

2001

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Recommended Citation

International Securities Law: A Contemporary and Comparative Analysis, 35 INT'L L. 231 (2001)
<https://scholar.smu.edu/til/vol35/iss1/16>

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BOOK REVIEW

International Securities Law: A Contemporary and Comparative Analysis

By MARC I. STEINBERG. KLUWER LAW INTERNATIONAL, 1999, Pp. xvii, 340. \$135.00.

Reviewed By Manning Gilbert Warren III*

The globalization of securities markets is a process that has become predominant in the last fifteen years and one that may largely be completed within the next fifteen. It can be argued that this process began with the implementation of modern portfolio theories, exemplified by ERISA in the United States, with its imposition of fiduciary duties to reduce investment risk through global diversification. The globalization process was accelerated, first by development of satellite-linked Eurobond markets, followed by massive governmental privatizations, and, more recently, by the harmonization of securities laws in the European Union (EU).¹ Most importantly, incredible advances in information and telecommunications technologies have linked the world's issuers, financial intermediaries, investors, and regulatory authorities. These players, through the advent of computer networks, satellite links, and the Internet, are now only nanoseconds apart in the communications systems that make markets work. The technology has become available and is being utilized to issue and buy and sell securities twenty-four hours a day all around the world.²

The accelerating speed of communications technology, while enabling globalization of markets, has created a time warp for regulatory authorities left far behind in their efforts to protect market participants from disclosure failures, insider trading, and other forms of market abuse. Clearance and settlement systems, despite available technology, have not sufficiently globalized and remain highly fragmented and problematic.³ Moreover, despite

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1. See generally Manning Gilbert Warren III, *Global Harmonization of Securities Laws: The Achievements of the European Communities*, 31 HARV. INT'L L.J. 185 (1990).

2. See, e.g., Terzah Ewing & Silvia Ascarelli, *Barriers Fall Amid Markets Rush to Meld*, WALL ST. J., May 15, 2000, at C1; Jeff D. Opyke, *U.S. Investors Are Already Going Global*, WALL ST. J., May 15, 2000, at C1.

3. The European marketplace still has over twenty-five separate clearance and settlement houses, as opposed to two in the United States. It has been estimated that clearance and settlement costs for pan-European securities traders are as much as ten times more in Europe than in the United States. See Vanessa Fuhrmans & James R. Hagerty, *Clearing Houses Promise to Reduce Costs If European Exchanges Merge*, WALL ST. J. INTERACTIVE, Aug. 29, 2000. However, consolidation has begun to occur. Euroclear has recently agreed to acquire

notable efforts toward regulatory harmonization, regulatory impediments to international market integration continue to frustrate the globalization process. And rapidly emerging Internet markets, arguably beyond the jurisdiction of any regulatory authority, will continue to proliferate.⁴ The clash of global technology with the national regulatory system has and will continue to produce anarchy and chaos. At present, no one knows how market structure will evolve. Will we have intermarket linkages of the existent primary markets in various nations, whether through cooperative agreements or mergers?⁵ Will we have large, regional marketplaces that transcend national borders? Will we have proprietary electronic communications networks (ECN) that push traditional markets into extinction and then ultimately combine into a single, international market system?⁶ And how will the emergent trading structure cope with clearance and settlement and other enormous back-office challenges? The present mix of traditional markets, ECNs, and Internet markets and the developing linkages between them, now confront the entire financial services industry and its regulators with complex issues never faced before.

The world markets are in a critical state of flux. National regulators currently have no idea as to what market structure will evolve and, therefore, exactly how, what, whom, and where they will regulate. Perhaps the best approach, for now, is to focus on the harmonization of regulatory policies and methodologies, without regard to the evolving trading platforms. As it stands now, national regulatory policies are widely disparate even when applied to traditional markets now in their third and final age. Certainly, these disparities need to be at least generally resolved as the new age becomes established. The accomplishment of this daunting task would provide a solid base from which to contemplate the new age that is upon us and to provide the means by which global marketplace integrity can be established and maintained. If governments are unable to harmonize their basic regulatory philosophies, the new age marketplace will be at risk of a disastrous implosion.

Professor Marc Steinberg, one of the United States' foremost securities scholars, has written a book that covers the critical juncture that I have briefly described. He has focused

a majority stake in the Belgian depository CIK and the Dutch depository Negicef and intends to pursue a merger with Clearstream, which in turn was created by the merger last year of Cedel International and Deutsche Boerse Clearing AG. See Martin Boer, *Euroclear Steps Up Clearing, Settlement Consolidation*, WALL ST. J. INTERACTIVE, Sept. 6, 2000.

4. See, e.g., Silvia Ascarelli & Vanessa Fuhrmans, *New Online Exchange in Europe Faces Crowded Race for Dominance*, WALL ST. J., Nov. 17, 2000, at A17; Yaroslav Trofimov, *Odd Couple's Fledgling Internet Stock Exchange Frustrates Italian Regulators Who Want to Clip It*, WALL ST. J., Aug. 18, 2000, at C1. See generally ABA Global Cyberspace Jurisdiction Project, *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*, 55 BUS. LAW. 1801 (2000); John C. Coffee, Jr., *Brave New World?: The Impact(s) of the Internet on Modern Securities Regulation*, 52 BUS. LAW. 1195 (1997).

5. Despite the recent failure of the proposed merger between the London Stock Exchange and the Deutsche Boerse in Frankfurt, significant consolidation through mergers and joint venture agreements has already occurred and is certain to continue. See, e.g., Silvia Ascarelli, *Pan-Europe Market for Online Traders Planned*, WALL ST. J., Feb. 9, 2000, at A21; Vincent Boland, *Tradeport and SWX Seal Virt-X Merger*, FIN. TIMES, Oct. 24, 2000, at 9; *Exchanging Places*, ECONOMIST, Nov. 20, 1999, at 89; Vanessa Fuhrmans & Silvia Ascarelli, *As London Exchange's Merger Agreement Fails, Some Suitors Think About Taking Hostile Route*, WALL ST. J., Sept. 25, 2000, at C10; Greg Ip et al., *NYSE Talks to Markets in Latin America, Europe, Canada About Possible Alliances*, WALL ST. J., May 9, 2000, at C1; *NASDAQ Unveils Plan for 3 ECN's to Join Its Trading Network*, WALL ST. J., June 14, 2000, at C18; David I. Oyama, *Bourses in Australia and Singapore Plan Electronic Linkage*, WALL ST. J., June 7, 2000, at A21.

6. See Diana B. Henriques, *Trading Will Evolve With or Without Wall Street*, N.Y. TIMES, Dec. 20, 1999, at C30; *Farewell to the Floor?*, ECONOMIST, Aug. 7, 1999, at 61-62; *Stockmarket Regulation: Only Connect*, ECONOMIST, Oct. 9, 1999, at 97.

his enormous academic energy on accomplishments to date by various national governments in achieving a desirable degree of regulatory harmonization, whether through commonality or reciprocity. In doing so, Professor Steinberg has provided legal practitioners, regulators, and legal scholars with an outstanding introduction to the field of international securities law.

In the book's first chapter, Professor Steinberg begins with a useful nation-by-nation comparison of disclosure rules and regulations in the world's major industrialized nations, including the United States, the United Kingdom, France, Germany, Canada, Mexico, Japan, and Australia. He then discusses with considerable agility the concepts of commonality and reciprocity that have been recognized as the primary approaches to global regulatory harmonization.⁷ He provides lucid treatment of the continuing achievements by the International Organization of Securities Commissions (IOSCO)⁸ in promoting international consensus in accounting and other disclosure issues, including as an appendix IOSCO's invaluable report, *International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers*.

Professor Steinberg then addresses the U.S. Securities and Exchange Commission's (SEC) efforts to promote access to the United States' capital markets and, consequently, international global market integration by reducing regulatory hurdles for foreign issuers that have often been viewed as non-tariff trade barriers. He also provides an excellent description and analysis of the SEC's bilateral undertaking with Canadian authorities that resulted in a multi-jurisdictional disclosure system to facilitate cross-border securities transactions. This development, as Professor Steinberg notes, marked the first and, to date, the only time the SEC has agreed to accept prospectuses for securities that meet the standards of a foreign issuer's home country.⁹

His treatment of the SEC's efforts is followed by a summary of the more noteworthy accomplishments of the European Union in achieving regulatory harmony among its fifteen member states. In his discussion, he criticizes the EU's failure to create a Euro-SEC as a central regulatory authority, a failure that is unlikely to be addressed in the near future.¹⁰

7. See generally Marc I. Steinberg & Lee E. Michaels, *Disclosure in Global Securities Offerings: Analysis of Jurisdictional Approaches, Commonality and Reciprocity*, 20 MICH. J. INT'L L. 207 (1999).

8. IOSCO, founded in 1974, continues to serve as a vitally important forum for national regulators to develop common regulatory standards and to enhance cooperative enforcement. See generally IOSCO, *General Information on IOSCO*, at <http://www.iosco.org/geninfo-01.html>. The Forum of European Securities Commissions (FESCO), founded in 1997, has also become a significant force in the development of common standards and cooperative enforcement. See generally FESCO, *FESCO'S Organization*, at <http://www.eurofesco.org>. Its membership includes securities regulatory authorities of all seventeen Member States in the European Economic Area. *Id.*

9. The SEC is generally viewed as the most intransigent securities regulatory authority in the development of a global securities market, largely because of its insistence on the use of U.S. GAAP and its refusal to provide direct access to foreign exchanges. See, e.g., *EU Representative Says SEC Must Open Access to Exchanges*, WALL ST. J., June 12, 2000, at C24.

10. The European Commission has not seriously considered the establishment of a Euro-SEC. Indeed, not even the Securities Committee envisaged by the Commission and referenced in the European Union's Investment Services Directive has been established. Interview with Juan Fernández-Armesto, former president, Comisión Nacional de Mercado Valores (CNMV) in Madrid, Spain (Oct. 24, 2000); see also Manning Gilbert Warren III, *The European Union's Investment Services Directive*, 15 U. PA. J. INT'L BUS. L. 181, 218 n.182 (1994). See generally Roberta S. Karmel, *The Case for a European Securities Commission*, 38 COLUM. J. TRANSNAT'L L. 9 (1999); No SECs Please, We're European, ECONOMIST, Aug. 21, 1999, at 66; Erik Portanger, *Politics and National Pride Slow Drive for Pan-European Securities Regulator*, WALL ST. J., Aug. 17, 2000, at C7.

While Member States have ceded considerable sovereignty to the EU, securities regulatory authority is viewed by many Member State governments as the last bastion of political control over their individual economies.¹¹

Professor Steinberg concludes his first chapter with a number of interesting proposals for the development of a global disclosure system. He suggests a three-tiered system, in which disclosure documents would differ among developed, semi-developed, and emerging markets. His basic premise is that "enterprises situated in countries having more sophisticated markets are capable of greater substantive disclosure than enterprises from less developed capital markets."¹² While issuers from the two types of less-developed markets can opt for a more advanced disclosure document and, thus, gain access to all three types of markets, issuers from lesser-developed markets are entitled to opt for less costly disclosure processes. This proposal, embracing regional commonality and a substantial degree of global reciprocity, deserves considerable attention as the harmonization debate continues.

In his other chapters, Professor Steinberg addresses a number of significant developments to date in international securities law. In Chapter 2, he engages in a thorough and well-documented comparison of the insider trading laws in the major industrialized nations, as well as the EU's Insider Trading Directive.¹³ In Chapter 3, he addresses significant advances in the development of internationally accepted accounting and auditing standards. In Chapter 4, he provides enlightening coverage of the development and application of the SEC's Regulation S, including its vital interplay with Rule 144A. In Chapter 5, he describes and analyzes the SEC's and IOSCO's generally successful efforts to establish intergovernmental securities regulation through approval of memoranda of understanding (MOU), a momentous advance that has become an integral part of international regulatory enforcement. He appends to his analysis the MOUs negotiated with regulatory authorities in the United Kingdom, Germany, and India.

In his final chapter, Professor Steinberg undertakes, perhaps too ambitiously, to provide a regulatory formula for emerging capital markets that understandably demand access to their respective shares of globally available capital. In advancing his approach, he recognizes the difficult challenges faced by these markets but argues that skepticism would be fatal. He adroitly outlines and discusses the central issues of (1) government versus self-regulation; (2) available regulatory resources; (3) government civil versus criminal enforcement; (4) the merits of private civil litigation; (5) disclosure versus merit regulation; (6) market access; and (7) supervision of financial intermediaries.¹⁴ He concludes that for these emerging markets to attract outside capital, they not only must offer the "realistic lure of attractive profit," but also must implement a "sufficiently credible regulatory framework"¹⁵ to comfort institutional investors and induce the participation of sophisticated financial intermediaries. He appends to his discussion his own course outline on emerging capital markets, as well as IOSCO's report, *Objectives and Principles of Securities Regulation*.

Professor Steinberg in this book has made a significant contribution to the field of international securities law. For the practitioner, this book provides a valuable overview of

11. See Interview with Juan Fernández-Armesto, *supra* note 10.

12. MARC I. STEINBERG, *INTERNATIONAL SECURITIES LAW: A CONTEMPORARY AND COMPARATIVE ANALYSIS* 49 (1999).

13. See generally Warren, *supra* note 10, at 181.

14. STEINBERG, *supra* note 12, at 259.

15. *Id.* at 227.

the regulatory structures that his or her clients face in accessing the world's major capital markets. For the regulator, the book offers an opportunity to review and reassess the problems that continue to frustrate the complementary goals of investor protection and capital formation in a global environment. And for the academic, the book constitutes a very useful text for further study and research in a legal field still in its infancy.

