

BOOK REVIEWS

Antitrust and Trade Policies of the European Economic Community

Edited by Barry Hawk, Fordham Corporate Law Institute, 1983. Matthew Bender & Co., Inc., 1984, pp. 687.

This volume, containing the proceedings and papers of the Tenth Annual Fordham Corporate Law Institute, is a must for practitioners and scholars on both sides of the Atlantic who are interested in where European Economic Community (EEC) law (primarily, but not exclusively, EEC competition law) is, where it is going, and where it should go.

The contributors to the book include a number of high-level EEC officials and prominent European and U.S. academics and practitioners, many of whose names will already be familiar to readers. The topics, which are timely and important, include: procedural questions currently before the EC Commission, the European Court of Justice and national courts; a range of substantive questions under EEC law—vertical restraints under Article 85, a comparison of Article 86 of the Treaty of Rome and Section 2 of the Sherman Act, industrial property rights, future competition policy, the developing law of antidumping and countervailing duties, and the little-understood topic of state aids; and the extraterritorial application of the U.S. antitrust laws. Some of the chapters are in the nature of essays; most are not. Most of the chapters are well—indeed, in some cases, extensively—documented and will be extremely useful to practitioners. Virtually all of the chapters are well-written and reflect a significant degree of analysis. Moreover, because most of the contributors are familiar with U.S. law, a comparative dimension runs throughout the book, adding insight and value. The mix of contributors ensures a diversity of views, official and non-official, and a lively debate. The format is the usual one: a chapter or series of chapters on a particular topic, followed by a panel discussion.

Space limitations prevent commenting on each of the twenty-odd chapters here. Instead, I will discuss a few chapters that may be of particular interest to U.S. practitioners. The volume begins with a chapter on State Aids in the EEC by Manfred Casperi, the EC Commission's Director-

General for Competition. That chapter, and the panel discussion that follows, provide a readable, cogent overview of the generally little-understood—at least on this side of the Atlantic—EEC policy towards “state aids” or, as we in the United States know them, government subsidies, provided by Member States. Chapter 2 is comprised of an extraordinarily comprehensive paper by William L. Davey of Cleary, Gottlieb, Steen and Hamilton on the developing EEC law concerning antidumping and countervailing duties. Extensively footnoted, this article will be an invaluable research tool for anyone seeking to learn about these areas. Practitioners familiar with U.S. antidumping and countervailing duty law will also find enlightening his comparisons between U.S. and EEC law.

Chapters 5 through 9 focus on procedural issues, so controversial in recent years. Chapter 5, written by Helmut Kreis, Principal Administrator of the Directorate-General for Competition, describes recent reforms of the EC Commission’s procedures in competition proceedings, as well as the current status of the brouhaha over attorney-client privilege in the EEC. Chapter 7, by John Temple Lang, Legal Advisor to the EC Commission and a frequent commentator on competition issues, contains an extensive discussion of the topical subject of EEC competition actions in member states. The chapter includes a review of the case law to date, and a proposed scheme for determining which matters are more appropriately heard by the EC Commission and which are more appropriately aired in national courts. While Mr. Lang’s views are, like those of the other EEC officials, purely personal, they will in all likelihood be very influential both within the Commission and on a national level.

Chapters 10 through 12 deal with Article 86, the “anti-monopoly” provision of the Treaty of Rome. N.Y.U. law professor Eleanor Fox, a frequent writer on U.S. antitrust issues, incisively and insightfully analyzes in Chapter 10 the relatively few decisions to date of the EC Commission and Court of Justice under Article 86, and compares the development of EEC law to that of U.S. law under, *inter alia*, Section 2 of the Sherman Act. Given the indications that in the near future, greater attention will be paid by the EEC authorities to Article 86, her paper, as well as Professor Valentine Korah’s comments in Chapter 11, could assume great importance.

Chapters 13 through 17 deal with the recurrent problems of distribution and industrial property rights under EEC law. Chapter 13, “Distribution under EEC law—An Official View,” by Roger Daout, Assistant to the Director-General of Competition of the EC Commission, provides an excellent overview of the evolution of the EEC’s rules on both exclusive and selective distribution schemes, including an analysis of the 1983 block exemptions for exclusive distribution and exclusive purchasing agreements. The panel discussion on this topic, in Chapter 15, is also full of substantive nuggets. The discussion of industrial property rights in Chapters 16 through

17 is unfortunately already somewhat dated due to subsequent changes in the block exemption on patent licensing agreements. Nevertheless, the background these chapters provide is worthwhile.

Finally, a thought-provoking article by John Shenefield, "Thoughts on Extraterritorial Application of the U.S. Antitrust Laws," in Chapter 19, addresses the persistent, difficult problems of extraterritoriality—or conflicts of jurisdiction, as we are now exhorted to call them—from the perspective of one who has served both inside and outside the U.S. government, and suggests possible solutions.

Some of the material in this volume will become dated relatively quickly. Much of it, however, will not be. While the volume will be most useful to those who grapple with EEC issues on a regular basis, those just entering this area will also find it worthwhile.

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The French Law of Arbitration

By Jean Robert and Thomas E. Carbonneau, Matthew Bender & Co., Inc., 1983, pp. approx. 300 plus Appendices.

Jean Robert has practiced at the Paris Bar for sixty years. His textbook on arbitration,¹ of which the fifth edition was published in France in 1983, has staked out a unique place in the law of arbitration in France. Thomas E. Carbonneau, an Associate Professor of Law at Tulane, is a specialist in comparative law and has written extensively concerning the development of the French law of arbitration and particularly its international aspects.² Together they have co-authored *The French Law of Arbitration*, which is an adaptation of Robert's French-language book. Prepared under the auspices of the Parker School of Foreign and Comparative Law of the Columbia University School of Law, this work will be of use both to comparative law

1. *L'Arbitrage: droit interne, droit international privé*, Dalloz, Paris (5th ed., 1983).

2. See, e.g., *The French Jurisprudence on International Commercial Arbitration*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION* (Sixth Sokol Colloquium) (T. Carbonneau, ed., 1984); *The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity*, 55 *TULANE L. REV.* 1 (1980); *The Reform of the French Procedural Law on Arbitration: An Analytical Commentary on the Decree of May 14, 1980*, 4 *HAST. INT'L & COMP. L. REV.* 273 (1981).

scholars and to international practitioners, who will profit from the extensive exposé, copiously annotated with case law references, of the development of the law of arbitration in France.

This book comes at a useful time for it follows upon the 1980 and 1981 revisions of the French law of procedure concerning domestic arbitration³ and the complementary and distinct regime for international arbitrations.⁴ It is not, however, organized primarily as an analysis of these provisions⁵ but rather is conceptual in nature, the authors tending to root the book in the history of the development of arbitration and the case law which has been a part of that development. Following the organization developed in the previous editions of Robert's French-language text, the book examines the entire range of the law relating to arbitration including capacity to arbitrate, arbitrability, arbitration agreements, arbitral proceedings, awards, appeals, and recognition and enforcement.

Examination of the new legislative provisions is incorporated into this pre-existing organization—an approach which has some drawbacks for the hurried practitioner in search of a specific answer to a procedural problem. The text provides, however, much background against which the current procedural revisions may be considered. It is also perhaps an apt approach in view of the somewhat uneasy position that arbitration enjoys in French law astride the provisions of substantive law (as exemplified in Articles 2059 through 2061 of the Civil Code) and procedural law (as exemplified by the newly added Articles 1442 to 1507 of the “Nouveau Code de Procédure Civile”). This basic dichotomy is illustrated by the fact that the new provisions of the “Nouveau Code de Procédure Civile” were added by decree (adequate for procedural provisions) and not by act of Parliament (necessary for modification of substantive law). Certain provisions of the decree concerning international arbitration as originally drafted restated pre-existing law as found in the case law. These were excluded from the final text of the decree by a ruling of the “Conseil d'Etat” since they concerned substantive law and were beyond the power of amendment by decree. As pointed out by the authors,⁶ the legislative history of the decree nevertheless makes clear that the substantive arbitration law as represented by prior case law is intended to remain undisturbed. It is accordingly of special interest that the growth and development of this case law is studied in detail in the text prepared by Messrs. Robert and Carbonneau.

3. Decree No. 80-354 of May 14, 1980.

4. Decree No. 81-500 of May 12, 1981.

5. Such specific commentary on the provision of Decree No. 81-500 of May 11, 1981 may be found in Audit, *A National Codification of International Commercial Arbitration: The French Decree of May 12, 1981*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION* (Sixth Sokol Colloquium)(T. Carbonneau, ed., 1984), and the numerous articles in French cited therein.

6. Robert and Carbonneau, II: 2.04.

The book is organized in two parts. The first concerns domestic arbitration, and is a condensation of Robert's French-language text; the second, which covers about twice as many pages, concerns international arbitration and is an adaptation of the Robert text, including commentaries particularly useful to an English-speaking audience.

This emphasis quite rightly assumes that it is the practice⁷ of international arbitration in France which will most interest the Anglo-American reader, since it is most likely that any arbitration a foreign practitioner may be concerned with will be an international arbitration, given the broad definition of what constitutes an international arbitration under the 1981 decree, to wit: "an international arbitration is one which implicates the interests of international commerce."⁸ The authors point out that in international arbitrations taking place in France, questions of procedural law are greatly reduced, the parties being free to establish any procedural rules that they desire.⁹ Nevertheless, the procedure applicable to domestic arbitration has an interest since even in international arbitrations taking place in France, the parties may elect to have the arbitration procedure governed by French procedural law, in which case all the provisions of French domestic procedure apply absent agreement by the parties to any other procedure (including those procedures which are set forth in arbitration rules, such as the Rules of the International Chamber of Commerce, which may be incorporated into the arbitration agreement).

Quite apart from the interest that this book presents to the practitioner dealing with an international arbitration taking place in France, or the problems of executing a foreign arbitration award in France, is the learning that the development of the law of international arbitration in France may contribute to other systems. It was recognized early in France that the needs of international commerce for a dispute-resolution system agreeable to the commercial interests of different countries required the acceptance of arbitration to a degree not present in purely domestic situations. In a step-by-step process, the courts ruled that in international matters recourse to arbitration was appropriate and would be enforced under circumstances not permitted in domestic matters. Thus it was held that in international arbitration the parties could agree in advance to submit to arbitration disputes which might arise in the future, that arbitrators have jurisdiction to determine their own jurisdiction, that an arbitration clause was independent

7. It should be made clear, however, that the authors' focus is on the relation between arbitration and the courts and not on the practice of arbitration before arbitral tribunals. For a valuable text concerning international practices in arbitration, see R. David, *L'Arbitrage dans le Commerce International*, Economica, Paris (1983), of which an English language version has recently been published.

8. Nouveau Code de Procédure Civile, art. 1492.

9. *Id.*, art. 1494.

of the other clauses of a contract and could survive the nullity of the principal contract, that public corporations could agree to arbitrate even though they might not have the capacity to so agree under domestic arbitration law, that arbitration clauses in "Contrats Mixtes" (that is between a "commerçant" and a private person) could be subject to arbitration, and finally, that an international arbitration might decide questions involving considerations of public policy which would be a bar to arbitral jurisdiction in domestic arbitration.

The author's treatment of the development of French case law concerning international arbitration is complete. With copious references, it shows the development of the specificity of international arbitration in France. From a comparative point of view, this is of great interest due to the richness of French case law. Other jurisdictions, considering the circumstances in which the rules governing international arbitration should be different from those governing domestic arbitration, as well as considering specific points arising in the context of international arbitration, would be well advised to give some consideration to the French approach. Since at least 1930, the French courts have shown themselves particularly receptive to supporting international arbitration as the favored way of resolving international commercial disputes. This preference has manifested itself not only by enforcement of foreign awards rendered under procedures which would not have been permitted under French internal law but also by minimal interference by French courts in international arbitration taking place in France. This accordingly has resulted in the growth of France as a center for the holding of international arbitrations.¹⁰ The 1981 decree was intended to further this development and to clarify any areas of procedural uncertainty.

Prior to the reform, the greatest area of uncertainty was the procedure relating to appeal from, and recognition and enforcement of, awards. As the authors indicate,¹¹ the 1981 decree has greatly simplified what had been seen as a quagmire resulting from the multiplicity of procedural paths open to a disappointed litigant under prior laws. The new procedure provides for a direct, but limited, appeal to the Court of Appeal as the sole authorized appeal from an award in an arbitration taking place in France, and an appeal as well on the same limited grounds from the District Court's grant, or refusal, of execution of a foreign award or an award rendered in France.

It remains to be seen, however, whether these measures concerning the jurisdiction of French courts in respect to arbitration matters, which were intended to limit and restrict appeals in international arbitration to really

10. An interesting example of this is that nearly one-third of International Chamber of Commerce arbitrations are held in France, although under the Rules, the parties (and in the absence of a choice by the parties, the Court of Arbitration) may fix the place of arbitration any place in the world.

11. Robert and Carbonneau, ch. II, 8-1.

exceptional grounds, will have the effect desired. In view of the general acceptance of arbitration as the normal method of resolution of international disputes, and accordingly the increasingly contentious behavior of participants in the arbitration process, it is possible that the clarification of appellate procedures will only serve as an incitation to disappointed litigants to allege failure of compliance with the restricted grounds for appeal even though the chances of success on such appeals are slight. It will be up to the French courts to determine whether to discourage such appeals or to find themselves, contrary to their history and the intention of the drafters of the new procedural law revisions, regularly enmeshed in the international arbitral process.

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Introduction to Swiss Law

Edited by F. Dessemontet and T. Ansay. Deventer, The Netherlands: Kluwer Academic Publishers, 1984. Also available from International Law Institute, Washington, D.C. Pp. x, 292. \$85.00, hardcover.

Introduction to Swiss Law is part of a series of similar books in English on the law of various countries, the purpose of which is to provide basic information on legal concepts and specific areas of law, with an emphasis on practical matters. The series editors are Professors Don Wallace of the Georgetown University Law Center and Tuğrul Ansay of the University of Ankara. Ansay and Professor François Dessemontet of the Universities of Lausanne and Fribourg edited this volume. Most of the contributing authors are also law professors.

The book is well written, well edited, and very readable. Conciseness has been achieved without confusion or loss of comprehension, and as the series editors point out, while the answers to every question may not be here, the reader will at least learn the proper question to ask and the proper place to find the answer. The book includes an extensive bibliography of writings in English, and most of the chapters also have a selected listing of materials in French and German.

An introductory chapter by Joseph Voyame, Director of the Federal Office of Justice, addresses, among other things, certain basic principles of Swiss law and politics. It includes an eloquent commentary on the reasons

for the stability of Swiss society. Fifteen subsequent chapters cover the most important areas of Swiss public and private law: the federal constitution; cantonal and federal administrative law; the law of persons and family law; the law of inheritance, of property, of contracts, and of torts; commercial, competition and intellectual property law; banking law; the law of taxation; labor and social insurance law; criminal law; and criminal and civil procedure.

The chapter on the federal constitution—by Professor Jean-François Aubert, who is also an influential member of the Federal Senate—summarizes thoroughly and accurately the evolution of the constitution from 1848 to the present. United States readers will appreciate the references to and points of comparison with the United States Constitution.

The chapter on administrative law, by Professor Thomas Fleiner-Gerster, offers a particularly good description of the most important principles of administrative law that have grown out of article 4 of the federal constitution. That article “establishes a right somewhat similar to the Fifth and Fourteenth Amendments of the American Constitution to be implemented by the cantonal administrative law according to the decisions of the Federal Tribunal.”¹ It has permitted the Federal Tribunal to develop, through case law, such “principles as ‘natural justice,’ ‘due process,’ administrative ‘estoppel,’ the ‘principal of legality,’ and of ‘proportionality.’”²

Curiously, the ordering of chapters does not follow the logical division in civil law systems into public and private law. The public law chapters are at the beginning and end, with private law in between. This might result in confusion for readers more familiar with the common law system. Some areas of the law, of course, do have both public and private components.

The chapter on banking law is perhaps the book’s most attractive. Its author is Beat Kleiner, head of the Legal Department of the Union Bank of Switzerland, and a part-time professor of law at the St. Gall Graduate School of Economics, Business and Public Administration. The chapter facilitates a clear—though obviously not completely comprehensive—understanding of the Swiss banking law system. Accordingly, it corrects the inaccurate representations of some Anglo-Saxon jurists concerning certain aspects of that system—for example, the famous banking secrecy. The reader might initially regret the absence of sensationalism in the discussion of banking secrecy, but a more careful reading will reveal that the writer has avoided polemics and maintained neutrality.

Swiss family law is in full transformation, as Professor J.-M. Grossen accurately explains. The new law will bring about very significant changes, arising from the evolution of the thinking of the Swiss people concerning the

1. INTRODUCTION TO SWISS LAW 30 (F. Dessemontet and T. Ansay eds. 1984).

2. *Id.* at 35 (footnotes omitted).

equality of the sexes and other moral issues. These modifications in the law will also entail some changes in inheritance law. The reader is alerted that “[i]f it ever was it is no longer safe to rely on a mere reading of the Code to get an idea of Swiss family law. . . . [T]he distance has grown between the law of the books and the law in action.”³

In the chapter on commercial law, Professor Dessementet appropriately emphasizes the joint stock corporation (Aktiengesellschaft/Société Anonyme), which is by far the corporation most often used in Switzerland. His detailed description offers very useful information to practitioners. He also describes the two main aspects of competition law: unfair competition, and cartels and similar restrictive trade practices (antitrust law). He notes that the “general feeling about the Law on Cartels is that it is the most effective law in the Western world.”⁴ His discussion will no doubt interest lawyers accustomed to United States antitrust law, which is well known, much feared, and often criticized all around the world.

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3. *Id.* at 63–64.

4. *Id.* at 167.

