

ANNUAL BIBLIOGRAPHY

This is the second in a series of annual annotated bibliographies on corporate law and securities regulation. Most of the books and articles noted here were published in 1978. Although the publications represent only six countries, many of these writings discuss the domestic application of a particular nation's laws and their effect, or potential effect, upon laws and transactions in the remaining nations of the world as well.

The entries are arranged by country of origin and have been selected and annotated by individual country editors. *

France

B. Mercadal et Ph. Janin, *La Société Civile, Nouveau Régime* (Paris, Francis Lefebvre, 1978, 360 pp).

Cet ouvrage est le premier consacré à l'exposé et à l'interprétation des dispositions relatives à la société civile contenues dans l'importante loi du 4 janvier 1978. Écrit par un enseignant et un praticien, il traite de la constitution et du fonctionnement de la société civile. A remarquer: les développements consacrés aux sociétés sans personnalité morale.

P. De Croux, *Les Sociétés en Droit Marocain* (Rabat, La Porte, 3ème éd., 1978, 491 pp.).

M. De Croux, spécialiste incontesté du droit commercial marocain vient de faire paraître la troisième édition d'un ouvrage devenue classique. On notera les développements consacrés aux sociétés d'investissement et à la réglementation de la bourse des valeurs mobilières de Casablanca.

Revue des Sociétés et Journal des Sociétés 1978 (Paris, Jurisprudence Générale Dalloz, 1978, 4 vol., 899 pp.).

* Members of the Board of Advisory Editors were assisted by Richard Sloane, Biddle Law Librarian and Professor of Law, University of Pennsylvania Law School, Philadelphia, Pennsylvania.

Cette revue publiée en français a fait paraître, à côté de nombreux commentaires de décisions rendues par les tribunaux français, plusieurs articles intéressants le droit des valeurs mobilières, parmi lesquels nous relevons:

Les cessions de droits sociaux emportant le transfert de contrôle d'une société, essai de synthèse, par B. Oppetit (Revue, p. 631 et seq.);

L'expertise comptable non limitée aux chiffres, par Ch. Pinoteau (Revue, p. 701 et seq.).

Federal Republic of Germany

Ulrich Fritsch, *Mehr Unternehmen an die Börse. Bedeutung und Chancen der Publikums-Aktiengesellschaft*. Schriftenreihe des Instituts für Kapitalmarktforschung an der J.W. Goethe-Universität Frankfurt am Main, vol. 17 (G. Bruns and K. Hauser, eds., Köln, Verlag Dr. Otto Schmidt KG, 1978, 190 pp., DM 32).

During the past thirty years the total number of stock corporations and listed companies has steadily declined in the Federal Republic of Germany. They have been largely replaced by limited liability companies and limited partnerships. Indeed, the tax sheltered "public" partnerships are frequently comprised of over a thousand partners and have proved to be a particularly successful device for raising capital. The author, a long time chief economics editor in broadcasting, and now chief executive of the Association for the Promotion of Listed Stock, has carefully collected statistics that reliably document this development. He pleads in favor of public corporations, noting their superior performance. He is mainly concerned with taxation, in which field a major change occurred three years ago when the double taxation of corporate earnings (income tax and corporate income tax) was abolished. The author's analysis is not exhaustive; however, the materials he has collected make his book an important source of information and a valuable aid for further studies.

Jacobi; Krahen; Moxter; Niederste-Ostholt; Schafer; Schirmer; Schlesinger; and Zimmerer, *Eigenkapital und Kapitalmarkt* (Frankfurt am Main, Verlag Fritz Knapp, 1978, 176 pp., DM 32.80).

For a long time the capital base of German enterprises has been narrow, not only as compared with the United States, but also as compared with such European countries as Belgium, Great Britain, Switzerland, and the Netherlands. Moreover, the ratio of internal resources during past years has indicated a tendency toward further decline. In this collection of lectures there are discussions concerning various aspects of the problem: methods of measurement, role of the capital market, comparisons with other countries, the impact of taxation, influence upon dividend policy and other problems of corporate finance, and national capital formation.

Most of the authors are executive directors of major banks, including the Deutsche Bundesbank. Each lecture is followed by a brief, but accurate, summary in English.

Peter Badura; Fritz Rittner; and Bernd Rütters, *Mitbestimmungsgesetz 1976 und Grundgesetz, Gemeinschaftsgutachten* (München, Beck, 1977, 298 pp.).

Friedrich Kübler; Walter Schmidt; and Spiros Simitis, *Mitbestimmung als gesetzgebungspolitische Aufgabe, Zur Verfassungsmässigkeit des Mitbestimmungsgesetzes 1976* (Baden-Baden, Nomos, 1978, 274 pp.).

The Act of 1976 took codetermination in Germany one step further than other countries have taken it, by providing for a far-reaching representation of labor on the supervisory boards of corporations. When the statute was first drafted, the intention of the coalition government and the trade unions was to establish parity between shareholders and labor. Strong criticism from industry and some lawyers resulted in modification of the original draft, and it was altered to provide for a deadlock solution and for a slight majority of shareholders, not in seats, but in voting. The chairman of the board who, in the case of conflict, is to be elected by the board members representing the shareholders, may cast two votes in the second ballot if the first one resulted in a deadlock. The deputy chairman, who is elected by the board members representing labor, does not have a second vote. The whole procedure is designed in such a way as to induce the board members to compromise instead of trying to make use of the small factual majority that the shareholders have.

Industry and some individual shareholders felt that this was an unconstitutional infringement upon their basic rights. The issue was tried by the Federal Constitutional Court, *i.e.* the German Supreme Court, in what has been called one of the most important constitutional cases in post-war Germany. Each side to the dispute was represented by expert legal counsel. Messrs. Badura, Rittner and Rütters argued on behalf of industry that, in practice, the Act of 1976 establishes parity between shareholders and labor and consequently violates the basic constitutional rights and liberties of the entrepreneurs and the shareholders. Messrs. Kübler, Schmidt and Simitis argued on behalf of the Federal Government that the Act of 1976 is constitutional and that the Supreme Court should refrain from interfering with the task of the legislature to resolve such broad political and economic issues.

It is very interesting to see the different lines of argument that are brought forward by each side. Even more interesting are the different styles of reasoning. Kübler and his co-authors represent a much more policy-oriented jurisprudence that considers law-making to be a part of the political process.

The dispute was resolved ultimately by the Court in March 1979, when it held that the Act, in its current form, did not violate German constitutional law. In addition, it set forth three more specific holdings. First, the German constitution does not mandate a particular economic system. Thus, although the Court does not

expressly state this, it is impliedly appropriate for the legislature to supersede the principles of a free market economy by elements of socialism and national planning — so long as the basic Bill of Rights is not thereby infringed upon. Secondly, the constitutional guarantee of ownership of property must be understood as part of the guarantee of personal liberty. Therefore, the looser the connection between certain property rights and personal liberty, the more power the legislature has to regulate and to interfere in order to promote the *bonum commune*. This is particularly true for property in the form of corporate stock. Such property tends to be rather impersonal, investment oriented, disposable and, where it is concentrated, may have substantial influence over the destinies of other people. Above all, the Court held, it cannot be used without the cooperation of labor. Finally, the constitutional right of free coalition of labor and industry requires some possibility of collective bargaining. It does not, however, prevent the legislature from laying down certain rules regarding the composition of boards or even coalitions.

Ralf J. Wojtek, *Insider Trading im deutschen und amerikanischen Recht* (Berlin, Duncker und Humblot, 1978, 204 pp.).

In Germany, discussion about preventing insider trading by means of some kind of regulation began in the 1960s, after several dubious cases were reported in the financial press. It was not until 1972, however, that a self-regulatory system, *i.e.* a code of conduct, was agreed upon by German banks and industries. Ever since then the legal literature has criticized the code for being a weak surrogate for the law. In his book, Ralf Wojtek describes the present status of the law, and agrees that something stronger than a voluntary code of conduct is needed to deal with the problem. He turns the bulk of his attention to the American regulatory system (common law, Section 16 of the Securities Exchange Act of 1934, and Rule 10b-5 of the Securities and Exchange Act), analyzing it, and then drawing some general conclusions about possible lessons to be learned from it. Ultimately, he pleads for a comprehensive system of investor protection in which regulation of insider trading would constitute just one part. Taken altogether, his book highlights the public policy aspects of investor protection in general, and insider trading, in particular, in Germany today.

Franz Gamillscheg; Xavier Blanc-Jouvan; Paul Davies; Peter Hanau; Ulrich Runggaldier; and Clyde W. Summers, *Mitbestimmung der Arbeitnehmer in Frankreich, Grossbritannien, Schweden, Italien, den USA und der Bundesrepublik Deutschland* (Frankfurt am Main, Metzner, 1978, 192 pp.).

In recent years, codetermination has been one of the most controversial topics in the field of corporate law and industrial relations in Germany. Germany has long had experience with some kind of labor representation in business enterprises; so too have other countries. The book by Gamillscheg et al., the result of a conference

by the Germany Association for Comparative Law in 1977 at Munster, is a most interesting comparative survey of the subject. The authors emphasize the institutional background and the functioning of codetermination in the various countries, not the details of the different laws themselves.

Japan

S. Tanaka and W. Horiguchi, *Komentaarü Syoken-Torihki-Ho* (1978, 676 pp., ¥7000).

This is a section-by-section analysis of Japan's Securities Exchange Law. It also contains the text of the Act. It is the only commentary that exists for the Act and it is an essential tool for securities practitioners.

Switzerland

Aktuelle Fragen des Handels- und Wirtschaftsrechts.

This special issue of *Schweizerische Aktengesellschaft* (see 1978 Annual Bibliography) is devoted to current problems in commercial law. Some of the topics that are addressed are corporate shareholder protection, auditors' tasks, auditors' liabilities, and the like. It is especially useful as a summary of some of the trends in Swiss law and can be helpful for purposes of discussion and comparative study.

Peter Forstmoser, *Die aktienrechtliche Verantwortlichkeit*, Schweizer Schriften zum Handels- und Wirtschaftsrecht, Vol. 30 (Zurich, Schulthess, 1978).

This book is a systematic survey of the various responsibilities that arise in connection with the operations of a corporation. Specifically, it deals with the responsibilities of directors, managers, and auditors at the various phases of corporate life. Also, it makes numerous and quasi-exhaustive references to jurisprudence and to the legal literature. Conceived as a guide for Swiss practitioners, it serves as a clear summary of Swiss law and practices, suitable for use by foreign lawyers.

The 29th volume of this same collection, entitled *Die Verantwortung des Verwaltungsrates in der AG*, deals exclusively with the responsibilities of the board of directors. It consists of lectures given by different speakers at a seminar in 1977 and consequently does not provide a general and coherent review of the subject. However, it does raise many important questions and could very well help to promote discussions about them.

Otto Kramis, *Insiderhandel in Effekten – eine schweizerische Losung*, Zurcher Studien zum Strafrecht, Vol. 2 (Zurich, Schulthess, 1978).

Insider trading problems have been, and still are, widely discussed in Switzerland. Otto Kramis, in his doctoral thesis, provides a good survey of the present legal situation and he suggests the creation of a new criminal offense to deal with insider trading. As yet, there has been no legislative reaction to the problems connected with insider trading. However, ideas make their way slowly and it is interesting to follow the different evolutionary stages which the author so clearly sums up.

United Kingdom

Briefly noted

- R.R. Pennington, *Company Law* (4th ed., 1979).
 L.G.B. Gower, *Principles of Modern Company Law* (4th ed., 1979).
 S.W. Magnus and M. Estrin, *Companies, Law and Practice* (5th ed., 1978).
 K. Walmsley, *Butterworth's Company Law Handbook* (1978).
 L.T. Berkowitz, *Companies Limited by Guarantee and Unlimited Companies* (1977).
 G. Cooper and R.O. Cridlen, *Law and Procedure of the Stock Exchange* (1971).
 M.A. Weinberg, *Takeovers and Mergers* (4th ed., 1979).

United States of America

Books

Sanford H. Goldberg, *U.S.-Based Corporation Expanding into the International Arena* (Practising Law Institute, 1978, 287 pp., \$ 20.00).

A brief analysis of some fourteen interrelated problems of doing business abroad, particularly in the Common Market countries. The main discussions cover forms of business organization, SEC controls, government financing and guarantees, and boycotts.

Walter S. Surrey and Robert B. Von Mehren, *Corporate Conduct Overseas: the U.S. Criminal Laws and International Codes* (New York, Practising Law Institute, 1978, 568 pp., \$ 20.00).

The once seething problem of questionable foreign payments is still simmering. This book is a detailed discussion of the Foreign Corrupt Practices Act of 1977, of related American enactments, and of questionable foreign payment regulation generally. It also contains relevant U.S. and U.N. documents, and a report on the subject as it affects corporations by the Bar Association of New York City. With its annotations and recommendations, this is an extremely useful sourcebook.

C. Fred Bergsten, Thomas Hurst and Theodore H. Moran, *American Multinationals and American Interests* (Washington, D.C., Brookings Institution, 1978, xiii, 535 pp., hardcover \$ 18.95; softcover \$ 8.95).

A massive Brookings Institution study completed with supplemental financing, some of it furnished by the United States government. Its importance to corporate lawyers lies in its final recommendations which, if adopted by the United States and, at its insistence, by other friendly governments, would impose severe restraints on American investment abroad and might in some situations result in the requirement to "disinvest". Among the subjects covered are disclosure matters, antitrust, taxation, and accounting. Since this book was written, Mr. Bergsten has become Assistant Secretary of the Treasury for International Affairs.

Marcia Stigum, *The Money Market: Myth, Reality, and Practice* (New York City: Dow-Jones Irwin, 1978).

This is a fascinating book that should be required reading for anyone interested in the money markets for academic, business or public policy purposes. Ms. Stigum approaches her task with solid street and academic credentials: she works in the money markets and has a Ph.D. from Massachusetts Institute of Technology. In her book she covers the Euromarkets as well as every major American money market. She provides an excellent description of the players and the instruments, and useful insights into the little understood phenomenon of market making. There are lucid illustrations of the equilibrating activities of the alert professionals. The book reveals Ms. Stigum's skepticism of the skills of most corporate money managers and a contempt for the slavish concern with accounting profits that prevents many money managers from employing highly profitable strategies because these would force the managers to reveal or record losses that had already been incurred.

Richard E. Deer, *Lawyer's Basic Corporate Practice Manual* (2d ed., Philadelphia, American Law Institute—American Bar Association, 1978, 282 pp. loose leaf, \$ 36.75).

A discussion of the formation and operation of a closely held corporation built around the activities of a small boat manufacturing company. It is accompanied by a set of eighteen basic corporate forms that have been tested in use. Subject areas that are covered include the original financing of the company, its articles and by-laws, accounting problems, liability of officers and directors, compensation questions, and dissolution of the corporation. It is designed both as a guide to the noncorporate specialist and as an introductory course for the novice.

Deborah A. Demott, *Reweaving the Corporate Veil* (Durham, N.C., Duke University, 1978, 244 pp., \$ 10.00).

A symposium on proposals for changes in corporate structure and regulatory reform, both at the state and federal levels. Participants include Bayless Manning, former Dean at Stanford University Law School and A.A. Sommer, recent SEC Commissioner. It discusses the current ferment for change in the United States and the agitation for greater corporate disclosure and greater corporate responsibility for company behavior. It is revised from its earlier publication in 41 *Law and Contemporary Problems* No. 3 (Summer, 1977).

Arthur Fleischer, *Tender Offers: Defenses, Responses, and Planning* (Harcourt, 1978, 828 pp., \$ 75.00).

Primarily a target company's defense manual, this book analyzes the existing statutes and case law and contains 1,000 pages of appended papers comprising newspaper advertisements of tender offers and responses to them, together with extracts from proxy statement provisions. It is a readable and useful work.

Martin Lipton and Erica H. Steinberger, *Takeovers and Freeze-out* (Law Journal Press, 1978, 2 volumes loose leaf, \$ 97.50).

A practical, carefully annotated outline of ideas and tactics for both the proponent and object of takeover and freeze-out attempts. Volume 1 tracks and interprets the state and federal statutes and regulations. Volume 2 contains pertinent corporate forms, court papers, and other documents.

Marshall E. Blume and Irwin Friend, *The Changing Role of the Individual Investor: A Twentieth Century Fund Report* (New York, John Wiley and Sons, 1978).

The impact of the ever-increasing participation of institutions in the stock market has been the subject of repeated studies since the mid-fifties. The Blume-Friend study is the first systematic investigation of the role played by individuals. Few of their findings are startling, but they serve to substantiate much of what has heretofore been considered hearsay. The statistical foundations of the study are tax returns and a special investor survey. The authors cast light on the socioeconomic characteristics of asset distribution, a variety of aspects of the investment behavior of individual investors, the consequences of the shift to greater institutional participation, and finally, on the meaningfulness of many of the suggestions for stock market reform.

Bruce M. Owen and Ronald Breutigam, *The Regulation Game: Strategic Uses of the Administrative Process* (Cambridge, Ballinger Publishing Co., 1978).

A pervasive theme of the literature of regulation is that regulation favors the regulated rather than those the regulated are supposed to serve. The authors suggest

that any industry should welcome regulation because it offers protection against competition from outsiders, from within the industry, from antitrust attack, and to a certain degree from congressional investigation. Industry can control the course of events by controlling the flow of information to the regulatory agencies. The delay offered by the administrative process can be augmented by the strategic use of litigation and innovation. Industry can utilize the respectable form of ransom that parades under the banner of cross-subsidization. Self-regulation transforms the regulatory agency into a cartel manager. Since regulatory policy increasingly depends upon the participation of experts, especially academics, coopting them — with the consequent debasement of academic freedom and erosion of the justification of academic tenure — becomes a logical strategy.

A variety of theories have been developed to explain this observed regulator behavior. These include several versions of the capture theory, including the more extreme form of the theory which suggests that the regulatory agencies were created to serve the regulated. The authors develop the novel theory that the primary purpose of regulation is to shelter the voters, or the deliverers of votes, from the vicissitudes of the economic changes that would take place if the impersonal market were allowed to run its course. The function of the administrative procedures with its emphasis on due process is to attenuate the adjustments.

The authors discuss several cases ranging from regulation of depletable resources to the regulation of transportation. Unfortunately, the several chapters do not seem to have been written with the confirmation of the thesis in mind. Even more unfortunate, the authors failed to include a case study of the Securities and Exchange Commission. This Commission has long been viewed as a model regulatory agency and has rarely been accused of being the captive of the industry. However, the Commission's behavior in response to the charge of the Securities Acts Amendments of 1975 to facilitate the development of a national market system is a fascinating illustration of the authors' thesis. Essentially, a true national market system is incompatible with the survival of the exchanges, the principal self-regulatory organizations in the American securities markets. In spite of that we have witnessed the ludicrous delegation of responsibility for the development of a national market system to these self-same, self-regulatory agencies, with the consequence that after four years of dilly dallying a number of redundant and questionable innovations have been hailed as giant strides toward the ultimate goal specified in the Act.

Looseleaf service

Bureau of National Affairs, Corporate Practice Series: Portfolios and Washington Memoranda (Wash., D.C., Bureau of National Affairs, 1978).

Consists of a series of separate portfolios prepared by sophisticated corporate practitioners. These eminently practical guides cover current developments in

matters relating to tender offers, insider trading, stock redemption and numerous other corporate problems. The portfolios include sets of working papers with completed forms and a bibliography of unofficial and government publications. This series is modeled after the same publisher's *Tax Management Portfolios* that are widely used by American lawyers.

Periodical

Corporation Law Review, V. 1 No. 1 (1978). (Boston, Mass., Warren, Gorham and Lamont, 1977; Subscription: \$ 44.00).

A new periodical that reviews current corporate problems.

Briefly noted

Proceedings of the American Bar Association National Institute, *Consumer Credit*, 33 Bus. Law. 945-1171 (1978).

Chance, *Codes of Conduct for Multinational Corporations*, 33 Bus. Law. 1799-1820 (1978).

Ethical Responsibilities of Corporate Lawyers (Proceedings of the Airlie House Conference), 33 Bus. Law. 1173-1586. Special Issue (March 1978).

Selected contents: Conflict Problems; Responsibility for Opinions, Public Documents, Illegal or Fraudulent Conduct by Client; Special Problems of Inside Counsel; Limitations on the Corporate Lawyer's and Law Firm's Freedom to Serve the Public Interest; Service of Lawyers on Boards of Corporations They Represent; Professional Responsibility and the Corporate Bar. Participants included Donald J. Evans, Harold Marsh, Jr., John T. Subak, Mendes Hershman, Brian D. Forrow, Robert H. Mundheim, Noyes E. Leech and Lloyd N. Cutler.

Legal Problems for Multinational Corporations, 10 Law. of the Americas, 265-423 (1978) (Symposium issue) (Published by School of Law, Univ. of Miami, Coral Gables, Fla.).

T.W. Walde, *Revision of transnational investment agreements in the natural resource industries*; R.F. Hudson, Jr., *Special vehicles for operating abroad: an overview of U.S. tax planning alternatives*; R.N. Laham, *Haiti: investment opportunities for the U.S. manufacturer*; J. Alvarez Soveranis, *The changing legal climate for multinational investments in developing countries*; M.E. Favre, *Bribery and the multi-*

nationals in Latin America: only the tip of the iceberg; R. Danino, *Regulating the multinational: a comment on the divestment myth*; R. Vargas-Hidalgo, *An evaluation of the Andean pact*.

Andre M. Saltoun, *Regulation of Foreign Boycotts*, 33 Bus. Law. 559–603 (1978).

Survey: Report of the Advisory Committee on Corporate Disclosure to the Securities and Exchange Commission, 26 UCLA L. Rev. 48–161 (1978).

A.A. Sommer, Jr., *Foreword*; F.M. Wheat and R.J. Schmidt, Jr., *The pleasures and pains of integration (a practicing lawyer's perspective)*; G.A. Blackstone, *A roadmap for disclosure vs. a blueprint for fraud*; T.J. Fifiis, *Soft information: The SEC's former exogenous zone*; H. Makens, *A state regulatory perspective of the Report of the Advisory Committee on Corporate Disclosure to the SEC*.

Tender Offer Developments, 28 Case W. Res. L. Rev. 842–1013 (1978).

Changes in offeror strategy in response to new laws and regulations; management's response to the takeover attempt; the creditor as a participant in a tender offer under the Williams Act; validity and constitutionality of state takeover statutes.

Tender Offer Symposium, 23 N.Y. L.S. L. Rev. 375–477 (1978).

M. Lipton and E.H. Steinberger, *Introduction*; H.A. Einhorn and T.L. Blackburn, *The developing concept of "tender offer": an analysis of the judicial and administrative interpretations of the term*; M.S. Gould and A.S. Jacobs, *The practical effects of state tender offer legislation*; D.H. Reuben and G.M. Elden, *How to be a target company*; M.I. Weiss, *Tender offers and management responsibility*; L.S. Black, Jr., *The Delaware tender offer law*.