

BOOK REVIEWS

Schmitthoff's Export Trade: The Law and Practice of International Trade, 9th Edition

By Clive M. Schmitthoff.* London Stevens & Sons, 1990, pp. cii, 798, \$86.75.

With the appearance of the ninth edition of Professor Schmitthoff's *Export Trade* it is hard to realize that the first edition appeared in 1948 when the nations of the world were still recovering from the devastating effects of World War II and international trade was just beginning to revive. There had been no Treaty of Rome to give birth to the European Economic Community and no Convention of Stockholm setting up the European Free Trade Association. The developments over the intervening years in all the fields covered by this book have been phenomenal, and yet the author (who has written by far the major part of each edition) has managed to keep abreast of them all. Professor Schmitthoff has, however, done much more than simply keep abreast of the developments in the international trade, he has also analyzed and explained them in a concise and well-organized fashion for both lawyer and businessperson alike. As he states in his preface, he writes "to give guidance to the newcomer and the expert" (p. vii), and this he certainly achieves.

The extent of the task undertaken by the author is appreciated when one considers the wide diversity of the topics covered by the book. These range from, of course, sale of goods, through marketing, financing, insurance, transportation and conclude with customs law. The needs of the businessperson are kept in mind as the author is careful not only to mention the forms required for particular transactions, but also the addresses of agencies from whom such forms or further information are available. At the same time the author bears in the mind the needs of the legal practitioner and academic by always providing the sources and the appropriate readings when discussing any points of law. His system of cross-references is good, and the examples he uses when explaining a difficult point are always helpful and to the point. Professor Schmitthoff is particularly to be commended for the way he endeavors to anticipate legal issues that might arise out of legislative developments when as yet there has been little or no litigation.

The author is careful to pay attention to the new trends in international trade law. He draws attention to the global integration in this field and the increasing importance of European Community law. These developments have led to two new chapters in this edition, one on Product Liability and the other on Com-

**Editor's Note:* Professor Emeritus Clive M. Schmitthoff passed away on September 28, 1990.

plaints Procedures under the General Agreement on Tariffs and Trade. The former is, of course, a large area, but on account of the nature of this book and the many topics it has to cover the subject unfortunately is dealt with in just fourteen pages. While the coverage is as always lucid, much has either been dealt with cursorily or omitted altogether. The lawyer will soon be aware of this, but it is to be hoped that the businessperson will not be misled by the oversimplification of a difficult subject.

Each edition of any work in the rapidly expanding subject of international trade law is bound to be overtaken fairly quickly by both political and legal developments. The enormous changes that have taken place in Eastern Europe (including the reunification of Germany) have mostly occurred since the writing of this book toward the end of 1989. These developments have already affected and will continue to affect international trade, particularly in Europe. For example at page 762 there is reference to the Coordinating Committee on Multinational Export Controls (CoCom), which vets the transfer of sensitive Western technology to the Eastern bloc. Fortunately, Eastern and Western bloc concepts in the international trade world are becoming things of the past. We are also standing on the brink of the establishment of a single market in the European Community by December 31, 1992. The single market is referred to in this edition, but of course its implications and ramifications will have to await future editions.

While the book focuses on United Kingdom cases and legislation, the author is careful throughout to refer to appropriate U.S. legislation and leading cases. The book includes an index to American legal materials referred to in the volume, and many chapters contain a succinct summary of relevant American law. The author pays tribute for these references to Professor Stephen Leacock of De Paul University, Chicago. Use of the book certainly will cross national boundaries, as is evidenced by the fact that its various editions already have been translated into Russian, Japanese, France, and Chinese.

All in all this new edition maintains the high standard set by the previous editions for a lucid and highly competent summary in one volume of so many different areas of international trade law. The fact that it has now reached its ninth edition surely indicates its value to anyone who is at all interested or involved in the field of export trade.

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Current Topics in U.S.-German Tax and Commercial Law—Anniversary Issue in Honor of Otto L. Walter

Edited by Henry S. Conston, Osnabrück, Germany: Verlag A. Fromm, 1988, pp. 367, approx. \$40.00.

This is a useful, thorough book on selected U.S.-German topics¹ and an appropriate tribute to a man who truly has been American *and* German, a practitioner and a scholar. The emphasis on combining seemingly contrary aspects has characterized most of the life and work of Dr. Otto L. Walter. Dr. Walter appears to have been always on top of things: he was born in Hof, a small industrial town in the very north of Bavaria that now refers to itself as being “at the top of Bavaria”; Dr. Walter was at the top of his class and about to become, like his father, a Bavarian notary, a career reserved in Bavaria to the top law school graduates, when he was forced to leave Germany. After emigration, he reemerged in New York at the top of the U.S.-German tax and legal community and, finally, became the top of his own respected law firm. In his dedication to the present book, Walter Seuffert correctly states that Dr. Walter, a Munich emigrant in New York and a New Yorker travelling extensively in Germany and Europe, has provided an “encouraging experience,” which was necessary to rebuild his home country.²

The bulk of the contributions to the present book deal with taxation; the two contributions dealing with commercial law concern the U.N. Convention on the International Sale of Goods and are written by associates of Dr. Walter’s law firms in New York and Munich. The contributors include the most distinguished experts in their fields. Most of the contributions on taxation deal with matters under the U.S.-German Income Tax Treaty. While the U.S.-German Income Tax Treaty has been revised in the meantime, the essays continue to be important practical tools and scholarly sources.

I. Structure and Content

Goerdeler and Jahn³ reject the position of the German tax administration, which denies the German income tax exemption for remuneration of loans and services by a German partner to a U.S. partnership. Their argument is based on the basic rules of partnership taxation in the United States and Germany and on the general rule that, in international taxation, one needs to resort to domestic law in applying a treaty term that is not defined in, or otherwise controlled by, the

1. Hereinafter cited as CURRENT TOPICS.

2. Seuffert, *Dedication*, in CURRENT TOPICS, at 17, 18.

3. Goerdeler & Jahn, *Zur Problematik von Sondervergütungen unter dem deutsch-amerikanischen Doppelbesteuerungsabkommen aus deutscher Sicht*, in CURRENT TOPICS, at 25–42.

treaty. This rule, which is contained in most, if not all, international tax treaties, has been retained in the U.S.-German Income Tax Treaty as well. Goerdeler and Jahn present a considered, useful rationale: treaty terms should be applied identically in both treaty countries. Therefore, an express definition in the treaty or a definition to be derived from the context of the treaty has priority over any other interpretation. However, in the absence of such a definition in or by the treaty itself, each country is not free to interpret the treaty as it wishes. Rather, the treaty requires that each country apply the treaty in accordance with its own domestic law. The objective of this rule is not merely the elimination or reduction of arbitrary or unpredictable treaty application. Each country is required to follow the standards that the country itself has set in defining its own domestic law. This requirement combines principles of nondiscrimination, the prohibition of *venire contra factum proprium*, practicality, and predictability.

Lempenau⁴ discusses the importance of the place of performance in taxing income derived from services. He focuses on the tax and legal ramifications of the issue, as illustrated by the unique German rule that services of a company's managing director are deemed performed at the statutory seat of the company. Lempenau retraces the development of the pertinent case law: initially, the courts sought to tax nonresident managing directors of German companies irrespective of the place where the services were actually performed. This approach backfired because it exempted from German tax the income of German managing directors of foreign companies. As a result, the German tax courts, prodded by the German tax authorities, began to "refine" the rule in a manner that made its application both uncertain and unconvincing. Lempenau advocates the U.S. rules, under which service income would be taxed solely on the basis of the place of (effective) performance. While Lempenau stresses the 1986 U.S. tax reform, this U.S. rule dates back much further.

Killius⁵ discusses German taxation of Anglo-American trusts under both domestic and treaty law. He distinguishes between Germany as the country of the source, Germany as the country of residence of the trustee, and Germany as the country of a lifetime beneficiary. The emphasis is on Germany as the country of the source. Killius puts the German rules of trust taxation into the broader context of the provisions and general rules of German income tax treaties. Trusts may be a very flexible and efficient tool for both international and German legal and tax planning. Apart from several uncertainties concerning basics and details of German trust taxation, the German tax authorities have been opposed to the use of trusts strictly for German tax planning. Nonetheless, Killius points out the many opportunities for using a trust for German property of nonresidents, for

4. Lempenau, *Der Tätigkeitsort als Abgrenzungskriterium bei der Besteuerung von Einkünften aus Dienstleistungen*, in CURRENT TOPICS, at 43-62.

5. Killius, *Der anglo-amerikanische Trust und die deutschen Doppelbesteuerungsabkommen*, in CURRENT TOPICS, at 63-79.

nonresidents moving to, or moving back to, Germany, and for foreign assets of German residents. He provides new explanations for several German income tax decisions in this area. The most interesting tax benefits (as well as the most serious risks) derived from using a trust lie in the area of inheritance and gift tax.

The development of German tax law in the area of income taxation may be summarized by noting the increasing preference for the fully or partially transparent treatment of trusts for German tax purposes. This is also evident from Killius's discussion on, and practical German tax treatment of, other quasi-transparent structures (like conduit companies applying for treaty benefits or being designated as recipients of payments from Germany).

Horst Vogel⁶ contributes a critical view of German constitutional and tax law aspects of the retroactive application of tax treaties. He is skeptical of the distinction between retroactivity, in a narrow and a broad sense, and retrospectivity. He emphasizes that a permitted retrospective application of a new treaty or law to factual situations created many years ago may impose much more unreasonable burdens on a taxpayer than would a forbidden retroactive application over a short period. Vogel denies that the interpretation of the concept of retroactivity allows for fine distinctions; rather, he suggests that the concept is axiomatic and binds both those who make and those who apply the law.

Klaus Vogel⁷ analyzes the German "source" rules contained in two separate sets of provisions of the Income Tax Act, distinguishing between the foreign tax credit rules for residents earning foreign income and the rules on taxing nonresidents earning German income. The U.S. rules, as reflected in the International Revenue Code (IRC), distinguish between source rules and jurisdictional rules: the different sets of jurisdictional rules imposing tax (like those beginning with section 871 of the IRC) are separate from the source rules (beginning with section 861 of the IRC). The approach of the German Income Tax Act (ITA) has been the opposite: originally, source rules were only contained in the rules imposing tax on nonresidents (section 49 of the ITA). The source rules for the foreign tax credit for residents were added only recently. Between the two sets of source rules is a third area of sources of income that are neither German nor foreign (now covered by the rules on expatriate taxation in section 2 of the Foreign Tax Act). Vogel advocates a single set of source rules in order to distinguish German and foreign sources for all purposes.

Weber,⁸ a retired official of the German Federal Finance Ministry and a veteran of German treaty negotiations and applications (including the old U.S.-German

6. Vogel, *Zur Rückwirkung von Regelungen in Abkommen zur Vermeidung der Doppelbesteuerung*, in CURRENT TOPICS, at 81-100.

7. Vogel, "Source" und "Jurisdiction" im Steuerrecht der Vereinigten Staaten und im deutschen Recht, in CURRENT TOPICS, at 101-14.

8. Weber, *Überblick über die deutsche Rechtsprechung zum Doppelbesteuerungsabkommen zwischen den Vereinigten Staaten und der Bundesrepublik Deutschland*, in CURRENT TOPICS, at 115-68.

Income Tax Treaty), provides a fairly complete summary of German case law on the U.S.-German Income Tax Treaty. He starts his paper by highlighting the fact that the U.S.-German Income Tax Treaty of 1954 was the first German postwar treaty and was fraught with difficulties on the German side in understanding and dealing with the problems arising in the U.S.-German context. The difficulties have been reflected in the practical application of the treaty to this day. Take for instance the exemption of U.S. dividends paid to German corporate parents, an exemption that originally was not restricted to intercompany dividends, and until today, appears inappropriately limited to dividends subject to U.S. withholding tax, irrespective of the underlying U.S. corporate taxation. Or consider the prohibition against extraterritorial taxation in article XIV(2) on the German side, where the treaty provision was written very broadly even though an early paper coauthored by Dr. Walter (who advised the German side in the treaty negotiations at the time) indicates that the German side realized the uncertainty and possible broadness of the provision. (It was only after Weber wrote his paper that the German Supreme Tax Court applied article XIV(2) to exempt the German branch of a U.S. bank from German tax on interest income earned in the branch, a result even more surprising than recent U.K. case law applying the similar rule in the U.K.-U.S. treaty to a U.K. branch of a German and a Brazilian bank).

Debatin⁹ analyses the rationales and the application of the U.S.-German Estate Tax Treaty. The difficulties in negotiating the treaty are reflected in several extraordinary provisions with loose ends, for example, the taxation of partnerships or estates and trusts. These are the estate tax aspects of the general complexity of partnership and trust structures, which are also reflected in the income tax papers mentioned above. In addition, the Estate Tax Treaty contains other interesting provisions regarding, for example, dual residents, allocation of liabilities, and inclusion of state taxes for German foreign tax credit purposes.

Ebke¹⁰ proposes a functional rather than deductive or inductive approach to the application of the German Value-Added Tax (VAT) rules to a German holding company with an interest in a U.S. or other subsidiary corporation or partnership. Starting with the basic distinction between consumption and excise taxes, Ebke confirms German and European Community case law, which denies the VAT credit to these holding companies.

Van Hoorn¹¹ advocates the deduction of losses of a foreign subsidiary by its domestic parent. He contrasts the need for such a deduction with the legislative and administrative practice of seeking to tax foreign profits under anti-abuse and anti-avoidance tax legislation, such as U.S. Subpart F or the German *Aussensteuergesetz*.

9. Debatin, *Das amerikanisch-deutsche Erbschaftsteuer-Doppelbesteuerungsabkommen als Instrument des Steuersystemausgleichs*, in CURRENT TOPICS, at 169-204.

10. Ebke, *Transnational Investments and Germany's Value Added Tax: A Statute in Search of a Purpose*, in CURRENT TOPICS, at 207-40.

11. Van Hoorn, *The Tax Treatment of Foreign Losses*, in CURRENT TOPICS, at 241-46.

Levin¹² reviews the fundamental issues of U.S. constitutional and tax law involved in the “override” of tax treaties by U.S. domestic law. At the time of his writing, the residual treaty override of the 1987 Technical Corrections Bill had only been proposed. Levin expresses his hope that this proposal would be recognized as misguided and withdrawn before it could injure U.S. international relations. This hope unfortunately has not been realized. Rather, treaty overriding has become almost a fixture in international tax treaty discussions.

Von Borch¹³ summarizes the history of the U.N. Convention on the International Sale of Goods since the 1930s and throws some light on its future. Para¹⁴ focuses on the U.N. Convention from a U.S. point of view.

II. Conclusion

The book concludes with an incomplete summary of Dr. Walter’s bibliography, listing more than one hundred books, articles, and lectures on matters of substantive and procedural tax law, on U.S.-German investment in general, on matters of business, trade, and currency, on the Bible, on ethical considerations, and on the international practice of law.

The book is memorable and useful, and —notwithstanding some typographical errors—a reliable and illuminating treatise on U.S.-German tax and commercial law.

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12. Levin, *United States Legislative Override of Tax Treaties*, in CURRENT TOPICS, at 247–62.

13. Von Borch, *Einheitliches UN-Kaufrecht. Entwicklung A Inhalt A Zukunft*, in CURRENT TOPICS, at 265–317.

14. Para, *The UN Convention on International Sales*, in CURRENT TOPICS, at 321–55.

