Test taking strategy

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Hypo

A and B are competing builders of water purification plants. They are both based in the U.S. The CEOs of A and B meet in New York and agree not to compete on projects in Southeast Asia. Pursuant to their agreement, “A gets Malaysia” and “B gets Indonesia.” A and B continue to compete everywhere else in the world. Because of the agreement, prices for water purification plants in both Malaysia and Indonesia have risen by 100% or more. […]

Question: Does the agreement between A and B violate Section 1 of the Sherman Act? Discuss.

Build a useful outline

1. Read the question

2. Read the hypo

3. Make a drawing to figure out horizontal and vertical relationships

4. Outline the mandatory elements of the Section 1 violation that you are considering, here:

   (a) Agreement

   - horizontal

   (b) Unreasonable restraint of trade

   - per se ("territorial allocation")

Build a useful outline (cont.)

5. Once you have considered the basic structure of the offense (and your answer), think about what the “issues” could be

    - This hypo talks a lot about “the U.S.,” “meet in NY,” “Malaysia,” “Indonesia,” where the price increase takes place, etc. Whatever the hypo discusses at length is an issue.

    - What’s the issue here? Extraterritorial application of the U.S. antitrust laws! The agreement involves U.S. firms, was concluded in the U.S. but only affects non-U.S. commerce!

    - Even if you don’t know the first thing about the FTAIA, you have identified “the issue” and are now in a position to write a good exam answer.

6. Add the issue(s) to the outline.

7. Sanity check: Did you use all the facts in the hypo?

Write your answer

- Use the outline topics as headings
- Every legal conclusion **requires** factual backup—this is the most important aspect of legal writing in an exam situation; do this right and you will do well.
    - Use *because*, *therefore*, *as a result*, etc. Those are the words that help us connect facts to legal elements.
    - Mine the hypo; highlight the facts in the hypo that you have already used in your response. If there are leftover facts, think about what you might have missed.
- Write legibly
- Use appropriate language; no jokes, no colloquialisms
- Check your grammar and spelling

Sample answer with comments

A violation of Section 1 of the Sherman Act requires (1) an agreement (2) in restraint of trade.

1. Agreement

A and B entered into an express agreement “not to compete on projects in Southeast Asia” when their CEOs met in New York. {Non issue; no need to discuss tacit agreements, etc.} The agreement is horizontal in nature, **because** A and B are both builders of water purification plants and therefore competitors. {Important but not controversial}

Sample answer (cont.)

2. Unreasonable restraint of trade

As a rule, restraints of trade are evaluated under the rule of reason, except for certain plainly anticompetitive agreements that are judged illegal under a per se rule. Among the per se illegal agreements are market allocation agreements, whereby competitors agree not to compete in certain territories. {Rule statement. No need to list every category if only one is in play.}

The agreement between A and B falls into the market allocation category, **because** A and B agreed that “A gets Malaysia” and “B gets Indonesia", **meaning that** B would not compete for business in Malaysia and A would not compete for business in Indonesia. {The “meaning that” part is important, because it explains **why** the agreement limits competition.} The restraint is **therefore** per se illegal.

The fact that A and B continue to compete in the rest of the world does not change this analysis, **because** Section 1 liability does not require that A and B eliminate all competition between themselves. {If the fact is in the hypo, discuss it in your answer.}

There are no indications that the Southeast Asia market allocation is ancillary to a broader procompetitive agreement between A and B. The restraint is therefore a “naked” per se illegal restraint of trade. {Ancillary restraints are such a big issue in per se cases that I would take the time to quickly demonstrate that I have thought about this step in the analysis, even if it ultimately doesn't apply.}

Sample answer (cont.)

3. Extraterritorial application of the U.S. antitrust laws

{The headline flags the issue.}

A and B are both U.S. companies. They agreed to their market allocation scheme in New York. Had the market allocation been such that "A gets New York" and "B gets California," then liability under Section 1 would be obvious. {Pointing out in what way the case at hand deviates from the "normal" situation can be a very powerful and time-saving technique to show that you know what you are talking about.} However, in this case the effect of the market allocation agreement only manifests itself outside the U.S., **because** "prices for water purification plants in both Malaysia and Indonesia have risen by 100% or more." The question is thus whether domestic agreements to restrain trade with purely extraterritorial effects, or export cartels, are actionable under Section 1 of the Sherman Act. {"The question is …" should be reserved for the big issues.}