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BOOK REVIEWS

REFERENCE MANUAL ON DOING BUSINESS IN LATIN AMERICA. Edited by Donald R. Shea, Frank W. Swacker, Robert J. Radway, and Stanley T. Stairs. University of Wisconsin-Milwaukee: Center for Latin America, 1979. Pp. xiii, 206. Bibliographies. Index. Hard-cover \$30.00; soft-cover \$20.00.

This work precisely fulfills the promise of its title, reflecting the expertise of editor Shea, a political science professor who specializes in Latin America, and editors Swacker, Radway and Stairs, knowledgeable practicing international lawyers. The introduction to Chapter I states:

This *Reference Manual* is intended to be a basic guide for lawyers and business executives . . . anticipating an involvement in international business transactions in Latin America. . . . [T]he major objective is to identify the best sources of information, reference data, analytical materials, reports, and consultation services which will assist practitioners in making the hard decisions

Chapter II deals with special responsibilities U.S. lawyers must bear in transnational transactions involving Latin America. Mr. Swacker enjoins such lawyers to *inter alia*, study applicable treaties before attempting to draft proposed documentation or render advice to the clients, obtain the assistance of qualified foreign counsel, and develop a general familiarity with the Calvo Doctrine, the Act of State Doctrine, and other general principles of international law. He advises that equity and compromise more often frame the arbitration award than strict applications of law that a court would be required to impose. Furthermore, states Swacker, inflation is rampant, mini-devaluations of currency have become common, and a client may unknowingly violate local foreign exchange control laws if he agrees to make payments outside the host country in a foreign currency. This is all good advice, yet many are points that any lawyer who has had a basic course in international law should have in mind.

The remainder of Chapter II is devoted to an excellent "Checklist For Investors" authored by Messers Stairs and Dillenbeck. This most practical compilation addresses several topics in acute detail including: selection of foreign counsel; choice of form of business organization; dispute settlement alternatives (arbitration); problems related to joint venture planning and foreign acquisitions; investment incentive opportunities; negotiations with foreign country governments; personnel (labor) problems; the drafting of corporate papers; patent, trademark

and technical services agreements; real estate acquisitions; distributorship/agency agreements; and review of local contracts. This checklist alone is worth the purchase price. It does not purport to give answers, but faithfully raises almost all of the pertinent questions.

Chapter III, entitled "General Reference Materials, Information Sources and Bibliographic Citations On Doing Business in Latin America," adequately performs its mission. It lists thirty-one basic references with terse indications of contents, *e.g.*, Copyright Protection in the Americas, in addition to publications by such organizations as accounting firms, banks, the American Bar Association, the Practicing Law Institute and the U.S. Government.

Also set forth are fourteen major journals including the prestigious *American Journal of International Law* and *The Latin American Research Review* published by the Latin American Studies Association at the University of North Carolina. Representative of the materials cited in the section on individual country profiles is *Foreign Enterprise in Colombia*, authored by Professor Seymour W. Wurfel of the University of North Carolina Law School and published by the UNC Press. Chapter III also makes other valuable suggestions concerning how to obtain specific materials on the Latin American commercial climate.

Chapter IV deals with services provided by the U.S. and Latin American governments, foreign counsel and private agencies. The Department of Commerce through its individual Country Marketing Managers (country "desk" officers) in Washington, D.C., and its district offices in every state, provides substantial information services including trade lists, agent/distributor service, technical help, overseas business opportunities and product sales groups, trade opportunity programs, and foreign investment services. Among those listed is the North Carolina district office located at 203 Federal Building, P.O. Box 1950, Greensboro, N.C. 27403, Tel. (919) 378-5345. Similarly Washington based, Department of State "desk" officers are prepared to render assistance, as are financial attachés, economic/commercial officers, political officers, public affairs officers and consular officers in U.S. embassies and consular offices in Latin America. Addresses and telephone numbers for these U.S. missions in Latin America are listed.

The editors also provide an excellent summary of the services the office of Legal Adviser to the Department of State renders to U.S. businessmen. Its essence is captured in the following quotation:

With the passage of the [U.S.] Foreign Sovereign Immunities Act . . . [t]he Department no longer has any role in determining whether a [foreign] government is entitled to immunity in a [U.S.] judicial proceeding.

[A]s a general rule investment disputes, especially over issues concerning the valuation of expropriated property, are best resolved by the investor and the host government through direct negotiations, without the direct involvement of the U.S. Government.

This reviewer would reinforce these statements by observing that a U.S. businessman should expect no help from the Department of State in recovering for any economic loss suffered abroad, except under most extraordinary circumstances.

Useful publications of the Bureau of Legal Affairs, Organization of American States noted are: Statements of the Law of the OAS Member States in Matters Affecting Business; Constitutions of OAS Countries; Inter-American Convention Series; Mining and Petroleum Legislation of the Americas and the Caribbean; and Copyright Protection in the Americas. All are available in English. OAS publications on legal affairs are authentic and usually genuinely helpful.

Use of local counsel is normally both prudent and necessary in the conduct of business abroad. With this in mind, the Manual stresses the availability at U.S. Consulates throughout Latin America of lists of English speaking host-country lawyers and their fields of specialization. More difficult to ascertain initially are the factors of community standing and expeditious discharge of business. The most prominent lawyer is not necessarily the best nor the most diligent in protecting client interests. A continuing legal affiliation in the country of interest based upon successful experience is most desirable.

All Latin American embassies in the United States are listed with addresses. Several Latin American countries maintain government organizations to provide information and assist foreign investors in establishing businesses. Private organizations which also operate in this area are identified.

Chapter IV concludes with a brief statement of major U.S. statutes affecting imports into the United States. Discussed are the countervailing duty law and the unfair practices provisions of the Tariff Act of 1930, as amended; the Antidumping Act of 1921; and the import relief and generalized system of preference (for developing countries) requirements of the Trade Act of 1974. Not included are the provisions of the Trade Act of 1979 which must now be taken into consideration in Latin American transactions.

Chapter V consists of six articles on selected aspects of doing business in Latin America. The first by Robert Moran, with the formidable title *Cross-Cultural Dimensions of Doing Business in Latin America* only drove this reviewer to the dictionary once to determine that "synergistic" means "working together." "Working together," a somewhat fluid subject, is here admirably applied to the Latin American arena with capsulated clarity; a must for U.S. businessmen and lawyers, polarized to the concept of "let's get on with it." A really valuable "synergistic" bibliography is provided.

The second article of Chapter V grapples with negotiating in Latin America. It states there is a rising distrust of transnational corporations and an attitude that smaller firms are more responsive to host country

needs. Efforts to reduce dependency of developing nations on transnational corporations in Latin America have been enacted into national legislation in Colombia, Chile, Brazil, Argentina, Venezuela and Mexico. Regional control is imposed by Decision 24 of the Commission of the Andean Common Market entitled *Common Rules for Treatment of Foreign Capital and of Trademarks, Patents, and Licensing Royalties*. These require host government screening of all agreements involving new foreign investment, the prohibition of certain contractual provisions, and registration of foreign transactions with competent local authorities.

Practical recommendations are made as to how both informal and formal negotiations should be conducted, and adherence to the requirements of the U.S. Foreign Corrupt Practices Act is enjoined. The author of this second article advises that negotiating teams be kept small but should include the marketing person, a lawyer, a financial or accounting person, the appropriate engineer or technical person and, on occasion, local counsel.

The next article effectively summarizes the status of commercial arbitration in Latin America. Previously drastically curtailed, the present trend, though slow, is towards acceptance of international commercial arbitration. The World Bank treaty creating the International Center for the Settlement of Investment Disputes has, in general, received scant recognition in Latin America. However, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been ratified by Chile, Cuba, Ecuador, Mexico, Trinidad, Tobago and the United States. Moreover, the 1975 Inter-American Convention on International Commercial Arbitration has been ratified by Chile, Panama, Paraguay, Uruguay, Costa Rica, Mexico and Honduras, and signed, but not yet ratified, by the United States. This latter convention is set forth in full in Appendix I of the Manual along with documents and rules of the Inter-American Commercial Arbitration Commission. Hopefully, this 1975 Convention will be widely accepted in Latin America and will make commercial arbitration under impartial international rules a reality, but until that time many disputes will continue to be adjudicated in Latin American local courts.

Joint ventures under Latin American corporation laws is the subject of the next piece. The trend away from the use of wholly U.S. owned foreign affiliates to foreign joint ventures, with only minority U.S. participation, is traced. Now that local legislation frequently expressly limits foreign enterprise direct investment to a minority interest, it becomes more important for U.S. counsel to understand in detail the provisions of corporation law prevailing in Latin American countries so that affirmative steps may be taken to protect the minority shareholder position in which the U.S. investor finds himself. With this need in mind, fairly detailed examination of the present corporation laws of Brazil and Ecuador is made. Brazil represents the modern approach, giving stockholders

derivative remedies in some cases. Ecuador uses the more traditional treatment. The former gives substantial protection to minority stockholders, the latter very little. The author admonishes each lawyer to study carefully the laws of any particular country in advance so that the organization document may be drafted to maximize minority rights.

The fifth part of Chapter V describes private sector capital mobilization. In Latin America commercial credit is habitually scarce and costly and when available is short term only. Each country has its own stock exchange, but these are relatively inactive and do not really participate in capital formation. Originally business and finance were kept entirely within the family, too good to be shared with outsiders all of whom were viewed with distrust. When capital, personnel and information came almost entirely from within a family group, growth was limited.

The family dominated firms gradually expanded and formed investment groups. The pattern common to these investment groups is a central investment company which supplies risk capital to investment development companies (*financieras*) and to commercial banks within the group orbit. These in turn finance and inform a cluster of manufacturing and commercial enterprises. All this is under family control so far as possible, but inevitably the decentralization creates more impersonal business relationships. For the foreseeable future, investment groups will predominate, and family control will continue to play an important role. This structure favors the formation of joint venture corporations.

The final segment of Chapter V covers investment and contract guaranties. The foreign direct investor must carefully consider the hazards of arbitrary acts of a host government such as expropriations, currency blockages, forced divestitures, deprivation of assets, or contract repudiations. Evaluating these aspects of "investment climate" is very difficult, and therefore the investor may wish to seek insurance to neutralize some of the perceived risks.

The Overseas Private Investment Corporation (OPIC), a U.S. government agency, was created to provide political risk insurance to U.S. nationals for new investments abroad under certain circumstances. In 1978 Congress revised OPIC's charter limiting its scope with a view to transferring more of the program to the private sector, but also increasing flexibility in its rate structures. At present OPIC offers insurance against (1) inconvertibility of currency earned as dividends, interest or fees or from initial capital, and principal investment; (2) expropriation of investment by a host government; (3) physical damage to an investment caused by war, revolution, or insurrection and (4) arbitrary calling of bank guarantees. Insurance may also be tailored to cover contractual forms of investment. OPIC's present emphasis is on guarantees for smaller U.S. businesses investing in non-labor intensive enterprises in least developed Latin countries.

The U.S. Export-Import Bank (Eximbank) and its underwriting

agency, the Foreign Credit Insurance Association (FCIA), also offer several political risk coverages for foreign businessmen, particularly the Contractors' Guarantee Program. In addition, broad coverage is now available in the private market for political risk insurance through normal insurance channels. A table in Chapter V sets forth current availability of OPIC, Eximbank and private insurance in each Latin American country. In several countries only the private sector will provide coverage. Such political risk insurance is very important, its premium just one of the costs of doing business and its availability often a critical factor in determining whether to undertake the enterprise.

Finally, the Manual offers a Glossary of Terms, primarily making acronyms intelligible, and a good index.

This reviewer believes it would be helpful if this Manual would present a statement of the important and extensive powers exercised by notaries in Latin America in matters of incorporation, conveyancing, wills and probate and some contracts. These transactions which in common law countries are lawyers' tasks, in the civil law world of Latin America frequently come within the exclusive prerogative of the notary. A further suggestion would be rather frequent updating of the Manual to keep it current in its references to pertinent laws and sources of information available.

To those who may detect a lack of sparkle in the preceding pages it is suggested that expositions of legal techniques to be employed in international business transactions do not readily equate to exotic recreational reading. Faithful, determined devotion to detail is more the order of the day.

Recently a North Carolina Department of Commerce spokesman told a committee of the State Economic Development Board that international investment in North Carolina in the last two years surpassed that of the total for the thirteen preceding years, and that the value of current imports from Mexico to the United States is about equal to those from Japan, that Mexico appears to be another Saudi Arabia in the making at our doorstep, and that many Latin American countries need technology and machinery to obtain maximum crop and industrial yields. With these prospects businessmen, lawyers and law students with Latin American interests will find this Reference Manual helpful and practical.

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TRANSNATIONAL CORPORATE CONDUCT: THE IMPACT OF UNITED STATES LAWS ON EUROPEAN AND UNITED STATES OPERATIONS. By Robert B. von Mehren and Walter S. Surrey. New York: Practising Law Institute, 810 Seventh Ave., New York, N.Y., 10019, 1979. Pp. 849. \$20.00.

Transnational Corporate Conduct: The Impact of United States Laws on European and United States Operations is one of many handbooks published annually by the Practising Law Institute. Although the title implies a broad topic encompassing all related transnational operations, major emphasis is placed on the Foreign Corrupt Practices Act of 1977. The original purpose of the handbook's publication was to supplement a program on the same topic held in London on May 23-24, 1979. To accomplish this purpose, the book is divided into sections by speaker, and each section is composed of a brief speech outline followed by legislation or cases relevant to the speech. An appendix of other major documents affecting the conduct of multinational corporations has also been compiled. Since the book was organized in a way to best aid the program attendants, its present usefulness is primarily as a reference manual for other interested professionals.

Program co-chairmen Robert von Mehren¹ and Walter S. Surrey² succeeded in securing speakers representative of various viewpoints on multinational corporations. Government perspectives on transnational enforcement policy of the United States, as presented by Mark M. Richard³ of the U.S. Department of Justice, were contrasted with perspectives of private firms.⁴ Corporate strategies under the Foreign Corrupt Practices Act were presented from an American,⁵ British⁶ and European⁷ perspective. Ralph C. Ferrara,⁸ General Counsel of the Securities & Exchange Commission, explained the background history of the Act.

¹ Debevoise, Plimpton, Lyons & Gates, New York City.

² Surrey, Karasik & Morse, Washington, D.C.

³ Acting Deputy Assistant Attorney-General, U.S. Department of Justice, Washington, D.C.

⁴ As presented by Peter M. Fishbein of Kaye, Scholer, Fierman, Hays & Handler, New York City.

⁵ As presented by Alan B. Levenson of Fulbright & Jaworski, Washington, D.C. Unfortunately, no materials are provided for this speech.

⁶ As presented by Mark Littman, Q.C., of the British Steel Corporation, London, England.

⁷ As presented by Jan R. Schaafsma of De Brauw en Helbech, The Hague, The Netherlands.

⁸ Securities & Exchange Commission, Washington, D.C.

Edward F. Paquette⁹ spoke on the Act's record keeping and accounting requirements from an overseas point of view. Co-chairmen von Mehren and Surrey delivered speeches on extraterritorial jurisdiction and the international codes of conduct, respectively.

Transnational Corporate Conduct contains approximately 850 pages, over 300 of which are devoted to the appendix. The appendix contains the full text of the Foreign Corrupt Practices (FCP) Act and information relating to its legislative history, in addition to relevant Securities Exchange Act Releases and cases illustrating SEC enforcement activities. The book is divided into six sections, one for each of the speakers who submitted materials for publication. The first section, entitled "International Codes and Standards Materials," covers United Nations and the Organization for Economic Cooperation and Development (OECD) recommendations and guidelines for corporate conduct. Particular emphasis is placed on rules to combat extortion and bribery in business transactions. In the second section, Ralph C. Ferrara and Daniel L. Goelzer¹⁰ present detailed information relevant to the FCP Act of 1977. Sections three and four deal with the transnational enforcement policy of the United States. Section three, giving the government perspective, reproduces miscellaneous documents (*e.g.*, a plea agreement filed with respect to *United States v. Westinghouse Electric Corp.*) illustrating government prosecution of various U.S. companies. Section four describes in outline form the enforcement of the FCP Act by the U.S. Department of Justice as viewed from the private perspective. This section provides a condensed summary of the Justice Department's prosecution with regard to illegal payments, often utilizing a question and answer format; some questions are answered concisely and others merely raise relevant issues. Sections five and six are devoted to the legal positions of Britain and the Netherlands on the subject of corrupt practices in international dealings.

One of the most comprehensive sections is the one compiled by program co-chairman Walter Surrey. While no speech outline is provided, the background documents are excellent reference materials for practitioners requiring information on standards by which transnational corporations are expected to abide. The text of the United Nations Economic and Social Council 1978 Code of Conduct is followed by the Council's subsequent conclusions concerning illicit payments and attempt to reach an international agreement in this regard. Extremely helpful, well-stated reviews of the OECD Declaration on International Investment and Multinational Enterprises and OECD Guidelines are supplied by the USA/BIAC Committee.¹¹ The Committee's remarks are prefaced by the notation that these guidelines are voluntary and not le-

⁹ Executive Office Continental Europe, Deloitte, Haskins & Sells, London, England. Paquette's presentation is also omitted from the book.

¹⁰ Special Counsel to Harold M. Williams, Chairman, Securities & Exchange Commission, Washington, D.C.

¹¹ "BIAC" is the U. S. Business and Industry Advisory Committee.

gally enforceable. The statements in this section are brief and help to define corporate behavior which may be seen as anti-competitive, discriminatory or predatory under the OECD Declaration. An excerpt from the International Chamber of Commerce report on *Extortion and Bribery in Business Transactions* suggests ways to combat such practices.

The second section, developed by Ralph Ferrara and Daniel Goelzer is, in the opinion of this reviewer, the singularly most complete portion of this handbook. Titled, "Saints and Sinners Concluded: The Foreign Corrupt Practices Act," this outline is part of a series by these authors describing the 94th and 95th Congress' legislative responses to illegal corporate payments. This section is internally indexed and provides an overview of federal, state and foreign legislation. Following a brief outline of the mechanics of the FCP Act, the majority of this section is devoted to summarizing key provisions of Senate bills and House Reports on foreign corporate practices which cause problems within the United States. Where pertinent, excerpts of Presidential Task Force Recommendations and statements by Senators and Representatives are inserted. These comments are also in outline form and, while not extensive, are complete enough to provide the reader with introductory information and an indication of legislative reaction to questionable foreign practices. In addition, the authors have assembled an excellent summary of provisions of existing federal legislation (other than the FCP Act) relating to questionable corporate payments and practices. A survey of state legislation, indicating which states have enacted statutes in this area and which have not, is also provided. Citations for the statutes are included.

The remaining sections of the book are not quite as complete as the first two. Section three is simply a collection of documents, and section four consists of an outline without much explanation. Section five, only two and one-half pages in length, provides merely a brief topic overview. Section six, the most comprehensive of these four, incorporates relevant provisions of national and international codes into a concise outline.

In general, while many of these overviews are easy to read and enable the reader to grasp basic ideas quickly, some inherent weaknesses exist in this type of organization. No in-depth analysis is provided for any of these areas. Problems of the Foreign Corrupt Practices Act are noted and recommendations for future use are often provided, but the format provides virtually no discussion or comparison of speakers' views. Often only a topic is mentioned or a question stated, with no further discussion or answer. While apparently these ideas were raised and discussed at the program, to the absent reader many of these inquiries remain unanswered questions. The addition of an index would be particularly helpful, as the location of specific information is not easily ascertainable from the Table of Contents.

Many of these weaknesses may be overlooked, however, in light of

the advantages *Transnational Corporate Conduct* offers in terms of timeliness and simplicity. The publishers do not profess to have furnished the reader with a total survey of multinational corporate activities and all possible repercussions of corrupt practices. The Practising Law Institute recommends this book merely as a reference manual comprising a variety of experts' views on corporate conduct and an assortment of relevant documents to the topic, updated through 1979. The compilation of an extensive array of documents on this topic in one text is indeed one of the major strengths of the handbook. Thus, as a reference manual rather than a literary exposition of this area of corporate law, the book may enhance any interested professional's library material.

—KATHLEEN T. WEAVER