflict of law principles point to the use of the UCC. Third, German and American laws tell different stories about contract formation and liability. Fourth, the EC-Convention on Contract Obligations commends the use of American law. Fifth, the CISG won't help B. Sixth, B faces a struggle if he pursues warranty damages. Seventh, B could recover consequential damages if B supplied C with his reasons for buying C's Knickknacks. Eighth, B should check his insurance to see if this situation is covered by the contract. Finally, B should apply the law which upholds a contract between the parties.

V. AIRCRAFT INDUSTRY FRONTIERS

In the previous section we examined a delicate web of ideas, legislation, international conventions and policies symbolizing contract practice. What's the reality? Is there a frontier (an unilluminated landscape) where the previous discussion did not go? If reality is larger than theory—which is a true statement in this case—there is turf to be explored. First the landscape looks like a two dimensional, inverted pyramid (Figure B). Along the inverted base, the observer will find that manufacturers have camped at one corner. Purchasers have camped at the other. At the apex, one will find manufacturers and suppliers of airplane parts.¹²⁰

117. Convention, *supra* note 14, art. 1.

118. If Article 19 adopts the mirror-image-rule and the offer and acceptance clashes, the Convention may be unavailable to us. See Convention, *supra* note 14, art. 19.

119. *Id.*

120.

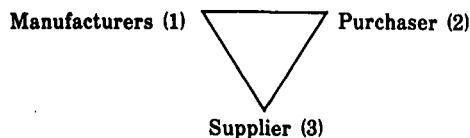


Figure B

Manufacturers have simple motivations. They want airplane orders which guarantee a steady stream of cash and profits. If the situation presents itself, they will sell planes on credit; lease them; provide purchasers with credit on spare parts; close a deal with the option to replace a purchased plane with an innovative improvement; sell airplanes with the option to buy new or improved models at prices "not fully adjusted for inflation."¹²¹ They will guarantee the integrity of the airframe and the performance characteristics of the engine.¹²² During negotiations some—like Boeing, for example—will present their opinions about engines and rival manufacturers' claims on topics like turbines, compressors, fuel consumption and efficiency.¹²³

Purchasers are interested in both government and private financing, airframe integrity, engine size and reliability, speed, fuel efficiency and spare parts.¹²⁴ Competition has come down to "who can provide the best engine for the frame selected by the purchaser."¹²⁵ To date purchasers make separate contracts with engine suppliers. They cover matters like the cost of spare parts, spare engines, and the period of time, typically three thousand miles, during which the engines must perform reliably.¹²⁶ In recent years, suppliers, to get more customers, have given into exaggeration.¹²⁷ One company has gone into both the brokering and the banking business,¹²⁸ causing some to wonder, in these uncertain and troubling days, whether a business alliance be-

First, suppliers (3) and manufacturers (1) make engine purchase agreements (EPA). They take several years to negotiate and govern the purchase orders submitted by the manufacturers to the suppliers.

Next, suppliers (3) and purchasers (2) make general term agreements (GTA). They take several years to negotiate and cover technical data, training and engine guarantees. Purchase orders (POs) submitted by the purchaser to the supplier are governed by the GTA. The POs cover quantity of engines, time of delivery, payment terms and price. Interview with Cynthia Brockman, Contracting Officer Legal Division, General Electric in Cincinnati, Ohio (Oct. 18, 1990). The terms of these contracts, that is GTAs and EPAs, constitute proprietary information. J. NEWHOUSE, *supra* note 15, at 56.

121. J. NEWHOUSE, *supra* note 15, at 54-55, 60.

122. *Id.* at 53.

123. *Id.* at 54.

124. *Id.* at 61 (recent developments).

125. *Id.* at 51, 186.

126. See J. NEWHOUSE, *supra* note 15, at 187.

127. *Id.* at 54.

128. Weiner, *Suppliers in Loan to Northwest*, *supra* note 40, at C1, col. 2; Weiner, *Unusual Deal by America West Seen*, *supra* note 42, at C5, col. 4.

tween General Electric and Airbus, and General Electric and a large leasing syndicate like Guinness Peat Aviation selling Airbus products, will harm Boeing and others, that is, cause them to lose a great number of airplane orders?

Alliances between engine suppliers and airframe manufacturers, puffery blended with the sale of an engine, and wired contracts, are not the only thing troubling firms in the airframe business. Boeing, like other multinational businesses, is worried about people pirating their technology and the absence of effective laws or conventions to stop it.¹²⁹ In recent weeks, the governments of the United States, France and Germany have accused one another of violating GATT—subsidizing its airframe manufacturers to ward off foreign competition.¹³⁰

The unauthorized use of patented technology is a worrisome problem. It can cost the airframe business billions of dollars in lost revenue.¹³¹ Boeing and its rivals have used contracts, a federal statute and international agreements to protect their property. When Boeing (seller), for example, makes a contract with a purchaser that is controlled by its government, the seller extracts a promise from the purchaser (the government) that it will do nothing to impair the value of the patent in that country. In some cases, the seller extracts a promise that the purchaser will pay a standard royalty for the reproduction and the use of patented technology,¹³² or a promise to pay a smaller sum that is offset by a tax credit in the seller's country.¹³³

On another level, the United States government has the power to impose sanctions upon, or withdraw trading privileges from, nations which do nothing to protect American patents abroad.¹³⁴ Under the Paris Convention, a patentee can impose a licensing agreement and a duty to pay royalties upon an entity that has

129. Boeing should be concerned about this. See J. NEWHOUSE, *supra* note 15, at 5; Abbott, *Protecting the First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 VAND. J. TRANS. L. 691, 697 (1989).

130. *Making Airwaves—Turbulence—Tensions Rise as Trade Talks Approach with Subsidized Airbus*, Seattle Times, Sep. 20, 1990, at 131; Field, *supra* note 70, at D5; Labich, *Boeing Battles To Stay on Top*, FORTUNE, Sep. 28, 1987, at 71.

131. See Abbott, *supra* note 129, at 700.

132. *Id.* at 740.

133. *Id.*

134. *Id.* at 707-09.

pirated technology.¹³⁵ Under GATT, there is a pending proposal that "all nations consult, compromise and settle their patent disputes, when doing nothing would cause trade distortions between them."¹³⁶

It has been said that subsidies of foreign concerns, like Airbus, make it difficult for Boeing to compete. If most of the world's air carriers reside in the United States, and Airbus is free, because of its subsidies, to woo American carriers while Boeing scrounges for money to build the next plane, Airbus is going to have the marketing advantage. Europeans say that extensive Pentagon orders placed with American manufacturers, for planes that are modified versions of civilian airliners, amount to subsidies.¹³⁷ It is money going to Boeing, for example, to finance new planes. It releases time to recapture customers lost to Airbus. The matter of where airframe companies get money to finance the next generation of planes came to a head in September, 1990, and, to everyone's surprise, nothing was done by the concerned governments.¹³⁸

VI. EVALUATION

There is a sea change just ahead. No one knows whether Boeing will face an ill wind. Boeing is worried about the following:

135. *Id.* at 702-09.

136. *Id.* at 715-17.

137. Fields, *supra* note 70, at D5.

138. *Id.* The United States decided to file a formal complaint with GATT over a German government program to address losses covered by the high value of the Deutsche mark against the dollar. The program provides subsidies, asserted the United States, to Deutsche Airbus (the German partner in Airbus). Carla Hills, the U.S. Trade Representative, said that the German program was "wholly inconsistent" with GATT rules.

Ms. Hills requested the formation of a GATT panel to rule in this case. American officials said that a GATT ruling, assuming a panel is created, could be handed down within six months. A ruling favorable to the United States could call on the German government to end the subsidies, clearing the way for the United States to seek compensation.

According to American officials, the German Government paid \$240 million in subsidies to Deutsche Airbus and to German component suppliers last year. That sum does not include the \$5.8 billion committed to the Airbus program by the German government over the past 20 years. According to a study commissioned by the Commerce Department, total government support provided to all Airbus partner companies amounted to \$13.5 billion, or \$19.4 billion, if interest costs are included. *U.S. Files Formal Complaint with GATT over German Subsidies for Airbus Industries*, 8 Int'l Trade Rep. (BNA) No. 8, at 282 (Feb. 20, 1991); see Dullforce, *GATT Told of Dollars 257m German Airbus Subsidies*, *Fin. Times*, Feb. 27, 1991, § 1, at 7; *International Trade, U.S. EC at Odds Over Which GATT Committee has Jurisdiction in the Airbus Industrie Dispute*, *Daily Rep. for Executives* (BNA) (Mar. 7, 1991).

(1) people pirating its technology; (2) the indeterminate nature of its marketing strategy in Eastern Europe; (3) government funding (subsidies) of Airbus; (4) the economic fallout that will befall Boeing if the American government takes no action on the subsidy issue under GATT; (5) the loss of sales to Airbus; (6) the loss of market share to Airbus; (7) alliances between American engine suppliers, world-wide leasing companies, and Airbus; (8) the use of American engine suppliers like General Electric to broker Airbus products; (9) the use of American engine manufacturers to finance the sale of Airbus products in the United States; and (10) the volatility of the demand for energy.

If Europe is distracted by the crisis in the Middle East, or the "common currency" issue is not resolved under the Rome Treaty (the basic agreement establishing the EEC),¹³⁹ there will be less time and attention and, perhaps, less money to spend on Airbus Industries. If you put the matter in a different context, from Boeing's perspective, Airbus looks like a four legged stool. One leg, Germany, is preoccupied with its reunification.¹⁴⁰ It has to spend billions of marks—money it might have spent on Airbus—on the reconstruction of East Germany.¹⁴¹ France's economy, heavily dependent upon foreign oil, is subject to oil shocks.¹⁴² England is in political and economic turmoil.¹⁴³ If anyone of these nations (legs) is unable to carry its consortium load in the near future, Airbus will become Boeing's weak foe. Boeing will exploit its markets in Eastern Europe; it will corner Western European suppliers and customers it lost to Airbus. It will appeal to customers around the globe whom Airbus can no longer reach.

In this setting, because Boeing planes will be in demand, the patent issue will get addressed in GATT. Boeing and the United States government will have some leverage in the next round of

139. Riding, *Hesitation Now Greets Europe's Unity Plan*, N.Y. Times, Oct. 1, 1990, at C1, col. 3; see Prokesch, *Kohl Plan Breathes Life into Monetary Union*, N.Y. Times, Oct. 22, 1990, at C8, col. 5; Neher, *Paris Futures Market Starts New Contract: Greater Allure Sought by Linking European Currency Unit to Issue*, N.Y. Times, Oct. 22, 1990, at C8, col. 1; see also Kennedy, *supra* note 7, at 473, 475; Lewis, *The Bane of Nations*, N.Y. Times, Nov. 28, 1990, at A15, col. 1.

140. Protzman, *Slowing Economy Predicted for a United Germany*, N.Y. Times, Oct. 23, 1990, at C20, col. 3; see P. KENNEDY, *supra* note 8, at 483-84.

141. Protzman, *supra* note 140, at C20.

142. P. KENNEDY, *supra* note 8, at 483-84.

143. *Id.* at 480-82. Spain is the fourth leg of the stool. See *International Trade, U.S. EC at Odds*, *supra* note 138.

negotiations. The subsidy issue will get buried in a pile of diplomatic papers—there will be no need to squawk about it. Boeing's markets will show some expansion. There will be some increases in the firm's sales volume. Engine suppliers will have to rethink their positions with regards to alliances with non-engine suppliers.¹⁴⁴ Boeing will have time to fashion its airplane partnership the way it wishes with Japan.¹⁴⁵

This rosy picture rests upon the assumption that Europeans aren't smart enough to sense the ill winds blowing their way.¹⁴⁶ What is their solution to this currency crisis?¹⁴⁷ How would they finesse the Middle East crisis? First, Europe should purchase oil from Saudi Arabia to recoup the oil it lost in Kuwait. Second, France or Germany should open negotiations with the Soviet Union, hoping that nation will sell oil to the West for hard currency. Next, as regards the currency crisis, Europe could embrace the British Chancellor of the Exchequer's plan.¹⁴⁸ As an interim step, a so-called expression of interest, nine nations could create a convertible hard currency. Acting as the 13th currency—value being linked with the currencies belonging to the European Monetary System—the new money could replace The European Currency Unit.¹⁴⁹ Taking these steps would both brighten Europe's future, promote stability, and halt the machinery that would propel Boeing ahead of Airbus.¹⁵⁰

VII. CONCLUSION

In closing, Boeing's future (perhaps the future of other fretting businesses) is neither grim nor generously bright. Snags slowing European unification may weaken Airbus. Political wrangles may provide Boeing with time to fortify itself against the next round of competition and, hopefully, reduce the pressure to accept hasty solutions to nagging subsidy and patent problems. In the final analysis time will tell all.

144. Is G.E.'s alliance with Airbus and Guinness Peat too much of a good thing? See *International Trade, U.S. EC at Odds*, *supra* note 138.

145. J. NEWHOUSE, *supra* note 15, at 218; see P. KENNEDY, *supra* note 8, at 488.

146. P. KENNEDY, *supra* note 8, at 488.

147. See Moore, *Foreign Policy and the Crisis in Oil*, in *THE RESOURCE WAR IN 3-D: DEPENDENCY, DIPLOMACY AND DEFENSE*, 19-28 (World Affairs Council of Pittsburg 1980).

148. Riding, *supra* note 139, at C4, col. 4.

149. *Id.*

150. P. KENNEDY, *supra* note 8, at 432-33.

