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Book Reviews

BOOK REVIEWS

Mixed International Arbitration

By Stephen J. Toope. Cambridge, U.K.: Grotius Publications Limited (P.O. Box 115, Cambridge CB3 9BP, England), 1990, pp. xxxi, 404, £58.00, $110.00.

The purpose of this book is to "highlight the unique difficulties" (p. 12) that arise in the context of arbitration between states and foreign private parties. To that end, the book is divided into two nearly equal parts. Part I examines "the central theoretical problems raised in the context of [that type of] arbitration" (p. 12), while Part II purports to contain a "series of case studies," with special emphasis upon International Chamber of Commerce (ICC) arbitration; International Centre for Settlement of Investment Disputes (ICSID) arbitration; and arbitration under the auspices of the Iran–U.S. Claims Tribunal (p. 13). This division of the material under review might have been justified if Part II had been used to nurture the theoretical Part I discussion and enliven it with concrete illustrations. However, this is not the case. The logical, almost natural, process of cross-fertilization between the lessons of experience and doctrinal rationalization remains largely foreign to this work, which for all practical purposes consists of two almost unrelated books under a single cover.[1]

Perhaps for this reason, this review may as well begin with Part II and its "case studies." The few pages of chapter VII dealing with ICC arbitration (pp. 199–217) can hardly be qualified as a study of that institution. The commentary is, in effect, an indictment of institutional commercial arbitration deemed to be inappropriate to handle disputes involving the "policy objectives"

1. The table of cases illustrates this remark. Part I contains almost no reference to the decisions of the Iran–U.S. Claims Tribunal (which is the object of some 120 pages in Part II) and only occasional references to ICSID cases (sparingly discussed also in Part II). Interestingly enough, while Part I refers to several ICC cases, these are practically ignored in the review of ICC arbitration in Part II.

of the state party to the proceedings.[2] This type of argument is not new, but fails to carry conviction. The study in chapter VII devoted to ICSID (pp. 219–62) is also disappointing, albeit for other reasons. Much dialectical talent is wasted in a sterile debate over the "self-contained" or "international" character of the ICSID machinery, while only the briefest attention is given to issues concerning the jurisdiction of ICSID. These are issues that would have been worthy of further consideration, since a number of them, and in particular those concerning matters of applicable law, might have yielded material for doctrinal consideration in the general part of the book.

The real study in chapters VIII and IX of Part II concerns arbitration under the aegis of the Iran–U.S. Claims Tribunal (pp. 263–83). This well-organized presentation of the major issues relating to that institution includes a discussion of its nature, the scope of its jurisdiction, the enforcement of its decisions, concrete aspects of its day-to-day operations, and the role of the arbitrators and their performance. However, once again, the reader has reason to query the relevance of this study to the general purpose of the book, since it is stated at the beginning of the study that "[there] is significant disagreement amongst the arbitrators concerning the precedential or persuasive value of Tribunal judgments and concerning the role of an arbitrator" (pp. 270–271), and the study concludes "it would be unwise and misleading to treat the substantive output of the Iran–U.S. Claims Tribunal as highly persuasive authority in other third-party adjudications of conflicts between states and foreign private parties." (p. 383) The only issue germane to the general discussion relates to the broader question concerning the recognition of delocalized or internationalized awards under the New York Convention.[3]

The "central theoretical problems" discussed in Part I are well known and relate primarily to the delocalization of the procedural and substantive aspects of the arbitral process. As to procedural matters, the author strongly endorses in

2. The following quotation sets the tone of the argumentation:

> The ICC system is designed to resolve "business disputes," and it is widely accepted that good business relations require, above all, stability and predictability. Although, as noted above, no system of rules can promote one value to the exclusion of all others, it is in the interest of most participants in the ICC system that the values of clarity and certainty be emphasized. Private commercial relations require that emphasis. Yet states cannot be concerned solely (or even primarily) with the commercial value of stability and predictable rules. Congruence with their own policy objectives must be a major preoccupation. But the congruence valued by the creators of the ICC Rules was, of course, congruence between the Rules and the ICC's own policy purpose, which is to encourage increased commercial contact by promoting stability and certainty. For the institution of the ICC, then, pursuing the values of congruence with policy objectives and of clarity and certainty in the drafting of rules is complementary. For governmental participants in the process, the values of certainty and congruence with policy may be conflicting. This conflict itself creates a further, systemic, lack of congruity between the institution of the ICC and the social reality it seeks to serve, at least in so far as states are involved in the process, The ICC and its Rules pursue a policy objective which may come into direct conflict with the needs of one class of clients—states. (pp. 214–15, footnotes omitted)

At p. 217, the author extends this reasoning to other types of arbitration under the auspices of such institutions as the American Arbitration Association and the "London Centre for Commercial Arbitration," intended presumably to refer to the London Court of International Arbitration.

3. *See* p. 119. An affirmative answer was given to this question in a case decided after Mr. Toope's book was written: Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc., 887 F.2d 1357 (9th Cir. 1989).

chapter II the advanced and increasingly accepted arguments in favor of the delocalization of procedural rules (pp. 17–44) and later, in chapter IV, of the recognition of delocalized awards in the context of the New York Convention (pp. 99–138). These issues are, of course, not unique to mixed arbitration and arise also in the context of private commercial arbitration. The abundant references to the literature and the cases in point show clearly that the author is aware of the need to broaden the scope of the discussion.[4] What is unique to the process of mixed arbitration is the impact that considerations of sovereign immunity may have upon the nature of the procedural rules guiding the tribunal and upon issues concerning the recognition and enforcement of an award against a state. As to procedural rules, it is well known that, with the exception of the *Aramco*[5] and *Topco*[6] awards, other tribunals have refused to be swayed by considerations of immunity and, to the extent that they have opted for delocalized rules of procedure, have found other arguments to support their determinations.[7] The brief summary of this issue (pp. 37–38) deserves no particular comment.

Such is not the case, however, of the treatment of sovereign immunity issues concerning postaward execution, which begins with the rather startling statement that:

4. The discussion unfortunately is not always accurate. An example concerns the analysis of the *Norsolor* case, Judgment of Oct. 9, 1984 (Société Pabalk Ticaret Ltd. Sirketi v. Société Norsolor), Cour de Cassation (Fr.), REVUE DE L'ARBITRAGE 1985, at 431, *translated in* 24 I.L.M. 360 (1985). Recognition was sought of an Austrian award (rendered on the basis of the lex mercatoria) which, at the time of recognition in France, had been annulled by the Court of Appeal of Vienna. The Court of Appeal of Paris denied recognition on the basis of article V(1)(e) of the New York Convention. On appeal, the Court of Cassation quashed that decision on the ground that the Court of Appeal should have ascertained whether: (i) French law was more favorable to recognition than article V(1)(e), in which case (pursuant to article VII of the Convention) it should become relevant to the outcome of the issue of recognition; and (ii) assuming a positive answer to question (i), whether French law would have permitted the recognition in France of an award annulled in its country of origin. At no time did the Court of Cassation rule on the merits of these issues (which became moot since the Supreme Court of Austria reversed the decision of the Court of Appeal of Vienna and restored the validity of the award). Its decision is strictly limited to formulating the principles that should guide French courts in their concrete determination of a particular case.

Under the circumstances, there is no basis for the caustic criticism of the *Norsolor* decision (qualified simultaneously as "highly authoritative," "singular," and "audacious" (p. 122)) on the ground that it would have "allowed enforcement of an award despite its annulment by a court in its country of origin." (p. 122) The answer to the issue of recognition might well depend upon whether the award should be considered as a "foreign" award (governed by a domestic law) or as an "international" award (delocalized or internationalized). In the first instance, recognition might be denied, whereas it might be granted in the second instance. *See Norsolor,* REVUE DE L'ARBITRAGE 1985, at 435–36) (comments of Prof. Goldman); *Norsolor,* 24 I.L.M. at 362 (comments of Prof. Emmanuel Gaillard).

5. Saudi Arabia v. Arabian American Oil Co. (Aramco) (Award of Aug. 23, 1958), 27 I.L.R. 117, 155 (Arb. Trib. 1963).

6. Texaco Overseas Petroleum Co. v. Libyan Arab Republic (Award of Jan. 19, 1977), 53 I.L.R. 389, 433 (Int'l Arb. Trib. 1979) (para. 13 of the award).

7. Libyan American Oil Company (LIAMCO) v. Libyan Arab Republic (Award of Apr. 12, 1977), 20 I.L.M. 1, 43 (Arb. Trib. 1981); Kuwait v. American Independent Oil Company (AMINOIL) (Award of Mar. 24, 1982), 66 I.L.R. 519, 532–33 (Arb. Trib 1984) (paras. 4 & 5 of the award).

> The New York Convention does not refer explicitly to the doctrine of sovereign immunity as a bar to enforcement of a non-domestic arbitral award, but *it has been argued* that Article V(2)(b), the public policy exception to enforcement, justifies a refusal to recognize and enforce a non-domestic award if sovereign immunity can be pleaded. (p. 140, emphasis added)

No reference is given as to the source from which this remarkable "argument" originated. Whatever the source, the argument would seem to be based upon a confusion between the respective domains of the Convention and of immunity rules, as well as between rules of immunity from suit at the time of recognition and immunity from execution following recognition. Clearly, the Convention will become relevant for the formulation or implementation of immunity rules. The 1988 amendment of the U.S. Foreign Sovereign Immunities Act bears sufficient testimony to this remark.[8] However, the converse proposition that immunity might have an impact upon issues of recognition within the scope, and for the sole purpose, of the Convention has no substance.[9] To the knowledge of this reviewer, not a single case can be cited that would support the contention that immunity might fall within the purview of article V(2)(b) of the Convention.

Whatever the reasons for this initial confusion (recurring on pp. 141 and 143), it affords little justification for the rather casual treatment of cases cited in support of statements that may reflect a simplified view of immunity rules and are not always as accurate as would be desirable.[10]

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8. 28 U.S.C. § 1605(a)-(b) (1988). Note also that pursuant to § 1610(a)-(b), immunity from execution would be lost following judicial confirmation of an award.

9. "The Convention by itself would not support a withdrawal of immunity. In fact, it does not even mention the question." CHRISTOPH H. SCHREUER, STATE IMMUNITY: SOME RECENT DEVELOPMENTS 87 (1988).

10. *See, e.g.*, p. 146, where the author states that "the enforcement of an arbitral award against the contracting state is not precluded by sovereign immunity, because the agreement to arbitrate constitutes a waiver of that immunity." Reality is otherwise, since national immunity rules are not necessarily as concordant as this general statement would imply. *See, e.g.*, Georges R. Delaume, *Contractual Waivers of Sovereign Immunity: Some Practical Considerations*, 5 ICSID REV.—FOREIGN INT'L L.J. 232 (1990).

In support of the above statement, cases are indiscriminately cited (pp. 146–47 nn.194–202), although some of them concern immunity from suit and others immunity from execution, which should have been carefully distinguished. Also in one instance, reference is made in the same note (200) to a case involving a foreign state (the *SEEE* case) and to another case involving a state enterprise (the *N.V. Cabolent* case), although the rules of immunity (or the lack thereof) are not the same in the two situations. A similar misreading of immunity rules appears at p. 148, where the French rule applicable to states is correctly stated in the text, but the alleged "reaffirmation" of that rule in regard to state corporations (note 205 referring to the *Sonatrach* case) is incorrect. Unlike a state, such a corporation is subject to execution against its property regardless of whether there is a nexus between that property and the transaction from which the claim arose. At p. 147 the analysis of the decision of the Court of Appeal of Rouen in the *SEEE* case is wrong, since that decision dealt only with issues of immunity from suit in regard to recognition proceedings and did not touch upon issues of immunity from execution against the property of Yugoslavia.

At pp. 145 and 247 reference is made to the decision of the Court of Appeal of Paris regarding the recognition of an ICSID award, but the summaries of the case conflict with each other, the one at p. 247 being the correct one.

Chapter III (pp. 45–97) deals with substantive issues of applicable law. In contrast with his stand on procedural issues, the author is a staunch opponent of the delocalization of substantive rules applicable to state contract disputes. Considering that effective stabilization of these rules is not possible (p. 97), the author denounces attempts made to delocalize state contracts by having recourse to the general principles of law, international law, or *lex mercatoria,* which he views as one-sided devices proper to economic development agreements involving developing countries and without counterpart in agreements concluded by industrialized countries (pp. 65–97 and pp. 387–88). Since the author refers in this connection to similar views expressed by this reviewer (p. 65), it would not be appropriate for me to comment further on the subject.[11]

Chapter V (pp. 159–96), the last chapter in Part I, deals with the remedies available to mixed international arbitral tribunals. Believing (correctly it is submitted) that these tribunals are hardly in a position to order specific performance or *restitutio in integrum* against a state (pp. 165–66), the author proceeds with a rather succinct review of issues regarding compensation and ends his analysis with a discussion of the compatibility of judicially ordered provisional measures with transnational arbitration, including possible attachments of state property.[12]

In chapter X, the author's concluding remarks (pp. 385–400) restate his aversion for submitting contract disputes (other than those relating to "non-political commercial dealings," p. 399) to private arbitral institutions. Instead he recommends having recourse to ICSID or to ad hoc tribunals and he advises the parties to adopt appropriate arbitration rules covering a number of suggested matters. The list, however, is far from exhaustive.[13] Also one might query why no reference is made to the UNCITRAL Arbitration Rules, which are adopted in an increasing number of mixed arbitration clauses and which, incidentally, are largely incorporated into, or have inspired many provisions of, such commercial arbitration rules as those of the Inter-American Commercial Arbitration Commission[14] or the American Arbitration Association.[15]

11. Georges R. Delaume, *The Proper Law of State Contracts and the Lex Mercatoria: A Reappraisal,* 3 ICSID REV.—FOREIGN INT'L L.J. 79 (1988).

12. In discussing issues of immunity from attachment, the author approves the limitation of measures of execution to the commercial assets of foreign states (p. 195) and submits that it would be "very unfortunate . . . if an attachment were ordered covering all Embassy bank accounts," (p. 196). Yet, at p. 149, he considers that " 'mixed' use Embassy accounts should be subject to orders of execution."

13. In particular, no reference is made to the designation of an appointing authority, which, in the case of non-ICSID arbitration, might effectively intervene to overcome the lack of cooperation of a party in the appointment of arbitrators. The author also fails to refer to the designation of the seat of arbitration, which, even though it may have lost a great deal of its legal implications, remains of considerable practical significance as to such matters as ease of access, facilities of communications, costs, and the like.

14. RULES OF PROCEDURE OF THE INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION (as amended and in effect July 1, 1988), *reprinted in* THOMAS OEHNKE, INTERNATIONAL ARBITRATION 914 (1990).

15. AMERICAN ARBITRATION ASS'N, INTERNATIONAL ARBITRATION RULES (effective Mar. 1, 1991).

The wealth of information gathered by the author shows that considerable research has gone into the preparation of this book. Unfortunately it remains essentially an academic treatment of selected aspects of mixed arbitration.

Georges R. Delaume
(Member, Board of Editorial Advisors
of *The International Lawyer*)
Curtis, Mallet-Prevost, Colt & Mosle
Washington, D.C.

Economic Sanctions and U.S. Trade

By Michael P. Malloy. Boston-Toronto-London: Little, Brown and Company, 1990, pp. vii, 752, Bibliography, Tables of Cases, Statutes & Regulations, Index, $125.00.

Professor Malloy of the Fordham University law faculty and director of graduate studies there is one of a valued and useful species: scholars who have worked in the real-life application of their specialties. In Dr. Malloy's case it was at the Office of Foreign Assets Control, Department of the Treasury, when the Treasury was almost completely in charge of administering the economic sanctions programs of the United States, in war, in peace, and in the cold war. Now such activities, and in particular those relating to economic denials, are to a considerable extent shared with the Department of Commerce. This reviewer, of World War II vintage as to the pull-and-haul of executive-branch interagency associations, rivalries, and power-struggles about economic warfare (as economic sanctions then were), believes that Professor Malloy's experience in Washington has enriched the value of his study, to history, to scholarship, and to practitioners with export control, foreign funds control, and related economic denials operations or threats to deal with for their clients. And, of course, the experience at the capital involved Dr. Malloy with the intricacies of the basic legislation and the views, pressures, and doubts from Capitol Hill, Foggy Bottom, or the Pentagon. Altogether, he has had a keenly qualifying experience to leaven his scholarly talents.

The book is a learned one as well as a practical one. The author's classical education is delightfully displayed in a two-line prelude from canto 16 of *Paradiso*. Thucydides, in the original Greek, opens chapter 3 (History of U.S. Economic Sanctions). Other chapters are brought on by apposite quotations from

Churchill, congressional witnesses and members, presidents,[1] and finally, Shakespeare (to open chapter 12 on Concluding Observations).[2]

The Summary of Contents (pp. vii–viii) is reproduced here, to sketch the scope of the work:

Reverse subtraction of page numbers shows where the greatest detail of treatment lies: history, legal aspects, and effectiveness. The middle part is a rich and highly useful reporting of the post–World War II formal sanctions programs of the United States, to which, at this writing, it would have been good to have an added chapter on sanctions against Iraq had the author not been so prompt in meeting his deadlines. The difference between the experiences of the United States with sanctions or actions taken before the Persian Gulf crisis and those taken in response to the crisis is that in the latter instance the sanctions were genuinely multipartite, through the United Nations. The U.N. sanctions were neither ignored nor covertly opposed, as in notorious prior cases, such as the quixotic drives over the years by the United States in the name of east-west trade and the fiasco of collective action against Rhodesia.

As is well known, the United States has, in the conduct of foreign policy operations, denied benefits to particular countries such as Libya, Nicaragua,

1. Truman (Korea, p. 283); Kennedy (Cuba, p. 349); and Reagan, as to Central American sanctions programs (p. 395): "[W]e take seriously the obligation to protect our security interests and those of our friends."

2. "What shall I say more than I have inferr'd?" (p. 673, from Richard III).

Noriega's Panama, Pinochet's Chile, and (for some time) the People's Republic of China. There is a taxonomic problem as to whether cutting off development assistance; taking away most-favored-nation trade privileges; instructing the American representatives on international lending and financial agencies to vote against loans, grants, and currency support; and threatening demarches and declarations to these ends should be dealt with *in extenso* in a comprehensive study of resort to economic sanctions by the United States. Many of us use a somewhat looser term for these relatively unstructured activities: "denials policy." To some extent the authorization by basic internal law, the congruity with international law, and the effects of denials policy operations run parallel to the economic sanctions described and evaluated in the work under review, and the author makes linkages.

But denials policy's episodes and events differ in many ways, particularly when secret diplomacy and covert action are involved. The task of writing the history and evaluating the pros and cons of denials policy is an important one that calls for the diplomatic historian to participate with authorities such as Dr. Malloy on the structure and functioning of economic sanctions. A possibly important difference between the nature and location of the authority for economic sanctions and denials policy is that the latter has come to be used more frequently in attempts to rectify gross human rights violations, and as in the past it has been used to manifest U.S. determination to rectify foreign treatment of investments.[3] To some extent the use by U.S. decision makers of either economic sanctions as denials policy depends on how the issue of structure versus flexibility is evaluated: The power to block the foreign funds of country *K* and its nationals in American banks would not likely be used to express executive or legislative displeasure at, say, torture of its nationals by the said country *K*.

One of the most sensitive and difficult issues common to both policies is that by either sanctions or denials the United States often, too often perhaps, damages the well-being and opportunities for development of the ordinary people of the target country, people helpless to help themselves against a self-imposed authoritarian regime. Or, as recently pointed out by Deputy of State Lawrence Eagleburger in respect to China, use of either policy would trigger an immediate power-response of an aging group of totalitarians who cannot rule much longer. Thus, a degree of unevenhandness as to detrimental use of either sanctions or denials has proved to be inherent in post–World War II American foreign policy, as President Carter's Secretary of State, Cyrus Vance, declared when he resigned.

In the analysis of American national interest, which clearly includes an idealistic element related to human rights, freedom, and equality, the shift of the use of economic power to force or induce national action from a unilateral to a

3. As an example, take the losses to the well-being of the Chilean people resulting from the Nixon-Kissinger "destabilization" of the duly-elected president (Dr. Manuel Allende, socialist), followed by the Pinochet years of violence, horror, and loss of development dynamic.

multipartite, United Nations–based action center is now evident. As the unilateral American past will remain an important source of background and guidance, so Professor Malloy's contribution will continue "to have the power of life and see the light of day."[4]

Covey T. Oliver
Ferdinand Wakeman Hubbell Professor Emeritus
University of Pennsylvania Law School

Internationales Devisenrecht [Law of International Exchange Control Regulations]

By Werner F. Ebke. Heidelberg: Verlag Recht und Wirtschaft GmbH, 1991, pp. 410, indices, DM 190.00.

Some years ago a legal publisher produced an advertisement bearing a picture of a beautiful seashore (with a segment missing) accompanied by the question: "Would you swim at this beach?" Only on turning the page did the reader, now confronted with the complete picture, realize that the missing segment contained the dorsal fin of a shark. This example is similar to the situation of a lawyer from a country possessing a liberalized foreign commerce who confronts for the first time the potential applicability of foreign exchange control regulations. Such a lawyer has to learn not only that some fish of prey bite more savagely than others, but also that this can occur in waters where they are seemingly not even present. The worst of it is that before the lawyer can find a solution to the problem that foreign exchange rules can be enforced even in third states, in some jurisdictions (and especially in Germany) he or she may already have lost the case without any discussion of the merits.

The better-informed international lawyer knows of course that according to article VIII, section 2(b) of the Bretton Woods Agreements of 1945[1], foreign exchange contracts that involve the currency of any member of the International Monetary Fund and that are contrary to that member's regulations are unenforceable in that and all other member states. Due especially to the almost legendary series of articles and books of Sir Joseph Gold on the Fund Agreement,[2] the

4. Reviewer's citation: PLATO, REPUBLIC.

1. Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, 1411, 2 U.N.T.S. 39, 66–67.

2. 1 JOSEPH GOLD, THE FUND AGREEMENT IN THE COURTS (1962); 2 *id.* (1982); 3 *id.* (1986); 4 *id.* (1989).

judicial interpretation in the major jurisdictions of the western hemisphere has been collected and compared in many law review articles. A look at these cases and the abundant literature shows that the command that foreign restrictions be respected is interpreted quite differently in the more than 150 member states of the IMF. Whereas in England and the United States a narrow approach dominates, in continental Europe the convention is given a broader reading. So, a pilot is needed for the shallow waters of international finance regulations with their highly technical and often hardly intelligible terminology.

Such guidance can now be found in the *Law of International Exchange Control Regulations* by Werner F. Ebke, member of the New York Bar and professor of law at the University of Konstanz, Germany. The first chapter of his book—a German "Habilitation"—begins with the basic problem of international convertibility, that is, the change from one currency into another. Although the establishment of convertibility is one of the principal purposes of the IMF, restrictions are tolerated to a certain extent. While restrictions on payments for current transactions are admissible only within narrow limits, the member states are in principle free to take necessary measures to control international capital transfers. The author examines carefully the different terms and shows how the earlier skepticism of the framers of the convention regarding capital transfers has been gradually overcome (p. 89). Before the promulgation of the directives on capital movements, EEC law originally provided only for a liberalization for current transactions and indicated reservations towards movements of capital (p. 102).

The major part of the book is the second chapter, on the extraterritorial effect of restrictions on convertibility. After an introduction dealing with the emergence of modern exchange regulations between the two world wars (p. 117), Ebke examines traditional choice of law approaches. For private parties, two contradictory tendencies are of special concern. On the one hand, the development of party autonomy enables the parties themselves to choose the law of the contract. On the other hand, rules are developed to enforce domestic and foreign exchange restrictions (p. 130).

The introduction of article VIII, section 2(b) to bar the enforcement of illegal exchange contracts in any member state is, according to Ebke, a real "revolution in choice of law" (p. 180). The alleged violation of exchange control regulations is often advantageous for the debtor, whereas the proper law of the contract generally favors the creditor. Perhaps experience of restrictions in their own history disposes German courts to look more favorably on foreign restrictions than do English and American courts. (cf. p. 196).

Professor Ebke does not look for a simple solution to overcome this divergence of judicial interpretation, but rather starts with a careful analysis of the historical evolution and of the interpretation of the different elements of article VIII, section 2(b), which, for him, is not only a rule of substantive law but also one of private international law (p. 177). In accordance with the continental approach, he favors a broad interpretation of the term "exchange contract"; this

makes the provision one applicable to a wide range of agreements, including loan agreements and capital movements insofar as they concern an exchange of contractual performance (p. 240). The term "exchange control regulations" is also understood broadly; Ebke covers national and international security restrictions (p. 253) as well as restrictions on capital movements (p. 256).

One particular difficulty for a civil law system is to find an equivalent of the "unenforceability" of illegal contracts. The German Federal Supreme Court has taken the view that this did not amount to invalidity, but merely the inadmissibility of legal actions. This purely procedural solution leads to a series of contradictions and difficulties for many transactions such as guarantees. In certainly the most ingenious part of his book Ebke uses the civil law concept of "natural obligation" to overcome these inconsistencies. A natural obligation has the consequence that the contract is not enforceable by judicial action. Nevertheless, what has been freely performed in compliance with the obligation may not be reclaimed. If this approach were to be followed by German courts, it would bridge at least a part of the existing gap between the Anglo-American and the German interpretation.

A final chapter deals with the extraterritorial effects of foreign exchange control regulations under German conflicts rules outside the scope of the convention (p. 312). In this highly controversial area not all of Ebke's proposals are convincing. His harsh verdict that a foreign child support order in German currency using an official exchange rate that favors the East European creditor almost inevitably contradicts German public policy (p. 320, 333) seems especially to conflict with the otherwise well-balanced presentation of the issues.

These few examples may suffice to show that Ebke's book is the most comprehensive and scholarly comparative study in this field today. Although written in German and directed mainly to the German reader, it contains such a wealth of information and ideas that for the foreign reader the question "2(b) or not to 2(b)" (p. 231) will also lose much of its mystery. A table of books and articles, a table of cases, and a detailed index make the book accessible also to readers under pressure of time or those merely concerned with special details. One need not be a prophet to predict that Ebke's study will soon become one of the leading standard works and reference books in the field of exchange restrictions.

Dr. Dieter Martiny
Max Planck Institute for Foreign
and Private International Law
Hamburg, Germany

Comrade Lawyer: Inside Soviet Justice in an Era of Reform

By Robert Rand. Boulder, Colorado: Westview Press, 1991, pp. x, 166, $42.00 (hc), $14.95 (pb).

In March 1985 the Soviet Government, acting under the tutelage of the Communist Party of the Soviet Union (CPSU), instituted a reform program heralded as revolutionary and code-named *perestroika*. The most remarkable, yet often forgotten, aspect of *perestroika* is that it was conceived in the womb of the CPSU. Its principal architect was Mikhail Gorbachev,[1] the current president of the USSR and general secretary of the Central Committee of the Party. At its inception Gorbachev made it abundantly clear that the underlying purpose of *perestroika* was not to derail, but rather to micromanage the movement of the Soviet society towards communism. In other words, the intellectual foundations of *perestroika* are Marxian. However, as a result of the traumatic events of August 1991 Gorbachev has abandoned communism as the goal of *perestroika* and substituted a "regulated free market system" in its stead. He continues to view *perestroika* as a vehicle for cautious quantitative reforms of Soviet socialism, which he still insists is structurally sound.

Operating within these parameters, this new thinking was supposed to transform, albeit measuredly, the four pillars upon which the Soviet state is founded: the economic system, the political order, social relationships, and the legal infrastructure. Even though Marxist theory views law as a part of the superstructure, and notwithstanding the fact that *perestroika* is, by the admission of its architects, solidly anchored in Marxist ideology, the 1985 blueprints for reform nevertheless assigned a prominent role to changing Soviet legal culture. Proceeding on the assumption that any enduring restructuring of the Soviet state will be impossible without a fundamental change in the attitude of the Soviet people towards law and legal institutions, the *perestroichniki* (proponents of *perestroika*) specifically called for the establishment of a *pravovoe gosudarstvo* (law-based state) in the Soviet Union—the Soviet version of a state based on the rule of law.

In a series of law reforms in 1990-1991 the Soviet Union established a committee on constitutional supervision to monitor the constitutionality of actions by the legislative and executive departments of the Soviet Government, dealt a fatal blow at the brooding omnipotence of the CPSU by eliminating its constitutional supremacy in article 6 of the USSR Constitution, and abolished all special courts (i.e., courts that employed star chamber proceedings) in the USSR. At first sight

1. The goals and guiding principles of *perestroika* are clearly articulated in MIKHAIL S. GORBACHEV, PERESTROIKA: NEW THINKING FOR OUR COUNTRY AND THE WORLD (1987). In the words of Gorbachev, "*Perestroika* is a revolutionary process for it is a jump forward in the development of socialism, in the realization of its essential characteristics." *Id.* at 51.

it seemed that these changes, along with other institutional reforms, would guarantee the success of the Soviet Union's determined movement towards a *pravovoe gosudarstvo.*

Unfortunately, however, like anything else that bears the stamp of "made in the USSR," *perestroika* had neither a road map nor a general strategy to guide it. Law reform under *perestroika* quickly degenerated into a series of epileptic seizures, each of which only minimally advanced the country's legal system on its zigzag path towards its increasingly blurred goal. Thus, the one thing that has become increasingly apparent after more than five years of legal reform under *perestroika* is that the great expectations of 1985 have faded. Instead of making quantum leaps towards the bold goal envisioned in 1985, the Gorbachevian law reform is limping towards an uncertain future.

This observation about the qualified success of *perestroika* is particularly noticeable in the efforts of the *perestroichniki* to reform two aspects of modern Soviet law: the Soviet legal profession and the criminal justice system. Among the positive results that have already been recorded in these areas one may point to the following: criminal statistics are now officially reported in the Soviet Union; the French version of the jury system has been partially incorporated into Soviet criminal procedure; a new national union of Soviet advocates was created in 1989; the ceiling has been removed from the fees that advocates can charge their clients; a bar admission examination was instituted in 1989 in an effort to raise the quality of new admittees into the bar; and instead of waiting until the completion of the criminal investigation, as was the case in the past, a new rule of criminal procedure permits a criminal suspect to retain counsel from the moment of the suspect's first contact with the criminal justice system. However, after more than five years of law reform under *perestroika,* Soviet courts have not yet emerged into a truly independent judiciary, Soviet criminal procedure continues to retain its inquisitorial character, and the prosecutorial bias of the Soviet judge continues to play a major role in Soviet criminal proceedings. Of what use is it to the criminal defendant, one might ask, to allow him to retain counsel from the point of his first contact with the criminal justice system if the outcome of the state's case against him has already been determined by the prosecutorial bias of the judge who will handle his trial? This is the dilemma that is addressed in the book under review.

Robert Rand's *Comrade Lawyer* offers a biopsy of law reform under *perestroika.* The nine-chapter book focuses on two specific aspects of modern Soviet law: the legal profession and the delivery of legal services to criminal defendants. As his vehicle for discussing the later topic, the author chronicles the criminal proceedings against one defendant named Anatoly Borzov. With regard to the legal profession, the author narrows his discussions to an examination of the structure of the Moscow College of Advocates, which he rightfully regards as the best specimen of the Soviet practicing bar. Between these two themes the author discusses other topics such as the system of legal education in the Soviet Union,

crime and criminality in the USSR, and the goals of criminal punishment in Soviet legal theory.

A reader who is familiar with Soviet literature on the themes of this book will note that this is only one of many selected writings[2] on the Soviet *advokatura* and the Soviet criminal defense bar that were recently published in the West. Formidable students of Soviet law such as Harold Berman and Zigurds Zile published some of these earlier studies. These earlier studies contain everything that is worth knowing about the Soviet legal profession, and the most fascinating inside revelations about the Soviet criminal defense bar have been written by Dina Kaminskaya. Nevertheless, reading Rand's account is an enriching experience of sorts. Rand provides an oral history of one week in the life of a leading Soviet criminal defense attorney. The book reads like one continuous story connected by the author's personal observations.

Robert Rand is an accomplished journalist with a training in American law. He is also an aspiring student of Soviet law who spent a total of eight months in the Soviet Union observing the inner workings of the country's criminal justice machine. This book is the result of the author's empirical research that was conducted in the Soviet capital between November 1987 and June 1988 during which time he was based at the Law Office Number 21 in Moscow. In the preface the author promises the reader that this book will be about advocates and that its focus will be about law practice, notably criminal litigation in the Soviet capital (p. vii). Hence, in his discussions throughout the book, the author speaks only of one aspect of the Moscow advocate's law practice: representation in criminal proceedings.[3]

In keeping with the author's journalistic background, the book is presented in the form of a reportorial narrative with a general tendency to gloss over the important issues. Quite remarkably it avoids any in-depth analysis of the materials raised. The author's glossatorial discourse is embellished with strings of impressive statistics, citations from newspaper articles, extracts from police reports, and humorous anecdotes. The author's journalistic proclivities are further reflected in his tendency to

2. Previously published works in the West have examined various aspects of the Soviet *advokatura* and the role of Soviet criminal defense attorneys in the administration of criminal justice in the USSR. Prominent among them are: JEAN-GUY COLLIGNON, LES JURISTES EN L'UNION SOVIÉTIQUE (1977); DINA KAMINSKAYA, FINAL JUDGMENT: MY LIFE AS A SOVIET DEFENSE ATTORNEY (Michael Glenny trans., 1982); Harold J. Berman, *Legal Profession*, in 1 ENCYCLOPEDIA OF SOVIET LAW 416 (F.J.M. Feldbrugge ed., 1973); Zigurds L. Zile, *Soviet Advokatura Twenty-five Years After Stalin*, in 20 LAW IN EASTERN EUROPE: SOVIET LAW AFTER STALIN pt. 3, at 207 (Donald B. Barry et al. eds. 1979).

3. The Soviet advocate is a private general practitioner whose practice includes representation in criminal, civil, and administrative proceedings. His clients could be individuals, joint enterprises, foreign companies, or Soviet enterprises. Thus, for example, a state enterprise that does not have its own in-house corporate counsel may retain an advocate to represent its interests in proceedings before a regular court of law or before the special economic courts referred to as state *arbitrazh*. For a general discussion of the profession of the advocate in the Soviet Union, see MARY A. GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES 833–45 (1985).

transform probabilities into possibilities in an effort to liven up the narrative. Such was the case in the author's discussion of the failure of the USSR Supreme Soviet to confirm Associate Justice Sergei Gusev for the position of chief justice of the USSR Supreme Court for which he was nominated. At the beginning of this discussion the author says that Gusev's opposition to capital punishment "may have had some" effect on the Supreme Soviet's decision in the matter (p. 93). That initial conjecture becomes a possibility on p. 155, note 84, where the author notes quite affirmatively that "it is possible that it [Gusev's opposition to capital punishment] was a factor in Gusev's dismissal." The author offers no credible evidence to back this proposition.

When reviewed as the diary of a journalist, which is really what it is, the book must be given high marks. The most interesting parts of the book are the revealing discussions on pp. 34–37 and 67–68. The former is a debate between the organized bar and the office of the public prosecutor on how to implement the law of December 1, 1989, expanding the defendant's right of counsel in criminal proceedings. This discussion shows that the Moscow bar unashamedly places the pocketbook interests of its members over the defendant's newly won right to counsel. The second discussion is between the USSR Ministry of Justice and the Moscow bar about the need to create a national union of advocates in the USSR. As the "wicked stepmother" to the Soviet bar, the USSR Ministry of Justice was vehemently opposed to such an idea, which was strongly favored by the bar. The latter saw the creation of such an organization as a step toward asserting its independence from the USSR Ministry of Justice. The author is far less successful in his occasional attempts to articulate the principles of modern Soviet criminal law and procedure.

Another fascinating aspect of this book is the author's ability to paint a profile of the Soviet legal profession and criminal justice system. He tells us, for example, that there are thirty law offices and 1,100 practicing advocates in the city of Moscow (pp. 9–10); the initial consultation fee that a Moscow law office charges a walk-in client is $3.20 (p. 9); in Law Office Number 21 in the city of Moscow there are thirty-five staff attorneys (p. 11); Soviet law offices are open six days a week for eight to ten hours each day to receive clients (p. 11); in 1987 the average official monthly pay for a practicing attorney in Moscow was 242 rubles, but each attorney supplements his or her income by under-the-table honoraria called MIKST[4] (p. 12); there are 269,000 jurists[5] in the Soviet Union

4. MIKST is the Russian acronym for *maksimal'noe ispol'zovanie klienta sverkh taksi* (maximum utilization of the client above the rate stipulated in the attorney's fee schedule). It is a Soviet euphemism for a bribe.

5. In the Soviet Union, the term "jurist" refers generically to all members of the legal profession, that is, judges, attorneys, jurisconsults (in-house corporate lawyers), notaries public, procurators, criminal investigators, and academic lawyers. In Soviet popular parlance the term even includes law students. Thus, it is not clear to me whether Rand's figures include all eight subgroups of jurists or just the first six.

(p. 26) of which 27,000 are practicing advocates (p. 57); there are 160 colleges of advocates in the Soviet Union (p. 63); there were 28,500 incidents of assault and battery in the USSR in 1987 (p. 81); 1,798,523 criminal acts were registered in the USSR in 1987 (p. 81); 657 crimes are committed per 100,000 persons in the USSR annually (p. 81); and so forth.

The author also mentions a few recent developments in Soviet law such as the fact that Soviet regulations now permit advertising by lawyers and law offices (p. 56); the formation of the Union of Advocates in the USSR in February 1989 (p. 66) was quickly followed by the formation of a rival Union of Soviet Jurists in June 1989 (p. 151 n.28); bar admission examination was introduced in the Soviet Union in 1989 (p. 25); and in 1989 the Moscow city bar received permission from the Ministry of Justice of the Russian Soviet Federated Socialist Republic (RSFSR) to increase its membership from 1,100 to 1,150 (p. 113).

Even though this book is not about Soviet criminal procedure, at various points during his discussion the author tantalizes the reader by mentioning important institutions of Soviet criminal procedure only to stop short of explaining their role. For example, on p. 4 he refers to the testimony of two social defenders (Shitikov and Simakov) without even attempting to explain to the uninitiated reader who a social defender is and how the latter differs from a social accuser.[6] In the few instances in which the author departs from his self-imposed restriction of merely discussing the Soviet trial proceedings and actually attempts to analyze a subtle point in Soviet law of criminal procedure, he invariably stumbles. For example, the statement on p. 73 that Soviet law "views the relatives of injured parties as legal entities" is as baffling as it is wrong. Soviet law of criminal procedure grants the victims of crimes the right to participate in the criminal proceedings against the defendant whose criminal actions injured them. One is not sure of what the author means by "legal entities" in this context.

The author's occasional dabbling into the comparison of elements of Soviet and American criminal procedural systems also reveals his weakness as a comparativist. For example, his statement on p. 5 in which he equates the Soviet *obvinitel'noe zakliuchenie* (the criminal investigation report which lists the charges against the accused) with the American indictment is clearly erroneous. Indictment and presentment are the accepted forms of accusation following an American grand jury investigation. In the absence of a grand jury investigation, an American accusation is presented in the form of an information. The Soviet system of criminal investigation has no functional equivalent of a grand jury. Thus, the Soviet *obvinitel'noe zakliuchenie* is the procedural counterpart to the American bill of information, not the grand jury indictment or presentment.

At various points throughout the book the author makes very interesting observations about Soviet criminal procedure. For example, he asserts that an

6. For a detailed discussion of the role of the social defender and social accuser in Soviet criminal procedure, see GLENDON et al., *supra* note 3, at 863–64.

acquittal in a Soviet criminal trial is quite unlikely (p. 2); accusatory bias continues to dominate the thinking of Soviet judges (pp. 2, 42); courtroom advocacy has little impact on the outcome of criminal proceedings (p. 2); Jews cannot become prosecutors in the Soviet Union (p. 3); supervisory oversight over the Moscow City College of Advocates is exercised by the Ministry of Justice of the RSFSR and the Executive Committee of the Moscow City Council (p. 10); the shadow of the CPSU looms heavily over the Soviet bar (p. 11); the USSR Ministry of Justice is the "wicked stepmother" to the Soviet Bar (p. 66); and between 1958 and 1988 the general meeting of the Moscow city bar was not open to any members of the Moscow bar who wished to attend it (p. 61).

By scholarly standards, *Comrade Lawyer* is a flawed book. The chapters not directly related to the Borzov case (chs. 2, 5, 7, and 9) are poorly crafted and even more poorly executed, and the digressions from the Borzov case are long and rambling. But so captivating is the Borzov story itself and the personality of the chief defense counsel that the reader quickly forgives the author for these aforementioned indiscretions.

Rand set out to write a historical account of one criminal case that he observed in Moscow, and he succeeded in doing so. Because of his background as a journalist the author is superbly qualified to write such an empirical exposé. What I find curious about the book is its format; it is too long for an essay and too short for a full discussion. For all its defects this book is a welcome addition to the growing literature on an important phenomenon in Soviet law, the administration of criminal justice in the Soviet Union. Even though the book does not offer any new revelations about the two topics addressed, it nevertheless corroborates earlier observations by other scholars and presents a fascinating journey through the Soviet courtroom. It mixes old knowledge with few new insights. In the end, however, it paints an invaluable picture of the work of a Soviet criminal defense bar, which is ably represented by Ms. Silva Dubrovskaya, the defense counsel for Anatoly Borzov.

Christopher Osakwe*
Professor of Law
Whittier College School of Law

*LL.B. (1967), Ph.D. (1970), Moscow State University Lomonosov School of Law; J.S.D. (1974), University of Illinois College of Law; Professor of Comparative Law, Tulane University School of Law (1972–1988).