

BOOK REVIEWS

International Arbitration: Three Salient Problems (Hersch Lauterpacht Memorial Lectures, Vol. 4)

By Stephen M. Schwebel. Cambridge, U.K.: Grotius Publications Ltd. (P.O. Box 115, Cambridge CB3 9BP, U.K.), pp. xviii, 303, \$59.00 (£33.00).

This is a book important for both the theory and practice of international arbitration. Its author¹ deals with three salient problems that recur in public international and commercial international arbitration. Since the problems have to be decided so often, they need to be clarified. The book under review renders a noteworthy contribution hereto.

The first chapter is devoted to the problems of the severability of the arbitration agreement. It tries to answer the question: Does the invalidity, termination, nullification, or suspension of a contract to which an arbitration clause is attached, affect the arbitration clause or does the latter remain in effect notwithstanding the fate of the contract itself?

The author points out that this question is answered by the doctrine of severability, separability, or autonomy of the arbitration agreement. Since, according to the author, it is inherent in the arbitral process that a tribunal is the judge of its own jurisdiction, that it has "la compétence de la compétence" or the "Kompetenz-Kompetenz," it is no less inherent in that process that an arbitral tribunal should have the competence to pass upon disputes arising out of that agreement. To this general conclusion, a caveat is added by the author (p. 11): In all cases where the question would be not whether the principal agreement was or is valid, but whether it was actually concluded, there would be room to challenge the authority of the arbitral tribunal to determine that question; or at least the tribunal's conclusion on such question might be subject to judicial control. On the whole, however, the author finds (p. 60) the theory of severability well justified both as a matter of theory and as a matter of practice, the support for it being broad and compelling.

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The author's final conclusions deserve strong support. While his line of argumentation may be wholly accepted in public international arbitration, however, some national laws dealing with commercial international arbitration still deviate from his position. Some national laws, which are not unimportant in the field of international commercial arbitration, carefully distinguish between the problem of the severability or autonomy of the arbitration agreement, in the one hand, and the "compétence de la compétence" or the "Kompetenz-Kompetenz," on the other. While the severability of the arbitration agreement is recognized, for example, in U.S. federal,² in French,³ and in German⁴ law (it being well acknowledged in such legislations that the invalidity, termination, nullification, or suspension of a contract does not encroach upon the effectiveness of the arbitration agreement),⁵ the arbitral tribunal is denied the power to decide upon the "compétence de la compétence,"⁶ the assumption of such power being considered as some kind of a boot-strapping operation. In these national laws only the competent state court would be invested with the power to decide on whether the tribunal possesses jurisdiction unless the parties had, by an unequivocal agreement, vested such "compétence de la compétence" with the arbitral tribunal.

The position of the author, who argues strongly in favor of the possession by the arbitral tribunal of such "compétence de la compétence," is clearly preferable.⁷ If the arbitral tribunal were to be denied such power,

2. Cf. *Prima Paint Co. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967); *Pollux Marine Agencies, Inc. v. M.V. Captain Demosthenes*, 455 F. Supp. 211, 217-18 (S.D.N.Y. 1978).

3. Cf. M. DE BOISSESON, M. DE JUGLART & P. BELLET, *LE DROIT FRANÇAIS DE L'ARBITRAGE* 220-21 (1983); R. DAVID, *L'ARBITRAGE DANS LE COMMERCE INTERNATIONAL* 268 (1982); T. CARBONNEAU, *THE FRENCH LAW OF ARBITRATION* ¶ 3.01, n. 4 (1982).

4. Cf. "Bundesgerichtshof" in 53 *Entscheidungen des Bundesgerichtshofs in Zivilsachen* (Reports of the German Supreme Court) 315, 318-19, 321-23 (1970); 69 *id.* at 260, 261 (1977).

5. For a comparative survey, see R. DAVID, *supra* note 3, at 265-70.

6. As to U.S. federal law see, e.g., *Interocean Shipping Co. v. National Shipping & Trading Corp.*, 562 F.2d 673 (2d Cir. 1979); *Pollux Marine Agencies*, 455 F. Supp. at 211.

In former French law, the "compétence-compétence" was denied to the arbitral tribunal, see M. DE BOISSESON, M. DE JUGLART & P. BELLET, *supra* note 3, at 219-20. Article 1466 of the New French Code of Civil Procedure, however, has invested the arbitral tribunal with such power.

German law is not clear on this point. In the absence of an express, explicit agreement of the parties to confer jurisdiction upon the arbitral tribunal to decide on this issue, some court-rulings, see, e.g., "Bundesgerichtshof" in 68 *Entscheidungen des Bundesgerichtshofs in Zivilsachen* (Reports of the German Supreme Court) 356, 358, 365-66 (1977), deny the existence of such a power. Other court rulings, see, e.g., "Oberlandesgericht Celle" (Court of Appeals of Celle), in 1958 *MONATSSCHRIFT FUER DEUTSCHES RECHT* 172, are ready to admit it to a certain extent.

7. See Sandrock, *Arbitration between U.S. and West German Companies: An Example of Effective Dispute Resolution in International Transactions*, 9 U. PA. J. INT'L BUS. L. 27, 46-49 (1986); Sandrock, *Dispute Resolution in International Business Transactions, in PUBLIC INTERNATIONAL LAW AND THE FUTURE WORLD ORDER*, 3-1, 8-13 to 8-16 (J. Norton 3d ed. 1987).

enormous practical problems would ensue: a party, after having instituted arbitration proceedings and after having heard his adversary's arguments, could be forced to desist from arbitration and to seek, first, a decision by the competent state court as to its "compétence de la compétence." If such state court were to find in favor of the jurisdiction of the arbitral tribunal, the arbitral proceedings would have to be reactivated. This would be a time-and-money-consuming, zig-zagging between arbitration and state court proceedings—a needless operation that should be avoided.

The second chapter deals with the refusal of a state to arbitrate pursuant to a clause inserted into a contract between that state and an alien that provides for exclusive jurisdiction between the two. The chapter raises the question: Does such refusal constitute a denial of justice under international law? This question does not arise often in international law. It is an important question, nevertheless, because the refusal of a state to follow such an arbitration clause may deprive the alien of the only effective remedy and may thus have disastrous consequences for him.

Resuming an earlier discussion of that problem by Dr. F.A. Mann,⁸ the author agrees with Dr. Mann that there is a denial of justice when the arbitration clause is merely repudiated or when the failure to implement such arbitration clause results from specific legislation directed against the contracting alien. In addition, however, the author cogently proves that one must assume the existence of a denial of justice also in a third group of cases in which the failure of the state to implement the arbitration clause results from general legislation not specifically directed against the respective aliens, but based upon a new general attitude of the contracting state vis-à-vis international arbitration (a group of cases that Dr. Mann had found unobjectionable under international law). The author is able to support his view with rulings from arbitral awards and a number of scholarly comments. But it is submitted here that the most persuasive principle in point so far is the ancient but "evergreen" rule of *venire contra factum proprium*. How could a state that voluntarily, deliberately, and in full awareness of the legal meaning of its action, enter into a binding arbitration agreement with an alien terminate this agreement without inducing liability under international law? It may be doubted, however, whether the author is right in assuming (pp. 125–43) the respective alien to be entitled to plead such denial of justice before the arbitral tribunal.⁹ Does the author, indeed, maintain that the arbitral tribunal is authorized to issue an award condemning the state to compensate the damage sustained by the alien?

8. State Contracts and International Arbitration, XLII BYIL p. 26–29 (1967).

9. Another reviewer of this book, B. Stern, 114 JOURNAL DE DROIT INTERNATIONAL 1092, 1093 (1987), also is not persuaded by the arguments produced thus far.

The third problem analyzed by the author is "the authority of truncated international arbitral tribunals," (pp. 144-296) that is, the power of an international arbitral tribunal to render an award after one of the arbitrators has withdrawn from the tribunal. Unfortunately, such withdrawals are not rare. They occur over and over, mainly after a party-appointed arbitrator realizes that the forthcoming award will run counter to the motions put forward by the party upon whose proposal he has been appointed.

In international commercial arbitration any frustration of the arbitral tribunal's exercise of functions by such a withdrawal is sought to be avoided by the rules of most of the arbitral institutions in that they authorize the thus truncated tribunal to render its award despite any unauthorized withdrawal of an arbitrator.¹⁰ In public international law, such rules mostly are not available. Yet, upon a careful examination of theory and precedents the author arrives at the result that an arbitrator is not allowed to withdraw without the tribunal's leave, and that a withdrawal without such leave constitutes a wrong under customary international law that entitles the tribunal to proceed and to render a valid award.

What is the message this book has to convey to the student and practitioner of international arbitration?

In times when the world's largest markets grow together more and more, when it is essential for large firms to act on multinational levels, and when governments have to regulate the activities of an increasing number of alien firms, an effective means of international dispute settlement must be available. For many reasons, international arbitration is the best instrument at hand so far. For all those interested in the further expansion of world markets, the functioning of international arbitration must therefore be of primary interest. International arbitration is threatened by a few undesirable, deplorable practices.¹¹ The book here under review points out some of those practices, while at the same time showing how they may be overcome. It thereby renders a great service to the international community of merchants, lawyers, and scholars who are aware of the role that international arbitration has to play in the world of today.

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10. For a comparative overview of such rules see Sandrock, *Das Gesetz zur Neuregelung des Internationalen Privatrechts und die internationale Schiedsgerichtsbarkeit*, in 33 RECHT DER INTERNATIONALEN WIRTSCHAFT Beilage 2 zu Heft 4, pp. 4-7 (1987).

11. In this respect, see, e.g., Lalive, *Some Threats to International Investment Arbitration*, 1 FOREIGN INVESTMENT L.J. 26-40 (1986).

Dealing Effectively with Local Counsel Abroad

By John A. Nilsson. New York, New York: Matthew Bender & Co., Inc., 1988, 1 looseleaf volume, updated, \$85.00.

John A. Nilsson's book is a practical survey of the common difficulties that can arise in international legal cooperation and the pitfalls that may have caused skepticism of the use of local counsel abroad in the past. It provides a sound basis for assessment of where problem areas for such cooperation can lie. More importantly, it advises how to be prepared and how to avoid such problems with international dealings.

Mr. Nilsson's work is brief but well-written, concise and clear. In its "how-to" format (how to choose an advisor, how to determine if a foreign advisor is required, how to communicate with a foreign lawyer), the book provides a basic introductory guide to setting up and maintaining international legal contacts through effective and mutually beneficial cooperation. A practitioner experienced in international commercial matters would confirm the legitimacy of many points made by Mr. Nilsson. Among these, for instance, the following:

- As the laws and customs of different states vary to an extent not to be underestimated, local counsel should be brought into transactions as soon as possible. Specializations required of counsel must also be taken into account, such as for tax questions or trademark, patents, or "know-how" issues.
- Language barriers are by no means overcome by having all documents simply translated into a common language, usually English. Caution is advised; obtaining a careful explanation of the specific clauses of a contract and their relevance to the law of the jurisdiction affected is especially prudent.
- The author suggests the use of expatriot lawyers as one means of overcoming potential language barriers. In addition, such a person may act as an effective liaison individual. In most cases he is familiar with the law of his country of residence in addition to his own specialization, so that differences in legal systems are more readily ascertained and explained to a client.
- Choice of the advisor is usually the result of specific personal contacts. Absent such, Mr. Nilsson offers alternatives for locating foreign legal counsel through law directories, membership in law clubs, and listings of local counsel at the embassy in the target country.
- Mr. Nilsson does not restrict his analysis of dealing effectively with local counsel abroad to legal considerations, but points out that an awareness of local social customs is also imperative to avoid a *faux pas* that could hinder harmonious cooperation with local counsel.

- Considerations that often may be forgotten in international contracts are also mentioned by Mr. Nilsson. For example, in international contracts requiring individuals to be employed in foreign countries, consideration must be given to the requisite visa applications, personal tax considerations for such individuals, and potential legal ramifications for maintenance or alimony claims that could arise if expatriated families should have marital problems during residency in the foreign jurisdiction.
- The cooperative aspect of working with foreign local counsel requires total openness on both sides—information concerning the client and its needs on the one hand, and the realities of the venture for such client in the proposed jurisdiction, reviewed and assessed by local counsel, on the other. In addition, setting the framework of the cooperation at the outset is also essential in designating such matters as billing procedures, scales of charges, and who is to pay the bill. The parties should consider whether the foreign local counsel should bill the client separately or whether the original attorney-client relationship should be retained for billing.

Mr. Nilsson's work offers several strategic considerations, such as whether it would be more appropriate to litigate future disputes or whether it is in the client's best interest to include an arbitration clause in its contract. The advantages of arbitration, including the ability to form the arbitral tribunal and to choose, within limits, where the proceedings will be conducted, must be weighed against the disadvantages: the powers of the arbitrator are less than those of the judge of a court of law; once an arbitral tribunal has made its decision, in general terms, there is no appeal; enforcement of the arbitral award is not as simple as the enforcement of the order of a court of competent jurisdiction. Mr. Nilsson's reference to arbitration institutions, however, overlooks the American Arbitration Association (AAA), assuming perhaps that foreign parties would not favor such an institution, but which is, nevertheless, a most effective arbitration dispute mechanism utilized in the United States of America.

Mr. Nilsson's work provides a useful tool for attorneys interested in developing an international practice. Mr. Nilsson sets forth areas to be given special attention and provides general guidelines for future action. As such, it is an effective aid to lawyers with noninternational experience in expanding to different countries and different legal systems and to enable them to work more effectively to benefit their clients or potential clients engaged in international transactions.

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Business Law Guide to Germany

By Strobl, Killius & Vorbrugg. Bicester, Oxfordshire, U.K.: CCH Editions Limited, 1986, pp. xv, 387, \$33.00.

For many years armchair engineers have relied on the marvelous collection of engineering knowledge contained in *The Way Things Work, An Illustrated Encyclopedia of Technology*,¹ to explain, without extensive technological discussion, how various industrial technologies actually function. Like locomotives and nuclear power plants, the inner workings of Continental legal systems can be puzzling to an outsider, particularly since, with few exceptions, U.S. lawyers when confronted with English language literature often face either too little to assist in intelligent discourse with local counsel on "lawyer-issues" (for example, booklets prepared by major accounting firms) or scholarly comparative works, which often do not adequately address practical concerns.²

Fortunately for the English-speaking counselor, the recently published *Business Law Guide to Germany* (the *Guide*) by the Munich law firm of Strobl, Killius and Vorbrugg can serve as a practical handbook of "the way things work" in a legal context for companies with legal transactions involving West Germany. Although the authors state that the *Guide* is primarily meant to be a "handbook for general use rather than a specialized manual for the legal or tax professions," (p. v) both tax and business lawyers will find the *Guide* extremely helpful in illuminating the German, as well as the European, legal landscape, often putting an issue in context so that it can be addressed at an early stage with the client as well as local counsel.

The usefulness of the almost 400-page *Guide* begins in the Table of Contents, which is carefully organized with enough detail to pinpoint a problem area quickly. (pp. vii-xii) The Table of Contents is broken down into fourteen main topics: Sales Conditions and Consumer Protection, Importing into Germany (Customs), Commercial Intermediaries, Forms of Doing Business, Taxation, Accounting and Auditing, Banking and Finance, Investment Incentives, Labor Law and Social Security, German and EEC Competition Law, Unfair Competition: Restrictions on Commercial Advertising, Industrial Property Rights, Litigation and Arbitration, and finally, Personal Business. Each topic is further subdivided into practical subheadings and paragraph headings indicating the subject of

1. (Simon & Schuster 1967).

2. One recent notable exception, providing an excellent combination of scholarship and practice, is Martiny, *Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany*, 35 AM. J. COMP. L. 721 (1987).

discussion. The index at the end of the work (pp. 371–87), is organized using CCH paragraph numbers, a system familiar to the U.S. lawyer.

As with other good tools, value is proven by substantive usefulness, and the *Guide* shines when a common, but thorny issue is addressed, such as contractual choice of law and choice of forum problems. (pp. 10–15) In a straightforward style, the authors describe the nature of the problem. For example, since contract law in West Germany is federal and not state law, conflicts of law do not arise in purely domestic transactions. (p. 10) The brief discussion of the significance of contractual choice of law in a business context is welcome in a general work of this sort. The authors discuss in separate subparagraphs (pp. 10–12) the enforceability of express choice of law clauses (recognized as enforceable, unless there are “no foreign elements”—a situation the courts rarely find unless the choice was arbitrary), the applicable law in the event no express choice is made in the contract (analysis of conflicting interests of the parties to find the “center” of the contract or the legal system with which the contract has the closest correlation), significance of the place (or places) of performance (the place of performance of that obligation which “characterizes the contract”). In addition to traditional conflict analysis, the *Guide* also discusses (p. 12) the effect on the choice of law determination caused by the adoption of the Hague Uniform Law on the Formation of International Sale of Goods Contracts—considered to be an “integral part of German law.” This law requires express exclusion to avoid application.

One interesting subtopic (p. 13) is the effect upon the choice of law by the Law on General Terms of Business.³ This legislative attempt to address the problem of adhesion contracts provides, among other things, that there must be a “legitimate reason” for the choice of foreign law in a standard contract offered to persons not “merchants.” This is a higher standard than for individual contracts, and if foreign law is held applicable using a standard conflicts analysis, the Law on General Terms of Business may override the foreign law in certain instances, as when the otherwise applicable foreign law fails to provide protection for consumers equivalent to German law. (p. 14)

With respect to choice of forum clauses, the interpretation of which is subject to both German procedural law and, with respect to transactions with other European Community member countries, a specific EC Convention, the *Guide* (p. 14) leads the reader through the guidelines of the relevant regimes, pointing out where specific portions of German pro-

3. Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen, Dec. 9, 1976.

cedural law have been superseded by the Convention.⁴ Another particularly important aspect of the *Guide*, and one that demonstrates its practical orientation, is the frequent discussion of critical judicial decisions that could easily become a trap for the uninformed, such as the reference (p. 15) to a 1971 decision of the Federal Supreme Court,⁵ which provides that exclusive choice of forum provisions will be given effect, even where it is clear that the final decision could not be enforced (for example, for lack of reciprocity).

Space limitations do not permit the treatment in detail of many of the additional areas discussed in the Sales Conditions and Consumer Protection Chapter of the *Guide*, such as the brief discussions regarding the "battle of the forms" (p. 7), the German equivalent of the Statute of Frauds (p. 21), and clauses that are automatically void in standard contracts. (p. 116) There is an excellent treatment of the use of title retention agreements (p. 21) as well as the restrictions on the storage and use of computer data regarding individuals. Transmittal of certain personal data outside the country, even to a parent company, can be unlawful. (pp. 31–36) The issue of product liability, including the liability provisions of drug manufacturers (pp. 23–31), is particularly interesting as a counterpoint to the present debate in the United States about the constitutionality of liability caps. Of no less importance in the *Guide* are the concise and useful descriptions of the legal provisions relating to commercial agents and distributors (pp. 53–66), including useful drafting and negotiation tips that should prove invaluable to manufacturers dealing with intermediaries in Germany.

The chapters in the *Guide* dealing with taxation (pp. 101–52) are particularly helpful for U.S. companies presently establishing or contemplating a subsidiary or branch in West Germany as well as tax planning for mobile executives. One section (pp. 127–31) is devoted to particular tax problems of nonresident corporations and individuals. Additionally, each of the various "special" German taxes (e.g., wealth tax (Vermögensteuer), trade tax (Gewerbesteuer), inheritance tax (Erbchaftsteuer) and value added tax (Umsatzsteuer)), are explained with enough detail (pp. 135–51) to afford at least preliminary planning.

Both German and EC antitrust provisions regarding vertical and horizontal restrictions are treated in depth (pp. 245–300), with discussion and comparison of some of the most important decisions of the EC Commission and German courts. In addition to examining in detail EC group

4. Convention on Judicial Competence and on the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 21 O.J. EUR. COMM. (No. L 304) 77 (1978); 8 I.L.M. 229 (1969).

5. *Judgment* of Feb. 2, 1971, Bundesgerichtshof [BGH] 71 NJW 985.

exemptions for specialization agreements, research and development agreements, distribution agreements and license agreements, the *Guide* devotes several pages (pp. 284–91) to the German law provisions regarding the control of mergers and acquisitions.

The final chapter of the *Guide* (pp. 359–69) is entitled “Personal Business” and deals with the diverse legal, and often vexing, problems related to residence permits, local registration, private real estate leases, and drivers’ licenses and car registration for foreigners in West Germany.

In sum, the *Guide* is a major contribution to the non-German lawyer’s arsenal of workbooks, guides, and treatises regarding European law. The combination of theory and practice is exceptionally well-balanced and facilitates an intelligent starting point for further analysis, if necessary. The *Guide* sets a high standard for future handbooks on the legal systems of other countries.

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Doing Business in Ireland

Edited by P. Ussher, B.J. O’Connor, and C. McCarthy. New York: Matthew Bender, 1986, looseleaf, to be updated annually, \$80.00.

Considering how much U.S. investment there has been in the Republic of Ireland in recent years, it is perhaps surprising that no comprehensive book on the legal aspects of conducting business in Ireland has been published until now. Perhaps the success of U.S. investment there suggested that no such book was needed. The Republic of Ireland has consistently given foreign investors the highest rate of return on investment in Europe, and has the advantage for U.S. investors of having a well-educated, English-speaking population. Yet a book on transacting business in the Republic of Ireland was needed, because Irish law is now sufficiently different from English Law such that it is inadequate for both Irish and non-Irish lawyers to use English lawbooks.

This book is divided into eighteen chapters, with a total of thirty-seven authors, including one judge of the Irish High Court, a number of Irish practicing lawyers, several university law teachers, house counsel, patent agents, economists, accountants, and tax specialists, and an internationally known expert on engineering law and arbitration. Most of the chapters have more than one author, and the result is a useful mixture of clearly presented, comprehensive, and practical information. Since the book is

the result of collaboration between the Law School of Trinity College, Dublin, and the Dublin law firm McCann Fitzgerald Sutton Dudley (formerly this reviewer's firm), it is natural that many of the authors either are associated with Trinity or are members of that firm.

The chapters deal with the following topics: legal and economic background, investment incentives, business organization (that is, corporation law), acquisition of an existing Irish business, taxation, labor law, social security, land law and environmental law, contract, product liability, agency and franchising, intellectual property, banking institutions, legal aspects of banking and security, antitrust policy, litigation and arbitration, regulation of economic activity (securities regulation, insurance, export and import controls, oil and mineral, and regulated trades and professions), and insolvency law.

The chapter headings show that the approach is extremely practical. Conventional legal topics such as corporation law are also found in appropriate places in the chapters relating to acquisition of a business, securities regulation, and insolvency. The chapter on banks includes a list of the financial institutions in the Republic of Ireland. The chapters on investment incentives, acquisition of a business, and banking in particular deal with the practical aspects of those subjects very fully, with the added benefit of considerable experience. These chapters provide information that it would be difficult if not impossible to find in any other published source.

If this review were being written for an Irish law journal, it would be important to stress that this book is as valuable for Irish lawyers and accountants as for non-Irish lawyers advising corporations considering investing in Ireland, since there is so little other published material on some of the topics covered in the book. Indeed, the real subject matter of the book is wider than the title suggests, since unusual topics such as the law governing divorces of non-Irish executives are outlined (because the chapter on land law covers spouses' rights under the Family Home Protection Act, 1976). This book is in fact a summary of Irish law on a great number of subjects. On some of these topics, longer and more detailed information has already been published (e.g., corporation law, tax, environmental law, and land law). On other subjects there is effectively no other published material.

The approach adopted is practical in another way, because the rules of European Community Law are included in the appropriate chapters (for example, antitrust law, and product liability). The chapter on antitrust (competition) numbers fifty-one pages, thirty-four of which deal with Community antitrust law. Although there is already a vast quantity of published material on this subject, the authors are certainly correct in regarding the EC Law as more important than the infrequently used Irish

legislation. The practical approach leads to some topics appearing more than once (for example, currency controls, which are discussed both in the chapter on acquiring a business and in the chapter on banking). However the index (over fifty pages) and cross-referencing should resolve any potential difficulties.

What does the book reveal for the investor and its lawyer? An attractive range of investment incentives, a tax rate of only 10 percent on manufacturing activities, and a generally favorable investment climate are the principal points of note. As a member state of the European Community, Ireland is bound by EC directives. Currency controls do not cause any inconvenience for foreign investors.

Viewed broadly, Irish law is similar to English law. However, there are important differences, including: Ireland has a written constitution; Irish corporation legislation contains nothing corresponding to the recent United Kingdom legislation; tax laws are very diverse; and investment incentives vary from those in the United Kingdom. Labor law, social security law, and environmental protection laws are also different.

As thorough and detailed as the book is, inevitably, some problems are not dealt with fully. The chapter on intellectual property simply notes that Ireland has not yet ratified the European Community Patent Convention, and that a constitutional difficulty may prevent ratification. (p. 12.01(3)) This is perfectly correct and perhaps no useful forecast of the outcome was possible when the book was printed. (In any case the book is looseleaf and will be regularly updated). Ireland is not the only Member State that has not yet ratified the Convention. The constitutional problem has not yet been solved, and it may have been accentuated by the majority judgments of the Irish Supreme Court in *Crotty v. An Taoiseach* (1987). It appears the difficulty lies in that it is unclear whether the ratification of conventions, although negotiated under Community auspices and clearly needed for practical reasons, yet not mentioned in the EEC Treaty, is "necessitated by the obligations of membership of the Communities." If ratification is not necessitated, it would probably be unconstitutional, since some of the conventions in question confer jurisdiction on the Court in Luxembourg. The question whether ratification is or is not "necessitated" is a question of Community law, not Irish constitutional law, despite the fact the words quoted are found in the Irish constitution. It is likely that the Court of Justice would decide that ratification was necessitated by Ireland's obligations under Article 5 of the EEC treaty. Unfortunately the issue has not been resolved, either by a referendum to change the Constitution or by bringing a test case. Although a foreign investor's lawyer is not likely to be directly concerned with the constitutional issue, he might wish to know that Ireland may delay its ratification of several

EEC conventions for this reason. Ireland, like certain other EEC Member States, has not always implemented EEC directives on schedule.

There is nothing corresponding to the Securities Exchange Commission in Ireland, and few companies whose shares are available to the public. Irish corporation law relies on disclosure requirements for protection of creditors. But the authorities are not very effective in ensuring that company records available to the public are kept up-to-date. This means that companies' creditors cannot protect their interests in the way intended by the legislation. For example, the procedure for issuing patents is not as quick as in some other Member States of the European Community. Thus, in some respects the Irish legal system does not operate as efficiently as it was intended to.

The editors' preface and the chapter on litigation point out the difficulties in determining what is Irish law, and the need for consolidation. But these are not the only matters in which the Irish legal system is not as up to date as it should be. Some of these weaknesses surround genuinely difficult problems, for example, continued trading by insolvent companies. Other weaknesses are merely the result of undue tolerance of inefficiencies in the legal system which reduces the effective protection available for entities such as creditors. It is not, of course, the task of a book of this kind to criticize the legal system it describes, or to suggest reforms, but it is unfortunate that the pressures to improve the legal system do not seem to be as strong in Ireland as they are in other countries.

Although the point need not be stressed to the average investor, Irish constitutional law is pervasive. It may affect, for example, the amount of compensation payable under the physical planning legislation, the procedure to be followed when a company's affairs are inquired into by an official inspector, the powers of majority shareholders to acquire a minority, as well as the likelihood of Ireland ratifying the European Community Patent Convention. Such points are generally only briefly mentioned and references to more specialized books are given where they have been discussed more fully.

The Irish law on registered designs is briefly described. The use of copyright to protect industrial designs is mentioned, but so briefly that the question whether the principle approved by the UK House of Lords in *Armstrong v. British Leyland* would apply in Ireland is not raised or discussed. This is important as the House of Lords has ruled that copyright in three dimensional objects such as components for automobiles cannot be used to maintain a monopoly on the supply of spare parts.

A good legal textbook should contain the characteristics of balance and good judgment, both as to what is included and omitted, and in how the topics are presented. Such a balance involves a careful mixture of practical

information and intellectual clarity, and demands the ability to write clearly and without unnecessary technicalities. In addition, the use of legal experience and judgment is especially helpful. Judged by these standards, this is an excellent book, and a particularly good example of cooperation between university lawyers and practitioners.

In spite of its title, the book describes only the Republic of Ireland and not Northern Ireland. In a detailed book designed for practitioners one cannot reasonably ask for a comparative law approach. This may render the book rather difficult reading for lawyers with a civil law background, but should create no problems for U.S. lawyers. Generally, the writing is very clear and readable given the complexity of the topics discussed. (One important omission is the lack of an index entry under "treaties" and no mention of the U.S.-Ireland Treaty of Friendship, Commerce and Navigation.) A later supplement is planned dealing with Irish State monopolies.

Overall this is an excellent, important, and practical book, which no lawyer advising clients in Ireland can afford to be without.

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International Handelsschiedsgerichtsbarkeit (International Commercial Arbitration)

By Menno Aden, Heidelberg, Federal Republic of Germany: Verlag Recht und Wirtschaft, 1988, pp. 299, DM 100.00.

The present book deals with international commercial arbitration. International commercial arbitration has been the preeminent mechanism for resolving international commercial disputes, and it is likely to remain an important dispute resolution device in virtually all countries that are involved in international trade.¹ Litigation is usually too expensive and time-consuming, and court judgments very often have little international effect, as is vividly illustrated by two recent Texas cases dealing with the

¹ I. W. Fox, *INTERNATIONAL COMMERCIAL AGREEMENTS: A FUNCTIONAL PRIMER ON DRAFTING, NEGOTIATING AND RESOLVING DISPUTES* 275 (1988). See generally G. DE LAUME, *LAW AND PRACTICE OF TRANSNATIONAL CONTRACTS* 281-349 (1988); Sandrock, *Dispute Resolution in International Business Transactions*, in *PUBLIC INTERNATIONAL LAW AND THE FUTURE WORLD ORDER* (Liber Amicorum in Honor of A.J. Thomas, Jr.) ch. 8 (J. Norton ed. 1987).

enforcement of foreign country money judgments.² Because of its overwhelming practical importance and its theoretical appeal, international commercial arbitration has been the subject of numerous books, articles, papers, and conferences. One may therefore be tempted to ask whether there is a need for yet another publication on the subject. A book like the present one has, however, long been overdue.

While most books on international commercial arbitration today describe the major international arbitration systems, the author of the present book undertakes the task of annotating the procedural rules of some of the most sophisticated and respected systems of international commercial arbitration. The arbitration rules of the International Chamber of Commerce (ICC), the *Bundeskammer der gewerblichen Wirtschaft* at Vienna, Austria, and the Stockholm Chamber of Commerce are examined as examples of procedural rules of institutional arbitral systems. (pp. 59–210) The UNCITRAL Model Law on International Commercial Arbitration and the arbitration rules of the Economic Commission for Europe (ECE) have been selected as examples of procedural rules of noninstitutional international commercial arbitration. A close look at the various sets of rules shows that while there are numerous similarities among the systems, the nuances of the arbitration process in each system are sufficiently different that generalization is dangerous.³ The author's approach of commenting on each set of rules on a rule-by-rule basis is therefore not only appropriate but also necessary.

In Part I, entitled "Basic Issues of International Commercial Arbitration," readers are offered a brief discussion of some of the differences between international commercial litigation and international commercial arbitration. (pp. 9–20) The author also makes some general remarks on the enforceability of arbitration awards, (pp. 21–35) especially in the Federal Republic of Germany.⁴ While Part I of the present book adds little new to the currently burgeoning literature on the topic, the compact elucidation of the issues provides useful background information from the perspective of a European attorney. Part II is directed at the examination of the five sets of arbitral rules mentioned above. (pp. 37–291) The author

2. *Hennessy v. Marshall*, 682 S.W.2d 340 (Tex. App.—Dallas 1984, no writ); *Detamore v. Sullivan*, 731 S.W.2d 122 (Tex. App.—Houston [14th Dist.] 1987, no writ).

3. Stein & Wolman, *International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules*, 38 BUS. LAW. 1685 (1983); see also Perlman & Nelson, *New Approaches to the Resolution of International Commercial Disputes*, 17 INT'L LAW. 215 (1983).

4. For a thorough analysis of the recognition and enforcement of German money judgments in the United States, see F. WEINSCHENK, *DIE ANERKENNUNG UND VOLLSTRECKUNG BUNDESDEUTSCHER URTEILE IN DEN VEREINIGTEN STAATEN UNTER DEN FOREIGN COUNTRY MONEY JUDGMENT RECOGNITION ACTS* (1988).

begins with an "Overview" (pp. 37–57) in which he elaborates some basic concepts underlying these sets of rules. The overview is helpful, as a rule-by-rule annotation naturally can place little emphasis upon the interrelationship between the various rules.

Both Part I and the "Overview" lay the ground for the unique section of the present publication: the rule-by-rule annotation. (pp. 59–291) Not surprisingly, the main emphasis is on the arbitration rules (as amended January 1, 1988) of the International Chamber of Commerce, (pp. 59–145) which have received more attention, both in practice and theory, than the Vienna (pp. 146–83) and Stockholm rules. (pp. 183–210) The author provides the reader with a thorough annotation of the ICC, Vienna and Stockholm rules. While some of the comments may appear to be rather basic, they help the reader to gain an appreciation for the procedural forces that shape each of the three institutional arbitral systems and underscore the impact that the procedural rules have upon the parties' case. The same is true of the annotations of the UNCITRAL rules (pp. 211–58), which have gained rapid recognition in international commercial arbitration⁵ even though they do not provide an institutional framework. The short yet thought-provoking analysis of the UNCITRAL rules shows how carefully these rules were drafted to help alleviate the inevitable differences of culture, language, and law that frequently impede transnational dispute resolution.

In sum, this is an important book that alerts practitioners to basic procedural issues in international commercial arbitration. My only regret is that the author did not write the book in English. While the book is written in an accessible style, the fact that it is written in German will make it difficult, if not impossible, for many international business lawyers to use this fine book.

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5. Thus, for example, the UNCITRAL rules were adopted with only a few minor modifications by the United States-Iran Claims Tribunal at the Hague. Selby & Stewart, *Practical Aspects of Arbitrating Claims before the Iran-United States Claims Tribunal*, 18 INT'L LAW. 211 (1984).