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BOOK REVIEWS

German Administrative Law in Common Law Perspective

By Mahendra P. Singh. Berlin, Heidelberg, New York, Tokyo: Springer-Verlag. 1985. Pp. XXIV, 194. DM 78.00.

A century ago Andrew D. White, Cornell University's noted president, called on Americans to apply European experiences to develop solutions to American problems and directed their attention to the new European science of Administrative Law.¹ The "pioneer" scholars in American administrative law, Frank J. Goodnow and Ernst Freund,² did indeed pay close attention to European experiences. Goodnow published a two-volume comparative study of administration in the United States, England, France, and Germany³ before turning to a book on American law. Freund, who took a doctorate in law at Heidelberg, frequently incorporated a comparative perspective into his works on American administrative law,⁴ and also wrote a book explaining American public law to Europeans.⁵

Goodnow's and Freund's works are largely forgotten today. The reason, William C. Chase has argued, is that the American law school world was

1. A. WHITE, EUROPEAN SCHOOLS OF HISTORY AND POLITICS 31 (1887), *reprinted in* 5 JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE 477, 501 (1887).

2. See Frankfurter, *The Task of Administrative Law*, 75 U. PA L. REV. 614, 616 (1927), *reprinted in* F. FRANKFURTER, LAW AND POLITICS 231, 233, (1939).

3. F. GOODNOW, COMPARATIVE ADMINISTRATIVE LAW (1893). Goodnow later became president of Johns Hopkins University.

4. See, e.g., E. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY: A COMPARATIVE SURVEY (1928).

5. See, E. FREUND, DAS ÖFFENTLICHE RECHT DER VEREINIGTEN STAATEN VON AMERIKA (1911).

hostile to the work of Goodnow and Freund and persuaded the legal profession "to accept a view of administrative decision-making requiring only forbearance on the part of the courts, the law schools, and the bar."⁶ According to Chase, the American law schools' emphasis on the case method stunted the development of a scientific system of administrative law along the lines envisioned by Goodnow and Freund building on European models.⁷ One need not accept Chase's thesis to recognize that relatively little attention is given in this country to foreign administrative law.

Mahendra F. Singh, professor of law in the University of Delhi, India, has published an important book in *German Administrative Law in Common Law Perspective* that makes it inexcusable for Americans to ignore European administrative law any longer. Professor Singh eschews any claim that his work is comparative in a strict sense. Instead, he notes that "[p]rimarily it is a systematic presentation from the point of view of a common lawyer of those aspects of German administrative law which will interest him the most." (p. xv).

Professor Singh's book is important for Americans in at least two respects. First, it is a thorough and competent presentation of key aspects of the general part of German administrative law (*allgemeines Verwaltungsrecht*). As such, scholars may turn to it to get a rounded view of how the German legal system treats general problems of administrative law such as administrative discretion, control of administrative authorities, government contracts, and state liability.

Professor Singh's book is important for the further reason that a good general introduction in English to the general part of German administrative law will permit Americans more easily to understand and investigate the so-called special part of German administrative law. The special part includes German laws regulating such diverse fields as urban planning, social security, welfare, trade regulations, roads, environment, education, and health. Until now, lacking such an introduction, Americans could not easily understand the context in which these aspects of German administrative law function and could evaluate only with difficulty the solutions German law suggests. With the help of Professor Singh's book, practitioners will now be better equipped to deal with German administrative agencies, while scholars may build on it to investigate German solutions in the various specialized fields of administrative law.

6. W. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* 20 (1982).

7. *See id.* at 58, 136-137.

Professor Singh's book has five principal parts: I. Introductory; II. Powers and Functions of Administrative Authorities; III. Judicial Control of Administrative Powers; IV. Administrative Courts and Judicial Remedies; and V. State Liabilities. Americans should find parts II, III, and IV particularly interesting, since they permit an understanding of how German administrative law is able to subject a broader range of administrative decisions to judicial review than does its American counterpart, and yet does so more quickly and more cheaply.

An entire chapter in Part II explains the German concept of administrative act (*Verwaltungsakt*), which is defined by section 35 of the Law of Administrative Procedure to be "every order, decision, or other sovereign measure taken by an authority for the regulation of a particular case in the sphere of public law and directed at immediate external legal consequences." (p. 32). Under section 42 of the Law on Administrative Courts of 1960, every administrative act or every refusal or omission of an administrative act, which infringes an individual's rights, creates a right to judicial review. Chapters in Parts III and IV explain how the administrative courts are structured and how they review the administrative acts of the government authorities. What should intrigue American readers is how the German system—free of the burdens of adversary presentation—functions to insure that individual government actions are kept within bounds in run-of-the-mill cases.

Professor Singh's research and book, like many English language works on German law today, was sponsored by the Alexander von Humboldt Foundation of Germany, which sponsors scholars in all areas of scientific study from all over the world, and which has backed probably the majority of recent English language books on German law. Language in the book that strikes an American lawyer's ear as unusual is largely British or Indian usage; the book itself was published in Germany.

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Discovery in German-American Litigation (Discovery im deutsch-amerikanischen Rechtsverkehr)

By Abbo Junker, Verlag Recht und Wirtschaft, Heidelberg, Germany 1987, pp. 445, DM 180.00.

German-American civil litigation is part of European-American civil litigation. Both are presently being discussed in some dramatic tones. The U.S. Supreme Court has recently decided¹ salient questions relating to a proper application of the Hague Evidence Convention of March 18, 1970.² The Supreme Court has also decided upon the writ for certiorari in *In re Anschuetz & Co., GmbH*³ as well as in *In re Messerschmitt Bolekow Blohm, GmbH*.⁴ Similarly, the proper application of the Hague Service Convention of November 15, 1965⁵ is subject to a further proceeding before the Supreme Court in *Volkswagenwerk AG v. H. J. Schlunk*,⁶ in which the Supreme Court has asked the Solicitor General for his comment as *amicus curiae*.

In addition, enforcement of U.S. court verdicts in liability cases in Europe generates more and more resentment insofar as treble damages, punitive damages, or other exemplary damages are to be enforced.

It is therefore timely that Abbo Junker devotes his elaborate doctoral thesis, *Discovery im deutsch-amerikanischen Rechtsverkehr*,⁷ to this field, which is important to European-American trade relations as well as to European-American jurisprudence. Yet, he wisely refrains from giving advice for actual pending questions and cases.

Junker does not address whether or to what extent the German Government should enact a regulation modifying its article 23 reservation

1. *In re Société Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir.), *cert. granted*, 106 S. Ct. 2888 (1986), *vacated*, 55 U.S.L.W. 4842 (June 15, 1987).

2. Multilateral Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 [hereinafter Evidence Convention].

3. 754 F.2d 602 (5th Cir. 1985), *cert. granted*, 106 S. Ct. 52, *Anschuetz & Co., GmbH v. Mississippi River Bridge Authority*, 55 U.S.L.W. 3852 (June 22, 1987).

4. 757 F.2d 729 (5th Cir. 1985), *cert. granted*, 106 S. Ct. 1633, *Messerschmitt, Boelkow, Blohm, GmbH v. Walker*, 55 U.S.L.W. 3852 (June 22, 1987).

5. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* November 15, 1965, 20 U.S.T. 361, T.I.A.S. 6638.

6. 495 N.E.2d 1114 (Ill. App. 1986), *cert. granted*, 107 S. Ct. 1279 (1987).

7. A. JUNKER, *DISCOVERY IN GERMAN-AMERICAN LITIGATION (DISCOVERY IM DEUTSCH-AMERIKANISCHEN RECHTSVERKEHR)* (1987).

under the Evidence Convention⁸ regarding production of documents. It may be noted, however, that the German Government is currently circulating a draft regulation regarding production of documents. The difficulty with its enactment lies in the diverging concepts of evidence gathering in the United States on the one hand and in Germany on the other.

Abbo Junker's work, written in German, is divided into two chapters. Chapter 1 describes the U.S. methods of discovery and its dangers for German parties in the U.S.; Chapter 2 is entitled *The German-American Civil Litigation*, yet limits its contents to the taking of evidence.

In Chapter 1 the striking features (in the eyes of the German reader) of U.S.-style discovery are brilliantly depicted. The law before the 1938 reforms contained a prohibition of "fishing expeditions." In contrast, the pretrial discovery as practiced since the reforms is markedly different: Evidence through hearsay is allowed during pretrial although not admitted during trial;⁹ impeachment is admissible;¹⁰ the core of pretrial discovery seems to be to search for and find evidence that might be "admissible" during trial.¹¹

Of particular interest to German companies trading with the U.S. and their European insurers are liability suits. Should insurance be subject to pretrial discovery or to presentation at trial? Since the Supreme Court issued Federal Rule of Civil Procedure 26(b)(2) in 1970, the production of a policy's existence and of its contents at trial is permitted.¹²

Discovery may be limited by the judge through means of a protective order or a discovery conference.¹³ In the 1983 amendments to the Federal Rules of Civil Procedure the Supreme court introduced an additional theoretical possibility of a cost result analysis to be undertaken by the judge.¹⁴

With a clarity not known in German literature Junker pinpoints what this means: that in theory pretrial discovery transcripts kept by the courts are open to the public. European companies fear dilution of secrets. In practice, however, American courts rarely keep those records at all.¹⁵

A salient distinction between the German and U.S. systems relates to the question of which documents must be produced under pretrial discovery. Under German law, production of documents can only be re-

8. Evidence Convention, *supra* note 2, art. 23.

9. A. JUNKER, *supra* note 7, at 120.

10. *Id.* at 121.

11. *Id.* at 123.

12. *Id.* at 123, 124.

13. *Id.* at 136.

14. *Id.* at 142.

15. *Id.* at 141.

quested in very rare and limited cases and certainly only from those who have possession or custody. In the U.S. a party must produce those that are in its possession, custody, or control.¹⁶ The wide range of "control" as practiced in the U.S. is much narrower under the law of Germany (and of any of the other continental countries). Documents located at overseas affiliated companies are deemed under the control of the U.S. parent company, for example. This would not be the case in Germany. The "trial by ambush" may be replaced in the U.S. by "trial by avalanche" (of documents requested by the parties to a trial).¹⁷

In Chapter 2 Abbo Junker delves into the aspects of German-American civil litigation as regards the gathering of evidence. The Evidence Convention¹⁸ plays the central role in this chapter. Junker stresses that German-American relations are privileged compared to relations with other signatory states for four reasons.

First, the U.S. is the largest trade partner of Germany. Second, the German evidence proceedings with most of the other signatory states of the Evidence Convention have not been altered to a great degree after the Convention took effect (unlike in the U.S.). Third, the legal framework of litigation in the United States and in Germany is dramatically different. Finally, the taking of evidence in the United States is in the hands of the parties to the litigation, whereas in Germany the court oversees the taking of evidence as a general rule.¹⁹

Junker opens the itemized discussion with the *Westinghouse Uranium Litigation*²⁰ of the mid-70s relating to discovery of documents in Australia, Canada, and Great Britain and with the *Siemens Sicor* case before the Amtsgericht Muenchen and Oberlandesgericht Muenchen of 1981.²¹ He then addresses the main areas of dispute arising from the Evidence Convention,²² such as what is meant by the scope of its application being limited to civil or commercial matters. What might be a civil or commercial matter in the United States might not be qualified as such in Germany.

Germany is governed by a distinctive body of law such as public or administrative law, whereas in the United States many functions of administrative law are exercised through the adversary system in the state or federal courts. In Germany special administrative courts would be sitting over such cases, unlike in the United States. It is the law of the

16. *Id.* at 170.

17. *Id.* at 173.

18. Evidence Convention, *supra* note 2.

19. A. JUNKER, *supra* note 7, at 224.

20. Among others: *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992 (10th Cir. 1977).

21. Judgment of October 31, 1980, Oberlandesgericht, Muenchen, RIW/AWD 1981, 554.

22. Evidence Convention, *supra* note 2.

receiving state that decides whether or not evidence sought by the ending state is for a civil or commercial matter.²³ It is therefore a question of German jurisprudence whether punitive damages awarded by a U.S. verdict against a German defendant are deemed to be a civil or commercial matter. Junker claims that such a verdict should also be deemed a civil matter by German standards.²⁴ Other German scholars take a different position.

With respect to *ordre public* the reader finds a narrow interpretation of article 12(1)(b) of the Convention,²⁵ which does not itself use the term *ordre public*. The careful research of the history of the Convention seems to show, for example, that a request for production of documents may well be in conformity with the *ordre public* even if the verdict's execution in Germany might very well be rejected on the grounds of a violation of the *ordre public* at a later stage.²⁶ It follows that granting evidence assistance does not prejudice a subsequent claim of violation of the *ordre public* during a later execution procedure.

Article 23 of the Convention relating to pretrial discovery of documents is called the key provision.²⁷ This is a fair assessment that takes into account the high priority given to pretrial discovery of documents in the U.S. litigation process. It also correctly reflects the considerable resentment in Germany against any production of documents as such, and in foreign courts in particular.

Most of the eighteen signatory states have made use of the reservation accorded by article 23.²⁸ The majority of those modified their reservation again during the first years of the Convention's operation. In practice, they more or less limit the reservation to fishing expeditions. By notification of December 24, 1986, France was the latest nation to open up the pretrial discovery for those documents that are "limitatively enumerated in the letter of request and have a direct and clear nexus with the subject matter of the litigation."²⁹ The German Government has officially declared its intention to modify its reservation as well.

Junker gives a startling interpretation to the wording of article 23.³⁰ He claims that this provision not only relates to documents but to all

23. A. JUNKER, *supra* note 7, at 258.

24. *Id.* at 262.

25. Evidence Convention, *supra* note 2, art. 12(1)(b).

26. A. JUNKER, *supra* note 7, at 272.

27. *Id.* at 284.

28. Evidence Convention, *supra* note 2, art. 23.

29. Letter to the Minister of Foreign Affairs of France, dated Dec. 24, 1986, to the Minister of Foreign Affairs of the Netherlands as depositary under the Evidence Convention, presented to the Supreme Court *In re Société Nationale* for the record on Jan. 21, 1987.

30. Evidence Convention, *supra* note 2, art. 23.

other means of evidence gathering as well, and that it only allows signatory states to declare a reservation with respect to nonspecified or nonsubstantiated requests.³¹ The reason, according to Junker, lies in the history of the negotiations leading to article 23 and its alleged aims. This unorthodox result will stir up discussion. It is not in conformity with the German judicial practice of today. From what can be seen, no German scholar has taken this stand before. One thing can be said already: This revolutionary theory proves that the Evidence Convention is not as inflexible or esoteric as some German or American judges might have felt in the past.

The second part of Chapter 2 deals with taking evidence from Germany by means other than the Evidence Convention.³² Again, of great interest are Junker's observations of the above-mentioned Fifth Circuit decision, *In re Anschuetz*.³³ This decision plays a key role and exemplifies the need for a modification of the article 23 reservation by the German Government. Also, this decision at least gives a glimmer of hope that balancing the interests of friendly nations might become an everyday practice in U.S. courts.³⁴

Junker touches upon the question of public international law.³⁵ Therein might be the sole source of criticism. He neglects the concept of judicial sovereignty. For example Germany, by tradition and constitution, lays evidence-gathering in the hands of judges or authorized public prosecutors or in the hands of Parliament only. Free-wheeling evidence "tourism" by attorneys is unknown. It probably would be unconstitutional. Comity of nations as understood by the U.S. courts should take this into consideration.

It should be noted, that the reverse situation is also dealt with in depth in Chapter 3: Taking evidence from the U.S. for the benefit of claims before German courts.³⁶

As a conclusion, it should be said that Chapter 2 is worthy of being translated into English. Its clarity and comprehensiveness would do much to further mutual understanding on both sides of the Atlantic.

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31. A. JUNKER, *supra* note 7, at 300.

32. *Id.* at 361.

33. *Supra* note 3.

34. A. JUNKER, *supra* note 7, at 402.

35. *Id.* at 392.

36. *Id.* at 404.