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## Book Reviews

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## **BOOK REVIEWS**

### **Export Controls in the United States**

By John R. Liebman, Rauer H. Meyer, and Robert L. Johnson; Law & Business, Inc. / Harcourt Brace Jovanovich, Clifton, N.J., 1986, pp. xxxiii, 513. \$75.

The strict enforcement of United States export controls for national security and foreign policy purposes is one of the few regulatory areas to which the Reagan administration has given sharply increased priority in terms of policy, personnel, budgetary resources and enforcement activity. Clearly, there is a need for an export control practice book to serve as an introductory primer for new exporters and their counsel. This book goes a long way toward meeting this need. However, no practice book, even a loose-leaf edition with annual supplements such as this, can expect to keep up with the frequent regulatory changes which occur in this field.

The book's stated purpose is to provide a source to which exporters and their advisers can refer in order to comply as easily as possible with the complex network of export rules and regulations. The authors concentrate on the Export Administration Act (EAA) of 1979 as amended and the Export Administration Regulations (EAR) as administered by the Commerce Department, and to a lesser degree on the Arms Export Control Act of 1976 (AECA) and the International Traffic in Arms Regulations (ITAR) as administered by the State Department. Essential background information is provided in chapters on the Commerce Department's export licensing policies and procedures, the Commodity Control List and Country Groups, and the process of applying for and granting different types of export licenses and reexport authorizations. For the newcomer to this field, the book is particularly useful in its discussion of license application forms and necessary supporting documents, export clearance and related documentation, the responsibilities of freight forwarders, carriers and domestic sellers, and in the marketing and administrative aspects of corporate compliance programs, including internal audits and recordkeeping.

Only one chapter is devoted to the State Department's administration of the ITAR, while another deals with the complex regulations on the export of technical data under both the EAR and the ITAR.

The authors are uncertain and inconsistent as to whether United States antiboycott laws and regulations constitute export controls. They compromise by discussing the antiboycott provisions of the EAA and the EAR while omitting discussion of the antiboycott sections of the Internal Revenue Code (IRC). Nevertheless, the chapter on Restrictive Trade Practices and Boycotts includes a chart of twenty-seven requested boycott actions and how they are treated under § 999 of the IRC as well as under the substantive and reporting requirements of the EAA and the EAR.

The book's most significant problem is that frequent regulatory changes inevitably render any book in this area out of date soon after publication. For example, since this book's publication, there have already been significant EAR amendments, including those dealing with the Commerce Department's procedures and criteria for determining foreign availability, revisions in the EAR's enforcement provisions, and liberalized controls on exports to the People's Republic of China. The authors acknowledge this problem by stating that the book is not intended as a substitute for the statutes, regulations and administrative interpretations.

Another major problem is the authors' erroneous conclusion that the foreign assets control regulations administered by the Treasury Department are not "export controls as such." Thus, the book does not deal with Treasury prohibitions on exports to Cuba, Nicaragua, Iran, and South Africa, all of which were promulgated prior to the book's publication under the Trading With the Enemy Act or the International Emergency Economic Powers Act (IEEPA). For example, readers will not learn from this book that a United States corporation is prohibited from exporting to Cuba (with limited exceptions), but that its foreign subsidiary may export non-strategic goods to Cuba if the United States parent first obtains a license from Treasury's Office of Foreign Assets Control (OFAC) as well as the Commerce Department's authorization for reexport of any United States parts and components. And the book's treatment of exports to Libya under the EAR has been made completely obsolete by the President's invocation of IEEPA authority in February 1986 to impose a total ban on United States exports to Libya unless licensed by OFAC.

Finally, the book's treatment of the Export Administration Amendments of 1985 (the 1985 Amendments) is not as helpful as it could be. The preface suggests that much of the book was written prior to the expiration of the EAA in September 1983 and that further work was suspended until last July when Congress finally enacted the 1985 Amendments. However, it appears that rather than revise the bulk of the book to incorporate the new legislative changes, the authors have merely added a chapter on the 1985 Amendments. Consequently, exporters and their counsel must carefully review the EAA as amended by the 1985 Amend-

ments (published in its entirety as part of the chapter on the 1985 Amendments) as well as the subsequent amendments to the EAR.

In summary, the book is a useful source for background and introductory information on the policies and procedures of export control administration by Commerce and State, and it provides some excellent material on developing and administering corporate compliance programs. But no one should attempt to practice in this area without careful study of all applicable laws and the up-to-date regulations themselves.

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## **International Securities: Law and Practice**

Edited by J. Michael Robinson, Euromoney Publications Ltd., London, 1985, pp. 303, U.S. \$95, £65.

Editor J. Michael Robinson, a Q.C. with a major Toronto firm, has given international securities practitioners an innovative and useful summary of the securities laws, customs and practices of fifteen jurisdictions. They are: Australia, Brazil, Canada, the Federal Republic of Germany, Finland, France, Hong Kong, Japan, The Netherlands, Norway, Singapore, Sweden, Switzerland, the United Kingdom, and the United States.

First he presents four hypothetical cases. In case one, a large Canadian company, Canco, listed on United States and Canadian stock exchanges, sets out to make a primary offering of its common shares in each of the other fourteen countries. In case two, Canco offers unsecured debentures in the same markets. Listing on local stock exchanges is sought for both the equity and debt issues. Case three involves an open-ended mutual fund offering in the fourteen jurisdictions by a Canadian business trust. In case four, Canco makes a cash bid for a controlling interest in the shares of a public company in each of the other fourteen jurisdictions, at a price above market but below the price it had paid to lock up a 25 percent block. (To illustrate how the Canadian securities laws work, the hypothetical issuer/bidder is relocated in the United States.) These hypotheticals were constructed, obviously, with the objective of encompassing the great majority of actual deals encountered in transnational securities practice.

Editor Robinson then asked senior securities lawyers in each of the fifteen countries (himself in respect of Canada) to summarize the local

laws, stock exchange regulations and underwriting practices by responding to sixty-six standard questions spawned by the hypotheticals. If you wish to know, for example, what underwriters are charging in Hong Kong and Singapore, you would first locate the standard question that comes closest [in this case, D4: "What is the general range of fees or commissions charged (or underwriting discounts taken) with respect to the three types of securities to be issued by Canco?"] and then flip to D4 under Hong Kong [2.5 percent plus all expenses, including fees of the distributor's lawyers] and under Singapore [3.5 to 5 percent of gross fees for an equity offering, out of which a selling commission of 2.5 percent is paid; 1.75 to 2 percent for a debt offering, divided 3/8 percent for management, 3/8 percent for underwriting and 1 to 1.25 percent for selling group commission]. A chart at the beginning of the book makes it easy for the reader to find his way from any standard question to the answer provided in respect of a particular country.

A very impressive group of lawyers was assembled by Editor Robinson to provide answers to the standard questions, most of them from well-known firms. Most readers will recognize J. M. Pinheiro Neto and Irene Dias from São Paulo; Jean-Pierre Le Gall and Gerard Mazett from Paris; Jan R. Schaafsma from The Hague; and Simon MacLachlan from London. David Gonski and Patrick Keenan (assisted by Shemara Wikramanayake) contributed from Sydney; C. L. Sugiyama, George C. Glover, Jr., Douglas R. Scott and C. I. Kyer (with editor Robinson) from Toronto; Gerhard Wegen from Stuttgart; David W. Cheyne from Hong Kong; and Keiji Matsumoto from Tokyo. The Scandinavian group was represented by Lars Perhard in Stockholm (assisted by Lars Kinander); Asmund Simonsen in Oslo (assisted by Trond Hesby); and Robert Liljeström in Helsinki. Arfat Selvam wrote the Singapore summary and Robert Briner of Geneva (assisted by Marie-France Berset) wrote Switzerland's.

A. A. Sommer, Jr., who has been educating United States securities lawyers for more than twenty-five years, contributed the summary of United States laws and regulations and did his usual first-rate job. Since the scheme of the book is to describe the consequences of an offering *into* the United States by foreigners, Al Sommer wasn't able to tell us what he knows about the extraterritorial reach of the United States securities laws, which always is a matter of concern in overseas offerings by United States issuers.

The use of the standard questions means, of course, that this book does not function as a general summary of foreign securities laws. Your reviewer tried to find the answers to a couple of questions that had recently come his way (May interests in United States limited partnerships be sold in Japan? Do employee stock option offerings have to be registered in the United Kingdom?) and drew a blank. Within the scope of the standard

questions, however, the coverage is generally very good. As the reader will have anticipated, some of the countries cannot always be directly responsive to questions derived from editor Robinson's experience in the highly regulated Canadian and United States securities industry. This does not necessarily mean that other countries lack sophistication or that the questions have never come up, but rather that the countries involved rely more than we North Americans do on informal self-regulation of financial institutions and securities markets.

I would urge editor Robinson in a subsequent edition (and I hope that Euromoney Publications will consider updating this book every two years or so) to add standard questions that will elicit a summary of the principal exemptions that are available in each country (for small offerings, private placements and sales to institutional purchasers, for example).

This book is not intended to answer definitely any question that may arise in a transnational securities transaction, or to enable the reader to dispense with local lawyers and securities professionals. Its principal utility is to give the international securities practitioner an overview of each country's regulatory scheme, to facilitate the structuring of a proposed transaction to fit within that scheme, and to frame intelligent questions for the local experts.

The jurisdictions selected for coverage certainly include the major overseas securities markets. One wonders, however, about the editorial criteria that led to the selection of Finland and the exclusion of Belgium, Italy, Spain, Israel, Saudi Arabia, and Mexico. Even Liechtenstein and Luxembourg, those two tiny strongholds of investor anonymity, probably account for more investment volume than some of the countries included in the survey.

*International Securities: Law and Practice* is paperbound in an attractive large-page format (8-1/4" by 11-1/2"). Every securities lawyer will want to add this useful volume to his/her library.

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## **Extraterritorial Application of Laws and Responses Thereto**

Edited by C. Olmstead, 1984, ESC Publishing Ltd., 25 Beaumont St., Oxford OX1 2NP, U.K.; telex: 83147, pp. 235, £32.50.

SUMMER 1986

The book publishes the proceedings of the May 11-12, 1983 International Law Association Conference on Extraterritorial Application of Laws and Responses Thereto, which was held in London. The Conference was held in the wake of the judicial and diplomatic fall-out over the Laker Airways suits in United States and English courts, the pending amendments in the United States to the Export Administration Act, and the aftermath of the Soviet gas pipeline regulations. The purpose of the ILA Conference was to focus on the types of asserted extraterritorial application of a state's laws and responses to such efforts by other states, and to provide suggestions for resolving the resulting conflicts through analysis and application of international law principles of state jurisdiction. The manner in which conference participants found best to resolve conflicts was to follow the principle that international law does limit a state's authority to prescribe rules applicable to foreign persons outside the territorial limits of the state, and that efforts to enforce such rules extraterritorially could constitute a violation of international law. Participants also agreed that a state should consult with states likely to be affected by such prescriptions prior to any enforcement attempts, with the interests of all such states carefully considered. Participants urged that a balancing of the various interests of all states be considered both in diplomatic and judicial resolution of conflicts.

Part I, entitled "General Theory of State Jurisdiction and Limitations under General International Law and under International Agreements," was chaired by Professor Cecil J. Olmstead, who also edited the book. An incisive analysis with useful suggestions for resolution is provided by Professor Covey T. Oliver in his essay, "True Conflicts of Public Law National Jurisdiction and Their Resolution." A former Undersecretary of State, Professor Oliver advocates eliminating or reducing conflicts of jurisdiction by eliminating one or more of the several asserted bases for jurisdiction to make the law (prescribe the rule) to be applied. In particular, Professor Oliver suggests that politically and psychologically, the United States government should limit the reach under national law of the "economic effects" doctrine to actions brought by the state per se, rather than by so-called "private enforcers," as under the treble damages cause of action under the Sherman Antitrust Act. The point is well-taken since enforcement of international trade law in the United States has moved giant steps towards the anarchy of private enforcement. Professor Oliver also discusses the use of the effects doctrine on the power to restrict the original export of an artifact or the industrial property underlying it, and/or the contractual promises of foreign buyers. In particular, Professor Oliver criticizes the use of the effects doctrine in the Soviet gas pipeline regulations. Professor Oliver also advocates eliminating or reducing conflicts of jurisdiction by moderating or eliminating the multiple application

of essentially parallel, but cumulatively punitive, different national prescriptive rules. After noting that the approach of the Restatement of Foreign Relations leaves unresolved the natural lacuna between "reasonableness" and "most significant," he discusses attempts to formulate a substantive transnational law in at least some areas. However, Professor Oliver, commenting on the paper of Kenneth Dam, the U.S. Deputy Secretary of State, "Extraterritoriality and Conflicts of Jurisdiction," expresses the hope that the United States government will make good Secretary Dam's commitment's to multipartite, rather than unilateral, decision-making on export control and other denial strategies for political and security purposes.

Part II focuses on "Specific Extraterritorial Applications of Jurisdiction Resulting in Conflicts." In Part A, "Export Trade and Financial Controls," Monroe Leigh, Esq., Steptoe & Johnson, provides a brilliant analysis of "Export, Trade and Financial Controls of the United States," in his essay, entitled "The Long Arm of Uncle Sam—U.S. Controls as Applied to Foreign Persons and Transactions." Mr. Leigh states that one of the problems in the conflicts of jurisdictions and the United States extraterritoriality is that sometimes it has appeared to be based on the "cryptonationality notion that a foreign incorporated subsidiary of a United States parent assumes the nationality of the parent." Sometimes it appears based on the notion that an article exported from the United States continues thereafter to be subject to United States jurisdiction. Mr. Leigh also appropriately relates how the plethora of decision-making by various agencies over United States exports also leads to disparate notions and policies on extraterritoriality. Mr. Leigh also provides an excellent overview of the policy-making in the Soviet gas pipeline regulations. He observes that the United States had to make "an awkward withdrawal from a misconceived and divisive policy." Mr. Leigh also rightly points out that a failure by the United States policymakers led to the embarrassment: a failure to appreciate the weakness of the United States legal position in international law concerning an assertion of jurisdiction which was both unacceptably extraterritorial, insofar as it applied to foreign-incorporated companies having no connection with the United States except the jurisdiction of the United States over the parent, and unfairly retroactive, insofar as it applied to the use of technology already lawfully exported from the United States. Mr. Leigh's essay also contains a stimulating discussion of the difficulty of controlling data and the export of information in a free and democratic society. He makes two excellent suggestions on how to moderate diplomatic crises which arise from conflicts of jurisdiction. First, the United States should clearly and definitely abandon its assertion of direct jurisdiction over foreign incorporated subsidiaries whose only connection with the United States is that they are owned or controlled by a



United States parent. Secondly, disputes should as a matter of course be submitted to third-party arbitration whenever they arise.

Part II. B, entitled "Restrictive Business Practices or Antitrust: 'Effects' Doctrine and Territorial Approach," contains four essays: by Lloyd N. Cutler on United States concepts; by Professor Michel Waelbroeck on the European Community approach; by Professor Dr. Helmut Steinberger on the German approach; and by Berthold Goldman on the French experience.

Part III, chaired by Professor Maarten Bos, Institute of Public Law, University of Utrecht, considered "Securities Regulation: Extraterritorial Aspects." Part IV, chaired by Professor A. E. von Overbeck, University of Fribourg, discussed "Corporate Governance: Responsibilities of Directors and Officers for Acts of Foreign Subsidiaries and Affiliates."

Part V, chaired by Richard Bentham, Legal Adviser, British Petroleum Company Ltd., considered "Discovery of Documentary and Other Evidence in a Foreign Country." Helmut Furth, United States Deputy Assistant Attorney General for Antitrust, discussed "Discovery in Aid of Litigation Pending in a Foreign Court," and outlined the methods available in the United States for obtaining discovery in aid of foreign litigation. In particular, Mr. Furth discusses the alternative of using the Hague Convention on the taking of Evidence Abroad in Civil and Commercial Matters to using the Federal Rules of Civil Procedure. He notes that the United States procedure is broader than that of the Hague Convention in that it extends not only to civil and commercial proceedings, but also to proceedings before administrative tribunals and to criminal proceedings (e.g., letters rogatory or letters of request from a foreign tribunal). Lawrence Collins, Herbert Smith & Co., Solicitors, London, discusses "International Law Aspects of Obtaining Evidence Abroad." His article discusses the international law aspects of the foreign resistance to United States attempts to obtain evidence from abroad, as well as indicating the ways in which United States courts themselves recognize that they "work under the constraint of international law, not only in relation to the exercise of jurisdiction, but also with regard to the enforcement of orders for discovery or of subpoenas for evidence." According to Collins, the objections include first, those which are based on the nature of the exercise of substantive jurisdiction—objections to orders for the production of documents abroad which are made in proceedings which themselves rest upon an extraterritorial exercise of jurisdiction. A second and wider objection is an objection to all orders made in the United States against foreigners to produce documents abroad. A third type of objection is an objection to the method of service of an order for production of documents abroad. A fourth type of objection concerns the width of the discovery procedure,

the apparent disregard of the separate corporate identity of parents and subsidiaries, and the clash with foreign blocking or secrecy laws.

The distinguished Robert B. von Mehren, Debevoise & Plimpton, New York City, and President, American Branch of the International Law Association, discussed discovery abroad and the perspective of the United States private practitioner. He addressed three differences, drawing on comparisons between the United States, British, and Italian scenes: (1) the extensive, perhaps excessive, use of pretrial discovery in the United States; (2) the roles of the advocate and the judiciary in gathering evidence in the United States compared with other countries; and (3) the difference in structure between the United States legal profession and that of many other countries.

Mr. von Mehren concludes rather pessimistically that from the United States perspective the Hague Convention has contributed little to the solution of the problem of discovery from parties to the litigation of documentary and other evidence in a foreign country. He ruminates that, considering the aforementioned differences, domestic factors place severe limitations upon the effectiveness of international agreements. Additionally, it is difficult to establish procedures to harmonize legal systems with conflicting views on the conduct of litigation.

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## Business Law in Zimbabwe

By R. H. Christie, Juta & Company, 1985, Cape Town, Wetton, and Johannesburg, pp. lvii, 575, 85 Rand.

One of the major problems confronting the lawyer or scholar interested in the law of a third world nation, where legal publications have traditionally been scarce, is obtaining up-to-date source material, whether legislation, caselaw, or treatises. Moreover, in particular, the absence of timely legal publications has been one of the primary impediments to the systematic development of the legal systems of many countries in Africa.<sup>1</sup>

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1. On this problem, see Thompson, *The Formative Era of the Law of Sudan*, 1965 SUDAN L.J. & REP. 474, 480-87, revised and reprinted sub nom. *The Sources of Law in the New Nations of Africa: A Case Study from the Republic of the Sudan*, in AFRICA AND LAW 133, 139-47 (T. Hutchison ed. 1968); Twining, *Law Reporting in the Sudan*, 3 J. AFR. L. 176

Although the situation as to the availability of legal materials in Zimbabwe (formerly known as Rhodesia) has been better than in many African states, nonetheless one cannot be but pleased to note the publication of a new treatise on Zimbabwean law.

R. H. Christie, a Professor of Law at the University of Zimbabwe, and his publisher have produced an attractive and comprehensive text with the publication of *BUSINESS LAW IN ZIMBABWE*. The work constitutes a solid one-volume treatise on most aspects of the noncriminal law of Zimbabwe (tort and real estate are not covered), presented in a scholarly readable fashion, with the law stated as of October 1, 1984.

The book is a successor to the author's earlier text,<sup>2</sup> and will prove invaluable to the legal practitioner, particularly as a result of the extensive citation to applicable legislative provisions and caselaw. The style of citation used by the author is interesting and significant in terms of African law: in general, Zimbabwean statutes and cases are cited directly in the text, with English, South African and other sources cited in footnotes. The author states (page v): "This method of treatment is intended to show at a glance how much of the law is particular to Zimbabwe and how much is common to Zimbabwe, South Africa, and England." All too often treatises on aspects of African law, especially regarding former British territories, reference English case or statutory law even though the specific authorities may not have previously been expressly adopted by the courts or legislature of the country in question, although general principles of incorporation of English law may apply.<sup>3</sup>

Chapter One of Professor Christie's text is entitled "Historical Introduction," and constitutes a general introduction to Zimbabwean law. Brief surveys of the history of Roman Law, Roman-Dutch law, and English law are set forth, plus general discussions on the sources of law in Zimbabwe, the judiciary, and the legal profession in Zimbabwe. The influence of

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(1959); Tetteh, *Law Reporting in Anglophone Africa*, 20 INT'L & COMP. L.Q. 87 (1971); Martin, *Notes on Legal Literature in East Africa*, 10 CASE W. RES. J. INT'L L. 123 (1978); Huber, *Legal Education in Anglo-Phonic Africa: With Particular Attention to a Casebook and the Criminal Law*, 1969 WISC. L. REV. 1188, 1193.

2. RHODESIAN COMMERCIAL LAW (1961).

3. See, e.g., K. VASDEV, *THE LAW OF EVIDENCE IN THE SUDAN* (London 1981); P. OLUYEDE, *ADMINISTRATIVE LAW IN EAST AFRICA* (Nairobi 1973). In R. HODGIN, *LAW OF CONTRACT IN EAST AFRICA* (Nairobi 1975), the author discusses the procedure for the reception of English law in Kenya, Uganda and Tanzania. Regarding this process in the Sudan, see Z. MUSTAFA, *THE COMMON LAW IN THE SUDAN: AN ACCOUNT OF THE "JUSTICE, EQUITY, AND GOOD CONSCIENCE" PROVISION* (Oxford 1971); Akolawin, *The Courts and the Reception of English Law in the Sudan*, 1968 SUDAN L.J. & REP. 230; Guttman, *The Reception of the Common Law in the Sudan*, 6 INT'L & COMP. L.Q. 401 (1957). See generally, Roberts-Wray, *The Adaptation of Imported Law in Africa*, 4 J. AFR. L. 66 (1960); Derrett, *Justice, Equity and Good Conscience*, in *CHANGING LAW IN DEVELOPING COUNTRIES* (J. Anderson ed. 1963).

Roman and Roman-Dutch law in Zimbabwe goes back to Rhodesia having been settled in 1890 by "the pioneer column" from the Cape region of South Africa, and the previous practice of Rhodesian appeals being adjudicated in the courts of the Cape Colony (page 30). As a continuum with the past, section 89 of the Zimbabwe Constitution, consistent with earlier constitutional provisions governing Rhodesia, provides that the courts of Zimbabwe are to apply "the law in force in the Colony of the Cape of Good Hope on 10th June 1891, as modified by subsequent legislation having in Zimbabwe the force of law." Christie describes the effect of this section: "[T]he Roman-Dutch law became and still is the common law of this country," (page 27) with various Rhodesian cases giving sanction to the authority in Zimbabwe of South African judicial decisions rendered subsequent to 1891 (page 28). Regarding the application of this section 89 to Cape legislation, Christie states: "[A]ll statutes then in operation at the Cape were taken over and some are still in force." (page 25). He concludes, "Of highly persuasive authority in this country, and therefore always necessary to consult, are the decisions of the South African courts, which of course apply the modern Roman-Dutch law and many statutes with wording identical or very similar to ours." (page 29). One wonders whether in the current political environment existing in Southern Africa, this reliance on South African authorities will continue to hold true.

Chapter 2 on contract is the longest chapter in the text (pages 33-131). It covers in relative detail the subjects of offer and acceptance, required formalities, contents of various types of contracts, the parol evidence rule, capacity of parties to contract, and the enforceability of contracts, including the issues of misrepresentation, fraud, duress, mistake, illegality, restraint of trade, and the statute of limitations. It then covers problems in the performance of contracts, including novation, delegation, and breach, and the remedies therefor. Of related interest to chapter 2 are later discussions on sales (chapter 4), insurance (chapter 7), lease (chapter 9), employment contracts (chapter 10), and loans (chapter 14).

Chapter 3 is a short discussion entitled "Starting a Business," relating to the options available in Zimbabwe for the choice of business entity: sole proprietorship, partnership, and various types of companies under Zimbabwean law, including the licensing and registration of same. A fuller discussion on partnership is contained in chapter 12, and on companies in chapter 13.

Other subjects covered by individual chapters, all of interest to the foreign legal practitioner, are carriage of goods (chapter 5), negotiable instruments (chapter 6), Zimbabwean foreign trade (chapter 8), agency (chapter 11), arbitration (chapter 15), and insolvency (chapter 16).

The lawyer interested in an issue of Zimbabwean business law will

unquestionably find Professor Christie's book of substantial assistance. The only criticisms this reviewer has are two. First, a bibliography of other available literature on Zimbabwean business law would have made a valuable addition to the text.<sup>4</sup> Second, a listing of the abbreviations and modes of citation used by the author would have assisted the reader who is unfamiliar with the law of Southern Africa. But these two criticisms aside, *Business Law in Zimbabwe* provides an excellent model for other texts on African law one hopes to see in the future. One hopes Professor Christie will periodically update the work.

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## **The German Competition Law Legislation and Communication**

By Dr. Dietrich Hoffman and Dr. Stefan Schaub, Kluwer, Deventer, The Netherlands, and Hingham, Massachusetts, 1983, pp. 194, U.S. \$34.50.

American antitrust lawyers will quickly recognize the value of this one-hundred-ninety-four-page book on competition law in the Federal Republic of Germany. Written by eminent practitioners in the Dusseldorf firm of Hoffmann, Raeschke-Kessler, Liebs, this short volume provides the text of the important German competition statutes, significant pronouncements and orders of the German Federal Cartel Office (Bundeskartellamt) and most importantly the authors' commentary on the law.

As the authors explain, the basic German competition statute, the *Gesetz gegen Wettbewerbsbeschränkungen* (GWB) or Act Against Restraints on Competition, had its origins in the new economic policy of postwar Germany which emphasized the promotion of free competition. From 1957, when the GWB was enacted, to today, German competition law has to a remarkable degree developed competition doctrines that parallel those found in United States antitrust law. Indeed, Germany would appear to have the most developed, procompetition law of any European nation, and as students of Common Market competition law will attest, German

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4. This deficiency is remedied in part by T. BENNETT & S. PHILLIPS, *A BIBLIOGRAPHY OF AFRICAN LAW WITH SPECIAL REFERENCE TO RHODESIA* (Salisbury 1975), however this work seems to concentrate in large part on customary law.

competition practitioners have had a profound impact on the development of that body of law. The commentary is organized in a fashion which will aid United States practitioners who bring an understanding of American antitrust principles to the task of learning about the German counterpart. Thus, after briefly dealing with the history of the GWB the book's authors describe its basic principles as they concern such matters as horizontal restraints on competition (i.e., cartel arrangements), monopolies and the concept of "abuse," vertical restraints and the licensing of patents and know-how. Later in Part III of the commentary these substantive law topics are treated in some detail.

In the discussion on horizontal restraints the reader will note that as with American antitrust law, the GWB is concerned with restraints on competition in order to protect the market, not the contracting parties. Consumer welfare seems to have as significant a role in German competition law as it does today in American antitrust thinking. Other parallels to United States law exist. Section I of the GWB contains *per se* prohibitions against most concerted horizontal practices. As with United States law German competition law also struggles with the notion of what constitutes concerted action especially in the area of parallel conduct in oligopolistic markets.

While much exists that is similar to United States law in the area of horizontal restraints, the GWB mechanism for exempting cartels in specific areas that are thought to further the national interest such as specialization cartels and rationalization cartels is markedly different from traditional American practice.

As to vertical restraints, Section 15 *et seq.* of the GWB draws a distinction between resale price maintenance that is treated under *per se* principles and non-price restraints that are treated by the Bundeskartellamt under what Americans would call a "rule of reason" analysis.

In a section dealing with abuse of dominant market power, the reader will see that in contrast to American law the GWB proscribes only those monopolies which are abusive in the sense that they are destructive of competitive behavior. This doctrine is important not only in understanding German competition law, but also Common Market competition law which adopted the concept in its treatment of monopoly and other forms of dominant market power.

As the authors note, German merger control was added to the GWB in 1973. At the heart of merger control lies the various notification requirements. Notification prior to effecting a merger is required in large transactions. If prior notification is required the merger cannot take place while the Bundeskartellamt is examining it. Notification subsequent to a merger is required where the merger produces a significant share of a

relevant market. Divestiture power resides in the Bundeskartellamt under circumstances described in the volume.

Other topics covered by the authors include the GWB's territorial reach, remedies for violations of the GWB, exemptions and the like. While as noted there are a number of striking parallels to American antitrust law, in the area of remedies the two systems go their respective ways. Imprisonment for violation of the GWB's antiprice-fixing rules does not exist. Moreover, the private treble damage remedy and private class action suits are unknown. Thus, it is no small wonder that German cartel authorities look askance on attempts by American antitrust authorities and private plaintiffs to employ these draconian measures in the extraterritorial pursuit of German concerns suspected of violating American antitrust law.

The authors have rendered the American bar a true service in publishing this concise treatment of German competition law. Let us hope that they will keep the work current with periodic updates.

David S. Pennock  
Alexander & Green  
New York, NY

## **Les Contrats entre Etats et Entreprises Etrangères<sup>1</sup>**

By Philippe Leboulanger, Editions Economica, Paris, France, 1985, pp. 354, 145 Fr. francs.

Philippe Leboulanger is a member of the Paris Bar who formerly taught at the University of Paris. His book aims to describe the legal context of foreign investment, with primary emphasis on performance obligations of foreign contractors, use of guarantees, problems of impossibility of performance and force majeure, applicable law, arbitration, and sovereign immunity. In the French Cartesian tradition, Mr. Leboulanger expends considerable effort in working out definitions and philosophical problems of the appropriate hierarchy of different legal systems. Yet he writes clearly, and a tendency toward redundancy<sup>2</sup> helps the reader to assimilate his principal points.

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1. "Contracts Between States and Foreign Enterprises." (All translations in this review are by the reviewer, and all citations are to the book under review unless otherwise noted.)

2. See, e.g., "Contracts between states and foreign companies are the subject of long and sometimes difficult negotiations" at 23, and "the preparation of an operation as complex as an international investment sometimes necessitates much time" at 28.

Mr. Leboulanger's thesis is that state economic activity is being "privatized" through the enforcement of contractual rights by foreign companies. He believes that the legal context of foreign investment should ideally be governed by the so-called New International Economic Order as gleaned from United Nations resolutions and the like. Mr. Leboulanger laments that this has not occurred. "Arbitrators and judges are in agreement that nations must submit to a legal framework which is nothing but the reflection of free market concepts. Nations can accept or reject it in toto, but can barely influence it at all."<sup>3</sup>

Apart from one's sympathy or lack thereof with the book's ideological bias, it could be a valuable tool for an American practitioner counseling a client on an investment in a former French colony or a country influenced by French civil and administrative law. Mr. Leboulanger states that he closely studied thirty-two examples of foreign investment contracts in addition to petroleum exploration contracts available in listed sources.<sup>4</sup> The text sets forth a number of sample French (and American) clauses, particularly concerning arbitration and conciliation, force majeure, guarantees and payment and repatriation of funds. The French legal significance of the clauses is explored in detail and contrasted usefully in many cases with American and English practice. The contracts of most interest to Mr. Leboulanger are natural resource exploration and production, turnkey construction, and engineering or management consulting services. Confronted therefore with a construction or oil exploration contract with the government of a French speaking African country, Mr. Leboulanger's book would be the first I would consult.

This specific French emphasis is of course both the book's strength and its weakness. Apart from a concise discussion of the Calvo doctrine<sup>5</sup>, Latin America is almost nowhere mentioned. In a rather theoretical discussion of whether or not parent companies should be deemed to have guaranteed the performance of their subsidiaries, one of the arguments Mr. Leboulanger advances for the current presumption of limited liability (and no such guarantee) is that the parent's certificate of incorporation is likely to be different from those of its subsidiaries. To try to enforce an implicit guarantee of a subsidiary's obligation would therefore require the parent's action to be *ultra vires*!<sup>6</sup> This argument, perhaps the weakest in the book, stems from Mr. Leboulanger's obtuseness to impinging eco-

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3. At 326, and quoted by Professor Goldman at XII.

4. Note 16 at 241.

5. A foreign corporation investing in a country accepts the exclusive jurisdiction of that country's courts and law and implicitly relinquishes the benefit of diplomatic protection from its home country. At 254.

6. At 129.



conomic reality and his focus on French precedents in Africa and the Middle East. It is self-evident that many risky foreign ventures would never get off the ground without the protection of limited liability. Indeed, the entire sorry experience of the Deltec doctrine<sup>7</sup> in Argentina would have been a salutary addition to the book if only Mr. Leboulanger was more familiar with Latin America.

In addition to ignoring Peronist legal excesses in Argentina, Mr. Leboulanger's knowledge of Chile is weak. He asserts that after the Chilean military coup of 1973, the expropriations of the earlier elected government were abrogated and the assets returned to their former owners.<sup>8</sup> In fact, Chilean copper and telephone companies remain nationalized to the present day. Other dubious assertions include such overbroad factual claims as "most foreign contracts result from public bidding,"<sup>9</sup> "everyone knows" that multinational corporations have "planetary" strategies to set prices on other than an arm's length basis<sup>10</sup>, and foreign investment contracts with developing countries "very often" require the investor to build schools and hospitals for his employees.<sup>11</sup> A few editing oversights were also noted.<sup>12</sup>

It is fortunate for the future of foreign investment that developing countries are weaning themselves away from the New International Economic Order and ideological sympathies such as those of Mr. Leboulanger. He laments that "most investment codes drafted by developing countries contain nothing but a catalogue of concessions granted to foreign investors," in flagrant contradiction to United Nations resolutions.<sup>13</sup> Mr. Leboulanger once again overlooks economic reality and the fact that there is indeed a market for foreign investments in which "all countries compete . . . to some degree."<sup>14</sup> Without an increasing interest in foreign investment and a legal framework which incorporates relatively stable rules of the game, the prospects for economic growth in the developing world would be poorer. Lawyers can justifiably take pride in their contribution to the goal of a defined and stable legal investment framework. Mr. Le-

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7. In *Compania Swift de la Plata S.A.*, the Argentine Supreme Court confirmed in September 1973 the lower court's 1971 judgment that several sister companies would be included in the bankrupt's estate because of the sole fact of common foreign ownership. Argentine Bankruptcy Law 19551 of 1972 gave statutory form to this judicial invention, and it was confirmed in the 1983 revision of Bankruptcy Law 22917.

8. Note 44 at 83.

9. At 24.

10. At 72.

11. At 78.

12. Note 16 at 241 and note 135 at 309 bear no relation to the statements in the main text.

13. At 176.

14. Guisinger, "Investment Incentives and Performance Requirements," Praeger 1985 at 19.

boulangier, despite his regret that foreign investors often enforce their contractual rights against the host country, has also contributed to a fuller understanding of the international investment system.

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## Hong Kong Revenue Law—Taxation of Income

Volumes 2 and 3, By P. G. Willoughby, Matthew Bender, New York, 1985, pp. 600 approx. per vol., \$220. (3 vol. set).

Professor Willoughby is a professor at the Faculty of Law, Hong Kong University and one of the few prolific writers and scholars on Hong Kong taxation. In writing Part I, he was assisted by a practicing Hong Kong Barrister at Law. The volumes under review are separated into five parts: part I is a guide to the Inland Revenue Ordinance; part II is the Inland Revenue Legislation Annotated; part III is the Interpretation and Practice Notes, Circular Letters and Information Pamphlets; part IV is the Inland Revenue Ordinance Forms; and part V is Tax Law Reform.

Volume two begins with a "budget alert 1985" which summarizes recent developments, and it would be helpful if the volumes could be updated on some regular basis, such as weekly or monthly so as to insure the reader to have knowledge of the latest development of revenue law. For example, the annotations on "Official Secrecy" are quite detailed, yet an update on the interrelationship between the secrecy act and the recent U.S. Court Order to allow U.S. Revenue Agents (Internal Revenue Service) to obtain information from the Hong Kong and Shanghai Banking Corporation in Hong Kong would be most appreciated by many readers. *Hong Kong and Shanghai Banking Corp. v. Commissioner*, 85 T.C. No. 41 (Nov. 5, 1985). Likewise, it would be instructive to include the Hong Kong Court of Appeal's decision (*F.D.C. Co. Ltd., Vanguard International Manufacturing Ltd. Inc. & Garpeg Ltd. v. The Chase Manhattan Bank, N.A.* 1984 Civil Appeals Nos. 65 and 131) where the Hong Kong Court of Appeal upheld the injunction against the Chase Manhattan Bank, N.A. from disclosing documents of accounts of Mr. Aldo Gucci and of Gucci Shops Inc. to the United States Internal Revenue Service which suspected evasion of tax liability. The Hong Kong Court of Appeal unanimously held that Hong Kong law of banker-customer relationship is the *lexi loci solutionis* and the bank is obligated to protect its customer's

secrecy as an implied covenant enforceable by the grant of an injunction against disclosure.

Part I is an overview of the Hong Kong tax law and it explains the scope of the four taxes, i.e., the property tax, salaries tax, profits tax and interest tax. The author observes that "it is fundamental to the system of taxation in Hong Kong that to be taxable, income must have a Hong Kong source. In general, therefore, income arising offshore is outside the scope of the charges of the four taxes" and what is taxable and what isn't is further elaborated on. References to British Commonwealth cases and other comparable legislative instruments are helpful.

Professor Willoughby gives a useful discussion of tax avoidance schemes and although he urges guarding against the injudicious application of United Kingdom caselaw where there is a "complex system of high taxation" vis-à-vis Hong Kong the "recent caselaw in the United Kingdom has little in common with the system which operates in Hong Kong. . . . Nevertheless, new general principles are emerging from the United Kingdom caselaw which are likely to be followed in Hong Kong should tax avoidance schemes be attacked by the Commissioner through the Courts." Again, a thorough discussion of the administration of Hong Kong taxes is juxtaposed with an explanation of the administration of the four taxes by the Internal Revenue Department.

Further examples of tax planning such as the "election for separate chargeability, the advantages of personal assessment" and the voluntary election for personal assessment on total income for those taxpayers who can benefit from certain circumstances made possible by the "four separate taxes" are given. These reviewers would, however, like to see more space devoted to the legal avoidance of taxes in light of the recent caselaw in the United Kingdom. This proposed objective could be achieved by adding a section on tax planning placed after the appropriate areas in the text, as a second set of annotations or as a completely separate section, entitled tax planning as is often done in tax treatises. Moreover, the presentation on "non-residents and overseas corporations" should form an independent section separated from the rest of the work.

Part II deals with the "Internal Revenue Legislation Annotated." Professor Willoughby's annotations to the statute are apt as they are supported by caselaw. The author displays much mental dexterity in describing the overall tax system right down to the most minute detail of explaining and defining the term "wife."

The legislature should also be interested in the tax system's inequities discussed by the author and which could be eliminated through further legislation: e.g., the basic unfairness to the person under eighteen who inherits a business on the death of both parents and who cannot elect for

personal assessment; and also, why certain benefits are available if elected by the husband, but not by the wife.

Part III consists of the Interpretation and Practice Notes, Circular Letters, and Information Pamphlets, qualified by the editorial warning that "not all of these official notes have been brought up to date by the Internal Revenue Department with the latest amendments in the Internal Revenue Ordinance." The reader is cautioned to "check [the notes] against the text of the Ordinance" contained earlier in the volumes.

Part IV contains a selection of the principal forms used by the Internal Revenue Department.

Part V on Tax Law Reform is both interesting and informative. The reader is advised of the current thinking of those responsible for enacting the tax legislation.

The author makes thoughtful suggestions for improvements and advocates "a fourth Internal Revenue Ordinance Review Committee." The author's separate section entitled "Short Term Reform" is particularly relevant and refreshing. Lastly the cross-referencing of terms under the index is expertly executed.

In conclusion, anyone who has any interest in the Hong Kong revenue law should add these volumes to his/her library and first read them cover to cover and then refer to them often as an authoritative and dependable guide. What remains to be done, of course, is to continue the Herculean task of regularly updating these two volumes of important work.

As compared to its United States counterpart, no doubt, a reader is impressed by the simplicity of the Hong Kong tax system. There are fewer tax deductible items in the Hong Kong legislation which a tax practitioner who operates in a complicated tax milieu would manipulate to avoid chargeability.

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## Can Governments Learn? American Foreign Policy and Central American Revolutions

By Lloyd S. Etheridge, Pergamon Press, New York, 1985, pp. xii, 228, \$36 hardcover, \$13.35 softcover.

This is an interesting and valuable example of a new genre of studies of how and why the decision making process in the foreign policy arena functions in the United States.<sup>1</sup> What Professor Etheridge attempts to demonstrate is that governmental decisions at the highest level of national policy formulation and reactions tend to be dominated by the intellectual baggage of the players, many of whom may not have complete or mature grasp either of the facts or of the historical context which might indicate the correct choice in the absence of factual data. As a case study, we are led in impressive and sometimes overwhelming detail through the steps leading up to the decision of the Kennedy Administration to proceed with a caponized version of the invasion of the Bay of Pigs in 1961. The author is hard indeed on the principal actors, especially the Kennedy brothers and their clique.<sup>2</sup>

With tables, graphs, and copious footnotes, mainly to contemporaneous news accounts of the event, we are shown misassumptions and personal prejudices of the principal actors.<sup>3</sup> The author identifies nine points where belief or wishful thinking were substituted for reality. For example, he argues that President Kennedy believed he could "get away" without the disclosure of the United States role because up to that point the *New York*

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1. R. NEUSTADT & E. MAY, *THINKING IN TIME* (1986).

2. Professor Etheridge is hard indeed on the principals, especially the Kennedy brothers and their colleagues but not quite as cutting as former Under Secretary of State Chester Bowles was in assessing the same set of facts and actions:

The question which concerns me most about this new Administration is whether it lacks a genuine sense of conviction about what is right and what is wrong. I realize in posing the question I am raising an extremely serious point. . . . Anyone in public life who has strong convictions about the rights and wrongs of public morality, both domestic and international, has a very great advantage in times of strain, since his instincts on what to do are clear and immediate. Lacking such a framework of moral conviction . . . , he is forced to lean almost entirely upon his moral processes. . . . Under normal conditions, when he is not tired or frustrated, this programmatic approach would successfully bring him out on the right side of the question. What worries me are the conclusions that such an individual may reach when he is tired, angry, frustrated, or emotionally affected. The Cuban fiasco demonstrates how far astray a man as brilliant and well-intentioned as Kennedy can go who lacks a basic moral reference point.

D. HALBERTSTAM, *THE BEST AND THE BRIGHTEST* 69 (1969).

3. In an unintentional pun, the author attributes to President Kennedy a belief in the "Bonsai enthusiasm" of the force mounted by the United States to invade Cuba. From little trees small invasions grow?

*Times* had collaborated in maintaining secrecy and, for the President, the *Times* "defined reality."

This will be a tough book for aging New Frontiersmen and nostalgic Camelot fans; the factual data presented are not novel but the conclusions drawn about the Bay of Pigs, the subsequent assassination attempts on Fidel Castro, the vacillation between tough guy and wimp polarities in Laos, Berlin, and the Cuban Missile Crisis are damning to the reputation of the Kennedys. The case study overwhelms the lessons drawn. In an attempt to apply these lessons in a broader context, passing swipes are taken against U.S. involvement in Vietnam, Jimmy Carter, the Kissinger Commission on the Caribbean and the history of United States intervention in Latin America.

By adopting a template which seeks to organize history by examining whether United States leaders' decisions spring from "soft" or "hardball" mindsets, the author plays down the very sweep of history, geopolitics and the will of non-United States actors to whom his subjects are shown to react. What the author takes as endemic to all administrations in the United States, he attempts to prove with a brief warning on what he perceives to be current policy toward Nicaragua and concludes with some hortatory words about the respective roles and responsibilities of the executive branch, Congress, the press and universities. This is all pretty good stuff for thought, but somehow the lesson drawn from the Bay of Pigs of twenty-five years ago seems strained in the context of present day Nicaragua. The extrapolation of first principles obscures a well-researched history of ineptitude. The author says quite enough about the actors:

They were beginners, making complex judgments about novel problems in unfamiliar situations (page 68). In retrospect, it would have been more intelligent had Kennedy used consistent methods to communicate deterrent resolve to the Russians. . . . [T]here was something unconnected, almost dreamlike, in his thinking about Cuba and Russia (page 84).

Quite apart from the psychohistorical and behavioristic rationale for poor decision making at the highest levels of our government with which this book seems to flirt, it is submitted by this reviewer that a good part of the explanation for consistently erroneous policy toward Latin America stems from pure ignorance in this country of, and a history of indifference toward, our neighbors to the South.

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