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Book Reviews

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THE INTERNATIONAL AIR TRANSPORT ASSOCIATION: A CASE STUDY OF A QUASI-GOVERNMENTAL ORGANIZATION. By Richard Y. Chuang.[1] Leiden: A. W. Sijthoff, 1972. Pp. xviii, 185. $12.00.

This study of the structure and functions of IATA, whose role in the international air transport industry has been of great importance since its inception in 1945, is particularly timely, since the organization has been subjected to increasing criticism as a form of cartel which, by eliminating price competition, prevents the public from optimally utilizing the services of the industry.[2] As this review is being written, difficulties are being encountered, both within IATA and in intergovernmental negotiations, in reaching agreement on passenger fares to be charged on the North Atlantic route between America and Europe in the summer of 1973 and thereafter.

IATA, although called an "association," is incorporated under a special act of the Canadian Parliament. It is thus, in form, a private nonprofit corporation. It consists of most of the airlines operating international scheduled services. A large majority of its members are wholly or predominantly owned by governments. IATA's principal and most controversial function is to reach unanimous agreements among its members on minimum passenger fares and cargo rates to be charged on particular routes. Such agreements are subject to disapproval by the governments of the airlines concerned. Furthermore, many of the bilateral intergovernmental air transport agreements, including a large proportion of such agreements between the United States and other nations, expressly provide—or in some cases clearly

1. Associate Professor of Political Science, Northern State College, Aberdeen, South Dakota.

2. *See* K. PILLAI, THE AIR NET: THE CASE AGAINST THE WORLD AVIATION CARTEL (1969). Professor Chuang's book was written before the passage in 1972 of an act of Congress which for the first time gave the United States Civil Aeronautics Board adequate control over international airline rates, and which may significantly affect IATA's role. *See* Federal Aviation Act of 1958, 49 U.S.C.A. §§ 1374(a)(1)-(2), 1461(a)-(b), 1482(j)(1)-(5) (Supp. 1973), *amending* 49 U.S.C.A. §§ 1374, 1461, 1482 (1963). *Cf.* Comment, *CAB Regulation of Fares of Foreign Airlines: Civil Aeronautics Board v. Alitalia-Linee Aeree Italiane, S.p.A.*, 11 COLUM. J. TRANSNAT'L L. 276 (1972).

imply—that the fares and rates on the services covered by the agreements should be, in the first instance, those established through the IATA traffic conference machinery. The author of this book, therefore, is justified in referring to IATA as a "quasi-governmental" organization.

The chief merit of the book lies in its detailed description of the structure and organization of IATA. Although much of the book is devoted to a discussion of the traffic conference system, it also deals with the other functions and corresponding organs of IATA. The focus is not on critical analysis, but rather on the legal nature of IATA. Comparing it with other entities such as intergovernmental organizations, "public corporations," the International Committee of the Red Cross and corporations set up by special treaties (such as Air Afrique), the author offers a number of criteria to determine whether the entity is private or governmental, and suggests that many of these entities (apparently including IATA) "may be located anywhere along a continuum between the two extremes, *i.e.* purely inter-governmental and private organizations."[3]

A somewhat related question, that of enforcement of IATA rate agreements, which are in the form of "conference resolutions" binding on the participating airlines, is discussed at considerable length.[4] The author describes the enforcement machinery set up within IATA, including special officials to detect violations and impose penalties (ranging up to maximum fines of 25,000 dollars, with expulsion as the most severe sanction), and also analyzes the role of governments in taking action against offending airlines. Nowhere, however, is the question raised whether the "resolutions," which are contracts, could be enforced by private suit and, if so, where and by whom.

The author's analysis of the economic implications of IATA's rate-fixing machinery[5] is rather superficial. He shares, incidentally, the widespread but erroneous impression that from the beginning of the negotiations for a postwar regime of international civil aviation, and until the Anglo-American Bermuda Conference of 1946, the United States was adamantly opposed to rate fixing by interline agreements. That the contrary is true is shown amply by the repeated statements of Assistant Secretary of State Adolph A. Berle, Jr., chairman of the United States delegation at the Chicago Conference of 1944, to the

3. R. CHUANG, THE INTERNATIONAL AIR TRANSPORT ASSOCIATION: A CASE STUDY OF A QUASI-GOVERNMENTAL ORGANIZATION 154 (1972).

4. *Id.* ch. 8.

5. *Id.* ch. 9.

effect that his government favored rate fixing by such agreements subject to some form of governmental review and approval.[6] Indeed, there is reason to believe, though the evidence is not conclusive, that the impression of the United States accepting at Bermuda the IATA rate-making function only reluctantly as a trade-off for liberal capacity clauses was deliberately created by the two governments in order to disarm critics at home. One who seriously wants to understand IATA's role in the international airline rate structure and its implications should, at the very least, read Dr. Pillai's overtly partisan and already outdated but much more incisive and sophisticated analysis,[7] as well as Professor Chuang's book.

The volume is generally well written, although some unidiomatic English has crept in. Unfortunately, it contains a number of inaccuracies and omissions, including attribution to the International Law Commission of a report prepared merely by one of its special rapporteurs,[8] the failure to cite the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone in a discussion of "innocent passage" through the territorial sea,[9] and the telescoping into a single quotation articles 1 and 2 of the 1919 Paris Convention on Aerial Navigation and citing only article 1.[10] Very useful, however, is Appendix B, classifying as of 1970 all members of IATA by ownership—entirely governmental, partly governmental and private—with interesting details.

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6. 1 U.S. DEP'T STATE, PROCEEDINGS OF THE INTERNATIONAL CIVIL AVIATION CONFERENCE, CHICAGO, ILLINOIS, NOVEMBER 1-DECEMBER 7, 1944 at 62, 447, 451-52 (1948).

7. K. PILLAI, *supra* note 2.

8. R. CHUANG, *supra* note 3, at 4 n.15.

9. *Id.* at 14-15.

10. *Id.* at 17.

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AMERICAN-GERMAN PRIVATE INTERNATIONAL LAW. By Ulrich Drobnig. Dobbs Ferry, New York: Oceana Publications for Parker School of Foreign and Comparative Law, 1972. Pp. 510. $18.00. (No. 4 Bilateral Studies in Private International Law, Rev. ed. of M. Domke, American-German Private Law Relations Cases 1945-1955 (1956)).

Two factors explain, in part, the high renown of the *Bilateral Studies in Private International Law* among practitioners as well as scholars. The first concerns methodology; these studies deliberately depart from the traditional universal approach to the conflict-of-laws problem, which too often only opens the way to abstract restatement, merely showing the law of the books. This series instead draws living pictures of the functioning (and sometimes the nonfunctioning) of the conflicts rules between two concrete legal systems. The second reason why these *Bilateral Studies* have proved such a doubtless success is the skill of the editors in choosing the best man for each of the seventeen countries covered to date by the project. This infallible flair for the very best man led the capable editor, Nina Moore Galston, to persuade Dr. Ulrich Drobnig to undertake the task of a new edition of Martin Domke's *American-German Private Law Relations Cases 1945-1955.* Domke's book, largely concerned with post-War problems, was extremely useful for lawyers on both sides of the Atlantic in the period after World War II, but it is out of print, and Domke, owing to prior commitments, was not in a position to prepare a new edition. Dr. Drobnig, however, has produced not only a new edition, but an altogether new book, notwithstanding the many tasks he has to fulfill as a member of the famous Max Planck Society and in its Hamburg Institute for Foreign and International Private Law, and as the "whipper-in" of the nascent *International Encyclopedia of Comparative Law*, not to speak of his other activities. No one who knows the learned author's former works will be surprised to find here a new masterpiece by this outstanding scholar, who is one of the "*spiritus rectores*" of German comparative and private international lawyers.

The book's most interesting contents and the very stimulating way in which every subject is treated make it difficult for the reviewer to stay within the conventional framework of a book review.

Before discussing various special topics, Drognig very happily provides some basic background information that is indispensable for an approach not only to the German conflict of law rules but to German law as a whole. The author gives us a very useful survey of Germany's legal status following the unconditional surrender of May 8, 1945, and also explains the delicate question concerning the position of Eastern Germany. It is highly interesting to see how inextricably interwoven are legal arguments and political considera-

tions in this question, as well as in the extent to which the German Reich, as a state, has survived the defeat and subsequent occupation.

In the second chapter Drobnig outlines the legal sources for American-German relations in the field of private law. The author starts with the treaty network between the United States and Germany and, prior to the founding of the German Reich in 1871, with the various German states. Regarding the period before the reunification of Germany in 1871, Drobnig not only draws the reader's attention to the Bancroft nationality treaties of the 1860's, but goes back as far as the 1785 Treaty of Amity and Commerce between His Majesty the King of Prussia and the United States of America, giving a complete list of subsequent treaties. This research is not only interesting for the historian, but of considerable practical importance. For these old treaties, though now abrogated, are often helpful for the interpretation of the treaties in force. The remainder of this chapter very impressivly teaches the American lawyer where and how to find the German law rules.

In the last of his general chapters, which deals with nationality and domicile or residence as points of contact for the choice of law, Drobnig's highly developed art of explaining complicated matters quite plainly, distinctly reaches its summit. Here, on a few pages, we find the outlines of German nationality law. This treatment is concise, but nevertheless contains all essential information, and not only for routine cases. As Drobnig correctly emphasizes, American nationality law, because of the subject's importance to an immigration country, is much more complicated than that of Germany. This chapter also discusses the fundamental differences between domicile in its American sense and "domicilium" (*wohnsitz*) in a German (and generally a continental) sense. Particularly lucid is the discussion of how the choice of law, according to the German conflicts system, is determined by nationality, by domicile or by residence.

In the following two chapters American-German legal relations are analyzed from the perspective of family law, status and successions. Since about 90 per cent of all cases involving a conflict of laws that are brought to the courts—or have to be solved otherwise—are concerned with these matters, it is evident that this part of Drobnig's book has the greatest impact on an average lawyer's everyday practice. It is also in these fields of the law that the meeting of the German rules of private international law, based mainly on nationality as the point of contact, and of the American conflicts law, with its quite different approach to the problem, is creating most complicated questions. Consequently, it is of utmost importance whose law will be applied, since the law of family and successions in the two systems often substantially diverge from each other. Typically, the average

lawyer often is confronted with (and not seldom embarrassed by) questions such as: Can American spouses obtain a divorce in Germany? Can they acquire in Germany as joint tenants (a) real property, or (b) a bank account? What steps are necessary to transfer real property situated in Germany and inherited by an American minor from a parent of German origin? Can German support decrees be enforced in the United States and vice versa? What effect will be granted in the United States to a will executed in Germany, or in Germany to a will made or to a contract to make a will concluded in the United States? What power in Germany has an executor appointed under an American will? The solutions of these and countless similar, but frequently more intricate, questions are often very difficult. Consequently, Drobnig's gift—to bring order out of a complexity sometimes ranging quite close to chaos—makes these two chapters a particularly valuable guide for lawyers in both countries. The remarks on estate duties and inheritance taxes, in addition to what is said in the short but very instructive chapter (XVI) on taxes, will be especially useful because there is still no bilateral treaty on double taxation in this area.

One observation has to be added for readers interested in the most recent (and perhaps even future) evolution: After the book under review had been published, a famous (if not fatal) decision of the German Constitutional Court of May 5, 1971,[1] ruled that not only must German conflicts rules conform to the principles of the constitution but the application of foreign substantive law by German courts also must be measured by the standards of the German constitution. Because the decisions of the Constitutional Court are binding precedents even for the legislator, this judgment may have an enormous impact on the whole conflict of laws system of Germany, especially regarding family law. If it is actually implemented fully, German private international law would be not much more than a branch, or even just an appendix, of German constitutional law. Since this would draw Germany back beyond a medieval stage, and isolate her from all civilized nations as far as conflicts of laws are concerned, it may be hoped that the destructive effect of this famous decision will be restrained as much as possible. It is to be hoped also that Drobnig's statements on the German system of conflict of laws in the

1. This decision is reprinted in 36 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 143 (1972) and commented on by a considerable number of extremely competent authors. *Id.* at 2-142. For an English summary of the decision as well as of the comments see *id.* at 141-44.

field of family law and status will not be affected too much by this new development, which nevertheless must be carefully watched.

In German private international law, conflicts of law relating to property and to contractual obligations have a special feature created by the absence of any statutory provisions. It is interesting, from a methodological point of view, how German courts are getting along with customary and case law, otherwise quite unfamiliar to them. In the property chapter (VI), the American reader will be interested especially in the remarks on the influence of the American-German Treaty of Friendship of 1954 on the protection of United States property in Germany. The chapter on contracts (VIII) discusses the method of the gradual operation in German conflicts law to ascertain the proper law of the contract: It is started by the quest for an express, then for an implied choice of law by the parties. If necessary, courts resort to a balancing of the interests involved in weighing the individual circumstances of each case (which may differ for the various types of contracts). Finally, if it comes to the worst, *i.e.* if even after balancing the interests the proper law has not been found, a desperate effort is made to attach the case to the law of the place where the contract is to be performed. In this chapter Drobnig also discusses the scope of the proper law of the contract (especially concerning its formation and formal and substantial validity, as well as its interpretation). For the lawyer of the common law orbit, it is of importance that limitation of actions is also subject to the proper law of the contract, because in Germany, and on the continent in general, this question is regarded as one of substantive law, not of procedure. Special attention is given also to the role of the law of agency in American-German cases.

In our days of monetary instability, it goes without saying that Chapter IX on currency and foreign exchange has a painful actuality. The reviewer must also make at least one short remark on the tort chapter (VII), which not only describes the German conflicts system in its entire dissimilarity to America, with her "revolution" and "counterrevolution" in this field, but also warns Americans that according to an inveterate state of law that is hardly consistent with the constitutional ban of any discrimination, liability of public authorities for damages caused to aliens by public officials will only be recognized if reciprocity is granted between Germany and the state of origin of the claimant.

Of greatest importance for the activities of American firms in Germany is the chapter (X) on companies and other organizations. Of course, here also are described the rules of conflicts concerning, for example, the nationality of legal entities, their extra-territorial recognition and the power of agents and employees. But reaching far

beyond the conflicts problem, Drobnig here gives deep insights into German domestic law concerning organizational aspects of establishment in Germany. The most important of these practical details is perhaps what is told about the German commercial register.

Valuable information is also to be gleaned from the chapters on copyright, industrial property and unfair competition (XII) and on antitrust law (XIII). In the latter, the frequent conflicts of German firms with the American federal antitrust laws are impressively illustrated by several famous cases.

On reading the chapter on procedure (XIV), one could be inclined to question the old experience that, when procedural questions are at stake, the greatest difficulties arise for mutual understanding between lawyers from the common law orbit and continental (especially German) lawyers. Here, indeed, the author makes everything quite plausible, be it the jurisdiction problem in its various shapes, or any other question of international procedure, including that of costs, so often neglected in the treatises. Arbitration and bankruptcy, as well as the recognition and enforcement of foreign judgments and awards, are also described very clearly. When discussing the weight and importance of foreign public documents in the bilateral relations of the United States and Germany, Drobnig explains the various types and forms of German formalized documents. For example, when German law calls for a document notarially drawn up ("*beurkendet*" in the sense of section 128 of the German Civil Code), Drobnig correctly distinguishes this from a document drawn up by an American notary public. It is controversial in German law whether such a document prepared by an American notary public may be at all equivalent to a German "*beurkendung.*" As an American (or English) notary public has quite different functions than do his colleagues in the civil law countries, the formal requirement of a document notarially drawn up never can be fulfilled by an American notary public. The issue is different for the form of an "authentication of a signature" (*beglaubigung* according to section 129 of the German Civil Code), which may be practiced by any official disposing of a seal. It is, as may also be added, quite another problem whether a legal transaction for which German law requires a certain form will be valid if the transaction has been set up abroad in a plain form or without any form at all and if the law of the place where the transaction has been entered into does not require any form for transactions of that kind.

Drobnig, endeavoring to build a realistic and helpful instrument, does not confine himself to private international law in the strict and technical sense of the word, but extends his treatise also to neighboring matters so far as they are important for American-German legal relations. Examples are the position of aliens (chapter XI), social

security (chapter XV), taxation (chapter XVI) and criminal law and procedure (chapter XVII).

It must be further underlined that each chapter is preceded by a quotation of the literature important for the matter to be discussed, that thousands of footnotes contain precious documentation, and that at the end of each chapter appears an annex containing pervasive references to East German law.[2] Moreover, the practical value of the book is further increased by several appendices containing English translations of the statutory rules of conflict of laws, of the introductory law to the German Civil Code, the Text of the American-German Treaty of Friendship, Commerce and Navigation of 1954 and a complete compilation of treaties. A table of cases decided by German, American and Allied Courts in Western Germany also will be very helpful.

The reviewer must conclude by deploring the fact that this book did not appear a couple of years sooner. It must be freely admitted that this regret has quite an egoistic motive: while running the Foreign Law Program of The Law School of the University of Chicago in 1970, the reviewer (as well as his students) badly needed such a precious tool.

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2. Drobnig is a highly competent expert in the Law of Eastern Germany as he not only has written many profound publications on the subject but also has been the editor of the "Sammlung der deutschen Entscheidungen zum interzonalen Privatrecht" since the beginning of this collection reporting German decisions on interzonal and East German law.

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