

BOOK REVIEWS

International Business and National Jurisdiction

By A. D. Neale and M. L. Stephens. Oxford, England: Clarendon Press, 1988, pp. xix, 216, \$55.00.

One of the most important problems that confronts those engaged in transnational business transactions and their legal advisors is the assertion of jurisdiction by U.S. courts and enforcement agencies over transactions, witnesses, and evidence outside the United States and the widespread, hostile foreign governmental reactions to those assertions. A distinguished British civil servant, Sir Alan Neale, and a skilled U.S. scholar, Dr. Melville Stephens, have coauthored an important new book on this topic.

In their Preface the authors state that they hope to provide a comprehensive and up-to-date compilation of the relevant case law and a useful commentary on the state of the arguments concerning that law. They have succeeded admirably. The authors introduce the problem in a skillfully written chapter giving the background and practical aspects of current jurisdictional conflicts. They then review the public international law aspects of jurisdiction and the evolution of the U.S. antitrust laws. Three chapters are devoted to the evolution of theories of extraterritorial subject matter jurisdiction from the *American Banana*¹ decision in 1909 through the *ALCOA*² decision in 1945 to recent cases such as *Timberlane*³ and

1. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

2. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

3. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1977); 749 F.2d 1378 (9th Cir. 1984).

Laker.⁴ Subsequent chapters deal with cases relating to the Act of State doctrine, the foreign sovereign compulsion defense, transnational mergers, and international carriers, and other claims to extraterritorial jurisdiction such as personal jurisdiction, extraterritorial discovery demands, and extraterritorial enforcement of U.S. remedies.

The material in these chapters, which is heavily documented with footnotes and an extensive bibliography, is concisely and thoroughly set forth in an objective manner. The concluding part of the book deals with the authors' proposals to eliminate or minimize current disputes.

The authors persuasively contend that although the "effects" doctrine may be appropriate in situations involving generally recognized crimes such as fraud, it is not applicable to economic regulations such as the U.S. antitrust laws that differ substantially in concept and content from one nation to another. The authors use an intriguing example to demonstrate why Americans who so readily espouse the "effects" doctrine certainly would not agree with its application in all cases. They posit the existence of a strict Islamic state in which copies of magazines such as *Playboy* are distributed. Although proponents of the American version of the "effects" doctrine might deem that foreign country's ban on imports of the magazine unobjectionable, the same Americans probably would regard it as highly objectionable for that country to demand that American publishers of the magazines appear before the courts of that Islamic state to answer for conduct that occurred and was lawful in the United States or for it to impose default judgments on the publishers if they failed to appear. It could be argued that examples such as this one lead to the conclusion that rather than the "effects" doctrine the guiding principle of international jurisdiction should be the golden rule, i.e., the United States should not do unto citizens of other nations that which it would object being done unto its citizens.

One of the author's principal conclusions is that so long as American courts regard the "effects" doctrine as settled law, they will regard it as their duty to uphold that doctrine. Consequently, objections to the "effects" doctrine will not be resolved by U.S. judges' balancing all relevant interests pursuant to the so-called "jurisdictional rule of reason" under which jurisdiction is based on effects on U.S. commerce but may be declined as a result of a discretionary judicial balancing of interests. Moreover, in such situations legal advisors will be unable to predict the outcome of business decisions. The authors reject current proposals to codify the "jurisdictional rule of reason" or otherwise to moderate the disagreements. Instead they propose a return to the objective territorial principle

4. *Laker Airways, Ltd. v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984).

of jurisdiction under which U.S. jurisdiction would be exercised in the United States over antitrust offenses "prepared or initiated abroad and completed by means of illegal activity with the United States; it would not be exercised where there were merely commercial effects in the United States of anticompetitive schemes or agreements made and operated in other states." (p. 183) They propose that the U.S. Supreme Court adopt such a test and that it then evolve as a matter of common law. They recognize that their proposal would not resolve important controversies over situations involving truly concurrent jurisdiction such as international air and ocean transportation. They refer to the Mid Atlantic Tribunal⁵ and other similar proposals for the creation of new diplomatic and arbitral mechanisms that they assert should develop suitable compromises.

The authors make other interesting proposals concerning extraterritorial discovery and enforcement jurisdiction.

This valuable book is current as of early 1988. However, events move quickly and since the book was written, the Restatement (Third) of the Foreign Relations Law of the United States and the Draft Antitrust Guidelines for International Operations⁶ as well as the ABA critique of the Draft Guidelines⁷ have been published. This important new book should be considered required reading for anyone interested in the field. It is to be hoped that the authors will provide periodic supplements to give us all the benefit of their incisive commentary and innovative proposals as this field continues to develop rapidly.

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Litigation of International Disputes in U.S. Courts

By Ved P. Nanda and David K. Pansius. New York: Clark Boardman Company, Ltd., 1986, looseleaf, \$85.00

This fine book appeared over a year ago, but for reasons unknown has not been extensively reviewed. It has been recently substantially revised and updated, however, and deserves attention. It is the fourth volume in

5. American Chamber of Commerce (UK), *A Proposal for a Mid Atlantic Tribunal to Resolve UK-US Aviation Disputes*, 31 *WORLD COMPETITION*, Oct. 1987, at 99.

6. 53 Fed. Reg. 21584 (June 8, 1988) and corrections 53 Fed. Reg. 22426 (June 15, 1988).

7. ABA House of Delegates, Recommendation and Report on Antitrust Guidelines for International Operations, *reprinted in* this issue of *THE INTERNATIONAL LAWYER*.

Clark Boardman's excellent International Business & Law series, a practical and comprehensive conspectus of international business law.¹

There are, of course, reams of material written on this subject matter. It is variously dealt with in publications on conflicts of law, private international law,² or contracts.³ T. C. Hartley of the London School of Economics, who has reviewed Nanda and Pansius elsewhere,⁴ teaches a popular course for LL.M. students, which deals with the same subject matter, called "International Business Transactions." By concentrating on litigation, and particularly on U.S. litigation, the authors of *Litigation of International Disputes in U.S. Courts* have succeeded admirably in imposing both a focus and discipline that make their work a real contribution.

The twelve chapters may be generally divided into three groups. The first group, "Personal Jurisdiction" (chapter 1), "Service of Process Abroad" (chapter 2), "Venue in Suits with Alien Defendants" (chapter 3), "The Doctrine of Forum Non Conveniens" (chapter 4), and "Extra-territorial Jurisdiction" (chapter 5) deal generally with jurisdictional issues. Although the authors recognize that jurisdiction over alien defendants (throughout the book the distinction between "alien" defendants, that is those in foreign countries, and "foreign" defendants, that is, those in sister states, is usefully drawn) is "fraught with uncertainty," (p. I-52) they succeed in summarizing the ever changing U.S. law on the subject very well.

A comparison of the 1988 revision with the original text illustrates both the rapid evolution of the U.S. law in this area and the thoroughness of the authors in keeping the book current. The significant 1987 Supreme Court case *Asahi Metal Industry Co., Ltd. v. Superior Court of California*,⁵ for example, is discussed in the revision.

A second group of chapters deals with some specific substantive topics. Chapter 7 is a succinct discussion of the willingness of U.S. courts to recognize forum selection and choice of law clauses in transnational contracts. Chapters 8 and 10 deal with two thorny issues of public international law: sovereign immunity and the act of state doctrine.

1. The other books in the series are THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS (V. Nanda ed. 1981), LAW AND PRACTICE OF INTERNATIONAL FINANCE (P. Wood ed. 1980), ANTIDUMPING AND COUNTERVAILING DUTY LAW (J. Pattison ed. 1984).

2. P. NORTH, PRIVATE INTERNATIONAL LAW (1979).

3. G. DELAUME, TRANSNATIONAL CONTRACTS: APPLICABLE LAW AND SETTLEMENT OF DISPUTES—A STUDY IN CONFLICT AVOIDANCE (1975).

4. Hartley, Book Review, 15 DEN. J. INT'L L. & POL'Y 435 (1987).

5. 480 U.S. 102 (1987).

The book concludes with two chapters that treat the recognition and enforcement of foreign judgments and arbitral awards in U.S. courts and the recognition and enforcement of U.S. judgments and arbitral awards abroad. Interspersed among the main groupings are two chapters that deal with extraterritorial discovery (chapter 6) and the proof and pleading of foreign law (chapter 9). The former topic, the treatment of which was far too brief in the first edition, is rightly explored in much greater depth in the revision. Both treat the *Société Nationale Industrielle Aerospatiale v. District Court*⁶ decision, and the recent draft revisions of the *Restatement (Third) of the Foreign Relations Law of the United States* are discussed in detail, as are foreign blocking statutes and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.⁷

Ved P. Nanda is the Marsh Professor of Law at the University of Denver and David K. Pansius is a practicing lawyer in San Diego. Their combination of scholarship and experience has produced a book which will be useful to several types of readers. The authors state that "the purpose of the book is to sketch in a preliminary fashion the contours of the landscape for the practitioner engaged in transnational litigation in U.S. courts" (p. viii). Its intended and obvious appeal is to those practitioners. In addition to the analysis of the substantive legal issues, they will find the information on the more practical issues such as service of process abroad and gathering evidence abroad extremely useful. The approach of the authors, with its frequent suggestions of ways to approach problems and avoid possible pitfalls, is very practical.

Drafters of contracts between parties outside the United States will find those sections of the book that deal with contractual dispute settlement of interest. Although this subject is covered elsewhere, notably in the authoritative and encyclopedic *Transnational Contracts*⁸ by Georges Delaume, the reviewed book has two significant advantages. First, the authors' focus on U.S. litigation enables them to treat the subject much more concisely than other commentators. Second, Nanda and Pansius have organized their material well, a quality that will be appreciated by pressured practitioners who may have become lost in the labyrinth of Delaume.

Litigation of International Disputes in U.S. Courts can also well serve a third group of readers, which I suspect the authors may not have considered. Law students in international law or international business transactions courses will find the book of great value. Its clarity, succinctness,

6. 107 S. Ct. 2542 (1987).

7. Oct. 7, 1972, 23 U.S.T. 2555, T.I.A.S. No. 7444.

8. G. DELAUME, *supra* note 3.

and organization will make it a useful tool indeed, especially in the relative arcana of the act of state doctrine and sovereign immunity.

This is a very fine book, and it deserves a wide readership.

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Transnational Legal Practice in the EEC and the United States

By Linda S. Spedding. New York: Transnational Publishers, Inc., 1987,
pp. 341, \$52.00.

The issue of professional freedom of movement, particularly within the legal profession, is of great import and interest today.¹ Linda Spedding examines the feasibility of the realization of professional movement within the European Economic Community (EEC) and the United States, but with particular emphasis on the EEC and the extent to which the EEC anticipates overall community integration. The EEC, established on the idea of a community of EEC nationals, emphasizes the fundamental rights of nationals based on principles of nondiscrimination and freedom of movement. These principles are basic to the entire Community scheme. Functional limits to the Treaty's treatment of such freedoms in the furtherance of individual Member States' public policy regulations, however, require a balancing of the EEC's nationals' interests and liberties against those of the Member States.

1. For example, the EEC has recently decided that the Federal Republic of Germany (FRG) violated the obligations set forth in articles 59 and 60 of the EEC Treaty and Directive 77/249 of the Council requiring the facilitation of the open exercise of performance of services by attorneys. The FRG requires that attorneys not licensed in Germany seeking to practice law there (e.g., for the purpose of representing or defending a client) may only do so with the consent of a German attorney licensed in the State where the action is to take place, with power of attorney and with representation capacity at oral hearings afforded only to the German attorney. Such infringement of the free exercise of the profession by non-German attorneys constitutes discrimination by one Member State to the nationals (professionals) of other Member States and is, therefore, in contravention of the Treaty. *European Communities Comm'n v. Federal Republic of Germany*, RS 427/85 (European Court of Justice, decided Feb. 25, 1988) (unpublished decision); *see also* Judgment of July 7, 1987, *Bundesverfassungsgericht [BVerfGE] in Neue Juristische Wochenschrift (NJW) 1988, Heft 4*, at 191 (recent West German Supreme Court decision that ruled that Federal Bar Association Rules that impose restrictions on its members are unconstitutional). Also relevant is the fact that the internal market that will be created in 1992 will also have an effect in the cross-boundary practice of law within the EEC. *See generally* de Vries, *The International Legal Profession—The Fundamental Right of Association*, 21 INT'L LAW. 845 (1987).

Ms. Spedding presents the aims and key provisions of the Treaty by reference to its background principles. She states that, although the Community was meant to be merely economic, the economic objectives could be transcended to attain the original general aims. In addition, she illustrates that the objective of freedom of movement, with special reference to professionals, is fundamental. She singles out the legal profession because "it is believed that the lawyers have a special part to play in the creation of a new legal order so that it becomes a tool for integration . . . because lawyers' functions and legal systems develop to mirror changes in Society." (p. 21)

Ms. Spedding begins by analyzing article 7 of the Treaty and the principle of nondiscrimination due to nationality and its close relationship to the concept of fundamental freedoms in the Community. She then analyzes specific permitted exceptions to this principle for public policy, public security, and public health reasons. Ms. Spedding stresses that such exceptions to freedom of movement in the Treaty or its implementing directives should be interpreted strictly, with great emphasis put on protection of individual rights in, for instance, entry and residence. The Member States' discretion to restrict the individuals' substantive and procedural rights, therefore, is limited.

Also examined in detail is article 48(3), freedom of movement for workers subject to limitations justified on grounds of public policy, public security, and public health, as well as the public service exception found in article 48(4) and article 55(1).

Ms. Spedding provides an analysis of the prospects for harmonization in the internal market, for example, in view of the trend towards specialization (and the required assessment of whether experience or qualification, or both, justify a claim of specialist status), publicity, and cross-country cooperation for a proposed general system for the recognition of higher educational national diplomas. Also treated is the relevance of privileged communications and the inherent difficulties connected with extensive activity and movement within the Member States.

Ms. Spedding recognizes that the various structures of lawyers' training and organization, which is "essentially national in character, practiced in national courts enforcing national law by national legislators," (p. 21) works as an impediment to professional freedom of movement. Thus, because there is "no single legal profession in Europe," (p. 87) the concept of an "European lawyer" poses some difficulties. Ms. Spedding points out, however, that such difficulties are not insurmountable. As a first step Ms. Spedding suggests the coordination and equivalence of qualification. The primary qualifications would include unreserved activities, training, knowledge, and experience in the candidates' national legal systems and in Community law, European human rights, private international law, and

public international law. Training, knowledge, and experience would be the responsibility of recognized institutions, and could be obtained and proved through the availability of courses and exchange programs.²

As the legal professional qualifications necessary to obtain a license to practice law vary from Member State to Member State, Ms. Spedding provides a useful survey of the lawyers' role in Member States. She provides a brief description of the training and educational requirements as well as a description of the profession in each State. Also of interest is the summary description of each Member State's court organization. Quite useful as well is the assessment of the qualifications required of an American attorney wishing to practice within the EEC as well as the case of an EEC lawyer wishing to work in the United States.

Throughout the book, Ms. Spedding traces the expansion of the traditional (national) role of the lawyer through the changing function of the legal profession and the development of interdisciplinary practices. She points out that modern technology and commercial clientele requirements present particular requirements which, by their very nature, challenge traditional European methods and put protectionist resistance into question. Implementation of client requirements causes a need to expand beyond national borders and causes respective developments in the profession's structure.

An assessment of the Treaty's specifics concerning professional establishment and the distinction between establishment and services is also provided in detail. Of particular interest is the discussion of the extent of the right of establishment pursuant to article 52(2)³ and also the freedom to provide legal services pursuant to article 60.

In view of the Lawyers Services Directive 1977⁴ and the right of the Member States to regulate attorneys' court work, Ms. Spedding provides a timely summary study of the requirements of each Member State for legal practice of foreigners within their borders. This study also provides a useful summary of the EEC treaty law concerning freedom of movement, with particular emphasis on the legal profession. The assessment of individual Member States' requirements as well as legal structure provides a functional compilation for lawyers requiring more information about the legal systems beyond their own national borders, with some emphasis on

2. Mutual recognition of diplomas has been agreed to by the Member States not only for lawyers (Directive on mutual recognition of legal diplomas), but also for accountants, teachers, surveyors, several medical professions, and probably also engineers. See INT'L FIN. L. REV., Aug. 1988, at 10.

3. Cf. European Communities Comm'n v. Federal Republic of Germany, RS 427/85 (European Court of Justice, decided Feb. 25, 1988).

4. *Directive to Facilitate Lawyers' Freedom to Provide Services*, 20 O.J. EUR. COMM. (No. L 78) 17 (1977).

giving American attorneys interested in practicing within the EEC insights as to specific requirements needed therefor.

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Der Zivilprozess in den Vereinigten Staaten, Ein Praktischer Leitfadent fuer Deutsche Unternehmen [Civil Procedure in the United States, A Practical Guide for German Businesses]

By Dieter G. Lange and Stephen F. Black. Heidelberg: Verlag Recht und Wirtschaft GmbH, 1987, pp. 202 (paperback), DM 86.00 [ca. \$48.00].

Einfuehrung in das US-Amerikanische Zivilprozessrecht [Introduction to American Law of Civil Procedure]

By Haimo Schack. Munich: Verlag C. H. Beck, 1988, pp. 86 (paperback), DM 18.00 [ca. \$10.00].

The appearance of two German language introductions to American civil procedure within one year evidences a substantial interest in the subject in West Germany today. That interest is born of practical concerns: as West German firms have increased their presence in the U.S. market, more of them have become entangled in American litigation. Consequently, more American litigators must advise German-speaking clients who have little or no knowledge of our legal system. These two books can help American lawyers in their dealings with their foreign clients.

Any American lawyer who has advised a client from a civil law jurisdiction knows that American procedures may bewilder the foreign client. When neither client nor counsel knows the other's system, misunderstandings easily arise. Some misunderstandings might be avoided if the American attorney were to send the German-speaking client one of these books.

Either book is suitable to instruct a German client in the basics of American civil procedure, although they were clearly written with different audiences in mind. Dieter Lange and Stephen Black wrote their book as practitioners for practitioners.¹ The co-authors are partners in a noted U.S. law firm. The book is an adaptation of an English language version privately published for that firm in 1985. The Schack book, on the other hand, is the 101st volume of the *Schriftenreihe der Juristischen Schulung*, a series of well-known and widely respected introductions to special problem areas of law. This book is aimed at the needs of advanced students and inexperienced practitioners and is published by Germany's equivalent of West Publishing Company. Schack is a German university professor with an American law degree.

The Lange/Black book consists of four chapters and a sixty-page appendix, which reproduces the texts of the Hague Convention on the Service of Process Abroad in Civil or Commercial Matters, the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and the West German statute implementing the Evidence Convention. The first chapter covers initial phases of American litigation, such as selection of an attorney, jurisdiction and pleadings, and special topics, such as injunctions and class actions. The second chapter deals with pretrial discovery, an aspect of American civil procedure that is often perplexing to German clients who are used to having evidence taken by a judge. The third chapter covers the trial itself and motions for summary judgment, while the concluding chapter deals with judgment enforcement.

The busy businessman who appreciates a telegraphic style will like the directness of the Lange/Black volume. Each of its four chapters commences with a brief overview entitled "Practical Hints" and follows with concise descriptions of its various topics. Each chapter concludes with a section entitled "Important Points for German Parties." This last section provides important advice to German clients and should encourage the client to become actively involved in planning the course of the litigation.

The Schack book, on the other hand, has an academic style. In typical German academic fashion, it eschews a cookbook approach to litigation (that is, one begins a lawsuit by filing a complaint, etc.) and instead begins with an explanation of general principles underlying litigation. After an introductory chapter, it first offers a chapter on courts and attorneys, including a section on sources of the law, and another chapter on jurisdiction. An extended chapter on pretrial proceedings covers both pleading and discovery stages. Its next chapter, on trials, also explains the position

1. An earlier book of this type that is still quite serviceable as an introduction is W. SCHURTMAN & O. WALTER, *DER AMERIKANISCHE ZIVILPROZESS, EIN UEBERBLICK FUER DIE PRAXIS* [AMERICAN CIVIL PROCEDURE, AN OVERVIEW FOR PRACTITIONERS] (1978).

and functions of jury and judge, which are quite different from German practices. The book concludes with chapters on appeal, judgment enforcement, special procedures (injunctions, class actions, and declaratory judgment actions), and alternative dispute resolution. The book provides numerous citations to the American and German literature for further reading.

The reader willing to devote time to study one of these books is likely to find the Schack book more rewarding. It gives a deeper explanation of American procedures and more comparisons to German practice. On the other hand, the Lange/Black book serves its audience of executives well. Since German counsel tend to have a somewhat academic orientation (at least compared to their American counterparts), the Schack book might be recommended to them, while the Lange/Black book would be recommended to lay clients.

While both these books evidence substantial interest in American civil procedure in West Germany, it is not an interest born of admiration. Today, when many American lawyers condemn the American system of civil litigation and call for alternative forms of dispute resolution, in Germany an alternative system is in place and seems to work fairly well.² German clients are likely to view critically anything less efficient or less just than the system they know. Indeed, Germans view the American system with fear. The first sentence in each book brings this fear home in almost exactly the same words. Lange/Black write: "A lawsuit in the United States is often a traumatic experience for a German business." Schack states: "To be involved in an American lawsuit is a nightmare for most German businesses."³ In dealing with a German client, the American lawyer ought to be aware that the client may view the U.S. system of litigation as inefficient, expensive, and indeed, fundamentally unjust, if not uncivilized. If so, the German client will only echo American critics.⁴

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2. See Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

3. The parallel is even closer in the original German, since the German word for nightmare (*Alptraum*) has the same root as the word for traumatic (*traumatisch*).

4. See, e.g., C. BORRIS, *DIE INTERNATIONALE HANDELSSCHIEDSGERICHTSBARKEIT IN DEN USA* 135 (1987), quoting former Chief Justice Burger: "Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people."

