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BOOK REVIEWS

D. Campbell (Ed.), *International Execution against Judgment Debtors*. London: Sweet & Maxwell, 1993. GBP 185. Loose-leaf, 2 vols. ISBN 0421 480 408.

"Où sont les neiges d'antan?", a melancholy poet once asked. When lawyers become melancholy they start praising the old days when law was still written with a capital "L", when lawyers were everybody's best friend, always ready to provide good advice, and clients were eager to pay the invariably modest fee in return. Things have changed, these and many other aspects of the old legal practice. Today's practitioners are faced with a demanding clientèle, a heavy workload and a never-ending demand by their senior partners for more billable hours. At the same time, the law itself has become more complex and calls for specialization. And above and beyond all that, the scale on which lawyers have to work has been enlarged. As the world becomes smaller and smaller, law's international and supranational dimension grows in importance. Not only the big lawyer from the mergers and acquisitions department has to pay attention to private international law and thereby to foreign substantive law, but also the small family law practitioner may have to deal with a case involving international aspects. Transnational take-overs as well as the recovery of maintenance abroad have become "ordinary" cases.

The present loose-leaf book, consisting of two volumes, provides attorneys-at-law and other lawyers with information on a vital aspect of private international law: the recognition and enforcement of judgments obtained in one country within the boundaries of another country. As many lawyers painfully realize: getting a jugdment in favour of a client is in many cases only the first step in the right direction. Obnoxious adversaries may make enforcement through attachment and other means necessary. Each country has its rules on execution of judgments, but more often than not those rules presuppose that the judgments-to-be-enforced are of local origin, that they were rendered by the local courts. Judgments rendered in another country are usually not treated in the same way as local judgments. However, in the present-day world, execution of a judgment obtained in country A on assets located in country B is no longer an uncommon phenomenon. Therefore attorneys and lawyers need to know what are the possibilities for enforcement in other countries than the one in which they are practicing.

This book might be of help here. It contains reports covering some 30 countries from all over the world, written – in most cases – by local, practising, attorneys, on the local rules of enforcement of foreign judgments. Added to the national reports is a chapter on the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, now in force between (almost all) the 12 European Union Member States. Extensive indices are to be found in each volume. The accompanying flyer promises to keep subscribers up to date through annual releases.

It must have been a major task for the national reporters and for the general editor to compile the present two volumes. It would seem that the result is a practical, easily accessible and generally reliable "first-aid" for both attorneys and other practising lawyers. Nevertheless I make a few critical observations.

First, there is a rather strong Commonwealth-"bias", leading to the inclusion of such countries as Hong Kong, Malta and Nigeria, whereas Eastern European countries are absent. Perhaps the next annual release will restore the balance somewhat.

Secondly, since each national report is written by a national expert, these reports vary as to subject-matters covered and size. Some reporters concentrate on the enforcement of money judgments rendered by foreign state courts, others include foreign arbitral awards as well, while still others make room for recognition of court decisions in family law matters. Perhaps the national experts were left too much discretion here. It is remarkable in this respect that the introduction to the two volumes is not very clear on the matters covered and not covered in this project.

Thirdly, the chapter on the Brussels Convention suggests that the Lugano Convention, concluded between the European Union Member States on the one hand and the European Free Trade Association member States on the other, is almost identical to the Brussels Convention. This may be true, especially of the rules on recognition and enforcement of both conventions, but one should not overlook important differences either. One such difference affects the very heart of the system of recognition and enforcement: Article 28 on the review of the jurisdictional basis of the court that rendered the judgment by the enforcement court. The Brussels Convention only admits such a review in a limited number of cases (Article 28(1)), while the Lugano Convention is much more permissive, for instance in the case where enforcement is sought against a defendant who is domiciled in an EFTA member State (Article 28(1), second sentence, in conjunction with Article 54B(3); see also Article 57(4)). This crucial difference between the two conventions ought to be discussed in this chapter.

Finally, there is the fact that practical books such as this one, can never replace local expertise. No wise attorney will ever advise a client on foreign law without consulting a local *confrère*. Of course, this book facilitates such cross-border communication between lawyers, by providing the basic rules in force in the relevant country. But I wonder whether this rather modest purpose will convince many lawyers to pay the initial sum of £185.00.

Maurice V. Polak
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Court of Justice of the EC, *Civil Jurisdiction and Judgments in Europe* – Proceedings of the Colloquium on the Interpretation of the Brussels Convention by the Court of Justice considered in the context of the European Judicial Area, held in Luxembourg, 11–12 March 1991. Editors: Helen Britton, Sandra Dutczak and Charmian Harvey. London: Butterworths, 1992. 402 pages. GBP 65. ISBN 0-406–01651–8

The Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968 has been in force since 1973. The original number of contracting States – 6 – has meanwhile doubled. In order to accommodate later signatories as well as to improve the Convention, the original text of 1968 has been revised three times, through Accession Conventions of 1978, 1982 and 1989. The Brussels Convention has also been "copied" in the Lugano Convention of 16 September 1988, now in force between several European Union Member States on the one hand and several European Free Trade member States on the other. The number of international cases which, either at the stage of determining international jurisdiction or during enforcement procedures, is affected by the Brussels Convention must be gigantic. This can be inferred, *inter alia*, from the fact that the Court of Justice of the European Communities from 1976 to 1991 had already given 61 rulings on the Brussels Convention's interpretation, thereto empowered by the special Protocol of 1971.

In March 1991 the Court of Justice celebrated its 15th anniversary as "Brussels Convention Oracle" and decided to throw a small party in the form of a Colloquium. To this effect the Court invited a selected group of specialists, either as authors of papers or as participants in the discussions. The proceedings of the Colloquium have been published in order to inform the "not-so-happy-few" of what was being discussed by those who were present.

The publication contains, first of all, a preface by Due, President of the European Court, explaining the why's and how's of the Colloquium.

The main part of the publication is formed by the papers of some 20 authors. These papers each focus on one of the five issues that were selected for the Colloquium and that correspond with the five chapters in the publication. Each chapter consists of a paper written by a Court-affiliated expert, followed by written reactions from outsiders. The subject-matters of the five chapters and the corresponding "inside" and "outside" authors are: (a) the task of the Court of Justice and the system of the Brussels Convention (papers by Darmon, Capotorti, Lando and Geimer), (b) the special jurisdictions of Article 5 (1) (papers by Kohler, Huet, Jayme and Vrellis) and of Article 5 (3) and (5) (papers by Duintjer Tebbens, Schultsz and Pocar), (c) jurisdiction clauses (papers by Schockweiler, Gaudemet-Tallon, Diamond and Philip), (d) selected problems in connection with *lis alibi pendens* and recognition of judgments (papers by Schockweiler, Linke and White), and (e) the development of other conventions in the context of the European Judicial Area (papers by Saggio, Möller, Carpenter, Ortiz-Arce and Vassali di Dachenhausen).

The discussions on these five issues are then synthesized by Droz, Secretary General of the Hague Conference on private international law.

The extensive annexes at the end of the book contain (a) the texts of the Brussels and Lugano Conventions, (b) a table of the judgments of the Court of Justice for the period 1976–1991, with extensive references on case notes in legal periodicals, (c) a selected bibliography on the Conventions, and (d) a list of the Colloquium's authors and participants.

The result is an interesting collection of useful comments on what the Court of Justice did or did not decide, and of valuable suggestions for what the Court in the future might or should decide. In this respect it is remarkable to detect, both in the papers and in the synthesis of the discussion, a large amount of frankness with which the Court's decisions were discussed, even by the Court's own "representatives", such as Judges Schockweiler and Saggio, and Advocate General Darmon. And all that took place "in diesen heilgen Hallen", i.e. in the Court's own building! The Court being so open and receptive for expert opinion on how it should develop its case law and do away with some of its more unfortunate decisions, practitioners who consider litigating a question of jurisdiction or enforcement under the Brussels Convention all the way up to their national court of last resort, and – if possible – even up to Luxembourg, are well advised to consult this rich "*Fundgrube*" when preparing their briefs. Chances are that they will find ample ammunition in this publication to strengthen their clients' positions and to undermine those of their adversaries, this ammunition being provided by experts from all contracting States, and moreover – in some instances – even a certain amount of agreement between these experts, in the synthesis by Droz.

In this review I cannot discuss any of the papers in depth. To illustrate my remark that this publication is a rich "*Fundgrube*" for – often different – ideas about the future interpretation of the Brussels and Lugano Conventions, I merely mention that several experts have suggested different alternatives for the Court's case law on Article 5(1), in particular the cases *De Bloos*, *Tessili* and *Shenavai*. The "system" developed in these cases is problematic because it necessitates a fragmentation of the contract into its component obligations and thereby leads to a proliferation of courts having competence for one or more of these obligations. Furthermore, in many instances, Article 5 (1) creates a *forum actoris* – for instance for the seller who wants to sue the purchaser for payment of the purchase price – while Article 3 at the same time explicitly sets aside national rules of jurisdiction that result in a *forum actoris*. In order to overcome the first problem, Lando suggests that Article 5(1) should be interpreted as vesting jurisdiction *for the whole of the contract* in the courts of the place of domicile of the party performing the characteristic obligation, thereby accepting the second problem as inevitable. Kohler and Jayme, on the other hand, are more concerned with avoiding the second problem and would like to see the place of performance of the "obligation in question" under Article 5 (1) interpreted as a factual rather than as a legal concept, the two authors being less worried about the fragmentation of the contract. *Quot capita, tot sensus*! Perhaps not unusual when lawyers meet, but in this publication under the Court of Justice's auspices it is particularly pleasant and welcome.

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Barry Hawk (Ed.), *Annual Proceedings of the Fordham Corporate Law Institute, 1992: International Antitrust Law and Policy*. New York: Transnational Juris Publications, and Kluwer: Netherlands, 1993. ISBN 90-6544-7334. 952 pages + Table of Contents.

Index and Table of Cases 1981–1990: Annual Proceedings of the Fordham Corporate Law Institute, compiled by Edward Bauder. New York, Transnational Juris Publications, 1993. ISBN 0-56425-006-7. $95. 272 pages.

The 1992 volume is the largest so far of the annual Fordham volumes, and maintains their very high standards. It contains eight papers and discussions on Community competition law, three chapters on German, UK and Polish law, and two chapters primarily on the European Economic Area (EEA). Outside Europe, it has chapters on US, Japanese, Canadian, Australian and New Zealand laws, and on "positive comity" (the idea that one government, at the request of another, would take enforcement action which it might not otherwise have taken, embodied in Article V of the US-EC Commission cooperation agreement of 1991, the lawfulness of which has been challenged before the Court of Justice). This review concentrates on the approximately 530 pages concerned with Community and EEA law. These include two papers on merger control (one by the excellent French economist Frédéric Jenny), and two chapters on the Court of First Instance and on what is said to be insufficient judicial control by the Court of Justice. The Community law part also includes a paper on proof and procedures in horizontal cartel cases, and two papers on maritime transport. In some ways the most interesting paper is an assessment by Don Holley of developments over 30 years of EC competition law.

Several papers point out that with the coming into force of the EEA the principles of Community law will have the widest geographical scope of any antitrust law in the world. As a careful reading of these papers shows, this law is still developing. The Merger Regulation came into force only in 1990, and the first litigation began only in 1993: the EEA Agreement came into force only at the end of 1993. The Court of First Instance began hearing cases in 1989, and according to two of the authors it has not yet clarified the burden of proof in cartel cases. The first decision applying Community antitrust law to maritime transport was only in 1992, and many issues remain unresolved, although Rakovsky rightly points out that the answers to the most important questions are already clear. It is therefore not surprising that Jenny considers that the merger decisions cannot be satisfactorily reconciled with the efficiency goal of antitrust, and that Holley says that the use and acceptance of economic evidence in EC cases will grow, in particular under the influence of the Court of First Instance. The distinction between concentrative and cooperative joint ventures can require "mystical foresight", and will need clarification. Basic issues of lawyers' professional ethics in relation to EC competition law need to be clarified by the lawyers organizations. "Decentralizations" of competition law to national courts and authorities is "one of the biggest challenges the system has faced". The Community's Agreements with Hungary, Poland and (then) Czechoslovakia became operational on an interim basis in 1992, and clearly have impli-

cations which have not yet been explored fully. Joint dominant positions are only now being explored (and still await a satisfactory economic theory of oligopoly).

This is not merely to say that EC competition law is still a rapidly developing area. All of the points just mentioned are discussed or touched on in this volume. The Fordham conferences are so well planned and the authors so well informed that often developments are discussed while they are taking place (and some even before they occur: two Fordham papers on national courts and Article 90 preceded the relevant Commission action by several years). It is exceptional consistently to achieve real in-depth analysis of such topical issues. No lawyer seriously concerned to keep up with Community competition law can do without these volumes (or without the cumulative index of the 1980–1991 volumes). As the panel discussion sections of this volume show, the depth of analysis by all participants is very high: economists criticize lawyers, US lawyers criticize European lawyers, practitioners criticize Commission officials, and judges write more freely than is usual extra-judicially (though the only judge in this volume is a member of the new EFTA-EEA Court). The practical and the theoretical are usefully mixed. It follows that some of what is written here is controversial, and will not necessarily prove to be accepted by the Courts in Luxembourg: the criticism of Jenny, for example, could perhaps be acted on, if it was thought right to do so, only by amending the Merger Regulation. Not everyone would agree with Van Bael's view that judicial control over the Commission has been inadequate, especially in relation to cases which, for whatever reason, have not been brought before the Court by the parties. The long paper on proof of cartels mentions that the Commission has no power to require individuals to give evidence under oath, and therefore has no power to punish them for perjury. To make Community law fully effective, these powers will be needed (and would no doubt need to be balanced by other measures safeguarding the rights of defendants and complainants). The problems of evidence are not merely questions of the burden of proof, and Van der Woude is right to say that the judgments of the Court of First Instance are not written in terms of burden of proof. Throughout, the effect of the analysis is to tackle the difficult and unresolved problems and to raise the most important questions, and when one has read this volume one is up-to-date and fully informed on all the topics covered.

The chapters on the EEA by Judge Norberg and Thinam Jacob are largely explanatory and descriptive, and are not limited to competition law. Since the substantive law will be the same as in the Community, the special features of the EEA are institutional and procedural, and these are concisely explained. Since EFTA countries (except Switzerland) which do not join the Community will be in the EEA indefinitely, these provisions are important. Since they represent the best way, and probably the only way, which can be found to give non-EC Member States a voice in Community affairs, and since it is unlikely that the Community would agree to any second, different, arrangement, the EEA will govern the Community's relations with some of its nearest neighbours for some time to come. For the success of the EEA much will depend on how closely the Commission and the Surveillance Authority work together, and how close the case law of the two Courts remains: it will also depend, of course, on how closely

the EFTA States and the Community can work together on new legislative measures. The institutional structure of the EEA cannot guarantee its success. Nevertheless it is a development of great intellectual interest and considerable historical significance. (See now Norberg, Hökberg, Johansson, Eliasson and Dedichter, *EEA Law: The European Economic Area – A Commentary on the EEA Agreement*, 1993, Fritzes Stockholm to be reviewed shortly – Ed.).

The paper on competition policy during the transformation of a centrally planned economy is of the greatest historical interest and importance. Written by Dr. Anna Fornalczyk, the President of the Antimonopoly Office, it describes not only the working of the Polish Antimonopoly Act but the creation of competitive markets by privatization and trade measures designed to expose privatized Polish companies to competition from imports.

The chapter on German law (by the Vice President of the *Bundeskartelamt*) also looks at it from new angles: antitrust aspects of German unification and the activity of the Treuhand, and German antitrust law in the period of transition towards European Union (harmonization of national competition laws, and decentralization of the application of EC law). In his chapter on UK law, the former Director General of the Office of Fair Trading stresses the need for effective national competition laws in the EC Member States and says frankly that "it has become notorious that UK law on cartels and restrictive trade agreements of all kinds is inadequate, a poor deterrent against malpractice, and only partially effective". In a third chapter Dr. Bechtold analyses the coexistence of EC and national laws in Germany and the UK, and says that contradictory results often occur. He concludes that "the only solution with regard to horizontal antitrust law is ... for Germany to incorporate provisions which correspond to Article 85(3) into German law", and that "there is a need for a directive to harmonize the antitrust laws of Member States". In the discussion Dr. Bechtold pointed out that German merger control law is much stricter that the Merger Regulation, and Jeremy Lever said "the time has come for the enforcement and administration of European Community law at the public level to be shared between the Commission ... and the competent authorities in the Member States". Lever called for a combination of EC substantive law and "the procedural safeguards which exist within Member States such as the UK". Again, whether one agrees or not, one cannot fail to be stimulated by this kind of discussion between participants from such a wide range of backgrounds and experience. These are issues which will continue to occupy competition lawyers in Europe in the 1990s and indeed some of them were discussed in more detail during the Fordham Conference in October 1993.

There are now a total of fourteen Fordham volumes on antitrust law, all containing far-ranging and detailed papers and, reports and discussions from many angles. This is the largest single source of information and analysis on Community (now European Union) antitrust law anywhere. It has not always been easy to find important passages when they were needed. Also, some of the older papers are still the best statement of the legal principles in certain areas, even if there is recent case law (one thinks in particular of papers by former Judge Pescatore). But it was easy to forget where these papers

are. These problems have now been tackled by an index covering the volumes 1981–1990. Unfortunately the 1975 and 1978 volumes are not included, and the index, though useful, is not as detailed or as accurate as one would wish. There are no entries for e.g. complainants, interim measures, or standing to challenge Commission decisions: one has to look under "judicial review" and "judicial review in competition matters". One of the papers on trade associations is not found under either of the two places where that heading occurs, but under a separate heading "trade associations and self regulation". In places the alphabet is mangled: entries beginning with "TR" come both before and after entries beginning with "TO". There is one entry (p. 200) with no page reference at all. Nevertheless, the index although not up to the very high standards of the volumes themselves, is useful, although its price is excessive in the light of its deficiencies.

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Debbie Harrison, *Pension Provision in the EC: Opportunities for the private sector in the Single Market*, Financial Times Management Report. London: Financial Times, 1992, 160 pages. GBP 250.

Peter Docking and Sarah Trier (Eds.), *EC Pensions Law*. London: Chancery Law Publishing, 1992. BGP 115.

The two books under review deal with the two main points of overlap between EC law and the law relating to occupational pensionsl. These two subjects are equal treatment of men and women and the free movement of persons.

Pension Provision in the EC: Opportunities for the private sector in the Single Market, according to the introduction aims "to pull together in one source document the most important developments that affect the pensions industry and employers today." These developments can be summarized as the demographic time bomb as a result of which, according to some estimates, the ratio of those over 65 to the working population may have increased by about 50% by 2020. This has consequences for, amongst other things, statutory pension provision, this largely currently being funded on a "pay-as-you-go" basis in the sense that the premiums currently paid go towards paying the pensions of the current generation of pensioners. Thus, throughout Europe alternatives will have to be sought to the traditional compulsory statutory provision. The first section of the Harrison book examines briefly the various methods available for funding occupational pensions before turning attention to the Community initiatives in the area of occupational pensions.

Until comparatively recently, occupational pensions had largely escaped the attentions of the Community legislative. Attention had focused on statutory provision which

had been coordinated, firstly by means of Regulations 3 and 4 and subsequently by Regulations 1408/71 and 574/72 as frequently amended. The Treaty drafters and Member States in Council were only too aware that if a migrant worker was to lose his social security rights on migration, this would form a serious obstacle to the free movement. Thus the Regulations. However, these did not extend to occupational schemes. It has only really been since the mid to late 1980s that the Community has begun to address the issues.

Harrison has chapters on the single market, the first pension funds directive, the impact of the directive on fund management and investment services, the role of occupational schemes for the social protection of workers and labour mobility, the current options for mobile workers, whether state provision provides a blue-print for private provision, equalization and the US experience. These Chapters take us from page 15 to page 67. Unfortunately these chapters do no more than summarize a selection of the relevant Community documents. Thus although the source for the chapter on "towards a single market" was cited as a speech given by Sir Leon Brittan at a conference in the Netherlands, the same information is available in COM(91) 301, other provisions of which seem to have been summarized at other points in this publication. Similarly, other passages seem to paraphrase SEC(91) 1332 – the Communication from the Commission to the Council on supplementary social security schemes: the role of occupational pension schemes in the social protection of workers and their implications for freedom of movement", as well as the working paper XV(90)224 on "Completing the Internal Market in Private Retirement Provision".

The second part of the book (pages 69–147) is devoted to "a detailed analysis of current state and private pension provision throughout the EC and certain other European and East European countries. Much of the detail is drawn from a range of annual pensions guides published by the international employee benefits consultancies. A list of source documents and contacts is provided and the end of this section" (p. 69). I was unable to find any source documents listed, unless the author was referring to annex II – Directives where a number of proposals for directives relating to financial services were mentioned (incidentally, no Official Journal references are given for any legislation, nor are the ECR references or case numbers given for any cases to which reference is made). The further sources of information listed in Annex III amount to no more than the Commission's offices in the various Member States plus Switzerland.

The "detailed analysis of current state and private pension provision" amounts to a very cursory summary of the provisions in force, with no reference to the laws in question, nor to any national literature on the subject, even general non-legal works. While some of the information provided may be interesting, it is too shallow to provide a useful source, even a useful introduction and source of references, for anyone wishing to know about the subject in any detail.

This publication is priced at £250, outrageously expensive by almost any standard. The information which it contains, in my opinion, simply does not justify this price. Nor does the printing or binding. This is a spirally bound booklet, and contains a number of typing errors. Thus, not only is the date of the *Barber* case given as 17 May 1991

instead of 1990 (while for the other cases mentioned, only the year was given), but the second *Defrenne* case is printed as *Defrenne* v. *Sabrina*.

In the current economic climate, I would venture to suggest that this particular publication is one thing that most businesses *can* afford to do without.

By contrast, the second publication "EC Pensions Law" edited and partially written by Sarah Trier and Peter Docking should form a useful addition to the shelves of many pension offices. This deals with the second point of contact between Community law and occupational pensions, the headline-grabbing equal treatment of men and women.

Despite the title, and the treatment given in other publications in the European Practice Library Series, as the preface to this volume makes clear, this book is actually concerned with the impact of EC law on UK (English) pension provision. It has been designed as a reference book, full of subdivisions, questions and answers. Consequently, it makes a somewhat disjointed read, with frequent repetitions. With the greatest respect for the authors and editors, I do wonder whether one general descriptive text, analysing the developments in the law would not be a useful addition in the future updates, as a sort of touchstone for the chapters which have been provided. Particularly for those lawyers for whom Community law is an exotic beast, some kind of explanation of the law itself, written by pensions lawyers, without any questions might be useful. The existing chapters could then perhaps be more easily consulted. However, the format adopted undoubtedly does have its merits.

The aim of Chapter 1 (by Peter Docking) is to provide "an understanding of the way in which the Community works" and "to show how and in what way EC law takes precedence over national law". This is done by providing thumbnail sketches of the institutions (that on the Parliament is rather cursory) together with an introduction to the principles of EC law. It seems unfortunate that, given the brief treatment in the texts, little additional reading is suggested, beyond a couple of articles, for neither of which a page reference is given. I can imagine that the national lawyer confronted with the section dealing (too) briefly with direct applicability and direct effect would be grateful for a reference to a more specialized Community law text. Additionally, in the section dealing with directives, no mention is made of *Marleasing*. Given the complexity of this subject-matter, perhaps in one of the future updates, more extensive treatment could be given this vital area.

Chapter 2 was written by Ian Pittaway and is entitled "Setting up a new Scheme". Chapter 3, "Established Pension Schemes", comes from the combined pens of Sarah Trier and Peter Docking. In both chapters, the authors examine the consequences of Community equality law for those contemplating setting up a new scheme, or for existing schemes. Given the time of writing of the texts, it is hardly surprising that many of the answers given to the questions are subject to a caveat, depending on the interpretation of the *Barber* case in what have come to be known as the *Coloroll* cases. Indeed, given the recent judgments in *Ten Oever*, *Moroni*, and *Neath* (surely *Coloroll* cannot be far behind) together with the interesting judgment in *Roberts* v. *Birds Eye Walls* a substantial revision of Chapters 2, 3 and 4 seems to be due, although, on most points the authors have correctly guessed the course which the Court of Justice would follow.

Chapter 4 by Edward Hayes on "Transfers, Investment and Mobility", is the most readable Chapter in this volume. He deals with the potential consequences of EC law for transfer values (not "pay" according to the Court of Justice in *Neath*) and the consequences of taking a transfer, as well as with actuarial factors (outside Article 119 according to the Court in *Neath*). His brief treatment of EC law and pension fund investments is infinitely more successful than that of Ms. Harrison.

Chapter 5 by Charlotte Hoyes deals with "Procedure and Claims", which will undoubtedly prove useful. My only quibble with this Chapter concerns the treatment of the judgment of the Court of Justice in *Emmot*. No mention is made of the Court's finding that national time limits can not begin to run until a directive has been properly transposed into national law, a pronouncement that has recently been the subject of an interesting interpretation in *Steenhorst-Neerings*.

There are also a number of useful appendices. I must admit to some surprise that working paper XV(90)224 on "Completing the Internal Market in Private Retirement Provision" is included but not the communication on the role of supplementary pensions SEC (91) 1332 final. For the updates, the working paper XV/2040/92 of September 1992 on cross-border membership would be a useful addition, as would, in addition to the texts of the four "*Barber*" cases, the text of *Roberts* v. *Birds Eye Walls*.

To conclude, the Docking/Trier book, having explicitly stated that it "is not a legal treatise on the intricacies of EC law. It is intended as a practical guide which aims to given straightforward advice on the difficult issues of EC law ... to be easily accessible to busy pension fund managers and other pension professionals and has been styled accordingly" (p. vi) succeeds in reaching the objectives set. While in many places the objective of giving "straightforward advice" often verged on the over-simplification, with frequent updates I am convinced that this will be a valuable tool for the English pension lawyer and is well worth the money. In these updates, some more extensive literature references would form a valuable addition. The authors and editors are to be congratulated in producing such a useful book on such a complex subject.

Elaine A. Whiteford
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M. Andenas and S. Kenyon-Slade (Eds.), *E.C. Financial Market Regulation and Company Law*. London: Sweet and Maxwell, 1993. 358 pages (including appendices) plus tables and index.

This book is the fruit of a conference (which this reviewer had the privilege of briefly attending). It was organized by the Centre for European Law, Kings College London and held at Jesus College, Cambridge. At a time of rapid E.C. progress in the company and securities law field this book should be widely wecomed not only by specialists in the field but by company lawyers generally as well as community lawyers who wish to

be better informed about these developments. The main text, based on revised conference papers, is helpfully interspersed with appendices setting out the full text of the more significant recent directives.

In the first few chapters some office-holders in Community institutions (Paulo Clarotti, Gisbert Wolff, Walter Van Gerven and Jan Wouters) authoritively assess the policy and theoretical foundation of the Completion of the Internal Financial Market and the programme for company law harmonization. Particular projects in these programmes (mostly still to be brought to full fruition) are then scrutinized in later chapters by academics and practitioners who have already established a name for themselves in their areas of expertise.

Gisbert Wolff's contribution (on the company harmonization programme) has some provocative as well as profound observations to make. Anyone familiar with the varying defects in the way the existing directives have been implemented in Britain over the last twenty years will more readily grasp why the Commission's supervisory role has been so laxly tolerant of what D.T.I. has done. Wolff (who should know) points (at p. 24) to the very thin resources the Commission has at its disposal "... the Commission has only a very limited staff to scrutinize the correct and complete implementation of directives into the domestic law of member states. The Community comprises 12 Member States and nine official languages. In the Commission's company law unit, there are only three lawyers and three accountants who are supposed to check more than 100 national laws implementing directives that have already been adopted in addition to drafting new proposals or negotiating proposals already made. The likelihood that infringements of directives by Member States will be detected by the Commission depends on the number of staff available for that watchdog function and in their quality."

Walter Van Gerven and Jan Wouters (respectively Advocate General and Legal Secretary to the Court of Justice) contribute a valuable chapter on "Free Movement of Financial Sources and the European Contracts Convention". Their chapter focuses upon a potential barrier to a truly integrated financial services market – the impact of various conflict of law rules on financial services. The authors point out that in the absence of specific Community rules with respect to financial services contracts, the conflicts provisions laid down in the Rome Convention on the law applicable to contract of obligation will apply. As well as examining the application of the Rome Convention to financial contracts and the case law of the Court of Justice on services, they explore "justification regimes" for barriers to intra-Community trade in services (both public policy as a justification for discriminatory national rule and non-discriminatory restrictions). They then examine the Community's new approach to financial services in the internal market directives. This important chapter then concludes with their considered judgment on the relationship between the Community rules on services, the Rome Convention and Member States' conflict rules.

Two related chapters by Eva Lammicker and Pauline Ashall analyse the Investment Service Directive and place it in its wider context in the Internal Financial Market. The subtitle of Ms. Ashall's paper "What was all the conflict about?" emphasizes the difficulty of agreeing the terms and timing of the Investment Services Directive and the

Capital Adequacy Directive. The delay in setting a common position on both Directives has resulted in the date of their implementation by Member States being put off to January 19 1996.

Eilish Ferran's chapter provides a very lucid and informative account of the problems Britain has experienced in implementing the Public Offers Directive. Essentially this difficulty is rooted in a mismatch between our own reform of the law on public offers of non-listed securities (in Part V of the Financial Services Act) which still exists in a state of suspended animation, and the need to comply with the somewhat different requirements of the Public Offers Directive. Ms. Ferran explores a further dilemma about using the power given by the European Communities Act to amend Part V of the F.S.A. As she succinctly puts it (at p. 107):

> "If European Communities Act powers are taken to amend Part V, the amendment will only have effect to the extent that the offers concerned are within P.O.D. For other offers which are within Part V, the unamended Part V will apply. Thus advisers would be faced with the prospect of two Part Vs, one implementing P.O.D. the others dealing with residual United Kingdom requirements."

Profession Sealy and the editors have contributed respectively two valuable chapters on the same general topic – the Draft Thirteenth Directive on Takeovers and the U.K.'s City Code on the same subject. There is inevitably some repetitious overlap between the contribution of the joint editors (Andenas and Kenyon-Slade) and that of Professor Sealy. This even extends to citing the same description of the multiple functions of the Panel by Lord Donaldson (see pp. 137 and 150). Incidentally this shared quotation is rightly ascribed to the Master of the Roll's judgment in *Guiness* (1989) whereas the footnote in the joint editors chapter appears to ascribe it to his judgment in *Datafin* (1987). Some degree of overlap is perhaps inevitable in any monograph publishing a series of conference papers but it is a little surprising when one of the chapters is that of the editors.

The Andenas/Kenyon-Slade chapter is much longer than Sealey's and is therefore able to engage in a critical analysis of the relationship between the City Code and the Directive. Sealy, however, finds space for a nub issue which they ignore (except for a passing reference). This is the critical question of the so-called "level playing field" as between Britain and other members of the E.U. in respect of the market for corporate control. As Sealy's conclusion to his chapter makes amply clear, the legal and cultural barriers to competitive takeovers in nearly all E.U. Member States (other than the United Kingdom) are an essential context in which to assess the strengths and weaknesses of the Thirteenth Directive (as well as the City Code). While such barriers inevitably remain largely intact, leaving takeover activity outside London a rarity, there will be little worth regulating elsewhere. Sealy rightly indicates that the City's very largely effective Code (and Panel) could well be undermined and impaired by the overzealous implementation of the Directive in the one jurisidcition where an active market flourishes.

Professor Sealy, no doubt spurred by his grasp of the implication of the Coopers Lybrand Report, seems alone in this whole range of conference papers in being fully

aware of the crucial divide between the philosophical beliefs and cultural practices of the corporate scene in Britain as opposed to her E.U. partners. This is much more than a matter of German banks versus Anglo-Saxon economics or christian democracy versus Thatcherite conservatism. The text of say the Fifth and Tenth Directive and that of the European Company statute (in their original form) are much older than that of the Thirteenth Directive. Although the politically controversial provisions in these texts have been amended to take account of British business and governmental ideological objections, a vast gap remains. The lack of a level playing field in the area of takeovers leaves a gap that even the most nimble and imaginative diplomacy is unlikely to bridge. The Commission, our own Government and the City Panel seem now to recognize this.

Both chapters demonstrate the rigidity and inflexibility of attempting to regulate takeover activity by legislation. The primacy of the Code's well-known principles over its rules in the Panel's interpretation of these rules is a likely casualty to a statutory text building on the Thirteenth Directive.

The paramount need for keeping opportunities for litigation at bay (to deter the use of the courts as a defensive tactic to defeat takeovers) is well made in both chapters. Andenas and Kenyon-Slade acknowledge some obscurity in the Code's own rules restraining the use of litigation by the offeree company. The courts have been much more successfully precise in curtailing the use of judicial review to challenge Panel decisions. Both Sealy and Andenas/Kenyon-Slade focus on the central significance of the Code's provisions restraining partial bids by the requirement of a mandatory offer. Unless adequately restrained, partial bids giving de facto control will destroy any serious substantive protection for offeree shareholders as a whole. Left to itself, the partial bid has a coercive effect on shareholders by reason of price discrimination. The pressure to respond to a partial bid stems from the difference between the price offered and the post takeover value of the remaining shares. While the Code amplifies its basic remedy (a mandatory bid for at least 50% of the voting rights where the 30% trigger is reached), the equivalent Article 4 of the Directive lacks the range and power of the Code's further provisions. One obvious flaw is that Article 4 allows the bidder (on reaching the trigger of 33%) to make a mandatory bid of up to 100%. Since the terms of such a total bid will never in practice be met, the mandatory bid under Article 4 can be rendered meaningless by the offeror.

In Chapter 11 Janet Dine treats of two innovative corporate persons which move beyond the company law harmonization programme and depend primarily on a regulation rather than a directive. These new creations are the still gestating European Company and the already flourishing European Economic Interest Grouping. The technique deployed brings advantages as well as disadvantages. As she aptly puts it:

> "The respective Regulations on the S.E. and E.E.I.G. set out framework, structures leaving the remaining legal issues to be governed by the law of the place where the instrument is registered. This approach has the advantage of providing a European instrument which clearly automatically adapts to detailed legislation in a Member State. It has the disadvantage that the interface between the European Regulation and national law is difficult to define and may be difficult to operate."

In her concluding section Dr. Dine observes (of the European Company proposal) that incorporating into "national law" different options offered by the Directors will create other differences. Destruction of freedom of movement may be built in by virtue of sheer weight of regulation with which companies have to comply. She notes the areas that have caused greatest difficulty to the company law harmonization programme. As a tentative solution to this dilemma she points to the liberal policy of freedom of incorporation in the United States and argues that this model has a great deal to offer. Instead of delaying completion of the harmonization programme (possibly for years of stagnation) until the problem areas of tax, employee participation and insolvency are solved, a "better way forward would surely be to make European registration equivalent to registration in Delaware". A simple liberal European Company Statute modelled on Delaware law or the Canadian Business Corporation Act 1975 "would avoid excessive national jealousies". As in the United States, Member States could impose reasonable restrictions on the operation of companies within those jurisdictions. Certainly as regards the board structure and employee participation issues, this approach underestimates the hard political differences between the "liberal" stance of the present British government and other political views and business philosophies broadly espoused by our E.U. partners. The divide between Britain and her partners (and to a lesser extent between those partners) is a world away from the common "liberal" business philosophy in the United States and Canada.

Barry Rider and Michael Aske's contribution in "The Insider Dealing Directive" concludes this excellent book with a chapter that is well up to the standard of erudition and lucid exposition which characterize the work as a whole. Although these authors have written elsewhere on the implementation of Council Directive 13 in Britain by the Criminal Justice Act 1993, they once again show their considerable knowledge of the whole subject of insider dealing in the British and Irish context. This chapter is enlivened by a lengthy but invaluable background to the more recent developments. This ranges from the *Segré* Report to the 1977 Code of Conduct via the Fifth Directive and the European Company Statute.

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A.J. Easson, *Taxation in the European Community*. London: Athlone, 1993. 322 pages. GBP 45. ISBN 0-485-70010-7.

For many years European law has been a somewhat neglected area for many tax law practitioners. In much the same way, taxation seems to have escaped the attention of many EC lawyers. In some respects this is surprising. The Community is after all based upon a customs union which limits the taxation powers of Member States in respect of cross-border movements of goods, both among themselves and in relation to third

countries. On the other hand, a brief look at the EC Treaty demonstrates that provisions on taxation are not in abundance. As Easson points out on pages 11 and 12, from the positioning of the articles relating to taxation in Chapter 2 of Part 3 (now: Title V of Part 3) of the Treaty, it follows that "tax policy was not considered by the authors of the Treaty to be one of the 'Foundations of the Community' but rather as a part of the Common Rules which are ancillary to the Treaty's main objectives". Despite this, tax law has developed into a separate area within European law which has grown in importance. From safeguarding free movement of goods in the Community and the establishment of a Common Customs Tariff, European tax law has expanded into a body of law in itself. An achievement of Easson's book is that the development of this body of law is thoroughly described. Particularly noteworthy is that Easson undertakes this examination from an EC rather than a tax perspective.

The book is divided into five chapters. The first chapter, "The Community Tax System", starts off with the discussion whether the Community possesses a tax system as opposed to a mere body of rules limiting the fiscal autonomy of the Member States. According to Easson (page 2), this is the case, "even though it is clear that the Community does not possess a general fiscal competence". Particularly interesting is the relationship between the Community budget and taxation. The link between the designation of value added tax as a source of Community revenue and the subsequent development of a common system of value added tax in the Community on the one hand and the financing of the Community on the other is without doubt relevant for those who support closer integration between the Member States. The replacement of a system of financial contributions from Member States by a system of own resources, including VAT, is important from a "constitutional" point of view, since it lays the foundations for a Community becoming ever more independent from the Member States. This of course may well have repercussions for the long term position of taxation within Community law. The expansion of the Community, not only in size, but also in importance, implies additional financing and a redistribution of resources. Furthermore, current international economic developments, such as the "successful" completion of the GATT Uruguay round, will cause "traditional" revenues from customs duties and agricultural levies to decline. The combination of these developments will fuel debates on the financial foundations of the EC. In the end, taxation at Community level may well play an important constitutional role in these debates.

The second chapter deals with "The Prohibition Against Discriminatory and Protective Taxation", an area which will undoubtedly be familiar to many EC lawyers. The central provision of this chapter is Article 95 EC, which is discussed extensively. The section dealing with the relationship between Article 95 and other provisions of the EC treaty provides a concise but good analysis of this often complex and sometimes confusing area of Community law.

Chapters three and four deal with indirect taxation: "The Harmonization of Turnover Taxes: The Common System of Value Added Tax" (chapter three) and "Excise Duties and Other Indirect Taxes" (chapter four). In the development of European tax law, the greatest progress has been achieved in the field of indirect taxation. This is by

no means surprising, since the EC Treaty does refer expressly to the harmonization of indirect taxes, but does not mention direct taxation, although Article 220, which obliges Member States to "enter into negotiations with each other with a view to securing for the benefit of their nationals the abolition of double taxation in the Community", implicitly also applies to direct taxation. As Easson observes (page 84), "the main concern of the architects of the Community, as far as taxation was concerned, was with the various forms of indirect taxes and their potential to distort the conditions of competition within the Common Market". From this point of view, the mere prohibition of discriminatory taxation and export subsidization as contained in Articles 95 and 96 would not solve the problem of the distortion caused by the existence of various systems of indirect taxation. Therefore, harmonization of these systems, even to a limited extent, is required. To a limited extent, since the original version of Article 99 restricted this harmonization to harmonization "in the interest of the Common Market", whereas after the Single European Act harmonization should take place to the extent this is necessary "to ensure the establishment and functioning of the internal market".

In the field of harmonization of indirect taxation, much was achieved in respect of the harmonization of turnover taxes, capital duty and (to a lesser extent) excises. In respect of the harmonization of turnover taxes, Easson (pp. 87 and 88) distinguishes three main policy trends: the establishment of a common system of turnover taxation in the form of a common system of VAT, the closer approximation of the national VAT bases, and finally the abolition of fiscal frontiers in order to create a single market without internal frontiers. This latest trend raises the interesting issue of the application of the destination and the origin principles in intra-Community trade. As Easson points out (p. 21) Articles 95 and 96 permit the application of the destination-principle in intra-Community trade by allowing a system of taxes on import and refunds on export. According to the origin principle, tax is basically levied in the country in which goods or services are supplied. The destination principle on the other hand prescribes taxation in the country of actual usage of the goods or services. Take for example the imposition of VAT. Suppose that a German national buys a car in France. The taxable event, the supply of the car, takes place in France. VAT will therefore be levied in France. However, under the destination principle, VAT should be levied in Germany if the car is to be used there. Technically this result can be achieved by a system in which France grants a refund of VAT if the car is "exported" to Germany, and the imposition of VAT upon "importation" of the car from France into Germany.

The operation of the destination principle forms an important source of internal fiscal borders within the EC, although it is possible to envisage a system which could be applied without the need for border checks. The destination principle of course does not sit comfortably with the internal market as prescribed by Article 7A. However, although therefore a prime candidate for harmonization on the basis of Article 99, it has proved to be difficult to abandon the destination principle. Abolition of the destination principle in respect of excise duties is not envisaged in the foreseeable future, whereas for VAT purposes, a rather hybrid transitional system has been adopted, which began on 1 January 1993 and in principle should expire on 31 December 1996. In prin-

ciple, because as long as the "definite" system of VAT has not been adopted, the transitional system will remain in force. The most drastic "definite" solution would have been the introduction of the origin principle. However, most Member States were not yet ready to accept this solution. Fears of, *inter alia*, loss of revenue, infringement of fiscal sovereignty and competitive distortions led to the adoption of the transitional system which combines both the origin and destination principles. As a general rule, private individuals are taxed in the country in which they make their purchase (origin principle), whilst taxable persons are taxed in the country of destination (destination principle). Unfortunately, this general scheme is subject to a number of derogations and exceptions, thereby making it a rather complex system involving considerable administrative problems for many businesses. Easson (p. 142) suggests that, rather than aiming at the adoption of a "definite" VAT system, a "more modest and realistic approach would be to pause and see if the transitional solution adopted by Directive 91/680 is effective to remove border controls, to remedy any defects that become apparent in that system, and to retain it for so long as it works satisfactorily". It is not difficult to concur with this view. It can be questioned whether introduction of the origin principle, probably combined with progressive harmonization, is the way forward. This question takes on an extra dimension if one realizes that introduction of the origin principle could well lead to the development of two systems of indirect taxation on intra-Community cross-border systems movements of goods, since abolition of the destination principle in respect of excise duties is not envisaged. It may indeed therefore be a good moment to pause, not only to analyse the future system of VAT in respect of intra-Community transactions, but also to discuss the foundations of indirect taxation in respect of intra-Community movements of goods.

Other areas of indirect taxation which are discussed by Easson are capital duty and excise duties. Together with turnover taxes, capital duty is an area of taxation which was harmonized at an early stage. The first VAT and capital duty directives were both adopted in the second part of the 1960s and therefore form the "nucleus" of Community legislation on indirect taxation. In the case of capital duty, as is mentioned by Easson (p. 190), this process of "early" harmonization can be explained by concerns about the distorting effects of the various capital duties in the Member States upon the free movement of capital. The Commission preferred to abolish capital duty altogether, but this was and still is not acceptable to some Member States. Easson categorizes capital duty as a direct rather than an indirect tax, which is debatable. By doing so, there exists a risk that the common origin of the first VAT and capital duty directives is overlooked.

The final area of indirect taxation discussed is that of excise duties and other indirect taxes. Particularly interesting is Easson's analysis of the problems involved in harmonizing excise duties (and more specifically the rates thereof) within the European Community, which clearly demonstrates the potential important economic and social repercussions which harmonization of excise duties may have.

Although within European tax law the greatest progress has been made in the field of indirect taxation, some important Community measures in the field of direct taxation have been adopted. This is the subject of the final chapter, "Direct Taxation". The

rather cumbersome process of adopting Community measures in the field of direct taxation is described thoroughly. In the light of the absence of any reference to direct taxation in the EC Treaty and the vehemence with which Member States have guarded their fiscal "sovereignty", it can be argued that it is surprising that any legislation on this matter was adopted at all. Concrete measures adopted are the Merger Directive (90/434), the Parent/Subsidiary Directive (90/435) and the Arbitration Convention (90/436), whilst two other directives – the Proposed Directive on Interest and Royalties and the Proposed Directive on Intra-Group Losses – await adoption. All these measures are described in this Chapter 5. The aim of the Merger Directive is to remove the tax costs involved in cross-frontier mergers (Easson, p. 195), whereas under the Parent/Subsidiary Directive certain qualifying dividend payments are exempt from dividend withholding tax in the country of the subsidiary, whilst the country in which the parent company is established should grant relief from double taxation (Easson, p. 206). The Arbitration Convention is an agreement between the Member States based upon Article 220, rather than a directive as originally proposed by the Commission (Easson, p. 208). The Convention deals with the subject of "transfer-pricing" i.e. the setting of prices in respect of intra-group transactions. Transfer-pricing is often the source of disputes between the tax authorities and companies, since the former often feel that the price charged to the taxpayer in respect of intra-group transactions is too high, thereby artificially reducing taxable profits in that jurisdiction. However, an adjustment of the tax authorities in Country A without a corresponding adjustment in Country B leads in effect to double taxation. The Arbitration Convention seeks to eliminate this double taxation resulting from the adjustment of profits of associated companies (Easson, p. 209). Under the Proposed Directive on Interest and Royalties, certain qualifying payments of interest and royalties will be exempt from withholding tax (Easson, p. 211), whereas under the Proposed Directive on Intra-Group Losses, in certain circumstances a company may take into account losses incurred by subsidiaries or permanent establishments in another Member State (Easson, p. 216). Together, the abovementioned measures, despite perhaps not going far enough, are of great importance to many EC companies. In this respect, the developments in the field of direct taxation over the last few years, together with progress in the field of mutual assistance of tax authorities through exchange of information, have certainly been significant.

The final section of this chapter is devoted to the subject of "Direct Taxation in an Internal Market". Easson discusses briefly the Commission's view on the principle of subsidiarity in relation to the harmonization of direct taxation and, in much more detail, the Report of the Ruding Committee established in December 1990 to report on the necessity of harmonization of company taxation in the EC. In his "tentative appraisal" of the Ruding Report, he concludes at page 248 that "perhaps the most sensitive issue of all", "the question of inter-nation equity, that is to say the allocation of revenues from cross-border investment and business activity between Member States" seems to have received little attention. His observations on this question are (page 249) that if the right to tax profits from equity investment is (primarily) allocated to the country of source whereas "the profits from debt-financed investment will be taxed exclu-

sively in the state of the lender", this will leave multinational enterprises "more or less free to determine in which of two or more countries the profits of any operation are to be taxed". This development would not only distort investment decisions but could also lead to "a tendency for source countries to become more vigorous in applying transfer-pricing and thin-capitalization rules".

Taxation in the European Community makes interesting reading for those interested in the development, functioning and role of taxation in the European Community. Despite the fact that it is written from an EC rather than a tax law perspective, some parts of the book may be too technical and detailed for some people unfamiliar with tax law. On the other hand, the book is not a handbook on taxation, but discusses taxation in the EC from an EC perspective. The treatment of some matters – for instance the conformity with Community law of tax incentives in various Member States, the possibility of Community-wide transfer pricing and thin capitalization rules or the relationship between bilateral tax treaties (especially with third countries) and European (tax) law – seems likely to be rather too cursory for the taste of many tax practitioners dealing primarily with direct taxation. The absence of any discussion of customs law in the EC is regrettable, although perhaps such a discussion can be considered to be too far removed from the subject of taxation in its strictest sense. Nevertheless, where Easson in his Preface concludes that "law – and especially tax law – can only be properly understood by examining it in its economic, social and political context", the conclusion is justified that *Taxation in the European Community* certainly contributes to this aim. The elaborate use of notes and references, together with a selected bibliography, tables of cases, treaty provisions and Community legislation make this book a good reference book.

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P. Tercier, P. Volken, N. Michel (Eds.), *Aspects du droit européen*. Arbeiten aus dem Iuristischen Seminar der Universität Freiburg Schweiz No. 127. Fribourg: Editions Universitaires Fribourg Suisse, 1993. 349 pages. SFR 88.

"La Suisse – certains le savent bien – n'est pas une île." Found in one of the essays of the book under review, this sentence could very suitably be its title. Since its negative vote on the EEA Treaty on the now notorious 6 December 1992 Switzerland has been realizing the truth of this statement (by D. Barrelet) more than ever and in some respects rather painfully. The Swiss Government is trying to do its best to avoid a "splendid isolation" of the country in the European context. In the meanwhile Swiss lawyers, of course, have been aware of the need to know about European law – a familiarity considered necessary in fact quite independently of Swiss membership of the EC – and are taking efforts to learn about it. For one, the Swiss Lawyers' Association dedicated its

yearly meeting in 1993 to subjects of European law. It is on this occasion that the members of the law faculty of the Freiburg/Fribourg University presented to the Association the book under review. They expressly put it in the context of 6 December 1992 and its consequences.

The book contains a collection of seventeen essays in German and French on various (not necessarily coherent) aspects of European law. I will first discuss one of the essays in some detail, and then give an overview of the other subjects which are dealt with. This essay, which is actually the very first in the book, is written by Th. Fleiner-Gerster and entitled: "Sind die politischen Institutionen der Schweiz europafaehig?" (which can roughly be translated as: "Are the Swiss political institutions ready for Europe?"). In his essay, Fleiner-Gerster addresses some consequences of Swiss membership of the EC. It is widely believed in Switzerland that the main barrier to Swiss membership consists in traditional Swiss political values and institutions – such as the federalistic structure of the Swiss state, the right to table bills (*"Initiativrecht"*) and the right to oppose (certain) legislation adopted by Parliament (*"Referendumsrecht"*) – since they would be restricted as a consequence of a membership. Fleiner-Gerster disagrees and maintains that, quite on the contrary, the traditions of federalism and democracy should be very helpful in the integration process since they are truly European ideas.

With regard to federalism, Fleiner-Gerster does see that Switzerland's joining the EC indeed would cause significant problems. These problems regard the autonomy of the cantons (which, in principle, are sovereign states under Swiss law), the participation of the cantons in the decision-making process of the EC and the implementation and enforcement of EC law in Switzerland.

Fleiner-Gerster then examines the consequences of Swiss EC membership with regard to the right to table bills and the right to oppose legislation adopted by Parliament. He points out that the supreme organ of the Swiss state is the Sovereign (*"Souveraen"*), namely the voting people and the cantons (*"Volk und Staende"*). It follows, he argues, that it is entirely up to the Swiss Sovereign to decide on initiatives and referendums, even when they are contrary to Community law. No authority or court of the Swiss can take away that competence of the sovereign. In consequence, this means that it would be possible for the Sovereign to adopt a law which is contrary to Community law (conduct, however, which Fleiner-Gerster considers unlikely). This line of argument resembles rather strongly the English attitude, as expressed by Lord Denning in the case *Blackburn* v. *Attorney-General* (English Court of Appeal, CMLR, (1971), 784, 790).

However, this very national view fails to take into account the drastic consequences of the principle of primacy of Community law – one of the twin pillars upon which the Community law is said to rest: Community law prevails over contradicting national law of the Member States. If a Member State adopts legtislation which is contrary to Community law, it fails to fulfil its obligations under the Treaty (Article 5). Such conduct might lead to an enforcement procedure against that Member State under Article 169 EC. It is well established case law (for instance Case C-217/88, *Commission* v. *Germany*, (1990) ECR I-2879) that internal difficulties to comply with the Treaty, among them particularities of national (including constitutional) law, can never serve as an ex-

cuse for a failure on the side of the Member State. Furthermore, if there is such contradicting national law, national courts have the duty not to apply it. The consequence of this is clear: Swiss membership of the EC most assuredly would lead to a restriction of the right to table bills and the right to oppose adopted legislation.

In the latter context an additional problem arises when Fleiner-Gerster suggests that, in the interest of greater acceptance of laws adopted in accordance with the Swiss *"Referendum"* system, considerable delays in the implementation of Community law due to that system should be accepted by the Union in the case of Swiss membership. In its result, this is proposing variouble geometry in favour of Switzerland. In the view of the Union, this cannot be desirable and it is therefore more than doubtful whether the Union would take the favourable stand which Fleiner-Gerster suggests.

Clearly, should Switzerland (again) contemplate membership of the Union seriously, it should be aware of the famous dictum of the Court of Justice in its *Van Gend en Loos* decision, according to which the EC "constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit in limited fields" (and, having regard to the development since this decision, it must be added: in ever-increasing fields). This would be true, of course, also for Switzerland should it become a member of the Union. The Swiss sovereign would have to consider whether or not there might be good reasons for joining the Union which might make a restriction of the Swiss sovereignty worthwile.

Of the other essays in the book under review, ten focus on Community law subjects in connection with Swiss law. S. Schnyder, "Der regionale Ausgleich – Bemerkungen zur europäischen Regionalpolitik", discusses the policy of the EC with regard to its regions and the problems of these regions. In his view, the agrarian areas of Switzerland would suffer seriously from Swiss membership of the EC. P. Haenni, "Die Kantone und Europa", discusses the position of the Swiss cantons as members of the Swiss federation in the light of European integration. In his view, this position is too weak and needs reforming. The protection of rights granted under Community law is described by N. Michel, "La protection des droits conférés par l'ordre juridique européen". E. Murer, "Einige Merkmale des 'europäischen Sozialversicherungsrechts'", addresses aspects of European Social Security law. Product liability is discussed by P. Gauch, "Die Produktehaftungsrichtlinie der EG – ein Ueberblick", and by P. Tercier, "Le concours d'actions selon la Directive européenne et les projets de droit suisse sur la responsabilité du fait du produit". J. Schmid, "Der EG-Richtlinienvorschlag über missbrauchliche Klauseln in Verbraucherverträgen – und mögliche Auswirkungen auf die Schweiz", discusses the proposal for a Council Directive on abusive clauses in consumer contracts and its possible effects on Switzerland. Swiss law, in the opinion of Schmid, is characterized by a serious development deficit in this area.

Two essays address the protection of data: P.-H. Steinauer, "La licéité du traitement des donnés personelles en droit privé suisse au regard des normes européennes", finds that the Swiss legislation in this area is "euro-compatible". D. Barrelet, "Les médias dans les législations suisse et communautaire sur la protection des donnés", focuses on the media in the context of Swiss law and various European laws on the protection of

data. F. Werro, "Les principaux contrats de service du Code des obligations – Quelques réflexions sur l'utilité d'une récodification dans la perspective de l'intégration européenne", suggests a new approach in interpreting the Swiss Code of Obligations with regard to service contracts. This would make the code a useful instrument with regard to modern types of contracts and it would bring it in line with other european approaches.

Procedural law is addressed in four essays. P. Volken, "Zum Stand des europaeischen Konkursrechts", gives an overview of the present situation of European bankruptcy law. The harmonization of Swiss procedural law in civil matters (every one of the 26 Swiss cantons still has its own code in this area) is discussed by O. Vogel ("Europavorbild und Eigenwuchs – Die Vereinheitlichung des schweizerischen Zivilprozessrechts"). L. Krauskopf, "Umwälzungen im Osten – Auswirkungen fuer die internationale Rechtshilfe in Strafsachen", addresses the consequences of the new situations in eastern European countries with regard to mutual assistence in the field of criminal procedure. F. Riklin, "Die Regelung des Abwesenheitsverfahrens in der Schweiz aus der Sicht der EMRK", discusses criminal procedure in the absence of the accused in the light of the European Convention on the Protection of Human Rights.

In addition, the social effectiveness of the European Convention on the Protection of Human Rights is discussed by M. Borghi; and J.-B. Zufferey suggests the introduction of a Swiss law on secondary financial markets.

In conclusion, the book presents an interesting outlook on various aspects of European law. But may be more than that, it is an expression of the wish of the authors that Switzerland might not be an island. Or rather, "stay an island", one is tempted to say after having read the essay by Fleiner-Gerster. It seems euphoric for the editors to express their belief that the negative vote of 6 December 1992 *"sera probablement qu'un incident de parcours dans la création d'une Europe nouvelle et unie, dans laquelle notre pays occupera la place que lui revient tout naturellement"*. Quite apparently, this process is going to be rather difficult. Nevertheless, one may still hope that in the end, the editors will be right.

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F. Reichert-Facilides and H.U. Jessurun d'Oliveira, *International Insurance Contract Law in the EC* – Proceedings of a Comparative Law Conference. Deventer: Kluwer Law and Taxation, 1993. xxi + 258 pages. ISBN 9065446761.

On 23 and 24 May 1991, a Comparative Law Conference was held at the European University Institute in Florence concerning international insurance contracts. The book under review is first and foremost a collection of essays submitted by participants of this Conference, on (Private and European) International Insurance Contract Law,

each discussing one or two problems posed by the manner in which that law has been regulated by the EC. First there is the 1980 Rome Convention, (Convention on the law applicable to contractual obligations, Rome, June 19, 1980, O.J. 1980, L 266/1) which can only be applied to insurance contracts when the insured risk is situated outside the EC territory. Secondly, there is EC law in the form of first, second and third generation Directives (First Council Directive 73/239/EEC, O.J. 1973, L 228/3; Second non-life insurance Directive 88/357/EEC, O.J. 1988, L 172/1; Third non-life insurance Directive 92/49/EEC, O.J. 1992, L 228/1) applicable to insurance contracts covering risks situated within the territory of the EC Member States and the national laws implementing these Directives. And finally there is Article 59 EC, concerning the free movement of services within the EC.

The essays are complemented by short summaries of the discussion at the Conference. The book also contains a number of annexes, containing amongst other things the texts of the second and third generation Directives on life and non-life insurance, and the text of the Rome Convention. The inclusion of the texts of the directives is very helpful in reading and understanding the essays.

The issues raised concern not only the content of the private international law rules given in the above mentioned instruments (the Rome Convention and the Directives), but also their relation to one another and to the EEC Convention in the light of its objective – creating an internal market in particular by means of the freedom of services (Article 59).

After reading the Preface by d'Oliveira, one hopes to find strongly advocated solutions to the problems stated therein in the essays which follow. The only general conclusion of almost every essay, however, is that all questions of private international law concerning insurance contracts should have fallen within the scope of the 1980 Rome Convention, regardless of where the risk is situated. I can only agree with this conclusion, but we are faced with the facts as they stand: a limited substantive scope of the 1980 Rome Convention; three generations of EC Directives with detailed rulings; and national law of the EC Member States implementing the Directives. A survey of relevant sources is given by Reichert-Facilides (pp. 11–22). As is pointed out by d'Oliveira (p. xvi) the Rome Convention has not only specifically stipulated that choice of law rules relating to contractual obligations which are or will be contained in acts of the institutions of the EC take precedence (Article 20), but has excluded insurance contracts covering risks situated within the EC territory from its substantive scope (Article 1(3)). In other words, the drafters of the Rome Convention have deliberately allowed "the maze", of which Lando speaks in his essay, of regulations for international insurance contracts to come into existence.

In the remaining part of this review I will concern myself with some of the problems of private international law and in view of the limited space I will only briefly discuss two of the nine essays: R.C.G.J. Morse, "Party Autonomy in International Insurance Contract Law" (pp. 23–53) and O. Lando, "Mandatory Rules Governing Insurance Contracts and Private International Law" (pp. 101–113). I will also touch on the differences in implementation of the Directives in the national laws of the Netherlands and France (see for France pp. 79–95).

Morse's essay concentrates on the issue of party-autonomy in international insurance contracts. In the introduction he points out that the difficulty of applying the choice of law rules, and in particular the rules concerning party-autonomy, is initially a result of the fact that two instruments co-exist. The immense complexity of the rules on party-autonomy contained in the Directives poses an even larger problem. Morse does not feel however that a consideration of the relationship between the Rome Convention and the directives will enlighten the readers of the book or the applicants of the rules. He thus continues by reviewing the party-autonomy rules laid down in the Rome Convention separately from those laid down in the directives. This is unfortunate, as one of the problems which d'Oliveira has stated in the preface is whether the Rome Convention is to be considered as forming part of the general provisions of private international law concerning obligations arising out of contract as mentioned in Article 7(3) of Directive 88/357/EEC (on page xvii, d'Oliveira erroneously refers to Article 7(2) of the Directive), given the fact that insurance contracts covered by this Directive have been excluded from the substantive scope of the Rome Convention. Although Morse (pp. 39–41) does recognize the problem and suggests different possibilities, he fails to take a strong standpoint. This is a pity especially for a book which offers an opportunity to tackle the problems posed by the co-existence of several instruments containing choice of law rules concerning international insurance contracts, instead of just describing them.

One of his suggestions is to consider the rules of the Rome Convention as forming the general principles of private international law of the EC Member States. Despite the exclusion in Article 1(3) of the Rome Convention, I would opt for this solution because it would result in a more uniform application of the directives. This is at present far from being the case. Just compare the French, English and Dutch implementing Acts.[1] The French have opted for a unilateral approach, adopting the rules of the Directive only in so far as risks are concerned which are situated in France, whereas the English take a multilateral approach. The Dutch legislative has also taken a multilateral approach, but has chosen to implement the Directive in coordination with the Rome Convention. Article 5 of the Dutch Act stipulates that the general principles of private international law referred to in several Articles of the Directive are considered to be laid down in the Rome Convention.

The interpretation given by Morse of Article 7(1)(b) in connection with Article 7(1)(d) of the second Directive is, in my opinion, erroneous. On p. 41 he suggests that, when Article 7(1)(d) stipulates "where the Member States ... grant greater freedom of choice of the law applicable to the contract, the parties may take advantage of this freedom",

1. French implementing Act: Code des Assurances, 31 Dec. 1989, reproduced on pp. 90–94; English implementing Act, Insurance Companies Act 1982, Sched. 3; Dutch implementing Act: Wet van 7 juli 1993 tot uitvoering van enkele conflictenrechtelijke bepalingen van de richtlijn 88/357/EEG van de Raad van de EEG, ... zoals gewijzigd bij de Richtlijn 92/94/EEG ... en coördinatie van de conflictenrechtelijke bepalingen van het op 19 juni 1980 te Rome tot stand gekomen verdrag inzake het recht dat van toepassing is op verbintenissen uit overeenkomst, ..., met die van de gewijzigde richtlijn.

this only refers back to the Member State where the risk is situated. Thus, he implies that only if that law allows a greater freedom of choice may the parties take advantage of that freedom. If, on the other hand, the law of the State where the policy holder is resident, grants greater freedom, that freedom is not available to the parties. This cannot be the meaning of Article 7(1)(d). In my opinion this Article stipulates that if either State grants greater freedom, the parties may take advantage thereof.

Lando tackles the problems concerning the mandatory rules, which have found their way both into the Rome Convention (Article 7) and into the Directives (Article 7(2) second Directive and Article 28 third Directive). Lando's definition of "mandatory rules" is however wider than those referred to in Article 7 Rome Convention. In his definition he includes the rules from which parties cannot derogate in their contract as is meant, for instance, by "mandatory rules" in Articles 5 and 6 Rome Convention. This definition is too wide in view of the wording of the articles in the directives. In my opinion the mandatory rules to which the directives refer have the same restrictive meaning as those referred to in Article 7 Rome Convention.

Lando subtitles his explanation of the Directive as "The Maze", which is exactly what it is. To try and find a way in this "maze" and in particular to establish the mandatory rules of which country will apply, he opts for the method of illustration. This is, of course, a sound method, but he warns the reader that he might not emerge without a scratch. He does not. What he mainly illustrates is the fact that the choice of law rules of the Directive form a "maze", and at some points he confused me even further.

In conclusion, I again missed the link to the Rome Convention in Lando's essay. His reason for not discussing it lies, I believe, in the fact that the Rome Convention has that limited substantive scope and Lando does not believe in its application to insurance contracts. He would rather see uniform substantive rules, mainly because of the intertwining relationship with the goal of the European Communities, a free movement of services.

The essays and issues raised are summarized by Reichert-Facilides, in "Synopsis of the Colloquy for International Insurance Contract Legislation within the EC" (pp. 191–196). In this brief summary most of the major issues raised are repeated and some are provided with a majority opinion. One of these being the issue of the "general rules of private international law". The majority of the participants is of the opinion that these are to be found in the Rome Convention.

I had high expectations of this book on International Insurance Law, and I was somewhat disappointed. This is mostly, I must admit, the result of the choice of law rules as they now stand. The EC and its Member States could hardly have come up with a more complex set of rules. The present essays raise all the main issues, but I would have liked to see the participants take a much stronger standpoint than they have. Other than that, the book puts forward a wide range of issues concerning international insurance contracts. And, although I have not discussed it in this review, I think the link to Article 59 EC – the free movement of services – is important in light of the future interpretation of the choice of law rules concerning insurance contracts.

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