

LAW AND CONTEMPORARY PROBLEMS

Volume 55

Autumn 1992

Number 4

FOREWORD

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The recent presidential election was dominated by concerns for the economy and more particularly the continuing competitiveness of U.S. industries. The candidates repeatedly identified areas where our regulatory climate disadvantages local firms in their competition with foreign firms. No industry is immune from such concerns and, given the well developed state of globalized trading and multinational securities offerings, the subject of securities regulation is especially suitable for close examination of how countries, and particularly the United States, should respond to the international regulatory competition. The internationalization of securities offerings and trading raises concerns beyond normalizing regulatory approaches among sister states.

We also can and should examine the regulatory practices of other nations to measure the worth of our own approaches, for certainly the United States holds no monopoly on either virtue or regulatory efficiency. Moreover, there is a need to develop coherent theories for choosing which country should have the paramount authority to regulate as well as means to assure the effective enforcement of that power whenever the misconduct crosses international borders or the ill-gotten gains are in another country. These issues were examined in a lively and productive conference held on October 24 and 25, 1991, at Duke University. The conference was made possible by the financial support of the New York Stock Exchange and the Josiah Charles Trent Memorial Foundation, to whom we express our great appreciation. The conference conveners were Mr. Gary Lynch and Professor James D. Cox. Both found it tremendously rewarding to work with the authors both during the conference and afterward during refinements to their manuscripts. The end product stands as the best evidence of our high opinion of the overall contribution all have made to the many facets of international regulatory

competition as it applies to the securities laws. The articles appearing in this symposium embody their authors' perspectives on the issues as refined through the benefit of the rich dialogue among the conference's participants. The balance of this foreword provides an abstract of the contributions of each of the published articles.

The European Community ("EC") is a microcosm of the problems facing competing regulatory bodies around the world. For example, each EC directive must consider how to respond to the differences in regulatory treatment of an item that occurs in more than one member state. Mr. Waide Warner examines the regulatory policies fulfilled by applying home country rules, host country rules or harmonized rules as these choices apply to intereuropean financial services. In doing so, he demonstrates that overall, the policy of mutual recognition promotes competition, but that it does so at a nonsignificant cost to the public policy of a host country.

On January 1, 1993, the EC's Second Banking Directive becomes effective, allowing banks domiciled in any EC member state to provide a full range of investment services throughout the Community. This development grants banks a significant competitive advantage over nonbank investment firms, who must await the EC Commission's approval of the Investment Services Directive ("ISD") to enjoy freedoms similar to bank investment firms. Professor Norman S. Poser examines the major roadblock to the ISD's adoption—the question of how to respond to the differences between EC member states who have different trading systems. The article provides an insightful analysis of the strengths and weaknesses between quote-driven and order-driven trading systems and offers an approach for the EC Commission to consider in its deliberations of the ISD.

The EC's proposed Takeover Directive has, as expected, produced a good deal of controversy. A full appreciation of the sources of its controversy is provided by David Berger's thorough analysis of the widely varying takeover regulations in three important EC countries—the United Kingdom, France, and Germany. The experiences of the three studied countries are most likely to influence the ultimate content of the EC's requirements. Through his comparative treatment of these regulatory regimes, we learn why the EC's action in this area has been controversial, particularly if its final directive unsettles the protective inhibiting procedures that exist in France. Of special interest in Berger's analysis is his examination of how culture impacts the content of regulation in each country.

Messrs. Beller, Teral, and Levine provide an insider's perspective on the registration process for initial public offerings ("IPOs") in Japan. It is a process in which disclosure plays a relatively minor role, being supplanted by an extensive merit review process. With their experiences from practicing in both Japan and the United States, the authors offer a rich comparison of the virtues and pitfalls of registering an IPO in each country. Messrs. Beller, Teral, and Levine examine the causes for concern regarding the lack of transparency and predictability under Japan's merit review procedures.

The press informs us daily about the move to markets in the Commonwealth of Independent States, the successor to the Soviet Union. Professors Belozertsev and Markham examine the evolution of commodity markets in the former Soviet republics from their restrained role under the Czars and Soviet Premiers to their rapid development in today's independent states. The authors describe the important contributions commodity markets make in the development of an economy, particularly an economy moving from central planning to free markets. They nevertheless detail many regulatory deficiencies in the republics' commodity markets and propose regulatory changes to improve their overall efficiency.

Professor James Cox develops a model of competitive securities regulation and data to support his view that U.S. securities markets are at a competitive disadvantage to their foreign counterparts. He counsels that the time is long overdue for the United States to liberalize its disclosure requirements and Professor Cox suggests a series of initiatives to make U.S. markets more competitive without sacrificing the investors' interests. More broadly, Professor Cox puts forth a framework within which countries can consider whether a particular disclosure requirement constitutes destructive regulatory competition or is legitimate experimentation and expression of that country's regulatory philosophy.

Regulatory interest in insider trading is worldwide. Messrs. Pitt and Hardison examine the political setting within which regulation and enforcement of insider trading occurs internationally, emphasizing the policies of Australia, France, Germany, Japan, and Mexico. From their review, they proffer several lessons the United States can learn from the approaches of its sister countries, foremost of which is the ability to provide a statutory definition of insider trading. Messrs. Pitt and Hardison also emphasize employing organizations' obligation to adopt procedures to deter their employees from violating local insider trading laws.

Professor Tom Hazen's article uses the United States' extensive experience with the regulation of insider trading to critique the treatment of insider trading by the recent EC Insider Trading Directive. Hazen laments the failed efforts of the United States Congress to define insider trading, and praises the ability of the EC to confront head on the definitional problems that have posed the greatest obstacles to U.S. legislative efforts in this area.

With globalized trading increasing, difficult jurisdictional questions arise concerning what country should proscribe market frauds. Using modern financial theory, Professor Merritt Fox examines the varying interests countries have in regulating insider trading when it crosses international borders. Professor Fox disaggregates insider trading and proceeds to examine the rationale for regulating each act and consequence of such trading. Rather than invoking the standard approach of resolving conflicting regulatory interests through principles of international law, Professor Fox demonstrates that the optimal approach is one that focuses on the individual country's jurisdiction to prescribe. An important dimension of his analysis is

the individual country's political and economic interest to regulate the transactions of foreign issuers.

One of the most exciting features of the U.S. securities laws' antifraud provisions is their malleability in the hands of the courts, which frequently extend their reach to nontraditional forms of fraud. Professor Donald Langevoort uses the classic illustration of this occurrence, *Schoenbaum v. Firstbrook*,¹ to explore the connection between substantive breadth and jurisdictional reach, focusing on international transactions. By invoking *Schoenbaum's* effects test, Professor Langevoort offers a useful approach for limiting the reach of the antifraud provisions to international transactions without violating the overall philosophy of the U.S. securities laws. His approach is similar to that of Professor Cox in that each author believes that investors considering foreign investments should internalize into their decision the relative quality of the home country's regulatory requirements.

Central to the detection and prosecution of international securities frauds has been the Securities and Exchange Commission's negotiation of Memoranda of Understanding ("MOUs") with their counterparts around the world. These cooperative arrangements removed barriers that once constrained the ability of the Securities and Exchange Commission to investigate and pursue foreign suspects whose fraudulent schemes penetrated U.S. markets. Messrs. Michael Mann and Paul Leder and Ms. Elizabeth Jacobs discuss the second shoe to drop in the development of international enforcement mechanisms: the evolution of devices to reach the violators' illicit profits so those profits can be returned to injured investors. Their article discusses the current framework within which securities regulators obtain and execute judgments against foreign defendants. The authors suggest a model of developing mutual cooperative arrangements for the enforcement of judgments that borrows from the experiences that preceded today's MOUs as well as the existing international conventions, such as those that apply to drug trafficking and money laundering, the European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, and various mutual legal assistance treaties.

The most fertile field for the extraterritorial application of the U.S. securities laws is the expansive use of Rule 10b-5 in private litigation. Advance sheets are replete with cases entertaining causes of action that have limited connections with the United States. Professor Robert W. Hillman challenges the contemporary view that the securities acts are public laws and hence not amenable to choice of law rules. He eschews the empty labels of "public" and "private" law and persuasively argues that private litigation based on the securities laws should be open for choice of law considerations.

One of the great fears of a company entering U.S. markets, particularly through a domestic subsidiary, is the fear of liability of its officers or directors. One mechanism to dampen somewhat the fears of costly derivative suit

1. 405 F2d 200 (2d Cir 1968), rev'd in part en banc, 405 F2d 215 (2d Cir 1968).

litigation is the utilization of an independent investigator in such contests. Professor Seligman shares the insights he recently gained as such an investigator under Michigan's newly enacted "disinterested person" statute similar to the German investigative judge. Professor Seligman's account suggests the disinterested person device is a worthy replacement for the more suspect special litigation committee, especially if the investigator follows the path he has blazed.

Mr. Glenn Sarno examines the general theories and legal standards for obtaining personal jurisdiction over a nonresident foreign subsidiary under section 27 of the Securities Exchange Act of 1934 because of the presence in the United States of its parent corporation. He examines the content of a reasonableness standard in such cases as well as the availability of the doctrine of forum non conveniens as devices to avoid an unfair exercise of personal jurisdiction over the foreign entity.

A significant consideration in deciding in which country to make a public offering of its securities is the liability of the issuer and the offering's participants if the offering is tainted by a misleading prospectus or offering circular. Mr. Robert Kohn provides a penetrating comparison of the public and private sanctioning mechanisms in the United Kingdom for public offerings. In his comparative study, Mr. Kohn reveals the British preference for governmental rather than private enforcement actions. The British preference no doubt reflects the limited role private actions can play in a society not endowed with a rich history of class actions contingency fee arrangements.

