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BOOK REVIEWS

Joint Venturing Abroad—A Case Study

Edited by David Goldsweig, American Bar Association, Section of International Law and Practice, Chicago, Ill., 1985, 310 pp., \$25.

Host countries have come to regard joint ventures between their nationals and United States companies as a preferred form of United States investment. Unlike some investments which United States companies fully or substantially control, a joint venture can offer skills to a greater number of host country nationals, prompt the United States investor to share capital and technology, and provide the host country with significant control over the investment. United States investors, in turn, often face host country investment controls and hard currency shortages which make joint venturing the best alternative for investment. Yet United States companies also have chosen joint ventures for the positive reason that properly structured, a joint venture can yield greater returns to both venture partners than could an investment by either partner alone.

To properly structure an international joint venture, however, counsel must be aware of both the applicable United States and foreign law. *Joint Venturing Abroad—A Case Study* treats many of the United States and foreign legal considerations involved in properly structuring an international joint venture. While the book does not deal with a particular body of foreign law, it instead provides the reader with considerations that might apply to forming a joint venture in any foreign country, particularly in developing countries. The book thus provides a guide to counsel at the initial stages of planning a joint venture or whose clients are considering a joint venture as a possible form of investment.

The book began as a National Institute sponsored by the Section of International Law and Practice of the American Bar Association. The Institute's focal point was a case study of a joint venture between a United States company and two foreign companies (one the direct venture partner, the second a supplier of the venture) in a hypothetical host country. Presentations focused on the United States and hypothetical foreign legal considerations that inhered in forming and operating the joint venture. Documents necessary to forming the joint venture also were drawn up and referred to in the presentations. The book was developed from the Institute presentations and documents.

Joint Venturing Abroad has two sections. The first section describes the case study joint venture and sets out the agreements necessary to it, includ-

ing a pre-incorporation agreement, company statutes, a share-acquisition agreement, a general-assistance agreement, a supply agreement, a machinery-and-equipment-purchase agreement, a technical-assistance-and-license agreement, a shareholder agreement, and a trademark-license agreement. Even though the documents were created for the case study, they are sufficiently general so that they might be used as the basis for actual joint venture agreements. The agreements set out in this section are particularly helpful for counsel in drafting agreements for an international joint venture, because they embody the legal considerations discussed in the book's second section.

The case study planners did not attempt to create laws of the hypothetical host country for the joint venture. The book's second section thus discusses the specific United States and general foreign legal considerations that a United States company might have to undertake when deciding to enter into a joint venture abroad. The editor, David Goldsweig of General Motors Corporation, has organized each of the articles of the second section into a logical progression of the considerations involved in forming an international joint venture, beginning with an article by Dean Jeswald Salacuse of the Southern Methodist University School of Law on "Host Country Regulation of Joint Ventures and Foreign Investment." This article outlines the structure that a joint venture should take given the legal and regulatory system of the host country. Immediately following are two articles on financing the joint venture, the first by S. Linn Williams, Vice President and General Counsel of Sears World Trade, Inc., and the second by James Silkenat of the International Finance Corporation. Mr. Williams' article discusses the relationship of the structure of the joint venture to financing by the United States joint venture partner, deals with the methods of securing financing, and explains the financing risks which arise during the different phases of an international joint venture. Mr. Silkenat then explains lending by multinational development institutions, in particular, by the International Finance Corporation, the private lending window of the World Bank.

The next several chapters examine the practical structuring of the international joint venture and the implications that structure has for profitability of the venture and the relationship of its partners. An article on "Tax Considerations of Joint Venturing" by Charles Gustafson of the Georgetown University Law Center succinctly describes the elements of United States domestic and foreign taxation that apply to an international joint venture, and how tax considerations should influence the ways that a joint venture is formed and managed. Professor Curtis Reitz of the University of Pennsylvania Law School then deals with "Supply-Purchase Agreements" in the joint venture, focusing on the United Nations Convention on Contracts for the International Sale of Goods and on the use of the Convention as a part of the joint venture's supply-purchase agreements. Since transfer of technology

and other intellectual property rights will likely be involved in an international joint venture, the book next includes an article by Michael Blechman of Kaye, Scholer, Fierman, Hays & Handler which deals with the possible controls that the United States company partner may place on technology transfers and the legal considerations that inhere in licensing. The portion of the book on structuring the joint venture ends with an article by Gerald Aksen, Reid & Priest, on "Arbitration and Other Means of Dispute Settlement, Law to Govern, and Venue." Mr. Aksen strongly recommends that any international joint venture agreement include a provision for arbitration of disputes, assuring that (1) the agreement to arbitrate is enforceable, (2) the procedures used to arbitrate are fair and impartial, and (3) the award is enforceable no matter where it is rendered.

The concluding portion of the book discusses remaining considerations important to the operation of the international joint venture. P.W. Rowberg, Vice President, Countertrade of Sears World Trade, begins this portion of the book with an article on "Countertrade as a Quid Pro Quo for Host Government Approval of a Joint Venture." Mr. Rowberg describes the types of countertrade used in international trade and discusses the potential application of these to the case study. Following is an article by Joseph Griffin, of Wald, Harkrader & Ross, on the antitrust considerations of joint venturing abroad. Mr. Griffin's article includes a useful summary of antitrust caselaw on joint ventures and of the registration requirements for joint ventures under the Hart-Scott-Rodino Act. Jay Vogelsson then explains "United States Foreign Corrupt Practices and Anti-Boycott Legislation," and presents a list of factors to assist joint venturers in complying with United States anti-boycott and foreign corrupt practices legislation. Since political risk insurance is often an important factor in obtaining financing for an international joint venture, the book's next article, by B. Thomas Mansbach of the Overseas Private Investment Corporation, details how such insurance may be obtained. Concluding the book is an article by James J. Combs, Associate General Counsel for the Burroughs Corporation, which discusses the various factors that a potential United States joint venturer might encounter when trying to obtain foreign government approval of a joint venture. Mr. Combs explains that while obtaining governmental approvals will always be difficult, such approvals will almost always be a prerequisite to any international joint venture, particularly a venture in a developing country.

If there is any criticism of the book, it is that its second section does not completely integrate with the case study and documents of its first section. Yet such integration would have been difficult without creating an entire set of hypothetical host country laws and regulations, which would have narrowed the entire exercise to one type of host country situation. Consequently, while the book does not completely meet its goal of being a case

study, this shortcoming makes the book more helpful to the practitioner approaching a joint venture. It gives the practitioner general, yet useful guidelines to the considerations involved in forming and operating an international joint venture, and helps the practitioner to assess along with the particular facts that he or she has in hand whether a joint venture would be desirable for the client.

Joint Venturing Abroad—A Case Study is a valuable work for practitioners who are not familiar with the process of forming and operating an international joint venture, especially given the book's low cover price and readability. The book will also be of high value to those already familiar with international joint venturing, but who nevertheless have the need for readily available, concise summaries of the many considerations involved in forming and operating an international joint venture.

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Dictionary of Legal, Commercial and Political Terms, German-English, Vol. I, 3rd ed., 1985

By Clara-Erika Dietl, Anneliese A. Moss and Egon Lorenz, assisted by Wiebke Buxbaum; C.H. Beck'sche Verlagsbuchhandlung, Munich, West Germany (sold in the United States by Matthew Bender Co.); 1985, 895 pp., \$100.

This is volume one (English-German) of the completely revised third edition of this excellent dictionary, the first edition of which was compiled by the late Prof. Erdsiek. We reviewed volume one of the second edition, which appeared in 1979, and volume two, published 1983, in 15 INT'L LAW. 172 (1981) and 18 INT'L LAW. 761 (1984), respectively. Frequent revisions of not only German-English, but also of all-German dictionaries have become common as the result of a rapidly expanding terminology. The specialized fields to which this dictionary is devoted must rank among the most prolific in this respect.

The dictionary is the result of more than twenty years of compiling legal, commercial and political terms from three linguistic and legal systems—German, English and United States—revealing, where necessary, subtle yet important distinctions between the English and United States legal and business terminology. It also contains a list of the important international and European organizations and institutions and conventions.

Like the previous edition, this volume is thorough and well-structured, providing concise translations for highly technical English and United States terms of art. Where no exact German equivalent exists—as is, for instance, the case with the peculiar Anglo-American concept of a “trust” and the “rule of reason” in United States antitrust law—the dictionary offers clear and understandable explanations.

The third edition takes the developments in the field of international conventions and the European integration into account and gives due consideration to changes in British and United States case law and legislation. It thus lists—to name only a few examples—the United States Bankruptcy Reform Act of 1978 and the British Protection of Trading Interests Act of 1980, the objective of which is to shield British companies from foreign antitrust actions and triple damage awards and which has been invoked in the *Laker* case.¹ The third edition also includes new political terms as well as new economic concepts based on the increasing cooperation between countries.

The new edition will prove a very valuable resource tool for practitioners, scholars and social scientists.

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International Space Law

By Gennady Zhukov and Yuri Kulosov, (translated from the Russian by Boris Belitzky); Praeger, New York, 1984, pp. xiv, 224, Index, references; \$29.95.

This work is a generally unbiased and thorough summary of current international space law by two eminent Soviet scholars. Professor Zhukov is Vice-President of the International Institute of Space Law and the author of two previous treatises on space law; Dr. Kulosov is a member of the Soviet

1. *Laker Airways, Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

Ministry of Foreign Affairs and has written extensively in several international law fields, including books on disarmament and broadcasting.

The introduction to their volume clearly embeds the discussion in political realities:

The evolution of international space law—and, for that matter, of international law in general—is influenced by the objective needs of states and, specifically, by such factors as changes in the correlation of strength on the international scene, the foreign policies of states, and world opinion, to mention only a few such factors. (P. xiv.)

This candid and, for the most part, even-handed attitude informs the treatment of the first five chapters which discuss general principles of space law and the development of the five United Nations space law treaties, as well as related US/USSR arms agreements. There is a strong emphasis on the supremacy of treaties over custom as a source of international law, as is typical of Soviet jurisprudence; less typically, the role of the United Nations and its Committee on the Peaceful Uses of Outer Space is described favorably and in some detail.

In prospective space law areas, a Western reader will be especially interested in the presentation of INTERSPUTNIK's history and operations (pp. 109–120), the importance given to issues concerning space meteorology (pp. 137–140) and the Soviet view of the problems brought on by vagueness in the Moon Treaty (pp. 184–187). Clear lines are also drawn between Soviet and United States policy in at least three areas.

First, the authors are very concerned about the possible privatization of activities in outer space (pp. 65–55, 192), given the 1967 Outer Space Treaty obligation of continuing national supervision. They view this obligation as being adequately served by the historical United States control of launches through a governmental agency (i.e., NASA), but seem to oppose private launches and believe current space commercialization initiatives require expounded governmental involvement.

Second, the Soviet position on direct broadcasting satellites insists on prior consent by the receiving country (pp. 127–136). The authors admit the pertinence of the United Nations Universal Declaration of Human Rights, which states that any individual has the right to “seek, receive, and impart information” independent of national boundaries, but claim that this right is to be interpreted by individual states and may be restricted under international law “for respect of the rights or reputations of others” and “for the protection of national security, or of public order, or of public health or morals” (p. 135). All broadcasting issues are seen in terms of propaganda and/or cultural imposition, rather than communications.

Third, a similar insistence on the dominance of sovereign rights characterizes their remote sensing discussion (pp. 141–146), with the Soviet position stipulating mandatory distribution to the sensed state, and no

distribution to third parties without the sensed state's consent, in strong contradiction to the Western privatization of remote sensing systems.

The handling of Western positions is usually fair and balanced, with two exceptions. First, although the references are quite international, quoting many different scholars both within and outside the two superpowers, usually only those Western views consistent with Soviet policy are cited; negative views are typically anonymous (e.g., pp. 44–45, 46, 60, 62). Second, although a reasonable case is made for the argument that radiation damage is not within the purview of the 1972 Liability Treaty (pp. 102–108), the Cosmos 954 incident which prompted such a claim by Canada against the Soviet Union is not mentioned at all. Indeed, somewhat ingenuously, the authors refer to regulation of nuclear power sources in space as an area where “there is no need for this as yet, but where haste could damage further advances in space research” (p. 193).

These exceptions aside, *International Space Law* is a valuable and accurate exposition of this rapidly evolving field from an alternative and informed position.

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Resolving Transnational Disputes through International Arbitration [Sixth Sokol Colloquium]

Edited by T. Carbonneau; The University Press of Virginia, 1984, pp. 291.

The papers collected in this volume offer both an excellent overview of the international arbitral process today and, in many instances, valuable in-depth exploration of selected issues of interest both to international practitioners and international legal scholars. They represent the work of some of the most eminent practitioners and commentators associated with international arbitration, quite a few of whom participated in the Sixth Sokol Colloquium held at the University of Virginia School of Law in 1982.

The papers are divided into three categories. The first section deals with arbitration in public international law, and includes a short but intriguing outline of the thoughts of former Secretary of State Dean Rusk concerning the role and problems of arbitration as a means of settling political disputes. Arbitration in the field of economic and trade relations between nations—with special emphasis on the dispute resolution mechanisms of the GATT—

is given a thorough and scholarly exegesis by John H. Jackson. Professor Jackson's in-depth exploration of the GATT dispute-resolution procedures, both in theory and in practice, illuminates not only some of the problems and weaknesses of these mechanisms in the GATT itself but also some of the problems and weaknesses of similar mechanisms in the context of international economic relations generally.

Richard Bilder offers some interesting insights in a chapter on the limitations of adjudication as an international dispute settlement technique. Primary among these limitations, Professor Bilder points out, is the reluctance of nations to submit what they often consider to be their vital interests to third-party decision-making, especially where that decision-making allows potentially little room for compromise and bargaining. As Dean Rusk also recognizes, some kinds of disputes of a primarily political character between nations simply do not lend themselves to resolution by means of application of legal principles. Nonetheless, as Professor Bilder notes, the availability of international arbitration as a possibility for resolving some kinds of disputes, such as primarily commercial controversies, can be a powerful mediating influence in tempering the severity of larger-scale political and strategic disputes. Nowhere has this fact been better illustrated in recent times, of course, than in the "Algiers Agreements" that brought the Iranian hostage crisis to a successful, or at least bloodless, resolution. The agreement of the United States and Iran to let the arbitration process resolve commercial disputes associated with the political and revolutionary upheavals in Iran gave both countries a mechanism for defusing the more immediate and pressing crisis, i.e., the detention of the United States nationals in Iran.

Professor Louis Sohn's paper examining the role of arbitration in recent international multilateral treaties rounds out a particularly provocative and comprehensive section on the role of the arbitral process in the public international-law context.

The second major subdivision of *Resolving Transnational Disputes Through International Arbitration* includes papers dealing with arbitration in a variety of different major legal systems. These articles examine arbitral law and practice within the common-law, civil-law, and socialist systems, and provide a useful comparative perspective on problems of common concern and interest. Recent developments in English arbitration law are explained by William Park; arbitration practice and procedure in France is thoroughly examined by Bernard Audit and the editor, Thomas Carbonneau; and the Soviet Union's position on international arbitration as a method of resolving transnational disputes is explained by Christopher Osakwe as a reflection of an increasingly pragmatic approach by the Soviet Union to the problems and complexities of international trade. Issues such as party and arbitral autonomy, the possibilities of judicial appeal and

intervention, and the effect of the *lex loci* are discussed by the authors contributing papers to this section.

The third part of the collection includes papers addressing a number of different selected topics of considerable interest to both practitioners and students of international commercial arbitration. George Delaume contributes a thoughtful analysis of recent trends at the national level toward divorcing arbitral proceedings more and more from court litigation and judicial intervention. At present, no international arbitration other than arbitration under the auspices of the International Center for Settlement of Investment Disputes (ICSID) is completely divorced from the possibility of court intervention. Mr. Delaume deals with problems raised by the judicial/arbitral interface with respect to enforcement of the agreement to arbitrate, judicial control over the arbitral proceedings themselves, and judicial control over transnational awards, especially with respect to recognition and enforcement of arbitral awards.

George Yates III contributes an analysis of the relative advantages and disadvantages of arbitration and court litigation from the point of view of cost, speed, efficiency, flexibility, confidentiality, and other relevant considerations. His cost analysis includes some interesting data on ICC and AAA arbitration fee schedules.

Jan Paulsson provides a detailed description of arbitration procedures and practices under the Rules of the International Chamber of Commerce (ICC). Mr. Paulson's study provides useful information to anyone contemplating ICC arbitration and includes previously unavailable statistical compilations of data concerning ICC arbitrations to date.

Finally, Gabriel Wilner contributes a perspicacious analysis of some of the problems of arbitration between industrialized or "developed" countries and "developing" countries.

In sum, this collection of essays, studies, and analyses of issues pertinent to the international arbitration process includes much that is both useful and thought-provoking and should be a welcome addition to the shelves of anyone practicing or studying the international arbitral process today.

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Kollisionsrecht der Zusammenschlusskontrolle¹

By Karl Matthias Meessen, Nomos Verlagsgesellschaft, Baden Baden, F.R.G., 1985, pp. 90, DM_____

Although the international controversy concerning the extraterritorial application of the antitrust laws has raged for decades, progress toward resolving basic issues has been hampered by two key factors. The first is the fact that it has been treated as a problem of the relationship between the United States and the rest of the world. It has generally been the United States whose assertions of extraterritorial jurisdiction have been criticized, with little recognition of the fact that other countries have recently been asserting similar jurisdictional rights. A second, and related, factor has been the overly general and abstract content of much of the controversy.

The present small book (90 pages) by Professor Karl Matthias Meessen is thus a particularly welcome addition to the literature in the area, because it is not affected by either of these limitations. First, it deals with the extraterritoriality problem in the context of West German antitrust law. The principles developed are often applicable outside the context of West German law, but the fact that they are considered in this context significantly expands the range of discourse on the subject and provides comparisons with the situation in the United States. Second, the book deals with a specific functional problem—namely, the extraterritorial application of West German merger control legislation. This has been the area of greatest controversy in the Federal Republic of Germany, and the most important recent cases have been in this area. Moreover, it is the problem area which is of most practical importance for United States lawyers, because United States firms can easily be directly affected by West German merger control legislation. West German merger controls are now generally more severe than United States merger controls, and they have been frequently used to attack foreign mergers.

The book is given an even more practical orientation by the fact that it focuses on several leading cases of the last five years in the merger control area (often involving United States corporate defendants). Meessen analyzes the existing case law, clarifies the conceptual issues which they raise, and provides suggestions as to how the analytical framework of the cases could be improved.

Professor Meessen is one of the leading experts on the issue of extraterritoriality in West Germany. His 1975 book entitled *Die Extraterritoriale Auswirkungen des deutschen Kartellrechts* is probably the single most

1. Merger Control and the Conflict of Laws

influential work in the area. He has continued to develop ideas originally presented there, and the current volume represents his most recent contribution.

The format that Meessen uses is particularly easy to follow and to understand. He provides a series of "black letter" principles which he considers applicable to the problem and which together provide a consistent analytical framework for the resolution of the relevant issues. He then discusses the derivation and degree of acceptance of each principle and the way in which it relates to the other principles and to the overall framework of analysis. Finally, he analyzes this framework and provides an English translation of the principles themselves.

In order to understand the West German context of the extraterritoriality problem, one must start with two central facts. First, section 98(2) of the West German antitrust statute—"GWB" (Gesetz gegen Wettbewerbsbeschränkungen)—*requires* that West German law be applied to anticompetitive behavior which has domestic effects. This is a statutory embodiment of the effects principle which was derived from United States law. Second, article 25 of the West German constitution prohibits the application of a West German statute where such application would violate customary international law. Given, then, that there is a statutory mandate to utilize the effects principle and a constitutional mandate not to violate customary international law, the critical issue is how to limit the application of the effects principle.

Meessen confirms the view taken by the West German courts (as well as by United States courts) that customary international law permits West Germany to use the effects principle in applying its merger controls, provided that there are significant, direct and predictable effects of the merger within West German territory. This first set of limitations is not particularly new.

There are, however, two other sources of limits which are relatively new and deserve particular attention in the United States. The first source is West German private international law (roughly, conflict of laws). According to Meessen, this body of law posits what may be called a principle of necessity (he calls it the "in-so-far-as" principle). According to this principle, West German courts may apply a West German statute only to the extent necessary to accomplish the purpose of the statutory enactment—here, to eliminate the domestic effects of the anticompetitive behavior. Thus, if a foreign merger of two foreign parent companies with subsidiaries in West Germany would have domestic effects, West German law would be applicable, but only to the extent of prohibiting the anticompetitive effects of the merger in West Germany.

The second source of limits consists of public international law principles. Of primary importance here is a balancing principle which Meessen derives

from the customary law principle of non-interference. According to this balancing test, a state is obligated to limit the effects of its sovereign acts (e.g., judicial orders) on foreign states to the extent that such sovereign act would cause greater harm to the interests of such other state than failure to take such action would harm the forum state's domestic interests. In other words, a state must look at the anticipated effects of any sovereign act on the legally protected interests of a foreign state, and where such act would cause greater harm to those interests than it would serve domestic interests, the forum state must limit the effects of its actions accordingly.

Although I am not convinced that such a broad balancing test represents the ultimate development of the law in this area, Meessen's contributions here have been extraordinarily important. Professor Meessen's analysis of the use of the effects principle is designed to allow the debate concerning extraterritoriality to shift to specific considerations of the kinds of remedies which are consistent with international legal principles. Such a shift would be a major advance in analysis of the problem and one deserving of close attention by United States lawyers.

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The Changing Law of International Claims

By F.V. Garcia-Amador, Oceana Publications, 1984, 2 vols., pp. 953, \$85.

Professor Garcia-Amador pursues two goals in his new treatise on the international law of claims. He seeks first, in the manner of traditional legal treatises, to explicate this confused and often contentious area of customary international law. Secondly, and potentially more profoundly, he examines the ways in which that law has changed in response to recent criticism, primarily from the Third World and most notably in the various attempts to constitute a "New International Economic Order." Garcia-Amador brings unique qualifications to these tasks. From 1953 through 1961, he was the Special Rapporteur for the International Law Commission in its attempts to codify the law of State responsibility. And, as a Latin American scholar of international law, he is thoroughly familiar with the longstanding Latin critique of the customary law of State responsibility that foreshadowed more recent Third World criticisms.

By the standards of international law, the sources of the law of claims are voluminous. The number and diversity of these sources, the confused and

incongruent doctrines that have grown up around them, and the complex political and economic interests that, generally unstated, underlie those doctrines make difficult any attempt to analyze the current state of the law. Garcia-Amador overcomes these obstacles and presents us with a highly useful and well-organized compendium of the customary law and recent attempts to change it.

Garcia-Amador begins his explication of the law of international claims with such general, underlying concepts as the status of aliens, the nature of international responsibility, and acquired rights, and proceeds to more specific topics such as expropriation, compensation and valuation, and the law governing modern concession agreements. He also discusses important ancillary topics, such as the admissibility of claims, the procedures for the submission of claims, and exhaustion of local remedies. For each topic, he examines the customary law sources and discusses recent critiques of the customary standards. His familiarity with the various attempts to codify the law of State responsibility is especially thorough and illuminating. The work concludes with a discussion of the New International Economic Order and its attempts to change the international law of claims. A very useful Appendix includes the texts of attempted codifications of the law of State responsibility and a comprehensive bibliography.

There are, however, curious omissions. Garcia-Amador makes no mention of the Iran-United States Claims Tribunal—certainly one of the most significant developments in the law of international claims in many decades. This may simply be unfortunate timing since the Tribunal's first decisions became readily available only when Garcia-Amador's treatise was presumably in preparation for publication. Less explicable is his treatment of the major international arbitrations of the 1970's. While in the context of the law applicable to State contracts he thoroughly examines such recent decisions as the three Libya oil arbitrations,¹ the *Aminoil* arbitration,² and the *Revere Copper* arbitration,³ he fails even to mention those decisions in other, equally significant areas.

This omission is particularly unfortunate in the critical area of compensation. Here Garcia-Amador accepts the view that the customary law requiring "full" compensation has now been supplanted by a standard permitting "partial and reasonable compensation" (p. 753). His principal evidence for this conclusion consists of General Assembly resolutions and post-World

1. *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Libya*, 53 Int'l L. Reps. 398, 17 Int'l Leg. Mats. 1 (R.-J. Dupuy, 1977); *Libyan American Oil Co. v. Libya*, 62 Int'l L. Reps. 140, 20 Int'l Leg. Mats. 1 (S. Mahmassani, 1981); *BP Exploration Co. v. Libya*, 53 Int'l L. Reps. 297 (G. Lagergren, 1979).

2. *Arbitration between the Government of Kuwait and the American Independent Oil Co.*, 21 Int'l Leg. Mats. 1001 (P. Reuter, H. Sultan, & G. Fitzmaurice, 1982).

3. *Revere Copper and Brass, Inc. v. Overseas Private Investment Corp.*, 17 Int'l Leg. Mats. 1321 (G. W. Haight, C. R. Wetzel, 1978, F. Bergan diss.).

War II lump-sum settlements. General Assembly resolutions are not, however, legally binding, and settlements are highly dubious evidence of the legal standard for compensating claims, especially international settlements whose terms may well reflect unrelated factors.⁴ The recent arbitrations, in contrast, involve attempts by leading scholars and judges, in an adversarial legal context, to determine binding legal standards and methods of valuation. The implications of these decisions are, to be sure, controversial,⁵ but any analysis of the current state of the law that fails to take them into account is incomplete.

More significantly, the number and diversity of sources for the international law of claims and the recurrence of the same issues over many decades and in many contexts offer an unusual opportunity to examine the evolution of international law generally and its response to major changes in the international community. For the same reasons, the law of international claims presents with unusual clarity many of the most profound questions confronting international law today: Should a customary "international" law that evolved primarily among European States prior to World War II be considered binding among all States today? If that customary law is binding, what sources of law can change it? Can the relatively small number of capital-exporting States continue the old law in force by refusing to acquiesce in its change? Conversely, can the capital-importing States change the law in the face of such opposition by passing legally non-binding resolutions in the General Assembly? How can the proponents of a New International Economic Order insist at one and the same time on a strict adherence to the equality of States and on preferential treatment for States at less advanced stages of economic development?

These are profound questions that are central to any thorough appreciation of the current status and future direction of the law of claims.⁶ Their implications for international law are, of course, much broader. Regrettably, Garcia-Amador, in an otherwise admirable work, touches only lightly on these weightier issues.

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*The views expressed herein are those of the reviewer and do not represent those of the Department of State or the United States Government.

4. Garcia-Amador in this respect merely endorses (see pp. 312-22) the views of Professors Lillich and Weston, *International Claims: Their Settlements by Lump Sum Agreements* (1975).

5. See the dispute between Professors Mendelson and Schachter: 78 AM. J. INT'L L. 121 (1984); 79 AM. J. INT'L L. 414 (1985); 79 AM. J. INT'L L. 1041 (1985).

6. For a discussion of these issues and their relationship to the laws of claims, see Dolzer, *New Foundations of the Law Expropriation of Alien Property*, 75 AM. J. INT'L L. 553 (1981).

International Trade Law and Practice of the European Community: EEC Anti-Dumping and Other Trade Protection Laws

By Ivo Van Bael and Jean-Francois Bellis, Oxfordshire, England, CCH Editions Limited, 1985, pp. 427.

Although always important, in a shrinking world of miraculous technological advances, international trade is probably more important today than ever before. As the impact of international trade on the economies of nations has grown in astounding proportions, there has been a corresponding increase in disputes within the international trade community. In view of the ever-increasing importance of international trade, all lawyers, as well as the members of the international trade community, should be familiar with the law of international trade. For the United States lawyer, this body of law should include a familiarity with the role and powers of the European Economic Community (EEC).

The EEC, created by the Treaty of Rome in 1957, is the world's outstanding illustration of economic integration and association of states. Because of its high level of international development, it is more than a mere common market, and may be regarded as a developing federated unit for major economic and social purposes. Although its members unquestionably remain sovereign states, the decisions of the EEC may have a direct effect within the territory of its member states. From its original six member states, consisting of Belgium, France, Germany, Holland, Italy, and Luxembourg, it has expanded to twelve members, with the addition of the United Kingdom, Denmark, Ireland and Greece, and most recently, on January 1, 1986, Spain and Portugal. Quite apart from the political potential of the EEC, it is clear that anyone interested in international trade and international trade law must also be familiar with the legal structure and rules under which the EEC will allow competition by non-member states.

The importance of the EEC as a leading international trade entity, with almost 20 percent of the world's imports and exports, cannot be minimized. Its commitment to free trade, however, does not imply that it is powerless against international trade practices, such as dumping and subsidization, which are deemed unfair and inconsistent with the rules and policies established by the General Agreement on Tariffs and Trade (GATT). The GATT, which extended on a multilateral basis the most favored nation concept, also established internationally accepted rules which dealt with quotas and dumped and subsidized merchandise.

The raising of tariffs and the imposition of quotas, which preceded World War II, were followed by a network of trade agreements calculated to exclude and regulate imports that adversely affected domestic industries.

International treaties, such as the GATT, and the national laws and regulations of the trading nations of the world, comprise the subject matter of the law of international trade. Formerly a specialization practiced by a small number of lawyers, it is today an important branch of the law of concern to a large segment of the bar.

Reflecting the importance of the subject, many books have recently been published on the various aspects of international trade law. A recent example of the books and monographs that have been published to fill the needs of the international trade community is *International Trade Law and Practice of the European Community: EEC Anti-Dumping and Other Trade Protection Laws*.

Written primarily for trade consultants and legal advisers, *International Trade Law and Practice of the European Community: EEC Anti-Dumping and Other Trade Protection Laws*, in a well-organized and convenient form, introduces the reader to the trade protection laws of the EEC. In summary, it may be said that the book, in the confines of 218 pages of text, presents and analyzes the trade protection laws of the EEC. In addition to a presentation of the pertinent legislation, the book also contains a useful explanation of the actual application of the laws in practice.

Over and beyond an informative introduction and useful tables and appendixes, the book discusses the EEC's four main measures or methods of trade protection. These measures are the anti-dumping rules, the anti-subsidy rules or countervailing measures, the safeguard measures, and the "New Commercial Policy Instrument." The book also includes a chapter specifically devoted to the anti-dumping rules of the European Coal and Steel Community (ECSC).

The book is organized into four parts, each part devoted to one of the four protective measures. The presentation within each part is clear and straightforward, and consists of an introduction, substantive elements or requirements, relief, and procedure. It is the authors' primary objective to provide the reader with a detailed practical commentary on the EEC international trade legislation, as actually applied by EEC authorities.

Part One, which deals with "Anti-Dumping Measures," treats the protective measures that may be taken by EEC authorities against dumped imports pursuant to EEC Regulation No. 2176/84, and ECSC Decision No. 2177/84. It should be noted that Article VI of GATT states that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. The parties, in Annex 2, the Agreement on the Implementation of Article VI, recognize that "anti-dumping practices should not constitute an unjustifiable impediment to international trade and that anti-dumping

duties may be applied against dumping only if such dumping causes or threatens material injury to an established industry or materially retards the establishment of an industry."

Under "substantive elements," the authors present the existence of "dumping," the existence of "injury" and the existence of "community interests" which warrant or require intervention. Since anti-dumping proceedings are those most frequently utilized by EEC authorities, and are of enormous practical significance, the major portion of the book is devoted to a treatment of the substantive and procedural aspects of anti-dumping proceedings. In Chapter 5 of Part I, the authors also present the rules and practices specifically applicable to coal and steel products.

The two legislative instruments cited above, which empower EEC authorities to act against dumped imports, also authorize protective measures as to subsidized imports. Although anti-dumping and anti-subsidy proceedings share many substantive and procedural concepts, contrary to dumping proceedings, anti-subsidy proceedings have been used infrequently.

Part III of the book treats "Safeguard Measures" under the pertinent provisions of EEC Regulations. Whereas anti-dumping and anti-subsidy measures allow EEC authorities to take action as to the price at which foreign merchandise and products are imported, safeguard measures permit the restriction of the volume of imports. In this respect, EEC safeguard measures, initiated with increasing regularity, are treated against the background of GATT and EEC rules on quantitative restrictions.

Part IV deals with the protective measures under the "New Commercial Policy Instrument." The reference is to the power conferred upon Community authorities, since September 1984, to take measures under Regulation No. 2641/84 to combat "illicit commercial practices" occurring in countries outside the EEC. This Regulation, modeled on Section 301 of the Trade Act of 1974, 19 U.S.C. § 2411 (1982), is the first Community instrument designed to protect European trade interests in markets outside the EEC. Regulation No. 2641/84, and some of its implications for United States firms engaged in trade in the EEC are the subject of an article that recently appeared in *THE INTERNATIONAL LAWYER*.¹

International Trade Law and Practice of the European Community is of obvious value to the international trade bar, as well as importers and exporters within and outside of the EEC. It is not only essential reading for manufacturers who deem themselves threatened by unfair competition from imports, but also for importers and exporters faced with dumping or countervailing duties, or quotas on their merchandise. Clearly, the book is a most

1. See Atwood, *EEC's New Measures Against Unfair Practices in International Trade*, 19 INT'L LAW. 361 (1985).

useful guide for those who seek accurate and authoritative information on the legislation and practices of the EEC.

Beyond the value to the international trade bar and trade community, manuals and monographs such as *International Trade Law and Practice of the European Community* serve to enlighten the public as to the difficult problems inherent in a field of law that so vitally affects every consumer. The authors should also be commended for their contribution to this necessary educational process.²

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Commercial Law in the Gulf States: The Islamic Legal Tradition

By Noel J. Coulson, Graham & Trotman, 1984, pp. 112, \$46, £29.

Professor Coulson has authored a much welcome contribution to the literature on Islamic law. Students of comparative legal systems and, particularly, Western practitioners experiencing their first close encounter with Islamic legal principles will find this small volume a valuable addition to their libraries. The author disclaims any "attempt to expound the Shari'a law of contract in detail or in a comprehensive fashion"; instead, he sets his sights on an exposition of the fundamental principles underlying contractual relations in the Shari'a which govern the mind-set of businessmen from the Mid-East in their contractual dealings with foreigners. Professor Coulson succeeds admirably in his stated aim, having brought to bear on the task his not inconsiderable qualifications as Professor of Oriental Laws, School of Oriental and African studies, University of London. His mastery of Arabic and Shari'a law in addition to the common law constitute the essential prerequisites to the insights contained in this book.

2. See also author Van Bael's article on "A Practitioner's Guide to Due Process in EEC Antitrust and Antidumping Proceedings," appearing in 18 INT'L LAW. 841 (1984).

Timeliness is another virtue of Professor Coulson's volume, considering the current trend of "Islamization" sweeping through the Mid-East in general and the Gulf States in particular.¹ As a result, native legal institutions having roots in Shari'a are being emphasized and Western legal institutions are accepted only to the extent they do not contradict the former.² Only by gaining familiarity with the historical development of Shari'a law will Western attorneys be in a position to structure contractual agreements in such a manner that they will achieve an acceptable degree of certainty and conformance to Islamic legal principles.

Chapter 1 examines the historical development of commercial contracts in Islam, the basic tenets of which were revealed by the Prophet Mohammed early in the seventh century. It was not until 100 years after his death, in the early eighth century, that the beginnings of Islamic jurisprudence are found. The jurisprudence is extensive, since the Koran (the holy book of Islam) itself provided little guidance regarding principles applicable to contracts beyond prohibiting "Riba" (illicit gain, unjustified profit, usury) and gambling while permitting "Bay" (selling and trading). The jurisprudence was consolidated into medieval legal manuals and is now divided between four schools,³ each of which acknowledge and accept variations in local practice as to specific legal issues as being natural and inevitable. Ultimately, legal theory and doctrine concerning sources of law became settled and it is now agreed that the sources, in order of decreasing importance, are: (1) the Koran—the Word of God as revealed by Mohammed; (2) Sunna-dicta, decisions, and acts of Mohammed; (3) Qiyas—analogical deductions from the Koran and Sunna, and (4) Ijma—consensus of jurisprudential opinion.

A major insight provided by the first chapter is the degree to which present Islamic contract law is attributable to the methodology employed by

1. See, e.g., Gordon, *The Islamic Legal Revolution: The Case of Sudan*, 19 INT'L. LAW. 793 (1985).

2. As an example of the inclination for Islamic courts not to apply Western law in toto but rather only to the extent consistent with Shari'a, the author cites a case in which an Islamic court, while recognizing a bill of exchange, nevertheless refused to accord its transferee the status of a holder in due course since, under the facts of the case, the original holder obtained the bills by fraud. This resulted in the bills of exchange being "no contract at all" under Shari'a and leaving the present holder with no right against the maker. Furthermore, the bank guaranty supporting the bills was of no legal effect for similar reasons. Under Western law, a different result would most likely have been achieved.

3. The four schools of Shari'a are as follows:

1. *Hanafi*: Founded by Abu Hanafi (D.767) and primarily centered in Qufa, Iraq, and now predominate in Egypt and the Sudan.

2. *Maliki*: Founded by Maliki B. Anas (D.796) and primarily centered in the holy city of Medina, Saudi Arabia.

3. *Shaf'i*: Founded by Shaf'i (D.820) in Baghdad and now dominate in Saudi Arabia & Oman.

4. *Hanbali*: Founded by Ahmad B. Hanbali (D.855).

For a description of Shari'a, see Gordon, *supra* note 1, at 800.

the early jurists, resulting in a *law of contracts* but no general *law of Contract*. This methodology involved a review of local commercial practices in order to decide whether they were permissible as "Bay" or prohibited as "Riba". This resulted in the establishment of leases, sales, barter, hire, pledge, etc. as separate nominate contracts to be utilized for specific purposes with rigid categorizations and definitions of the essential elements for each type of contract, but no general unifying theory of contract law as such. Another reason for the failure of Islamic law to develop a general theory of Contract law is due to the doctrine of "Taqlid" (imitation) whereby the later jurists felt bound to follow rules laid down by their predecessors, whose capability to interpret divine law could not be questioned.⁴ Accordingly, Islamic law became frozen early in its development. Only in recent times has development been renewed in such areas as banking and insurance in order to accommodate contemporary business practices. The text provides several examples of points of law on which the schools differ, such as the effect of duress: the Hanafi and Maliki schools hold duress vitiates consent thereby rendering a contract unenforceable at the election of the party subject to duress (is accord with the common law), while the Shafi and Hanbali schools adopt the view that a contract made under duress is no contract at all. It is in such examples as this that the reader realizes that occasional similarities between Western and Islamic legal institutions do exist on specific points of law, in spite of otherwise substantial differences.

Chapter 2 explores the scheme of contractual relationships. In the common law, a contract requires both agreement and consideration. In contrast, Islamic law does not necessarily require either. The Arabic word for contract is " 'aqd" ("tie" or "bond") and is no more than a legal undertaking the essential elements of which are as defined by Islamic contract doctrine applicable to the particular type of contract. Early Islamic jurisprudence systematically classified contracts into four basic categories based upon (i) whether or not consideration is involved and (ii) whether the transfer is of the corpus or merely the usufruct. The four classic contracts are as follows:

- (1) "Bay" ("sale")—transfer of corpus for consideration;
- (2) "Heba" ("gift")—transfer of corpus without consideration;
- (3) "Ijara" ("hire")—transfer of usufruct for consideration; and
- (4) "Ariyya" ("loan")—transfer of usufruct without consideration.

Although other forms of contract are recognized, these four occupy the utmost importance in classical Islamic legal manuals.⁵ Since the bulk of Islamic contracts constitute exceptions to these four, they are given legitimacy due to the fact that analogy is one of the four authoritative sources of

4. The Western legal practitioner will note a similarity between "Taqlid" and *stare decisis*.

5. Those familiar with Civil law systems based on Roman law will appreciate the similarity to the civilian method of classification and systemization.

Islamic law.⁶ In this manner, such contractual relationships as partnership, assignment, guarantee, pledge, deposit, agency, and others are given legal recognition. The author demonstrates that in Islamic jurisprudence, form is normally elevated over substance and what may not be permissible under one form of contract can be accomplished simply by changing its title and casting the transaction in a different form. For example, the sale of goods not in existence is, under the classic jurisprudence, impermissible as “Bay” (“sale”) due to Islam’s abhorrence of risk and uncertainty; nevertheless, it is permissible as “Salam,” a particular species of “Bay” developed for this purpose.

Chapter 3 examines the principles governing formation of contract. The first element is capacity, which requires both majority (defined as puberty and subject to certain legal presumptions) and prudence (in the commercial rather than the religious sense). Minors, lunatics, prodigals, and, in the Maliki school, unmarried women are all interdicted and have no capacity to contract except for minor exceptions. The second element required for formation of contract is uniquely Islamic and is known as “the session of contract.” Mutual agreement *during the “Majlis”* (session) must be reached. The session requires physical proximity and has no time limit. It ends when either party leaves or dies. Today, traditional theory has extended the classical concept to accommodate offer and acceptance via letters, etc. under a doctrine of “constructive majlis.”

The basis for nullity of agreements is discussed in Chapter 4, where the author observes that here, as elsewhere, diversity of opinion is of the essence of Shari’a doctrine. Contracts that are null and void are “Batil” (“empty,” “hollow”). Into this first category fall agreements that are illegal in the criminal sense as well as those that are religiously prohibited, and those not containing sufficient certainty. Any attempt to utilize legal devices to conceal improper motives will be pierced and made void.⁷ In finding a meeting of the minds, the subjective intent of the parties is controlling rather than the objective criteria employed by Western legal systems.

In addition to illegality, duress (“ikrah”) will serve to make an agreement null and void. Duress is determined in accordance with five objective criteria supplemented by a subjective criteria concerning the actual state of mind of the contracting party. The objective criteria are the minimal requisites to establish duress, with the subjective criteria being the controlling question.⁸

6. The four schools continue to differ concerning the extent to which analogical reasoning may be used.

7. As an example, the author describes the “double sale” which is intended to achieve a rate of interest that would otherwise be prohibited as usurious, e.g., A sells a wig to B for \$10 who resells the same wig to A for \$100.

8. On the effectiveness of duress, the Shafi’ and Hanbali schools hold that duress equals no

Finally, special conditions ("shuret") may or may not form a part of a valid contract. In the Islamic view, the addition of stipulations to specific nominate contracts can, in some instances, reduce certainty to such an extent as to be prohibited. It is a doctrine which serves to preserve the scheme of different, individual contracts and results in a basic rule that contracts should be kept simple and certain. Thus, a typical lengthy Western contract may advisedly be split into various separate contracts recognized by Islamic contract law.

Some contracts may also be categorized as voidable ("fasid") and thus subject to rescission. In the Maliki and Hanafi schools, duress results in a binding contract subject to rescission by the party under duress. Additionally, contracts that have not exhausted the complex system of options to rescind are voidable. Options to rescind are a complex system of options established by Islamic law and only when they have been exhausted may a contract be deemed to be legally binding ("lazim") and subject to judicial enforcement. Chapter 5 covers these options, and it is perhaps here more than any other area that the differences between Islamic and Western contract law are most extreme. First, an unconditional option to rescind is established as a matter of law (where it can be exercised anytime during the session) or by agreement (where it may exist for a certain period). Second, options to rescind for fault ("aib") are established for such matters such as defect,⁹ sight, and description. These options are mandatory and are strengthened by a rule of evidence that the burden of proof is on the seller. They exist for the exclusive benefit of the buyer and "constitute the heart of Islamic consumer protection." A third category of option to rescission is for mistake ("ghalat"). There is no general theory for mistake as in the West, perhaps because other principles suffice. A fourth and final category is rescission for fraud, including fraudulent acts and fraudulent statements.

Chapter 6 examines the causes for dissolution of an agreement. In addition to such causes as are recognized in Western law (performance, expiry of terms, mutual agreement, fundamental breach), Islamic legal doctrine has several unique causes for dissolution, the first of which is a unilateral termination without fault or legal cause applicable to contracts of partnership or agency. Although damages may be awarded for this unilateral decision, the Islamic measure of damage may be totally inadequate to Western sensibilities. Modern statutes in Islamic countries have attempted to treat early termination as a fundamental breach, but the statutes do not exist in a vacuum and must be interpreted against Islamic legal principles. A second uniquely Islamic cause for dissolution is frustration where perfor-

consent and therefore no contract exists, whereas the Maliki school holds that a contract exists but is subject to rescission or cancellation by the party affected.

9. This resembles an implied warranty of merchantability.

mance is either impossible or simply entails unforeseen burden to one of the parties. The traditional Islamic view is that the contract may be rescinded if frustrated, but having stated the principle, its application is left to the discretion of courts. The doctrine of frustration as applied is often itself a prime source of frustration to the Western businessman who is not accustomed to having his counterpart so easily avoid contractual obligations. The doctrine of frustration is related to the prohibition of "Riba" (risk, uncertainty). Modern Islamic commercial codes reflecting the influence of the French concept of Force Majeure have attempted to temper the classical doctrine of frustration. This is part of the general evolution of Islamic law which is attempting to reinterpret traditional principles in light of current commercial practices and acceptable levels of risk, and which must continue if Islamic law is to remain vital.

In the final chapter the author examines the extent to which parties enjoy freedom of contract under Islamic legal systems. The traditional doctrine of "Ibaha" (tolerance of activities not expressly forbidden) and contemporary "Ijtihad" (interpretation) of the sources of Islamic law provide the basis on which freedom of contract may expand to accommodate contemporary practices, such as banking and insurance. The author observes in his conclusion that the medieval legal texts are now undermined by a willingness by contemporary jurists to go directly to the sources of Islamic law for new interpretation. This process is gaining momentum and should, in the author's opinion, "produce a genuine Islamic law of Contract and Commerce which would enshrine the principle of contractual freedom within the bounds of Islamic legality."

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Occupier's Law: Israel and the West Bank

By Raja Shehadeh. Washington: Institute for Palestine Studies, 1985, pp. 212. \$17.95 (cloth), \$8.95 (paper).

A legal system in which separate courts and administrative structures exist for a minority population is the setting for Raja Shehadeh's study, his second major legal study of the West Bank.¹ With the rapid increase in Israeli settlement in the West Bank beginning in 1979, the Israeli government created local and regional government units for the settlers, as well as separate courts. However, the 800,000 Palestinians who inhabit the West Bank continue to function under their own municipalities and courts. The separate administrative and judicial institutions for the 50,000 settlers reflect separateness in other aspects of life in the West Bank, which Israel occupied in 1967. The settlers have their own economy. They pay taxes in Israel on income earned in the West Bank. If they commit a crime, they may be tried either in a settlement court or in a court in Israel, but not in the Palestinian courts. Shehadeh opines that the Israeli government created this separate system in part to accommodate the wishes of the settlers and in part to insulate the settlers from any possible grant of autonomy that Israel might give to the West Bank Palestinians. The Camp David Agreement of 1979 called for Palestinian autonomy.

The result is a unique legal order. Jurisdiction is personal. A conflict of laws system has developed to determine which law governs such incidents as automobile accidents involving a settler and a Palestinian. In addition to the settler and Palestinian courts, the Israeli military government operates military courts originally intended to try security offenses but which have concurrent jurisdiction with the Palestinian courts over any crime.

The substantive law for the two groups also differs. Settlers are governed by Israeli law, even though they reside outside Israel. Palestinians are governed by the law that was in force when Israel occupied the West Bank in 1967—a combination of Ottoman Empire law, British law from the inter-war British mandate over Palestine, and Jordanian law from Jordan's 1948–1967 occupation of the West Bank. And there is an overlay of international law, since as occupied territory the West Bank falls under the law of military occupation. Litigants invoke this international law for protection of rights much as citizens of other nations invoke their national constitution.

Shehadeh, a British-trained Palestinian attorney practicing in the West

1. Shehadeh co-authored with Jonathan Kuttub the book entitled *THE WEST BANK AND THE RULE OF LAW* (1980), which was reviewed in 15 INT'L LAW. 363 (1981).

Bank town of Ramallah, views this situation as more than a legal curiosity. He sees it as part of an effort by Israel to take over the West Bank: "to drive out the Palestinians, to take over their land, and eventually to annex the occupied territories." He describes the variety of confiscatory laws whereby Israel has put 40 percent of the West Bank's land under its control. He considers this land takeover the main element in an effort by Israel to establish control over the West Bank's economy, to encourage Palestinians to emigrate, and then to annex the territory without such a large number of Palestinians as to jeopardize the Jewish majority in Israel. The author draws on cases he has litigated and cites many of the military orders issued by the Israeli occupation government, the texts of which are not generally available outside Israel and the West Bank. He is not optimistic about the future status of the Palestinian majority in the West Bank. He sees them as "permanent resident aliens" whose economic base is likely to be further eroded and who are not likely to gain political autonomy. Furthermore, he chides the United States for providing funds that Israel can use to maintain its settlements, the centerpiece of its effort to control the West Bank.

Shehadeh's exposition is clear and well-documented. His book is a welcome addition to the literature in two respects. Through his description of the application of the law, he shows how the complex legal order of the West Bank affects the average citizen. On the theoretical side, he provides valuable insight into the question of the use of law to change a social order.

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