Book Reviews

BOOK REVIEWS

Legal Effects of Fluctuating Exchange Rates

By Sir Joseph Gold. Washington, D.C.: International Monetary Fund, 1990, pp. xviii, 473, $37.50.

A new book by Sir Joseph is always a treat, and this one is no exception. As the title makes clear, the book is about the effects of the current floating exchange rate system, rather than the system itself—but one learns much about the latter as well. The system itself is characterized by instability:

> For the purpose of this monograph, the fluctuation of exchange rates means all the movements in exchange rates that are possible under the exchange arrangements in force in the [current] discretionary system. A characteristic of such a system is that it makes predictability of exchange rate behavior extremely difficult. This difficulty generates problems for parties engaged in international payments. They have to be aware that wide and erratic variations can take place in the exchange rates that affect their costs, revenues, and profit margins. (p. 31)

And again, in conclusion, the author states (p. 425): "[a]s there is now no anchor in the international monetary system for the exchange rates of all currencies, as there was in the par value system, there is no unit of account that is in general use by governments or other parties."

The book extensively discusses the many consequences of this situation, both at the public and the private law levels. It deals with how public institutions—such as the IMF, the IBRD, or for example, the parties to the International Natural Rubber Agreement (p. 101)—and private parties seek to cope with the realities of the current system.

Public and private parties need a unit of account or *numeraire* to measure contributions, disbursements, repayments, and the like. In this connection Sir Joseph makes a good deal of both the IMF's Special Drawing Rights (SDR) and the European Community's European Currency Unit (ECU). The author acknowledges that the SDR is not favored in private transactions. He suggests the

opposite with respect to the ECU, yet also acknowledges that "[n]umerous critics argue that the success of the ECU as a private unit has been exaggerated and is disappointing so far." (p. 89, n.5) Private law is profoundly affected by the many situations where parties have to deal (or litigate) in more than one currency, and by the fluctuations in the relationship, that is the rate, between them. Examples abound: normal commercial contracts; possible corporate charters stated in more than one currency (p. 278); rights of bankruptcy creditors of different nationality (pp. 206 *et seq.*); Securities and Exchange Commission "convenience translation" rules with respect to the foreign currency books and accounts of foreign issuers; and court judgments in cases involving currencies foreign to that of the court.

In the past gold may have solved or cushioned currency fluctuations. This is less and less the case. The author notes the "many [manifestations] in the Articles [of Agreement of the IMF], of the determination of members to reduce the role of gold in the international monetary system." (p. 9) And, again, "another major development has been change in the definition of the SDR by substituting reference to a basket of prescribed amounts of specified currencies for reference to gold." (p. 406) In addition to continued references to the SDR and ECU, the reader learns of other units of account replacing gold. Such units include the "Malaysian/Singapore cent," defined as "the average of the Malaysian sen and the Singapore cent at the prevailing rates of exchange" (p. 101), and the "gaucho," a common currency unit announced by Brazil and Argentina in 1987 to be used in bilateral trade between these countries (p. 101, n. 2). The role of the U.S. dollar remains great: as in the reduction of the "headroom" or capacity to make loans of the IBRD, whose capital is expressed in U.S. dollars whereas many of its loans are made in other currencies whose values have appreciated against the dollar (p. 107); or in cases where a court or international organization refuses to use the SDR instead of the dollar to fix liabilities or rates (for example, *Transworld Airlines, Inc. v. Franklin Mint Corp.*[1] (p. 115) and the International Telecommunications Regulations of the ITU (pp. 118 *et seq.*)). It is not clear whether the author's view of the dollar is grudging, wistful or what:

> The explanation of the role of the U.S. dollar in international monetary matters and in the multitudinous public and private activities in which it serves as the unit of account is not that the dollar has a stable exchange value. The explanation is the power of the United States in the world economy and the strength and breadth of its financial and exchange markets, as well as the stability of its political system. This power gives the United States a de facto veto in much of the business of international organizations even when it has no de jure veto. It is power that should be exercised with maximum wisdom and with maximum concern for fairness in international and national monetary law. (p. 428)

There are splendid tidbits in the book. The reader learns that a meeting of the parties to the International Natural Rubber Agreement must be convened upon a "significant change" in the relationship between the currencies of the major

1. 466 U.S. 243 (1984).

natural rubber exporters/importers and the "Malaysian/Singapore cent." (p. 133) The author also explains that

> an agreement took effect on January 1, 1973 among 18 countries that belonged to the Organization for Economic Cooperation and Development (OECD), under which each country guaranteed for a period of three years the exchange value of working balances in its currency held by the central banks of the other parties. (p. 138)

And at another point the author notes the "archaic distinction between the delayed payment of a debt and the delayed payment of damages for breach of contract." (p. 206)

The more practical effects of fluctuating rates may be put in four groups: rates, maintenance of value, contract law problems, and court remedies associated with the celebrated British case, *Miliangos v. George Frank (Textiles) Ltd.*[2]

Rates

Frequent questions include the method by which rates are set and the freedom of parties to set them. In *President of India v. Lips Maritime Corp.*,[3] Clause 30 of a charterparty provided that freight and demurrage were to be calculated in U.S. dollars but paid in pounds sterling at the exchange rate "ruling on the date of the bills of lading." (p. 203) On that date the rate was 2.37 dollars to the pound; because of the delay in discharge of the cargo, by the time the resulting dispute was settled the rate was 1.54 dollars to the pound. The House of Lord reversed an award to the shipowner for special damages of 5,514 pounds, holding there was no such thing in English law as a cause of action in damages for the late payment of damages. (p. 205)

Parties may control outcomes. The English Law Commission has:

> concluded that parties were free, and should continue to be free, to agree that the translation of any currency into another currency that becomes necessary in their dealings shall be made at the exchange rate prevailing on a particular date or to name the exchange rate that is to be applied. (p. 156)

Maintenance of Value

Explicit clauses that allocate the risk arising from a change in a currency are common in contracts and loan agreements. Thus, the old gold clauses fixed the obligation of a loan borrower in gold notwithstanding that the borrowed currency might have depreciated. There are equivalent clauses today, but with reference to a currency or unit of account (for example, the ECU) other than gold. The author points out that there is no customary international law obligation; thus, in the absence of an explicit agreement such as the aforementioned 1973 OECD agreement, a government has no liability for a decline in the value of its currency held

2. [1975] 1 All E.R. 1076; [1975] 3 All E.R. 801; 1976 A.C. 443.
3. [1978] 3 All E.R. 110.

by another government. The IMF Articles of Agreement do not impose a maintenance of value obligation. However, the more recent charters of the Multilateral Investment Guarantee Agency (MIGA) and the European Bank for Reconstruction and Development (EBRD) fix government payment obligations at a higher level than a decline in the value of their currencies might yield. (p. 139)

The Law of Contracts

The author discusses a number of interesting matters including hardship clauses (which raise the question of whether a contract should be adapted even where there is no maintenance of value obligation and an explicit escalation clause does not do the job), impracticability (p. 233), unconscionability (p. 236), and unforeseeability. Courts doubt that currency changes can amount to impracticability or unconscionability (p. 236), and "[t]he role of foreseeability in connection with various judicial doctrines has not been fully worked out." (p. 422)

The case of *W. Bruns & Company of Hamburg v. Standard Fruit and Steamship Company of New Orleans* (The *Brunsrode*)[4] brings out the issue of hardship. A German owner chartered a ship to a U.S. charterer at 23.5 U.S. cents per bale cubic foot per thirty days. The shipowner required the charterer to make monthly payments in advance. The charter party provided that the charter rate would be changed to reflect changes under the owner's crew agreement. The owner paid his crew in deutsche marks that began to rise. The changes in the amounts to be paid the crew were made yearly. The U.S. charterer maintained that the deutsche mark—dollar rate prevailing on the day of the annual crew agreement change should then be applied for the following year; the German owner wished to make this adjustment each month as the deutsche mark rose against the dollar. The English court deciding the case (although neither of the currencies involved were pounds sterling) would not do so.

Miliangos

Much has already been written about breach, payment and judgment dates, and *Miliangos*. Sir Joseph discusses the development of the *Miliangos* doctrine (that is, that a court may award damages in the currency of the underlying contract or other transaction) in the United Kingdom and many other jurisdictions including the United States, which has still not accepted the doctrine of *Miliangos*. In this connection Sir Joseph discusses the Uniform Foreign-Money Claims Act, which he believes to be meticulous and admirable, which allows for the *Miliangos* rule if a statute so provides. (p. 356) Such has been done in New York (p. 335). The Restatement of Foreign Relations Law is criticized for stating that U.S. law, without statute, is amenable to *Miliangos*, which neither Sir Joseph, nor this reviewer, believes to be the case. (p. 332)

4. [1976] 1 Lloyd's Rep. 501.

I recommend the reading—either in whole or in pieces—of this book to specialist and nonspecialist alike. For the latter, at least, I do so on two counts: as an introduction to Joe Gold and his style and as an introduction into the world that Sir Joseph knows so well. The text and allusions in the book will open up the universe of law and money to the reader.

Don Wallace, Jr., Chairman
International Law Institute
and Professor of Law
Georgetown University Law Center
International Counsel
Shearman & Sterling, Washington, D.C.

Making Global Deals: Negotiating in the International Marketplace

By Jeswald W. Salacuse. Boston: Houghton Mifflin Company, 1991, pp. 185, $19.95.

> A country's economic competitiveness abroad faces many obstacles: protectionism in foreign markets, unfair trade practices by other nations, failures in international cooperation, and inadequacies in its domestic educational system. While these factors certainly influence global trade and capital flows, discussions about competitiveness often neglect the basic molecule of those flows—the international business deal.
>
> Most commentators take international deal making for granted. They apparently assume that if the right policies and structures are in place, business among nations will automatically follow. Experience clearly shows, however, that negotiating an international business transaction is a difficult, painstaking process that can fail even in the presence of the most favorable policies and institutions. The difference between failure and success often resides in the ability and knowledge of the persons at the negotiating table. If a nation is to become more competitive internationally, a broad segment of its business community needs to be skilled at international deal making. My purpose of this book is to provide business executives, lawyers, and government officials with useful advice on international business negotiation. (Preface)

These are the opening remarks of Dean Salacuse's recent book, *Making Global Deals*. He achieves his purpose.

This book contains a concise, simple statement of how to negotiate contracts in the international market place. Easy to read, the book divides the global deal into seven basic elements, each of which can be thought of as a barrier to a successful negotiation of an international transaction. The seven barriers are:

(1) negotiating environments;
(2) cultures;
(3) ideologies;
(4) foreign bureaucracies and organizations;

(5) foreign laws and governments;
(6) multiple monies; and
(7) instability and sudden change.

These seven barriers are best summarized by using Dean Salacuse's own words found in the first chapter:

> What are the barriers to a global deal?
>
> The first, and perhaps most obvious, barrier is the negotiating environment. The parties are usually located at a great distance from one another. Even in this age of instant global communication and high-speed travel, distance still complicates planning and executing negotiations. One side usually has to travel to the other side's turf to negotiate. For the visitor, that turf is a foreign environment, and that "foreigness"is a potential barrier to deal making.
>
> Culture is a second barrier to making global deals. International business transactions not only cross national boundaries, they also cross cultures. Culture is a powerful factor shaping how people think, communicate, and behave. It also affects their style of negotiation. The cultural differences between a Chinese public sector plant manager in Shanghai and an American division head of a family company in Cleveland can create a negotiating barrier that in the end will block any deal.
>
> Whether they are Democrats or Republicans, American business executives generally share a common ideology. But in the international arena, business negotiators encounter—and must be prepared to deal with—ideologies vastly different from their own. Ideology, then, is the third barrier to negotiating global deals.
>
> The fourth barrier to international business negotiations is foreign bureaucracy. Americans are often unprepared for the extensive influence exerted by foreign governments on business activities. Effective international negotiators must know how to deal with a wide variety of foreign organizations, both public and private.
>
> By engaging in international business, a company enters into a world of many different laws and political systems. Foreign laws and governments are a fifth barrier to negotiation. An export sale, a direct foreign investment, or a technology transfer brings at least one of the parties to the deal into contact with the laws and government of another country. Not only are these foreign laws and governments largely unknown to visiting global deal makers, but they must also figure out how to cope simultaneously with their own laws and government at home. Failure to overcome this barrier may mean that project income will be taxed by two or more governments, a contract may be governed by two or more legal systems, and a dispute between the parties will be decided by two or more courts—in two or more different ways.
>
> Unlike purely domestic deals, international transactions take place in a world of many currencies and monetary systems. Global deals cross monetary boundaries just as they cross political, cultural, and ideological lines. Multiple money, the sixth barrier to a global deal, is always present in negotiation, and it has proved to be insurmountable on numerous occasions.
>
> The seventh and final barrier to global deal making is the risk of instability and sudden change so common to the international system itself. Change, of course, is a fact of life, and sudden changes in circumstances are to be found in both domestic and international business. Still, the type and magnitude of change in the international arena appears far greater than in the U.S. domestic setting. The fall of the Shah of Iran, the opening of the Berlin Wall, and the closing of the Suez Canal are just a few examples of events that had wide and serious consequences for international business deals. (pp. 5–6)

Many of Dean Salacuse's observations are obvious and practical. Other are more erudite. Yet it is not the specifics of the book that are impressive. Rather it is Dean Salacuse's organizational skills and simplistic style that makes the book valuable. Where else can one find an easy-to-access outline of virtually every key element of an international transaction?

My only criticism of this book is that sometimes its approach is too simplistic. Although my experience is limited in the international arena, what experience I do have indicates that issues of authority, payment, and assurance of performance are the main impediments to the consummation of foreign transactions. In this regard, it is not unusual to find all three issues in an international negotiation. These three issues can be summarized in the following manner:

- Authority typically means not only a license or similar piece of paper issued by a governmental body, but also proof of that governmental body's authority. Many times it is not as difficult to obtain a license as it is to obtain assurances that the body issuing the license has the authority over the subject matter of the license.
- Issues of payment typically involve exchange rate risks. Other than the issue of authority, this issue predominates virtually every international transaction. No one wants to be left holding a bag of nonexchangeable currency or having to take a major risk of converting this currency to something of value.
- Assurance of performance typically means some sort of enhancement by a third party in the form of guarantees, letters of credit, or the like. Intermediaries such as the World Bank are important players in this arena of international negotiations.

I would have appreciated more focus by Dean Salacuse on these three issues, including a listing of source materials. Although these issues are covered, the coverage is too superficial considering their importance. Hence, I find the book incomplete and in need of a supplement with respect to these matters.

I would also have appreciated some opening remarks by Dean Salacuse on the future of global deal making. Dean Salacuse's book presents the classical picture of spirited negotiations between two parties of different nationalities with adverse interests. The book also presents the potential of government intervention, which could be detrimental to the negotiated deal. In my opinion, the book focuses too much on this adversarial interest.

With big businesses getting bigger and more international in scope, must not these barriers of separation ultimately fall? In a world shrunk by jet airliner, the fax, the computer, and television, will not alignment of multinational interests become more the rule, rather than the exception? Certainly, this seems to be the trend as we in the United States witness the European economic government and the development of U.S.-Mexico trade relations. It would have been helpful to have Dean Salacuse's views on these current developments.

Nevertheless, overall I recommend this book to anyone commencing negotiations of an international transaction, no matter whether the perspective is that of the United States interest or an interest from another country. The following words of advice alone make the book worth its price: "To communicate effectively, skilled negotiators must constantly and simultaneously be aware of three things throughout a negotiation: their own words and actions; the meaning that the other side gives to those words and actions; and the words and actions of the other side." (p. 43)

William B. Sechrest
Shareholder
Winstead Sechrest & Minick
Dallas, Texas

International Securities Regulation: London's "Big Bang" and the European Securities Markets

By Norman S. Poser. Boston, MA: Little, Brown and Company, 1990, pp. approx. 850, $125.00.

To the long list of books analyzing London's "Big Bang" and the subsequent regulatory evolution, add Professor Norman Poser's book, *International Securities Regulation.*[1] Add it, however, with a star because Poser writes from a unique and uniquely applicable perspective and draws from an impressive pool of sources. This, coupled with the successful efforts of the book's publisher to place the book in the hands of the public while its subject matter is still relatively current, results in a thoroughly worthwhile addition.

Having worked for the Securities and Exchange Commission and later for the American Stock Exchange during the years of financial market deregulation in the United States, Poser occupied a particularly good vantage point from which to observe the forces and consequences surrounding that deregulation. Those events were very similar to those that occurred and are still occurring in London's financial markets. This is the unique perspective that Poser offers in his preface and that is evident in the main text. This perspective, coupled with his access to the primary architects of the "Big Bang" as sources for his text, has produced by way of synthesis a highly informative study.

Of note is the fact that, without question, the book's title exceeds the scope of the text. The book's subtitle, *London's "Big Bang" and the European Securities*

1. Norman S. Poser is a Professor of Law at the Brooklyn Law School.

Markets is perhaps, like those of the Gilbert and Sullivan operas,[2] more revealing. Professor Poser more accurately describes his work's scope in its preface. Poser characterizes his book not as a "hornbook of British securities law," much less international securities law, but, instead, as an "interesting and helpful study of London's 'City Revolution'" to be used by practitioners and policymakers in the financial and legal fields. Poser delivers a solid account of the evolution and current state of London's financial markets' regulatory structure, discusses pending issues regarding the regulatory structure vis-à-vis EEC directives and policy, and concludes with brief descriptions of other European financial markets. The book's core is a description of and commentary on the Financial Services Act 1986 and its continuing evolution.

The first eighty pages of the book trace the series of events that led to the deregulation of London's financial markets, which came to be known as the "Big Bang." The examination identifies the forces—global and domestic—to which the deregulation was a response and briefly evaluates the effectiveness of that deregulation. Poser discusses the appearance in London during the 1970s of large foreign investment firms participating in the rapidly expanding Eurobond Market, and the threat that they posed to the then highly insulated and regulated London Stock Exchange. The author examines the need for U.K. investment firms to increase their capitalization in order to handle adequately the sharp increase in large institutional transactions. Poser also explores the internal pressures for change to a more open and internationally attractive market, as manifested by the legislative withdrawal of protection from antitrust-type liability that had been integral to the rules of the London Stock Exchange. Poser then addresses the main elements of deregulation, concentrating on the three most prominent: the elimination of fixed commissions; the broadening of access to Stock Exchange membership; and the adoption of the Stock Exchange Automated Quotation System (SEAQ) in place of the single-capacity system of jobbers and brokers.

The next 261 pages of Poser's text are dedicated to an analysis of the regulatory structure created by the Financial Services Act 1986 (FSA). After a brief history of the Act's naissance and a very general description of the regulatory structure the Act created, Poser methodically dissects the Act's more significant provisions and concepts: self-regulation, the nature of the Securities and Investments Board (SIB), authorization, and investments and "investment business," to name just a few. He next focuses on the progeny of the FSA: The regulation of conduct of business as prescribed in the SIB's 1987 Rules; the "equivalence test"; the SIB's "New Approach" and key principles therein; and the regulation of insider trading and, to a limited extent, takeovers.

Within this section is thorough and noteworthy discussion of the difficulties of regulating conflicts of interest and the effectiveness of implementing "Chinese

2. Most of the Savoy operas have subtitles, such as *Ruddigore or "the Witch's Curse."*

Walls'' to prevent these conflicts. Abandonment of London's traditional single-capacity system in favor of multifunction investment conglomerates meant that it became possible for two broad categories of conflict of interest to arise. The first occurs when a firm is acting in the market both on its own behalf and on behalf of its client. If the firm's actions on its own behalf benefit the firm to its client's detriment, the firm may be found in breach of the fiduciary duty it owes to its client. This situation would occur, for example, when the firm's retail department is recommending purchase of a security at the same time as the firm's treasury department, with a different research base, is selling on its own account. Had the client the benefit of the firm's cumulative opinion of the security, the client would not buy the security.

The second and perhaps more surreptitious type of conflict arises in the ''two-client'' form. Here the tension is between common law principles of agency law and restrictions on the use of material, nonpublic information. Agency law dictates that an agent has a fiduciary duty to act in its principal's best interest and that the knowledge of an agent is imputed to its principal. Thus, if the investment banking department of an investment firm deals with a public company, and a private client makes an investment in this company, the broker advising the private client, as agent for the private client, is bound by fiduciary duty to use all of the firm's information in advising the private client. The knowledge of the investment banking department is imputed to the entire firm by virtue of the investment banking department's agency-principal relationship with the firm as a whole. The broker is then between two fires: that of fiduciary duty to this client and the risk of insider dealing difficulties involved in using material, nonpublic information as a basis for investment decisions. Some, but not all, of these dangers can be eliminated by an appropriate contract; however, a contract can rarely provide a defense against criminal prosecution in this area.

A Chinese Wall is a corporate policy prohibiting communication of nonessential information between the various departments of an investment firm. In using a Chinese Wall, a corporation hopes to decrease the availability of insider information to parties not requiring access and thus to prevent the opportunity for information misuse. The core issue in respect of Chinese Walls (not yet tested in the U.K. courts) is the extent to which their use may be asserted as a legal defense both to charges of insider trading by prosecutors and to charges of breach of fiduciary duty by clients harmed by not having access to all the firm's information.

In the United States, where the concept of Chinese Wall was developed, its value is chiefly prophylactic. Existence of a Chinese Wall may be asserted as a defense only in limited situations, such as SEC rule 14e–3 regarding tender offers (which provides protection against SEC action for deals done on a client's behalf but not for principal deals). The underlying philosophy is that a firm, aware of its duty, knowingly enters into a conflict of interest by accepting an investment banking role for a company in whose security it already trades. Then,

if the firm does not curtail its trading activity in that security for the duration of its investment banking relationship and does not disclose to its retail client that it may acquire material information that it would not be able to communicate to the client in giving investment advice, the firm is taken, in the U.S. jurisdiction, to have chosen to leave itself vulnerable to claims of conflict of interest.

In the United Kingdom, while there is as yet no leading judicial decision on the subject, the availability of a Chinese Wall legal defense may be considerably greater. The Financial Services Act 1986 was initially interpreted by practitioners as recognizing a Chinese Wall legal defense for alleged violations of the Act's key antifraud provision and of rules adopted under the authority of the Act. However, doubt remained as to its effectiveness as a defense to claims for breach of fiduciary duty. Since the publication of Poser's book, the debate has moved to new territory with the SIB's Core Rule 36 on Chinese Walls and with an as yet incomplete review of the interlock by the English and Scottish Law Commissions. This review takes place at a time when the English judiciary has shown, in some leading decisions, considerable distrust of the practical effectiveness of Chinese Walls in large solicitors' firms.

Poser summarizes his valuable, but now necessarily incomplete, section by discussing the effectiveness of and problems with the Chinese Wall solution to conflicts of interest. No matter how high Chinese Walls are built in the corporate structure, sensitive information will almost always reach an individual with, at least, supervisory involvement in both the segment of the firm having the information and the segment of the firm from which the information should be kept. The predictability of human nature at that point, with the stakes as high as they tend to be, is reflected in the wariness with which leading members of the financial industry regard Chinese Walls. A high degree of internal segmentation by Chinese Walls would undercut the expected synergy that motivated the creation of multifunction investment conglomerates. Less comprehensive Chinese Walls risk not affording the private investor adequate protection. So "too much" and "too little" may be close neighbors, or may even overlap.

Poser's analysis points out the truth of the proposition that regulation, as yet incomplete, of conflicts of interest must find some compromise between efficiency and fairness, economic growth and abuse. Many economists say efficiency and market forces should be self-regulating. Lawyers and judges lean towards the fairness with which the common law agency principles are imbued. Total segregation—one broker for each investor—while fair, is obviously not feasible. Total abandonment of any concept of confidence would be as indefensible in the opposite direction. There has to be some middle ground.

The book's final section deals with the rest of the European Community (EC) and the nature of the relatively small financial markets in other European countries. Poser describes the EC goal of market integration within the Community and its implications for London's current status as a premier international financial market. By way of illustration, Poser highlights six European Commission

directives relevant to financial markets in terms of their potential effect on London's continuing attractiveness. Through this method, Poser shows the dilemma that the United Kingdom is experiencing as a result of its desire to participate as a member of the EC without sacrificing the advantage of its financial markets' current position. He infers, with some sense of worry, that the intended effects of deregulation and the Financial Services Act 1986 may be lost after a relatively short period. The section ends with several summaries of the financial market structure of five other EC Member States (France, Germany, Italy, the Netherlands, and Spain) and two other European countries (Switzerland and Sweden). Poser excludes from the analyses the other Member States (Belgium, Denmark, Greece, Ireland, Luxembourg, and Portugal). This exclusion occasions little surprise except perhaps in the case of Luxembourg, whose specialty in terms of European mutual funds in undoubtedly significant.

Finally, Poser supplements his book with generous appendices: an extensive bibliography; tables of U.K., U.S., and EC statutes, rules, and directives; a table of the cases mentioned in the text; an adequate glossary; and a complete copy of the Financial Services Act 1986, which alone accounts for 302 of the book's 799 pages.

The truly outstanding features of this work are its thoroughness and clarity. Professor Poser constructs a broad foundation on which to build an expansive understanding of the nature of London's financial markets' regulatory structure. Where helpful, he compares and contrasts the FSA's provisions with the corresponding provisions in U.S. securities law. And, where available, Poser identifies pivotal issues regarding legal questions about a given provision. Poser accomplishes this by citing seminal cases or policy statements by regulatory bodies dependably listed in the footnotes. Additionally, the book was published before its text became significantly dated, which is no easy task considering the rapid and ongoing evolution and continual honing of financial regulation in London.

If any criticism is to be made about this book, it is that Poser did not narrow his focus. A more limited number of aspects of the subject, explored from his unique perspective, might have repaid deeper and more extended analysis. Perhaps Poser left such an approach for his next book. Or perhaps, one may hope for more specific illumination of some of the points Poser makes from a forthcoming book on a similar subject matter, already foreshadowed in the *International Tax and Business Lawyer*:[3] Professor James J. Fishman's *The Transformation of Threadneedle Street: The Deregulation and Reregulation of Britain's Financial Services*. Carolina Academic Press will publish Fishman's text in 1992.

In short, Poser presents a valuable and thought-provoking book mainly about the United Kingdom as seen from a privileged U.S. standpoint. *International*

3. *See* James J. Fishman, *Enforcement of Securities Laws Violation in the United Kingdom*, 9 INT'L TAX & BUS. LAW. 131 (1991). Like Professor Poser, Professor Fishman has connections with the Brooklyn Law School.

Securities Regulation: London's "Big Bang" and the European Securities Markets should be valuable reading to practitioners and interested observers of international finance.

Michael Blair*
General Counsel
Securities and Investments Board
London

International Mergers: The Antitrust Process

By J. W. Rowley & D. I. Baker. London: Sweet & Maxwell, 1991, pp. xlix, £150.00, $277.00 (approx.).

There was a time when books on comparative law were almost exclusively of interest to legal scholars rather than practitioners. This was true especially in regard to comparative antitrust law treatises, not only because very few transactions were challenged in more than one jurisdiction, but also because very few foreign nations had effective systems of enforcement. That we have entered a new era is made clear by the publication of the superb survey on antitrust merger control by Rowley and Baker. The book will certainly be of use and interest to comparative law scholars; it is an absolute necessity for lawyers giving antitrust advice to foreign or multinational clients involved in transnational mergers or acquisitions.

The United States has had an antitrust merger law dealing with mergers since 1950; Japan since 1953. Nevertheless, the development of modern, full-scale merger *control* did not really take off until the passage of the Hart-Scott-Rodino (HSR) bill in the United States in 1976. Before that, the U.S. Justice Department and Federal Trade Commission usually learned about mergers from newspaper reports and often had to try to undo them long after the assets had been intermixed.

The HSR scheme has five major elements: (1) a statutory standard for judging the legality of mergers; (2) a requirement of notification, combined with size and other jurisdictional criteria; (3) a description of what basic information must be submitted initially and an authorization for the enforcement agency to issue a further demand (second request) for additional information; (4) a rule that the transaction cannot be completed until the enforcement agency has received all the information it is entitled to and has had time to consider the transaction's

*This review is written in a personal capacity and must not be taken to be expressing the views of the Securities and Investments Board. The author would like to acknowledge the help of Michael Pisani, a law student at Pepperdine University, in the preparation of this review.

merits; and (5) a set of prompt, inflexible time limits (months not years) within which the agency must challenge the transaction, negotiate about it, or allow it to proceed.

The successful application of the HSR process to domestic and transnational mergers made it clear that the United States was developing an effective, nondiscriminatory system of antitrust merger control under which no significant transaction would go unreviewed. In 1986, following the U.S. example, Canada adopted virtually the same system. Even more significant, the European Communities, after having sought authority for merger control since 1973, were authorized to adopt such a system in late 1989. Germany has had a notification system in effect for about as long as the United States. The United Kingdom strengthened its merger control process in 1989 by creating a notification system, although not a mandatory one.

Now, in the new antitrust world of the 1990s, a merger of two multinational corporations could conceivably require antitrust merger control notification in from four to twelve jurisdictions. As a result, a practitioner counseling such a company could have to coordinate with antitrust counsel in numerous countries and numerous languages simply to determine where the transaction might be examined and where filings must or should be made, much less predict its legality. Fortunately, counsel now have a better alternative: use of the Rowley & Baker treatise.

The book is divided into ten chapters, devoted to the merger control systems in the EEC, Germany, the United Kingdom, France, Spain, the United States, Canada, Australia, and Japan. Each chapter is written by an expert local practitioner. Baker is the author of the U.S. chapter, Rowley, author of the Canadian one. By design, all chapters are organized in the same straightforward logical manner, covering the statutory standard and filing requirements first, then describing the relevant enforcement agencies, the possibility of private actions, the adjudicative process, the major decisions, and so on. Each chapter ends with valuable appendices containing the relevant statutory materials, regulations, and guidelines (in admirable translations, where necessary). Although at least half the authors probably do not use English as their first language, the quality of the prose is uniformly high. Credit must go to Rowley and Baker for their choice of collaborators, or their editing.

Only an ingrate would criticize a work so well done and so informative, but a few thoughts concerning how the second edition might be made even more indispensable seem appropriate. First, the book begins a little abruptly, with only a two-page preface. The broad subjects covered cry out for a substantial introduction or conclusion that ties the material together, sketches the major trends and issues, and predicts where the field is going. One nagging question is whether "public interest" merger control, such as in England and Ireland, can coexist with pure competition standards, since the former tends to become a form of protection against foreign ownership, while the latter is neutral in that regard.

Questions abound also concerning how much cooperation, coordination, and avoidance of duplication will develop among merger control enforcers in different jurisdictions. The perceptive authors of the EC chapter touch on a few of these points, but we have no comment from Rowley or Baker or from some eleventh author assigned to discuss the overall picture.

Lastly are questions of inclusions and exclusions. The authors do not state how many merger control systems there are in the world, or why they picked these ten. This reviewer is aware of functioning systems in, for instance, Korea, Sweden, and Italy, which may well be of greater significance than those in Ireland and Spain.

No survey is ever perfect. Nevertheless, Rowley's and Baker's is one of the best new books in the antitrust field in many years and has no present rival. International lawyers and law firms in all major commercial capitals should own it.

Joel Davidow
Partner, Dickstein, Shapiro & Morin, Washington, D.C.
Former Chief, Foreign Commerce Section
Antitrust Division, U.S. Department of Justice
Adjunct Professor (International & Comparative Antitrust Law)
Washington College of Law at American University

International Joint Ventures—The Legal and Tax Issues

Edited by Richard P. Casna and John E. McDermott, Jr. London: Eurostudy Publishing Company Ltd., 1991, pp. 267, $160.00 (pb).

For decades the U.S. internationally oriented enterprise has been xenophobic: No foreigners have been included in offshore ventures. Grudgingly, local country partners might be included for some minority interest participation—if mandated by local requirements. For several decades after World War II the executives of U.S. international enterprises thought that they had a monopoly on the capable management of foreign investments. They also sought to protect the technology (if any) utilized offshore from possible exposure to non-U.S. owners, even those in minority positions. The decades of the 1970s and, more importantly, the 1980s sufficiently chastised U.S. businesses so that they must now recognize the absolute necessity of an amalgam of joint venturers having diverse perspectives. The recent collaboration of IBM and Apple Computer is a poignant domestic example of this dramatic reversal in attitude. International joint ventures also increasingly evidence the objective, and necessity, of blending expertise and technologies from multiple jurisdictions to obtain a competitive advantage.

An examination of the legal aspects of international joint ventures is always a frustrating exercise, as is evident from the Casna/McDermott volume. Each time one seems to have a grasp of the subject matter, another fundamental issue arises. This dilemma is so pervasive that the definition of an international joint venture is often elusive. With its release of *International Joint Ventures—The Legal and Tax Issues,* Eurostudy Publishing Company makes a further (and largely commendable) effort to grapple with defining international joint ventures and advising about the structuring of these endeavors in the transnational environment.

Eurostudy identifies itself as a publisher for "the international capital and money markets." It describes this volume as the latest addition to its Money Manager's Library Series (a series of Special Reports on international business topics). At the end of this volume it identifies other releases in its Special Report series that deal with, for example, the corporate management of foreign exchange, interest rate risk management, off-balance sheet financing, and leveraged buyouts.

The material included in this volume represents the proceedings of the International Tax Institute, Inc.'s 28th Annual Seminar in New York City in June 1989, with the papers revised to December 1990. Prominent practitioners in leading international law firms and international accounting firms delivered these papers (and the chapters in this volume).

The volume is divided into two primary segments: nontax and tax. One wishes that better nomenclature could be devised for the nontax portion, but often, the planning concerning international joint ventures revolves around these two fundamental universes. An identification of the more detailed structure of this volume is appropriate. The nontax segment identifies such issues as: (i) the form, structure, and location of the international joint venture; (ii) operational problems; (iii) winding up and withdrawal; (iv) trade secrets and other intangible property; (v) antitrust and competition rules; and (vi) management and accounting considerations. The tax portion examines the national and transnational tax aspects of joint ventures. The volume addresses this analysis on a territorial basis: Belgium and the Netherlands, Canada, France, Germany, Japan, the United Kingdom, and the United States.

A significant part of the nontax segment of these materials is devoted to defining just what this creature called a "joint venture" is. In the United States this term is often interpreted as being a partnership (that is, a transparent entity, as defined for U.S. tax purposes). For many others it might be perceived as consisting of joint shareholdings in a corporate organization. This confusion is compounded in the international environment where foreign law introduces other types of business entities that are not precisely parallel with the partnership/corporation dichotomy that has traditionally existed in the United States. The first part of the volume provides both a U.K. and a Dutch corporate law perspective to enable a more comprehensive examination of the available entity structuring alternatives.

The two other major segments of this first part detail the transfer of intangible property to the joint venture and antitrust issues. In the current environment the

U.S. participant's most valuable contribution to a joint venture may be the intangibles (for example, patents, trademarks, and know-how). The joint venturer contributing these intangibles to the joint venture must be adequately advised about how to make that transfer into the joint venture, how to assure adequate recognition by other joint venturers of the value of these contributed intangibles, and, unfortunately but often most importantly, how to extricate those intangibles from a disintegrating joint venture when the other joint venturer wants to exact some additional price.

One particularly useful chapter (ch. 8, p. 83) is entitled "International Strategic Partnering—When to do it—How to make it work" by David C. Connell of The Technology Partnership Ltd. Too often legal advisors become excessively enmeshed in documenting a transaction and they lose sight of the client's ultimate objective: to establish a business amalgamation that is economically productive. This chapter is a useful interlude in this volume, suggesting that the client-oriented attorney (the only surviving type of legal advisor in the increasingly competitive law practice environment) must focus with the client on how best to exploit market opportunities, build market position, succeed through specialization, achieve cost leadership, and, if necessary, accomplish an orderly withdrawal from the market.

The tax chapters initially proceed from the same general perspective as do the nontax chapters. These determine the types of legal entities appropriate for formulating the structure of the transnationally owned joint venture. These country-by-country discussions also focus on operational tax issues such as transfer pricing and the allocation of expenses, particularly where a third country related company is utilized for extracting earnings from high tax jurisdictions. Two chapters are particularly useful in providing diagrams concerning structuring alternatives: Chapter 13, "Germany—Tax Aspects of International Joint Ventures" (p. 152), by Dr. Jürgen Killius; and Chapter 20, "United States—Summary: Tax Issues in Organizing an International Joint Venture" (p. 246), by Paul M. Bodner.

Because these chapters are derived from presentations at proceedings of the International Tax Institute, much of the presentation is in an abbreviated or outline form. These chapters are certainly not intended to exhaust the subject matter. They are only a starting point. However, many chapters do provide a useful summary of the important issues confronting the organization and management of an international joint venture. From this perspective this volume will be useful. It can assist in determining the scope of examination that must be initiated by the legal advisor in planning to structure the venture and in assuring that the legal relationships among the joint venturers are appropriately documented.

William P. Streng
Vinson & Elkins Professor of Law
University of Houston Law Center

Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant

Edited by Thomas E. Carbonneau. Ardsley-on-Hudson, N.Y.: Transnational Publishers, Inc., 1990, pp. xxi, 227, $85.00

The concept of "lex mercatoria"—an "international" law for transnational business—has been a fertile topic of debate in Europe during the last thirty years.[1] In France Professor Berthold Goldman has nourished the debate by stressing the role of arbitration in the generation of a distinct "legal system." In other European countries the lex mercatoria literature has flourished more diffusely. Authors address such issues as the legal status of trade usages, the common principles that underlie different national legal rules, and the international movement to unify private law.

By contrast, the relatively few Anglo-American authors aware of the European debates have generally been hostile to the concept of lex mercatoria. A handful of authors writing in English—a group that includes the late Clive Schmitthoff, Ole Lando, Harold Berman, and Leon Trakman—have broadcast the seed on barren soil. Only in the relatively isolated field of international commercial arbitration has this seed germinated, but even here most English and American authors treat the concept as a noxious weed. Some writers, such as the late Dr. F. A. Mann, have bluntly questioned whether a lex mercatoria exists at all.

Publication of *Lex Mercatoria and Arbitration* greatly enhances the scope and quality of English-language commentary on the concept. Drawing upon two excellent colloquia sponsored by the Eason-Weinmann Center for Comparative Law at Tulane University,[2] the volume not only gives the reader access to the rich European literature, but also adds informed insights.[3] While it gives few definitive answers to specific issues, the volume embodies the range and vitality of the intellectual debate stimulated by analysis of the concept of lex mercatoria. Readers concerned with the private ordering of transnational business will find the volume informative and rewarding. All academic libraries should acquire the volume.

Twelve chapters, an Introduction, and an Afterword make up the volume. The Introduction summarizes characteristic views of lex mercatoria by incorporating two brief essays by Professor Goldman (pro) and Dr. Mann (con). While the

1. For a recent review of the literature described in the text, see Werner Ebke, *Book Review*, 21 INT'L LAW. 606 (1987).

2. Readers of this review may have read some of the volume's chapters in the *Tulane Law Review*. 63 TUL. L. REV. 431–709 (1989) (Smit, Highet, and Park chapters). These contributions have, however, been carefully re-edited for this volume.

3. In the interest of full disclosure, I should reveal that I was wined and dined as a guest of the Eason-Weinmann Center for Comparative Law at Tulane University at the second of its colloquia incorporated in the volume reviewed here.

authors of the subsequent chapters take up one or more of the themes in these introductory essays, none of the authors is an acolyte. A sampling of chapter titles suggests the broad range of notes struck by the contributors. "The 'New' Law Merchant and the 'Old': Sources, Contents and Legitimacy" (Berman & Dasser); "The Myth of the Lex Mercatoria and State Contracts" (Delaume); and "The Enigma of the Lex Mercatoria" (Highet). Professor Friedrich Juenger's Afterword—which itself adds important insights—valiantly tries to pull together themes, but the very cacophony of the contributions eludes resolution.

The hapless reviewer shares Professor Juenger's dilemma. No contribution is unworthy of note, yet to do justice to each author would require an extensive critique. While recognizing that each reader will find a different mix of contributions more stimulating, I have chosen to illustrate the range and vitality of the volume with brief reviews of only four chapters.

M. Georges Delaume's contribution is a devastating critique of those writers who cite the language of state contracts as evidence of the existence of a lex mercatoria.[4] M. Delaume reviews current practice with respect to modern state contracts. He concludes (pp. 96–98) not only that this practice is rooted in traditional conflict of laws analysis, but also that changing world conditions make a lex mercatoria unnecessary.

By contrast, Professor Bernard Audit's study of transnational sales contracts looks not to current practice, but to the hierarchy of norms recognized by the U.N. Convention on Contracts for the International Sale of Goods. Equating lex mercatoria with trade usages and party autonomy, Professor Audit concludes (pp. 141–43, 159–60) that the Convention complements, rather than contradicts, an existing lex mercatoria composed of custom and contract practices.

To Professor Audit's more abstract analysis, Professor Andreas Lowenfeld adds the flesh of illustrations drawn from his experience as an arbitrator. In practice, Professor Lowenfeld writes, arbitrators do occasionally refer to "general commercial law." In the examples he gives, arbitrators first identify the relevant legal rule using traditional choice-of-law analysis. If the rule is inappropriate for the transaction before them, however, the arbitrators will derive an appropriate "general commercial rule" by a comparison of national laws and (possibly) from international conventions. These general rules, in other words, play the limited, but useful role of negating what Ernst Rabel once called "the awesome relics from the dead past" found in some national laws.[5]

Professor Ference Madl of Hungary also assumes that there is a general commercial law, but his is a more eclectic and positivist conception. The major

4. M. Dulaume quotes (p. 83), for example, the language of a typical early state concession contract:

> The Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles, then by and in accordance with the general principles of law, including such of those principles as may have been applied in international tribunals.

5. Ernst Rabel, *The Hague Conference on the Unification of Sales Law*, 1 AM. J. COMP. L. 58, 61 (1952) (speaking of national sales laws).

component of the lex mercatoria, according to his view, is the body of international conventions, such as the U.N. Sales Convention, that have become law by state action. With this emphasis in mind, Professor (now Minister without Portfolio) Madl demonstrates the extent to which Hungary had already become integrated into the more general international economic order before the cataclysmic events of 1989.

Given how different Professor Madl's conception of the lex mercatoria is from that of Professor Lowenfeld or even from that of Professor Audit, one wishes that the volume incorporated a more open debate or interchange between the contributors. Is there, in fact, a common core of meaning one can give the concept of lex mercatoria?

The authors disagree, however, not only about what the lex mercatoria is, but also about what constitutes current practice. How often, for example, do parties to transnational contracts fail to designate the law they wish to govern their contract? Answers differ. Dr. Mann states (p. xix) that it is "increasingly rare" for parties not to choose the applicable law and, given his assumption that arbitrators will abide by the parties' choice, he intimates that the debate about lex mercatoria deals with relatively few transactions. Professor Lowenfeld, on the other hand, states (p. 53) that "agreements without a choice of law clause are common in my experience." More cautiously, Professor William Park observes (p. 113) that "[t]he variety of choice of law clauses found in international contracts makes it difficult to generalize."

Consider also the question of what legal rules business enterprises expect will govern their disputes when they choose to arbitrate. Professor Thomas Carbonneau suggests (p. 13) that when enterprises refer a dispute to arbitration they assume that arbitrators will temper references to national law with principles appropriate for transnational trade. He writes (p. 13): "Arguably, when arbitrators modify the governing municipal law by referring to the lex mercatoria, they disappoint party expectations. Such references, however, now appear to be part of the bargain associated with the agreement to submit disputes to international arbitration." Professor Lowenfeld expressly agrees (p. 56), while several other contributors implicitly concur.

Dr. Mann, on the other hand, emphatically disagrees (p. xxi): "It may be suggested with confidence that no merchant of any experience would ever be prepared to submit to the unforeseeable consequences which arise from the application of undefined and undefinable standards described as rules of a lex of unknown origin." Professor Park, who stresses (pp. 115–18) that business enterprises seek to make their legal obligations certain so that risks are predictable, presumably concurs with Dr. Mann.

Although no empirical evidence is cited to support these assumptions, Professor Lowenfeld does provide limited anecdotal evidence taken from arbitration cases on which he has sat as an arbitrator. To collect evidence of current practice is obviously very difficult. As Professor Carbonneau laments (p. 5), "[t]he

private, ad hoc character of arbitration makes it difficult to formulate an informed and comprehensive evaluation." "No one," he adds (p. 5, n.22), "can ever be quite sure of what actually happens because the proceedings and determinations are hidden from public scrutiny." If this difficulty is acknowledged for the arbitral proceedings themselves, consider how much more difficult it is to collect evidence of party expectations and practices that leave no traces in official records.

Yet these empirical assumptions are often vital to the authors' analyses, and it is unsettling to discover how often the authors fail to acknowledge the significance of their assumptions. This is all the more disturbing when an author then slips the assumption into normative conclusions. If one accepts, for example, the norm that decisionmakers should enforce the parties' expectations, then one should not object when arbitrators apply the lex mercatoria where parties, by choosing arbitration, expect the arbitrators to do so. This appears to be Professor Carbonneau's position (pp. 10–13). It rests, however, on an untested assumption about party expectations.

To ask for greater care when using empirical assumptions is one thing. To ask for the empirical studies themselves, however, is to ask for another book. Perhaps Professor Carbonneau, who so ably edited this volume and who is now the director of the Eason-Weinmann Center, will use the Center's resources to carry out and publish relevant empirical research.

Peter Winship
James Cleo Thompson Sr. Trustee Professor of Law
Southern Methodist University, Dallas, Texas