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Book Reviews

BOOK REVIEWS

The Legal Implications of Sovereign Syndicated Lending

By Padazis Karamanolis, Dobbs Ferry, New York: Oceana Publications, Inc., 1992, pp. 280, $65.00.

Over the past few years the focus of interest relating to loans and facilities made available to sovereign borrowers has moved away from the process of lending and has settled, quite understandably, on issues related to default and debt rescheduling. At the same time new lending activity has diminished, and the list of sovereign borrowers considered to represent a suitable investment risk has shortened.

It has been tempting, therefore, to regard the main activity of lenders in this area as participation in debt-for-debt or debt-for-equity swaps, or in the case of "official" lenders, debt restructuring and forgiveness arrangements dealt with in bilateral negotiations between those lenders and sovereign borrowers, notably the "Paris Club."

Padazis Karamanolis's book, *The Legal Implications of Sovereign Syndicated Lending,* serves as a timely reminder of the considerable amount of law relating to the mechanics of syndicated eurocurrency lending, whether to private sector or public sector borrowers.

The book begins with a general description of the eurocurrency market, and a brief historical description of the evolution of syndicated lending to sovereign borrowers. It then analyzes the lending process, including the preparatory steps that the borrower must take before contacting the financial institution selected by the borrower to arrange the loan facility, such as the taking of necessary legislative action to ratify the borrowing.

The middle section of the book contains an impressive analysis of the English law of misrepresentation. This analysis is thoughtfully presented in a manner

always relevant to the subject matter of the book while covering the basic law of misrepresentation and negligent misstatement clearly and comprehensively. In this reviewer's opinion, this section represents the feature of the book. The analysis of the application of the "special relationship" test formulated by the House of Lords in *Hedley Byrne & Co. Ltd. v. Heller and Partners Ltd.*[1] is particularly outstanding.

The author devotes the remainder of the book to a wide-ranging survey of the duties and obligations of the agent bank, that is, the bank selected to represent all the lenders in their contractual relationship with the borrower, and a discussion of the limits of the agent bank's authority. Readers who are unfamiliar with loan administration practices in syndicated transactions will find this part of the book particularly useful.

In his introduction, the author describes *The Legal Implications of Sovereign Syndicated Lending* as a "treatise." It is indeed a prodigious piece of research, as evidenced by the exceptionally comprehensive bibliography and voluminous footnotes. The author approaches the discussion of basic legal issues in a straightforward manner in the sense that he deals with those issues in the context of basic law and does not treat them as esoteric or special purely because of the sophisticated financial environment in which they occur.

The value of the book as a reference work is therefore beyond question. As for its value to a practitioner, it certainly commends itself to any practitioner not wholly familiar with the practice of syndicated lending, particularly with regard to the procedural aspects of arranging, disbursing, and monitoring the loan. In this respect Mr. Karamanolis rightly emphasizes the significance of the relationship between the agents and the participants, the relevance of the participants' previous experience of sovereign lending, and the extensive and potentially onerous nature of the duties and obligations of the agent to the creditors. Moreover, Mr. Karamanolis describes some ways in which agents seek to lessen this burden contractually through the use of exclusion and liability limitation clauses. However, the book cannot be described as a practitioner's manual. Indeed, it does not set out its stall in that particular market, which is well served by the works of a number of "academic practitioners," notably Philip Wood's outstanding (though aging) contribution, *The Law and Practice of International Finance.*

Nevertheless, Mr. Karamanolis's book offers much to the experienced practitioner, as well as to the student or academic reader, particularly in those areas in which it deals with specific issues relating to the sovereign borrower. The book is notable for the number of references to economic journals as well as to purely legal commentaries. Furthermore, the resulting blend of economic and legal issues is particularly apposite. This technique underlines one facet of the different approach that should be taken to public sector debt, particularly in relation to

1. [1963] 2 All E.R. 575 (H.L.).

lending to LDCs, namely, the need for the lawyer to be aware of the macroeconomic background to the transaction. In the case of LDC borrowing, a copy of the World Bank's annual World Development Report can be as, if not more, useful than a legal textbook.

Writing a book on sovereign syndicated lending that concentrates mainly on the mechanics of the syndicated transaction and the relationship between the agent bank and the participants is a difficult task. Other areas in which to distinguish between sovereign and nonsovereign borrowing are far more obvious, notably security, default, and debt rescheduling. A whole armful of treatises can be (and have been) written on the subjects of choice of law and jurisdiction. Moreover, ten years into the debt crisis and three years after the first attempts at implementing the debt reduction techniques promoted by the U.S. Government (principally through the issue of U.S. Treasury bonds known as "Brady Bonds" in exchange for unsecured debt), articles on debt-for-debt swaps, debt-for-equity swaps, and proposals for the securitization of sovereign debt still dominate the pages of financial law journals. At the same time, as banks continue to be pressured by the need to make provisions for bad or doubtful loans, general lack of liquidity, and the constraints of the capital adequacy rules, a "flight to quality" in terms of lending criteria has developed; and, sad to say, many sovereign borrowers are now perceived as lacking the necessary qualities of first-class borrowers.

However, the task remains relevant, and Mr. Karamanolis has accomplished it impressively. That any greater degree of thoroughness or scholarship could be brought to bear upon the subject than he has applied is difficult to imagine. The book is worth acquiring and studying for the footnotes alone. All in all, *The Legal Implications of Sovereign Syndicated Lending* represents a welcome contribution to our understanding of the process of sovereign syndicating lending and the rights, obligations, and duties of the principal parties involved.

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Nationale Souveränität: Versuch über Ende und Anfang einer Weltordnung [National Sovereignty: Essay on the End and the Beginning of a World Order]

By Rolf Knieper. Frankfurt am Main: Fischer Taschenbuch Verlag, 1991, pp. 247, DM9.80 [$15 approx.] (pb).

In his study on "the end and the beginning of a world order" Knieper explores whether the concept of national sovereignty is still viable in an interrelated world economy that dominates the political system. In his analysis he draws on his experience as legal adviser to the government of the Central African Republic. Knieper, who teaches law at the University of Bremen, Germany, spent almost a decade in Africa and, inter alia, was involved in negotiations concerning that country's foreign debt. Against this background, his sympathies are obvious and some of his attitudes are predictable. But since he is almost unacademically straightforward in sharpening his arguments, his book is refreshingly undogmatic and makes for entertaining reading. The sophisticated sociotheoretical jargon is nicely balanced by down-to-earth examples from the real world delivered with irony or even sarcasm.

The book starts with sketches from Knieper's African years. They are fictionalized in an African minister of planning and finance's diary that brings forward Knieper's central observation: that national sovereignty often is nothing but an empty notion vis-à-vis the economic reality, the latter being prominently represented by the World Bank and the International Monetary Fund.

From there, Knieper organizes his analysis in five main chapters. The first two chapters (pp. 27–87) take the reader on a tour d'horizon of the notion of national sovereignty and the use of this concept in the process of colonialization and decolonialization. Astonishingly, he does not account for the interrelation between the development of the nation state and the breakthrough of democracy in Europe.

Part three (pp. 88–168) is devoted to collecting evidence for the loss of significance of the territorial state and the notion of the nation state. The author stresses the importance of political and legal reactions and the emergence of structures that react to the transnationalization of production, examples of which are the Multilateral Investment Guarantee Agency and the International Center for the Settlement of Investment Disputes. According to the author all these trends are symptoms of transnationality that might eventually lead to a-nationality.

The following chapter (pp. 109–161) looks at development policy. The author's reading thereof is that development policies are a variant of world domestic policy fulfilling state tasks within an integrated economic system. Not admitting this fact openly is bound to lead to distortions and inconsistencies sometimes amounting to humiliation of the Third World countries.

The final part (pp. 162–212) reflects on the specific task of legal form and order in structuring "secular universalism." Knieper aims at nothing less than to build "a general theory of sovereignty and the nation state for practical purposes." In that attempt, he links his historical interpretation to phenomena often seen as unrelated.

Observing the paradox of an ever-increasing move for national sovereignty, we still lack criteria to make sensible judgments on who deserves it and who does not. Almost every day since the publication of Knieper's book has provided ample evidence of this lack, be it in former Yugoslavia, the former Soviet Union, or in the Gulf War, which Knieper treats in a postscript. Although the book is written mostly with least developed countries (LDCs) in mind, the arguments ultimately extend beyond LDCs. Knieper's proposal on a standing United Nations armed force and denationalization patterns within the United Nations no longer belong in the sphere of academic discussion, but are at the very center of politics in Somalia and former Yugoslavia.

Since there is no turning back to the pre–1989 status quo, national sovereignty needs to be thoroughly reconsidered. The thoughtful and thought-provoking questions Knieper raises need to be answered, if not exclusively, nevertheless prominently, by international law and international lawyers.

The unease that remains after reading Knieper's book stems from the daily confrontation with the irrationality apparently inherent in the nationality and nation concepts. His solutions are directed towards universal structures that abstract from national orientations. It is hard to believe that it will be possible to derive them in a rational manner and overcome the irrational attitudes that we observe. With respect to the emerging superstate one might have doubts about Knieper's trust in such a state's problem-solving power. Are the systems we try to manage today not complex enough? But then, Knieper would argue that we are already set for that direction and the choice we are left with is either to face that challenge or let things happen. Laissez-faire, in his view, is far too dangerous.

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U.S. International Taxation

By Joel D. Kuntz and Robert J. Peroni. New York, New York: Warren, Gorham & Lammont, Inc., 1991, 2 vols., looseleaf, $295.00.

Most tax practitioners will admit that international taxation is probably the most difficult area of taxation. The questions that arise in this area have no easy answer. In addition, teaching a course in international taxation has become one of the

toughest challenges that a law professor will encounter. The rules are extremely complex and, at times, can be mind-boggling. This complexity results in large part from the changes enacted by Congress during the 1980s as well as the massive number of regulations interpreting those changes.

Until about four years ago practitioners and academics in the international taxation field had relatively little guidance in the way of treatises. There was, of course, Rhoades and Langer's *Income Taxation of Foreign Related Transactions* as well as Postlewaite's two treatises, *International Corporate Taxation* and *International Income Taxation* (with M. Collins). These treatises were (and are) excellent—but that was about it.

In 1989, Michael J. McIntyre's *The International Income Tax Rules of the United States* was released. This treatise does not go into great detail in any particular area, but it is a good fundamental starting point for research. McIntyre's treatise remains an excellent text to use for a law course in international taxation. It does not get bogged down in detail and therefore is ideal for students.

The following year, Joseph Isenbergh's two-volume *International Taxation* was published. This treatise remains the finest commentary on international taxation, but does not go into quite the detail of the other treatises. In 1991, Boris I. Bittker and Lawrence Lokken released *Fundamentals of International Taxation*. This treatise is a paperbound version of the seven chapters on international taxation contained in the five-volume *Federal Taxation of Income, Estates and Gifts*. *Fundamentals of International Taxation* is very similar to McIntyre's treatise and is also an excellent text for use in a law school course.

With the publication of McIntyre, Isenbergh, and Bittker and Lokken, there seemed to be little need for another international taxation treatise. But in 1992, after four years of anticipation, *U.S. International Taxation* by Joel D. Kuntz and Robert J. Peroni finally appeared. It was worth the wait! This treatise will soon, if it has not already, take its place alongside Bittker and Eustice, Ginsburg and Levin, and McKee, Nelson, and Whitmire as the definitive treatise in its area. It is extremely well written and goes into tremendous detail while covering virtually every aspect of international taxation. In addition, the authors are well-respected authorities in taxation. Mr. Kuntz practices tax law in Portland and co-authored (with Professor James S. Eustice) *Federal Income Taxation of S Corporations*. Professor Peroni is the Robert Kramer Research Professor of Law at George Washington University and co-author of several leading tax publications. The combination of a private practitioner and an academic seems to have worked extremely well with respect to this treatise.

Kuntz and Peroni present *U.S. International Taxation* in a format unlike other international tax treatises, but one that makes a lot of sense. They divide the treatise into four main parts comprising two volumes. The first part is titled "General Matters." This part covers areas of general application in the international taxation field, such as sourcing of income and deductions as well as realloca-

tions of income and deductions among related persons. The second part is titled "Taxation of U.S. Persons." This part covers U.S. persons with foreign activities, so-called "outbound" transactions. More specifically, it deals with the definitions of U.S. citizens and residents, controlled foreign corporations, foreign tax credits, tax haven arrangements, and reorganization involving foreign corporations with U.S. shareholders. The third part is titled "Taxation of Foreign Persons." Generally, it covers foreign persons with U.S. activities, so-called "inbound" transactions. This part includes effectively connected income, branch profits tax, withholding, U.S. corporations with foreign shareholders, and income tax treaties. Part four is titled "U.S. Possessions." It covers such areas as taxation of individual residents in Puerto Rico, corporations organized in Puerto Rico, residents of the Virgin Islands, and corporations organized in the Virgin Islands. The authors state in the preface that chapters on Foreign Currency Transactions and Translations and on Corporations Used to Encourage Exports will be added later as part of future supplements. This material was apparently omitted so as not to delay any further the release of the treatise.

The only confusion regarding the organization of the treatise is that a particular code section might be given detailed coverage in more than one area. For example, chapter C1 of volume two (General Taxation—Foreign Persons with U.S. Activities) covers in great detail section 897 relating to gains and losses from dispositions of U.S. real property interests. But the rules regarding whether an interest in a domestic corporation may be a U.S. real property interest under section 897 are covered in a separate chapter—chapter C3 of volume two (U.S. Corporations Owned by Foreign Persons—Foreign Persons with U.S. Activities). The authors apparently split this material to ensure that chapter C3 was complete in its coverage of U.S. corporations owned by foreign persons. The approach is sensible, but one that takes some time to accustom oneself.

The treatise is very thorough in its coverage and includes numerous examples to illustrate the application of the international tax rules. Many of the examples are taken directly from the applicable regulations. The authors also provide fairly extensive commentary on various facets of the law. One minor criticism of the treatise is that, at times, the authors could go into more detail and analysis of a particular area of law rather than simply footnoting to a case or ruling. Because of the authors' expertise in the area, knowing their thoughts about the significance or importance of a case or ruling and how it applies to various fact patterns would be helpful.

The final chapter in part three of the treatise, on income tax treaties, is extremely helpful. The authors include numerous tables detailing the tax rates on various items of income for all of the countries with which the United States has an income tax treaty. For example, in table C4-4, if the payee is a resident of Greece, the tax rate on dividends paid by a U.S. corporation is generally 30 percent. If a U.S. subsidiary to a foreign parent corporation pays the dividend, the tax rate remains

at 30 percent. The table also shows that this information can be found in article 9 of the treaty. The tables save tremendous time when conducting research on various income tax treaty provisions.

The authors also do an excellent job of keeping the treatise current. The treatise is updated three times a year. The most recent supplement, 1992 Cumulative Supplement No. 2, released in September 1992 contains, among other things: a discussion of the final regulations defining U.S. resident aliens under section 7701(b), which were released in April 1992; the proposed regulations on transfer pricing under section 482, which were released in January 1992; and the proposed regulations on passive foreign investment companies under section 1291, which were released in April 1992. With the large number of changes taking place in international taxation, it will be interesting to see how quickly the authors will issue the second edition of the treatise. In just nine months of release the supplement has already grown quite large.

U.S. International Taxation fills a much needed void in the area of international taxation treatises because of its comprehensive coverage. For practitioners the treatise will provide quick answers for questions that may arise in practice. Consequently, practitioners will want to keep it within arm's reach. As Professor Eustice wrote in the preface, "This treatise will pay for itself the first day it arrives in the office." For academics it is not ideally suited for classroom use. But it is an excellent source for the professor for classroom preparation as well as recommended outside reading for students who may want to go into greater detail in a particular area.

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Public International Law: A Guide to Information Sources

By Elizabeth Beyerly. London, U.K.: Mansell Publishing Limited, 1991, pp. xviii, 331, $100.00.

Prior to her retirement in 1986, Elizabeth Beyerly was the head of Readers' Services and Documentation Section at the United Nations Library in Geneva. The library is an important center for research in international law and relations, especially in areas of interest to the many different world organizations located in Geneva. It has one of the largest collections on international law in Europe, and its holdings of international documents are especially noteworthy.

People who used the library when Beyerly worked there remember her as an exceptionally knowledgeable and skillful reference expert. She knew international

law literature well. She also possessed the uncanny ability to unearth from the most unlikely sources information on anything pertaining to international law or relations. Many regretted her retirement and were greatly concerned that with her departure the secrets of her craft would disappear. Beyerly recognized this danger, and her sense of responsibility led her to put the entirety of her accumulated knowledge into writing. This book is the result. It is Beyerly's bibliographic memoir of her professional experience, a record of the published sources she found helpful in searching for information on international law. The sources she mentions, and the order in which she places them, may seem unusual until one remembers that she bases her choices on her own personal preference. The book is not a comprehensive bibliography of every publication on international law. It is a guide to the sources she used, presumably with great success, in her searches for information. Using these sources as a base, one can locate other and more recent materials on the same subjects through library catalogs and more current bibliographies. The book, as Beyerly explains, is "an attempt to provide partial inventory assistance through the proliferating" mass of materials on public international law.

Roughly estimated, the book lists more than 2,000 titles on public international law—monographs, collections of essays, journals and some individual journal articles, treaty series and collections, reports, official documents, conference reports, and a variety of other types of publications. Annotations accompany most of the entries. Some annotations are quite lengthy, describing not only the works themselves, but also referring to other publications on the same issues or topics. Some annotations include brief comments on the origins and developments of the relevant areas of law as well as on the historical origins of the publications themselves. The entries are arranged by topics, but the book has an excellent index that combines names of authors, titles, geographic places, and subjects in one alphabetical sequence.

The topical arrangement is somewhat complex. It reflects the author's taxonomic view of public international law. However, once mastered, the arrangement is relatively easy to understand. The author divides the book into two parts. The first part describes both the primary and secondary published sources that constitute the written body of public international law—the record of its foundations. Loosely following the order of public international law sources mentioned in article 38 of the Statute of the International Court of Justice, this part begins with sections on treaties, customary law, judicial decisions, and official publications as the primary normative sources of evidence for public international law. Next come sections on such secondary sources as treatises, commemorative essays, dissertations, periodicals and yearbooks, encyclopedias and dictionaries, and conference reports, as well as colloquia. The first part concludes with a discussion of general reference aids, including bibliographies and directories.

The entries in each section appear in order of their importance as perceived by the author. For example, the section on treaties begins with the 1969 Vienna Convention on the Law of Treaties. Then come entries for the United Nations Treaty

Series, Multilateral Treaties Deposited with the Secretary-General (published annually as a list and containing current status information), the monthly Statement of Treaties and International Agreements Registered or Filed and Recorded with the Secretariat of the United Nations, the League of Nations Treaty Series, and so on. Altogether the book mentions some eighty publications in this section. In addition to treaty series or collections the book references treaty indices and catalogs, manuals and articles on treaty research, and even such computerized treaty information projects as the United Nations Treaty Information System (UNTIS) or Professor Peter Rohn's world treaty project at the University of Washington (this reviewer's computerized project for indexing the U.S. treaties began too late for inclusion in the book). The author's knowledge and critical judgment of treaty literature is clearly evident from the scope and depth of the publications she selected for inclusion in this section. She repeats the same quality of careful and intelligent selection in the other sections. In terms of time, except for classics (for example, Grotius) or historically important series (for example, the Martens treaty collections), the author limits the selection to current series or works published mainly after 1950. In some sections the time frame is even more recent. Linguistic coverage also is relatively selective. Though publications in the English language predominate, the book references many major works in other European languages. Geographic scope, however, is virtually unlimited for those countries where publications are available in the English language.

The second part of the book lists predominantly monographic works that deal with specific topics or discuss public international law from an interdisciplinary perspective. It consists of twenty-five sections. The author divides several of them, such as the section on peace and war, into subsections. This part of the book exhibits more variety in its depth of coverage than other parts. Some sections offer a complete overview of a topic. Others are no more than highly selective and generally constitute incomplete introductions to the literature in their particular areas. Sections on international criminal law, international environmental law, international trade law, international communication law, and international transportation law in particular belong in this latter category.

Though excellent in every respect, Beyerly's work suffers from the same problem that plagues bibliographic surveys and guides in general. Unless bibliographies are continuously and promptly updated, they do not contain information about the most recent literature. Yet in research, especially in active and intensively developing disciplines such as international law, current information is most in demand. Law books in general have the bad habit of becoming obsolete within a matter of a few years. Bibliographies date even more quickly, and the process of their obsolescence begins with the completion of the manuscript rather than the date of publication. Where the gap between manuscript completion and actual publication is long, a bibliography may be dated when it is published. Unfortunately, the present book exhibits this problem. Though published in 1991, the effective cutoff date for information it contains is mid-1987. The book contains a handful of entries for

publications with more recent imprint dates, but for all practical purposes the bulk of the information is pre–1987. Much has happened with international law since that time. It has expanded considerably and has moved into several new rapidly developing areas. Concomitantly, much has been published that is new and important. Commenting in her book on the growth rate of publications in the international law area, Beyerly writes that between 700 and 800 new monographs, several thousand articles, and countless official documents are added every year. The rate is likely to be higher now. According to this reviewer's estimate, more than 300 new law journals with an international content or focus have appeared in the last five years. Also, at least twenty new sovereign states and a dozen new international organizations have come into existence. All of them make international agreements and publish official documents.

International law is a discipline of fast and intensive development. Bibliographic analysis of its published sources has to be equally fast to be useful to researchers. Unfortunately, reality prevents prompt bibliographic analysis. Obtaining raw and indiscriminate bibliographic information on most new publications is relatively easy. Computer databases cumulate such information from different sources on a daily basis, but such lists are virtually meaningless unless they are carefully reviewed, analyzed, and sorted into appropriate categories. First, new lists are too voluminous to be of use to someone without bibliographic expertise. Second, the entries in such lists give no indication about the content of a publication or its focus and utility. Third, the lists, despite their size, are not comprehensive. The information in these lists derives from specific and rather limited sources.

So far, no bibliographic service exists that globally monitors every international law publication. Creating a service of this kind is predicated upon finding and employing on a permanent basis many bibliographic experts with good working knowledge of international law (information professionals in their own right). There must be experts who can be expected to sift intelligently through all information, study the contents of publications and evaluate their utility, and compile usefully organized and annotated bibliographies. So far, funding for this type of service has been unavailable, and no adequate market exists for the commercial distribution of its products. Bibliographic research is placed very low on the totem pole of legal research in general. Considering the realities of the situation, all that remains is a hope that there will be more dedicated international law bibliographers like Beyerly who from time to time decide, as a labor of love, to compile bibliographic works of similar quality. Her work is especially valuable because it combines knowledge with sound judgment. It contains competently selected information on the sources of international law as well as guidance on how that information can best be used. Beyerly has put together a guide that should help research in international law become simpler and easier for at least a few years.

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The United Nations Decade of International Law

Edited by Marcel Brus, Sam Muller, and Serv Wiemers. Dordrecht/Boston/London: Martinus Nijhoff, 1991, pp. viii, 160, Dfl. 125.00, $84.50, £43.50.

Perhaps the United Nations should have waited until the close of the twentieth century to decide whether to dub the 1990s the "Decade of International Law." As it is, the layperson might be forgiven for being somewhat puzzled at why of all post-World War II decades, the 1990s had been given that solemn title. It is, after all, the period during which Iraq flouted the most fundamental norms of international law by brazenly invading Kuwait; North Korea withdrew from the Nuclear Non-Proliferation Treaty, raising the threat of a nuclear holocaust; and crimes against peace and humanity of the most shocking and brutal kind were committed (and, as of this writing, are still being committed) in the former Yugoslavia, largely by the Bosnian Serbs.

The optimist, on the other hand, might point to other developments, such as the historic response of the United Nations Security Council to Iraq's invasion of Kuwait; the efforts of U.N. peacekeepers in the former Yugoslavia; the adoption by the Security Council, for the first time, of a resolution calling for the establishment of an international criminal tribunal—in this case, to deal with crimes committed in the former Yugoslavia; the issuance of an Order by the International Court of Justice (ICJ or World Court), calling upon Yugoslavia (Serbia and Montenegro) to "immediately . . . take all measures within its power to prevent commission of the crime of genocide"; the humanitarian and relief efforts of the United Nations in Somalia; the efforts of the United Nations to establish peace and order in Cambodia, Angola, and El Salvador; the long overdue but most welcome independence of Namibia; the improving situation in South Africa; and the increasing recourse to the World Court for the settlement of disputes between states.

Whether one chooses to emphasize the positive or negative aspects of international relations at the beginning of the 1990s, however, there remains a certain irony in the fact that the initiative to promote international law in the closing decade of the twentieth century came from the Non-Aligned Movement. The Movement is a group of states, many of which did not exist at the outset of the century, and most of which were sharply critical of what they viewed as the Eurocentric system of international law that prevailed when they finally attained independence in the century's latter half. In contrast, the world's major powers were the strongest promoters of international law at the turn of the century. Yet they, or at least some of them, are the states that are the most cautious about its application and development at the century's close (an interesting statistic in this regard is that nine of the twelve cases before the World Court as of September 1991 were brought by Third World countries). A further irony is that Iraq, a state within the Movement that was one of the chief promoters of the concept of the Decade of International Law, inaugurated the 1990s with one of the most flagrant violations of the system of world order in half a century.

As already indicated, the Decade was an initiative of the Non-Aligned Movement. At a ministerial meeting held in The Hague from June 26–29, 1989, to commemorate the ninetieth anniversary of the First Hague Peace Conference, the eighty members of the Movement attending the meeting called upon the United Nations General Assembly to proclaim the 1990s the Decade of International Law.[1] The General Assembly responded by adopting Resolution 44/23 on December 17, 1989, which proclaimed the Decade and set forth its purposes as follows:

a. To promote the acceptance of and respect for the principles of international law;
b. To promote means and methods for the peaceful settlement of disputes between states, including resort to and full respect for the International Court of Justice;
c. To encourage the progressive development of international law and its codification; and
d. To encourage the teaching, study, dissemination and wider appreciation of international law.[2]

At its Hague meeting the Movement also established a ministerial committee charged with planning activities for the Decade and proposed the convening of a Third Hague Peace Conference at the Decade's close, in 1999. The committee consisted of Yugoslavia (president), Nicaragua, Iraq, Indonesia, Senegal, Angola, and Iran. It hardly need be noted that most of these countries experienced, or are experiencing, severe internal upheavals, many with international implications, in the closing decades of the twentieth century.

The idea of a Third Peace Conference played to mixed reviews in the General Assembly. Following the general pattern noted above, Western states generally resisted committing themselves to hold such a meeting and were only lukewarm toward the Decade in general. The Third World (including China) generally favored holding the Conference and was joined in this position by the Soviet Union, as it then was.

The volume under review focuses on the second purpose of the Decade identified by the General Assembly, namely, promotion of the peaceful settlement of disputes between states. It devotes a single chapter—albeit a very thorough one—to another purpose, encouragement of the progressive development of international law and its codification. And the work as a whole is intended as a contribution to the fourth objective (p. 9). The volume is a republished collection of eleven essays that originally appeared in volume 3 of the *Leiden Journal of International Law*. While many of the authors are well known, the reader may lament the fact that their contributions were not structured by the editors so as to form a coherent

1. Declaration of the Ministers for Foreign Affairs of the Movement of Non-Aligned Countries Meeting in The Hague to Discuss the Issue of Peace and the Rule of Law in International Affairs, June 29, 1989.

2. U.N.G.A. Res. 44/23, operative para. 2.

whole. The editors, indeed, express "surprise" that "the various contributors had more in common than we had expected," but admit that "the specific subjects of the contributions vary considerably." (p. 10) It is almost as if prospective authors were invited to "write something on the Decade" with little or no guidance as to what specific topics to address or how individual contributions could relate to one another. The resulting lack of coherence lessens the utility of the volume, although many of the essays remain of interest.

It is also unfortunate that of the twelve authors, only two are from developing countries, and none is from Africa. Eight of the contributors are from Europe and two are from the United States. Thus ten of the twelve authors are from Western countries (although two of these are from countries with "economies in transition," Poland and Russia). This could be viewed as being academically appropriate, since the prime movers behind the concept of the Decade were developing countries. But the lack of regional balance does result in a spectrum of views that is less diverse than one might have hoped. In this light, it does not seem "surprising" that the contributors had much "in common."

The volume consists of a preface by the then-U.N. Secretary General, Javier Pérez de Cuéllar, an introduction by two of the editors (Muller and Brus), and ten essays. The essays are generally in the neighborhood of ten pages in length, although several are twice or three times that long. Roughly half of the contributors are recognized authorities in the field of international law, while the remaining authors have yet to attain this status—a mix that the editors indicate is "[i]n line with the policy of the [Leiden] Journal." (pp. 9–10) The contributions of the authors in the latter category are solid, however, and complement those of the better-known authorities.

The lead essay, by Sompong Sucharitkul, sheds light on the work of a body that has received too little attention in the literature. The essay examines the role of the U.N. International Law Commission in the codification and progressive development of international law. Sucharitkul assesses four decades of the Commission's work (1949–89), decade by decade, and offers his evaluation of its achievements and shortcomings. He points to the increasing politicization of a body that was established as a group of independent experts and laments the "brain-drain" caused by, among other factors, the politically motivated failure of the General Assembly to reelect certain key members. The essay is thorough and provides useful insight into the work and workings of this important body.

In the second essay, J.J. Quintana laments the "missed opportunity" to initiate a diplomatic mission designed to achieve wider acceptance of the compulsory jurisdiction of the ICJ. Such a mission had been proposed in an early draft of the Non-Aligned Ministerial Declaration, but was not included in the final version. Acceptance of the ICJ's jurisdiction is also the subject of the next contribution. In it Louis Sohn deals with the notion of a new agreement on the settlement of international disputes—an idea proposed by the Non-Aligned Movement and endorsed by the Soviet Union. Sohn takes a practical approach to dispute settle-

ment, recognizing the unlikelihood in the near future of unlimited acceptance by all members of the international community of the ICJ's compulsory jurisdiction. He proposes several ways in which states could accept the World Court's jurisdiction that are less ambitious, and therefore less threatening, than full acceptance of ICJ authority to decide all cases. The proposals are carefully thought out and could pave the way to wider resort to the World Court.

Rejection of the ICJ's jurisdiction, compulsory or otherwise, by the Soviet Union until the end of the 1980s is the subject of the next essay, by G. Shinkaretskaya. In the context of a survey of the Soviet Union's historical attitude toward international law in general (including treatment of the "era of compulsory hypocrisy," p. 61), Shinkaretskaya brings the reader up to date (April 1990) on the Soviet attitude, concluding that the country was then "beginning to show readiness to get involved in the process of adjudication." The next two contributions, by Richard Falk and Henry Schermers, deal with the role of domestic courts in implementing international law. Falk focuses on the United States, while Schermers deals with Europe. Schermers rejects Falk's argument that international law can be made more effective through suits in domestic courts, particularly to challenge government actions in the area of foreign policy. Reflecting his European perspective, Schermers argues that it is for parliament, not the courts, to rectify foreign policy that is contrary to international law. "In Europe," he observes, "it is generally accepted that courts should not take policy decisions of that kind." (p. 77) Falk, on the other hand, does not accept the idea of judicial restraint in this field, finding it "objectionable" both on world order and constitutional grounds. He believes that "citizens . . . deserve to be governed in accordance with international law and that international law would be more widely respected if domestic courts were more generally entrusted with part of the mission of implementation." (p. 76)

The final four essays deal with international dispute settlement in specific fields. P.H. Kooijmans deals with human rights disputes between states. He observes that interstate procedures leading to a binding decision have been resorted to only infrequently and that government charges about a human rights situation in another state are usually politically motivated. Kooijmans discusses recent developments in the context of the Conference on Security and Cooperation in Europe (CSCE) relating to the settlement of human rights disputes and makes proposals concerning the establishment of a body within the CSCE that would have fact-finding and reporting powers. Eric Myjer next treats the law of arms control and international supervision, verification, and dispute settlement, again principally within the CSCE context. He makes suggestions for dispute settlement procedures in that field, drawing on the CSCE mechanisms discussed by Kooijmans.

The last two contributions take the International Center for the Settlement of Investment Disputes (ICSID) as a model for new dispute settlement procedures in the fields of trade and outer space, respectively. Rudolf Ostraihansky discusses the future of dispute settlement within the General Agreement on Tariffs and Trade

(GATT), observing that traditional interstate models are not wholly appropriate in this field since most trade disputes are between a state and a private foreign person. This, he argues, would make ICSID procedures a suitable model. Finally, Hanneke Van Traa-Engelman argues that ICSID-like procedures would be appropriate for the settlement of space law disputes involving private actors.

Despite the shortcomings indicated above, the volume is an interesting collection of essays on subjects of contemporary concern to states and international lawyers, and makes a positive contribution to the United Nations Decade of International Law.

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Private International Law of Tort and Product Liability—Jurisdiction, Applicable Law & Extraterritorial Protective Measures

By Peter Kaye. Brookfield, Vermont: Dartmouth Publishing Co., 1990, pp. ix, 246, $64.95.

Products liability litigation is no longer limited to home-grown litigation tried in American courts. Nor is it limited to foreigners seeking out American defendants to hold accountable in American courts for injuries suffered abroad. Other countries now entertain advanced tort litigation, and as a result sophisticated lawyers must be aware of developments abroad, both for litigation and for planning. Peter Kaye of the University of East Anglia provides a useful guide to recent procedural developments in the United Kingdom involving international products liability problems. He divides his book into four parts: an analysis of jurisdictional problems, including the exercise of discretionary jurisdiction; an extended discussion of choice of law; an even longer discussion of the power of English courts to restrain the disposition of property overseas as a measure of interim relief; and an examination of the proposals released at the very end of 1990 by the English and Scottish Law Commissions on Tort and Delict.

I. Jurisdiction

The 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters[1] has been in effect in the United Kingdom since 1982. Jurisdiction[2] under that agreement is not complicated; the Brussels Convention bases the proper assertion of judicial power primarily on the defendant's domicile, regardless of the defendant's nationality.[3] If the defendant is domiciled in a state that is a party to the Convention, then jurisdiction in tort may also lie "where the injury occurred."[4] Noticeably absent from these provisions is jurisdiction based on presence alone, or what American lawyers call "tag" jurisdiction—a pernicious practice recently approved by the U.S. Supreme Court in an unfortunate decision.[5]

Kaye gives a useful, albeit brief, analysis of these jurisdictional provisions (ch. 3),[6] but the discretionary exercise of jurisdiction by English courts concerns him most.[7] Under this heading Kaye discusses forum non conveniens,[8] forum-selection clauses, lis pendens, and related concepts. The discussion is quite good, focusing on procedural issues such as the allocation of the burden of proof. (He provides a nice table summarizing the law in each area—p. 28.) Kaye concludes his review of methods of declining jurisdiction with the observation that forum non conveniens remains the "central doctrine" in this area, and that the English courts are really looking for a "forum conveniens" (p. 46). In the words of Lord Goff in the House of Lords, the proper forum is the one where "the case may be tried more suitably for the interests of all the parties and the ends of justice."[9] That search for the jurisdiction where the litigation can best be heard mirrors recent

1. European Communities Convention on Jurisdictional and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 8 I.L.M. 229 (1969) [hereinafter Convention].

2. *Id.* at 232–36. The Convention also addresses the question of enforcing judgments. *Id.* at 237–39. Kaye, however, only perfunctorily addresses that issue (pp. 10–13). As in the United States, an action to enforce does not include a review of the merits, although defenses to enforcement based on the public policy of the forum are available.

3. "Domicile" under the Convention differs considerably from its common law origins. The amenability of a corporation to jurisdiction resembles a corporation's citizenship for diversity purposes. *See* 28 U.S.C. § 1332(c) (1989).

4. Convention, *supra* note 1, at 232.

5. Burnham v. Superior Court of California, 495 U.S. 604 (1990).

6. Kaye only addresses jurisdiction under the Convention in tort; for a more general discussion of Convention jurisdiction in light of American practice, see Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121 (1992).

7. Scottish law is not discussed at this point, a peculiar lacuna given the Scottish origin of forum non conveniens. *See* C. Paul Rogers III, *Scots Law in Post-Revolutionary and Nineteenth Century America: The Neglected Jurisprudence*, 8 LAW & HIST. REV. 205, 210–12 (1990).

8. Forum non conveniens is not available when the defendant is domiciled in a state that is a party to the Convention (p. 27).

9. Spiliada Maritime Corp. v. Cansulex, Ltd., [1987] 1 App. Cas. 460, 476 (H.L.).

developments in America, where the movement to have the case tried in the most appropriate forum has become widespread and intensive.[10]

II. Choice of Law

The American reader will find Kaye's treatment of choice of law less sophisticated and less satisfying. He begins by analyzing the defects of the lex loci delicti system now prevailing in England and then explores alternative methods of choosing an applicable law. Americans understand well the lex loci delicti defects, although the complete demise of the system represented by the first *Conflicts Restatement* in the United States has been a very long time coming.[11] The lex loci delicti rules, in brief, can lead to arbitrary results because they are inflexible and not related either to policy or fairness; judges do not like the bad decisions that the rules sometimes call for, and, as a result, "cheat" when applying the rules in order to perform justice.

The present state of English choice of law derives from *Boys v. Chaplin*,[12] a case whose ratio decidendi, "if it exists at all, is notoriously difficult to discern" (p. 59). Kaye believes, however, that the applicable law to be applied under the *Boys* test is either (a) a combination of lex loci delicti and lex fori,[13] or (b) the proper law of the tort (p. 57). Kaye criticizes the *Boys* doctrine, drawing heavily on American developments. He considers alternatives such as lex fori and lex delicti, but finds them unsuitable. Lex loci delicti, for example, is unacceptable if the goal of tort law is compensation rather than regulation (p. 92). Similarly, the concept of the "proper law of a tort,"[14] which resembles "the most significant relationship" approach taken by the *Restatement (Second) of Conflict of Laws*,[15] suffers both from doctrinal indeterminacy and because it is "ill-equipped to accomplish perceived policy ends" (p. 94). Instead Kaye favors application of the law of the plaintiffs' "habitual residence" in order to achieve the "central and universal community aspiration" that tort law represents (p. 102). The difficulty with this solution is that domicile, or habitual residence, or any other single

10. *See* William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Antitrust Injunctions in Federal Courts*, 70 TEX. L. REV. 1663 (1992); Louise E. Teitz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings*, 26 INT'L LAW. 21 (1992) (model statute proposed by a subcommittee of the American Bar Association).

11. *See* Patrick J. Borchers, *The Choice of Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 373 (lex loci delicti rules still prevail in fifteen states). The attack on the lex loci delicti rules usually is dated to 1958 when Brainerd Currie launched his assault on them. *Id.* at 360.

12. 1971 App. Cas. 356 (1969).

13. This rule is known as the "double actionability" rule of Phillips v. Eyre, 22 L.T.R. 869 (Q.B. 1870). It requires that a cause of action must be available under both lex fori and lex loci delicti (p. 56).

14. *See* J.H.C. Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951).

15. This test has been adopted in about half of the states. *See* Borchers, *supra* note 11, at 373.

method of choosing law necessarily achieves functional and fair results only fortuitously.[16]

III. Extraterritorial Protection

A recent spate of English cases have worked "a profound change" in the ability and willingness of English courts to grant "*Mareva* injunctions," orders "purporting to have extraterritorial effects upon assets situated abroad" (p. 113). Kaye's unfailingly useful summary (pp. 169–72) clarifies much of the law in the area. The discretion granted to the judges to issue those orders has come complete with workable procedures. Kaye justifiably concludes that "those who possess assets outside the United Kingdom . . . must take care to remain aware of activities of their opponents in the English courts" (p. 172).

IV. Law Reform

Kaye's last discussion deals with the proposals of the English and Scottish Law Commissions concerning choice of law in tort (p. 177).[17] Their suggestions would make the law of the place of injury prima facie applicable; however, the lex loci delicti could be displaced by the proper law of the tort where appropriate. But if the most significant portion of the tortious conduct took place in the United Kingdom, then British law must be applied.

Prima facie application of lex loci delicti is hardly a radical concept. Yet, all presumptive rules suffer from a common deficit: there must be some way of determining when the presumption has been overcome. This deficit is a major failing of the otherwise useful *Restatement (Second) of Conflict of Laws*, and it is a problem not addressed either by Kaye or (apparently) by the Law Commissions.

V. Conclusion

Kaye's legal arguments are well researched and soundly presented. However, his book suffers problems in organization and prose. Particularly unfortunate are Kaye's lengthy and convoluted sentences. Sometimes it is difficult to figure out exactly what are the black letter rules. Also, the very detailed factual analysis of a large number of cases will irritate American readers. This reviewer knows that British lawyers, unlike their American counterparts, actually read cases in depth, but more effort from Kaye to cut through the case law underbrush would have enabled this reviewer to find both trees and forest more easily.

Nevertheless, anyone who wishes to grapple with developments in England concerning transnational products liability law will find this book useful. Both

16. *See* Bruce Posnak, *Choice of Law: Interest Analysis and the "New Crits,"* 36 AM. J. COMP. L. 681 (1988) (discussing fortuitous aspects of domicile-driven choice-of-law methodology).

17. These proposals had not been adopted as of December 15, 1992.

scholar and practitioner will appreciate the solid grounding in procedural case law they receive. The book rewards a careful reading.

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The Economic Contract Law of China: Legitimation and Contract Autonomy in the PRC

By Pitman B. Potter. Seattle, Washington: University of Washington Press, 1992, pp. 246, $50.00.

In this era of change for many of the formerly socialist states, China's surprising success in its transition from a planned to a limited market economy warrants study.[1] While there have been studies on the motivations and implications of China's economic reforms and more still on China's regulations on foreign investments, less has been written about the Chinese use of contracts to encourage the expansion of a market economy and the use of law to change existing contract norms. Pitman B. Potter's book, *The Economic Contract Law of China: Legitimation and Contract Autonomy in the PRC,* adds to a growing body of work that analyzes China's new economic contract law and the ability of that law to foster greater contract responsibility in China.[2] Potter's work stands as an important contribution not only to an understanding of China's long road to a market economy, but also to an understanding of the interaction between imposed law and norms.

Potter's book begins by placing the 1981 Economic Contract Law (ECL) in its historical context. The law was enacted as part of China's process of economic reform that began in 1978 and that was designed to move the country away from

1. One economist estimates the prices of 80 percent of consumer goods and 50 percent of capital goods are now market-determined. The Chinese economy expanded by 12 percent in real terms this past year, and foreign trade tripled in ten years, totaling $135 billion in 1991. Arne J. De Keijzer, *A Pig With Wings? Making It Fly in China*, ASIAN WALL ST. J. WKLY., Oct. 26, 1992, at 16.

2. Others include: HENRY ZHENG, CHINA'S CIVIL AND COMMERCIAL LAW (1988); Lucie Cheng & Arthur Rosett, *Contract with a Chinese Face: Socially Embedded Factors in the Transformation from Hierarchy to Market, 1978-1989*, 5 J. CHINESE L. 143 (1991); David Zweig et al., *Law, Contracts, and Economic Modernization: Lessons from the Recent Chinese Rural Reforms*, 23 STAN. J. INT'L L. 319 (1987); Roderick Macneil, *Contract in China: Law, Practice and Dispute Resolution*, 38 STAN. L. REV. 303 (1986).

a centrally controlled, state-planned economy. As part of this economic reform program, China reestablished its legal institutions and laws, primarily for the purpose of ensuring a stable economic environment. New statutes and regulations were enacted, including the Foreign Economic Contract Law, the Tax Law, and the Law of the PRC on Chinese-Foreign Joint Ventures, as well as the ECL. The ECL was one of the more important new laws because it was designed primarily to regulate contractual relationships among Chinese domestic business entities.[3]

To analyze the effectiveness of the ECL, Potter correctly turns to the critical question of the ECL's ability to achieve legitimacy. According to Potter, "the ECL's ability to foster the recognition and enforcement of contract autonomy depends on the ability of the law to acquire legitimacy." (p. 6) Indeed, the issue of legitimacy is not an insignficant one in analyzing Chinese law. Unlike Western law, laws in China, including the ECL, do not acquire their legitimacy from a democratic lawmaking process that institutionalizes existing social norms. The laws in China, imposed from above by a ruling elite, can conflict with preexisting customary norms. As a result, Chinese laws often suffer the characterization of "laws on paper, but not in practice."

As Potter explains, pre-ECL contract norms regulating economic transactions reflected socialist dogma, which placed primacy on collective interests. Contract terms were "dictated by external organizational relationships of the parties, rather than by the terms and rules specific to the transactions themselves." (p. 11) Party officials and the state plan determined the terms and form of contract formation and enforcement. It was not "the relationship between the parties to a particular transaction, but rather the relationship of the parties to the rest of society." (p. 10) Contract transaction in China during the prereform period was a "collective exercise in administrative resource allocation," and contract law was "to promote the state's collective interest." (p. 113) Preexisting contract norms then strongly favored collectivism over autonomy and placed emphasis on internal supervision and consensual methods of dispute resolution.

Potter points out the ways in which the ECL attempted to wrestle contracts away from influences external to the economic transaction and to how the ECL encouraged the autonomy of contracts. For example, the ECL recognized the legal rights of parties to an economic contract. It further gave parties autonomy in calculating costs and damages in the event of breach by allowing the use of liquidated damages clauses. The ECL also required damages to be taken from operating funds rather than treated as expenses, thereby placing greater responsibility for nonperformance on the contracting parties themselves. In cases of breach, the ECL granted contracting parties the right to go directly to court for adjudication.

Yet, the success of these new norms of autonomy necessarily depends on

3. Economic Contract Law of the People's Republic of China, adopted by the Fourth Session of the Fifth National People's Congress on December 13, 1981. CCH Austl. section 5-500.

whether they "can overcome various attitudinal and operational obstacles to abstract and practical legitimacy, and thus, possibly create a basis for recognition and enforcement of autonomous contracts." (p. 17) To examine whether the ECL can overcome attitudinal and operational obstacles to abstract legitimacy, Potter first surveys the various governmental and legal entities that have interpreted the ECL to discern whether a consistent doctrine of the ECL has emerged. According to Potter, doctrinal differences would undermine the legitimacy of the law as economic actors come to question which of the competing views is correct. Acknowledging the importance of practical legitimacy as well as abstract legitimacy, Potter then asks the next critical question of how many of the ECL's new norms have infiltrated the actual practice of contract formation and dispute resolution. Is there consistency between practice and doctrine?

Potter ultimately concludes that there has been sufficient unity of doctrinal views for abstract legitimacy. Looking at official pronouncements from the central political leadership as well as doctrinal discussions within the Chinese legal community, Potter concludes that there is consistent doctrinal support for contract autonomy norms such as external supervision and compulsory resolution of disputes. There is, however, less doctrinal consensus on the issue of the role of contracts and contract law. While the central political leadership continues to see the role of contracts and contract law as subservient to and serving state economic policy, others in the legal community favor the ECL as a form of protection for private rights.

The research data used to answer the latter question of the ECL's *practical* legitimacy constitute perhaps the most interesting body of Potter's work. Potter analyzes 131 contract cases comparing pre-ECL with post-ECL contract formation, and 131 contract disputes comparing pre-ECL with post-ECL contract dispute resolution. These cases provide a qualified answer to the question of whether contract autonomy exists in practice in China.

As an initial matter, the cases reveal a great diversity of economic transactions and parties subject to contracts, leading Potter to conclude that there is greater transactional autonomy and increased recognition of private contract rights in China than before the ECL. On the other hand, the cases reveal less practical legitimacy on the issues of contract performance and enforcement.

Potter finds that external factors, such as unrelated personal and organizational relationships, continue to influence contract performance. Contract obligations are therefore based not "only on the autonomous contract relationships, but rather [are] dependent on the external organizational and economic environment of the parties." (p. 110) Additionally, while there appears to be an increased use of courts and compulsory dispute settlement, the cases reveal a continued failure to utilize monetary remedies. While compulsory dispute settlement is consistent with doctrinal views, the failure to use money damages is inconsistent with doctrinal views and affirms the reality that the cost of nonperformance is still being distributed in a collectivist way.

Potter concludes that the disparity between doctrinal norms and operational reality suggests that preexisting collectivist norms remain strong. Consequently, Potter ultimately predicts that there is and will be "selective legitimation" of the ECL as certain aspects of the ECL's doctrine are accepted and others are not. The resulting contract practice in China will be characterized by partial autonomy derived from selective legitimation. (p. 120)

It is perhaps unsurprising to those who have attempted to do business in China that the practical legitimacy of the ECL breaks down on the issue of contract enforcement. Contract enforcement is the most often cited concern of those doing business in China. Potter traces the problem with contract performance to the residual problem of the dominance of political abuses (such as local bureaucrats unilaterally refusing to perform) and economic conditions. Yet, there is more. As pointed out in a recent article by Arthur Rosette and Lucie Cheng, "socially embedded" practices have channeled the course of Chinese economic reform.[4] In the PRC, collectivism has both a socialist dimension and a dimension of traditional culture. In socialist dogma, collectivism takes the form of a dominant state. In traditional China, the norm of collectivism derives from the emphasis on personal relationships and harmony. With the retreat of the socialist state from the economic realm, China appears to be reverting to its traditional norms.

Indeed, traditional norms of relationships and harmony dominate the formation and enforcement of economic transactions in China.[5] A focus on relationships, or *guanxi*, in turn means that the scope of one's business associates depends largely on the scope of one's personal relationships. *Guanxi*, meanwhile, has as its darker side corruption and "using the backdoor" to evade the restrictions of law.[6] The ECL has made a dent in this norm by encouraging greater numbers of economic transactions by parties autonomous of personal relationships. Once a relationship is formed, however, traditional norms take over on how a dispute should be resolved should the relationship turn sour.

In China, then, contract performance may be less important than maintaining existing relationships. Even in instances of disputes, the use of go-betweens and mediators is preferred over the assertion of a contract right. In the compulsory dispute resolution area of the courts, experience suggests that courts do not enforce the strict letter of contracts, but instead apply the concept of "*heqing, heli,*

4. *See* Cheng & Rosett, *supra* note 2, at 242.

5. For a good study depicting the power of the family clan and merchant guilds in resolving civil disputes in Qing China, see SYBIL VAN DER SPRENDEL, LEGAL INSTITUTIONS IN MANCHU CHINA (1962).

6. One of the principal demands of the 1989 Pro-Democracy Movement was the elimination of corruption, which has lead to the adoption of a few limited measures aimed at combating corruption. *See, e.g., Detailed Implementing Regulations for the Interim Provisions Relating to Administrative Sanctions for Corruption and Bribery by State Administrative Personnel*, RENMIN RIBAO (PEOPLE'S DAILY), Sept. 22, 1988, at 6; *Circular Relating to Corruption, Bribery, Speculation and Other Criminal Elements Who Must Voluntarily Surrender and Make a Confession Within the Deadline*, RENMIN RIBAO (PEOPLE'S DAILY), Aug. 16, 1989, at 4.

hefa"[7] and consensual resolution to split the difference of the costs of contract nonperformance.[8]

Hence, Potter may need to clarify in what sense he is using the term contract autonomy. While the contract autonomy norms of the ECL may be more successful in rendering contracts autonomous from the state,[9] the ECL has been less successful in rendering contracts autonomous of social and personal relationship concerns. Traditional collectivist norms of relationships and harmony may continue to dominate and characterize Chinese contracts.

A further unanswered question is why collectivist norms prove to be a greater obstacle to contract enforcement than to contract formation. One answer may be that the legal institutions in China are still weak. While legal institutions and actors have expanded since the reform began, these actors and institutions have not achieved the prestige and authority to replace traditional norms as agents of contract enforcement. The force of legal sanctions behind contracts remains questionable. Enforcement through compulsory dispute resolution and payment of damages may take greater shape as legal institutions and actors gain more prominence.

Potter's work is, overall, extremely well researched in an area where information is not easy to obtain. His prose is clear and the entire work is well organized. As such, Potter's is a lucid study of a changing and multifaceted topic. In focusing on both the practical and abstract ramifications of the ECL, Potter's book should be of interest and of value to academics and practitioners alike.

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7. According to Cheng and Rosette, judges by and large are guided by the doctrine of "*heqing, heli, hefa*," or "according to people's feelings or affection, according to propriety or reason, according to law," in handling economic disputes. Cheng & Rosett, *supra* note 2, at 143.

8. *See* Roderick Macneil, *Contract in China: Law, Practice, and Dispute Resolution*, 38 STAN. L. REV. 303, 341–42 (1986).

9. Potter acknowledges that even this separation is not complete since as an initial matter, the ECL has not fully rejected the primacy of the state plan. As pointed out by Potter, official doctrinal discussions continue to emphasize the role of contract law in serving state goals and hence, the subservience of economic contracts to the state.