

## ANNUAL BIBLIOGRAPHY

This is the fourth in a series of annotated bibliographies on business and capital market law. Most of the books and articles noted here were published in 1981 and 1982. Although the publications represent only four 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.

### Federal Republic of Germany

German corporate law has recently been the subject of a number of systematic treatises. The complexity and speed of recent developments in corporate law have made work in this area both challenging and urgent. The law of the stock corporation (AG) and the limited liability company (GmbH) has undergone continuous regulatory reform, in part due to the EEC Directives concerning the harmonization of members' corporate laws. Case law has become one of the prime legal sources in the law of partnership. For example, the judiciary has reacted to the combination of a limited liability company and a limited partnership (GmbH & Co. KG) by creating a set of special legal rules to regulate its proper use. Thus, any treatise contenting itself with giving a simple snapshot of current corporate law would not offer much legal guidance and would soon become obsolete.

Robert Fischer, *GmbH-Gesetz. Kommentar*, 10th ed. (Köln: Verlag Dr. Otto Schmidt KG, 1983, 302 pp.).

The most popular form of incorporation in Germany is the "Gesellschaft mit beschränkter Haftung" (GmbH), or limited company. Over 270,000 GmbH exist, compared to only 2,100 Aktiengesellschaften (stock corporations).

Robert Fischer, former President of the Federal Court, died last year. For decades, he was regarded as the most eminent company lawyer on the bench, and his *Kommentar* is an indispensable tool for work with the GmbH. This latest edition, like previous ones, contains brief, up-to-date, accurate and accessible information. Fischer's opinions are highly valuable, for the Federal Court continues to move along the lines he forcefully drew as a judge.

Friedrich Kübler, *Gesellschaftsrecht. Die privatrechtlichen Ordnungsstrukturen und Regelungsprobleme von Verbänden und Unternehmen* (Heidelberg, Karlsruhe: C.F. Müller Juristischer Verlag, 1981, xix, 429 pp.).

Kübler's *Gesellschaftsrecht* is notable for combining a sound review of the law of available corporate forms with an interdisciplinary discussion of contemporary regulatory problems of corporate law in general, including accounting, disclosure, and taxes; combinations of corporate forms and disregard of the corporate form; preincorporation problems, defective incorporation, change of corporate status, and mergers. The book thus provides a problem-oriented "sectional drawing" of corporate law.

Kübler perceives corporate law development as a process in which the law of private organizations is used increasingly to regulate economic and social performance. The discussion of investor protection, capital market law, code-termination, and the regulatory problems of associations bear witness to this approach.

Those who are interested in comparative corporate law, or who wish to get an impression of German corporate law as "law in action", will find in Kübler's *Gesellschaftsrecht* the most outstanding treatise available.

Rudolf Reinhardt and Dietrich Shultz, *Gesellschaftsrecht* (Tübingen: J.C.B. Mohr (Paul Siebeck), 1981, xx, 424 pp.).

Reinhardt's *Gesellschaftsrecht* is now available in a second edition, updated and supplemented by Schultz. Like Kübler's treatise, this book provides a complete survey of the law of available corporate forms. Its primary purpose is to help students explore the vast material of corporate law in its relation to the law of economic regulation (*Wirtschaftsrecht*). Unlike Kübler, Reinhardt/Schultz put emphasis on partnership law.

Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts, Erster Band, erster Teil: Die Personengesellschaft* (Berlin, Heidelberg, New York: Springer Verlag, 1977, xiii, 451 pp.).

Flume's treatise is dedicated to nonincorporated company forms, such as partnership, trading (general) partnership, and limited partnership. In contrast to Kübler and Reinhardt/Schultz, Flume perceives the legal problems of partnerships as problems of general private law. This conservative approach challenges the concept of corporate law's originality advocated by the other authors. The treatise does, however, provide a detailed discussion of currently pertinent law and legal theory.

Hans Würdinger, *Aktienrecht und das Recht der verbundenen Unternehmen*, 4th edn (Heidelberg, Karlsruhe: C.F. Müller Juristischer Verlag, 1981, xiv, 365 pp.).

The law of stock corporations and trust law are the subjects of Würdinger's systematic treatise. This renowned book has been completely revised in this fourth edition to cover the latest case law and legislation. Würdinger's book provides practitioners and academics with a detailed survey of the principles governing the law of the stock corporation and a sound scholarly discussion of its legal issues.

Claus-Wilhelm Canaris, *Bankvertragsrecht, 2. Vollständig neubearbeitete und erweiterte Auflage* (Berlin, New York: Walter de Gruyter, 1981, viii, 1393 pp.).

This book is the leading treatise on German bank contract law. In its first edition, which appeared in 1975 as part of a renowned commentary on German commercial law, the book received high praise for its profound, clear treatment of the contract problems of private banking law. The second edition amounts to a new book, nearly double in substance and size. This treatise is now an indispensable tool for anyone, practitioner or academic, confronted with banking law. The subjects covered include general banking contracts, banking secrecy, a bank's duty of information and warning to its customer, the checking account, different ways of paying (by remittance, check, bank clearing, letter of credit, or bank guaranty), different types of bank credit (including installment credit, bills of exchange, factoring, and financial leasing), securities contracts (broker-dealer contracts with customers, safe custody contracts, underwriting, and investment company contracts) and, finally, the general business conditions of German private banks. Public banking law, bank supervision and international banking are not treated. Due to its comprehensiveness, originality, and thorough convincing analysis, Canaris' book is very influential in the German courts. It is wholeheartedly recommended as a masterpiece in its field.

Joachim Klages, *Die Richtlinie der EG über den Borsenzulassungsprospekt. Ein Vergleich mit den heutigen nationalen Regelungen* (Baden-Baden: Nomos Verlagsgesellschaft, 1981, 231 pp.).

The Directive of the Council of the European Communities of March 17, 1980, envisions substantial harmonization of the law of Member States concerning stock exchange admission prospectuses. Klages' book is a thorough treatment of the present law of the Member States, the Council directive, and the problems of incorporating the directive into national laws.

## Japan

Masahiro Kitazawa, *Kasei Kabushikigaishahō Kaisetsu (Explanation on Amended Stock Corporation Law)* (Tokyo: Zeimu Keiri Kyokai, 1981, xvii, 311 pp.).

Shin Motoki, *Kasei Shōhō Chikojō Kaisetsu (Commentaries on the Amended Commercial Code)* (Tokyo: Shōjihōmu Kenkyūkai, 1981, xiv, 462 pp.).

Akio Takeuchi, *Kasei Kaishahō Kaisetsu (Explanation on Amended Corporation Law)* (Tokyo: Yūhikaku, 1981, xiv, 476 pp.).

Takeo Inaba, *Kasei Kaishahō (Amended Corporation Law)* (Tokyo: Kin'yū-Zaiseijijō Kenkyūkai, 1982, xix, 466, iv pp.).

Japanese corporation law, set forth in the Commercial Code and several special statutes, was substantially amended in June 1981. Since then, many books have been published explaining the amended version of the law. The four books cited above are all written by the members of the Subcommittee of the Commercial Law of the Legislative Council. Two of the authors are academicians, Mr. Kitazawa, Professor of Nagoya University, and Mr. Takeuchi, Professor of the University of Tokyo. The other two authors oversaw the amendments for the Ministry of Justice. Mr. Inaba's book is particularly noteworthy because it covers the implementing ministerial rules promulgated in April 1982.

Makoto Yazawa, *Kigyōkaikeihō no Riron (Theories on Corporate Accounting Law)* (Tokyo: Yūhikaku, 1981, vii, 430 pp.).

Makoto Yazawa, *Kigyōhō no Shomondai (Problems on Business Law)* (Tokyo: Shōjihōmu Kenkyūkai, 1981, ix, 586 pp.).

Professor Yazawa, one of the leading scholars in Japanese business law, died at the age of fifty-nine in 1980. These two books are collections of articles selected by his colleagues from among Professor Yazawa's published works. The first book contains fifteen papers on the subject of law and accounting, including auditing. The second book gathers together selections on corporation law, securities regulation, antimonopoly law, and air transportation law. Most of these articles had great influence upon Japanese legislation.

Katsuro Kanzaki, *Torishimariyaku Seidoron (Studies on Directorship)* (Tokyo: Chuo Keizai-sha, 1981, viii, 312 pp.).

This collection contains two new pieces, in addition to previously published articles. Part I, "Vitalization of Board of Directors", examines the board's

power, outside directors, and disclosure. Part II, "Directors' Duty of Care", studies duty of care, the business judgment rule, and the duty to monitor. Part III, "Liabilities of Directors", deals with guaranty, insider trading, civil liabilities under the Securities and Exchange Law, and liability to third parties. Part IV contains case notes concerning directors' liabilities. The author's persuasive insight into the problem of improving legal control of corporate management is demonstrated in this book.

## Switzerland

Peter Forstmoser, *Schweizerisches Aktienrecht*, Vol. I/1 (Zurich: Schulthess, 1981, 639 pp.).

The first volume of a general treatise on the Swiss corporation (*société anonyme*, *Aktiengesellschaft*), this book begins by dealing with basic principles of corporate law, types of corporations, and applicable statutes. It then conducts a detailed examination of formation procedures and modifications (increase and decrease) of capital stock. Because it is the only current treatise on this rapidly evolving subject, Professor Forstmoser's book should appear in every legal library. Clearly written and easy to consult, it is recommended to foreign lawyers.

*SAG* (*Schweizerische Aktiengesellschaft*, see 1 J. Corp. L. & Sec. Reg. 290 (1978)).

Many articles on corporate or commercial law have recently been published in this periodical. Particularly noteworthy are articles by R. Ruedin on proposed rules for groups of companies (1982, p. 100 ss; see also R. Tschäni in *SAG*, 1980, p. 65 ss), J. Dohm on receivership and bank guarantees (1982, p. 53 ss), and D. Urech on Euromoney and civil law (1982, p. 19 ss). Consultation of the numerous articles discussing recent judicial decisions may also be useful. (See 1981, pp. 16, 64, 125 & 177; 1982, pp. 37, 83, 177).

## United States

Guy P. Wyser-Pratte, *Risk Arbitrage II*. (Graduate School of Business Administration, New York University, Salomon Brothers Center for the Study of Financial Institutions, Monograph 1982-3-4, 1982, pp. 132 + 5 pp.).

Since the publication of *Risk Arbitrage* as an MBA Thesis at the Graduate School of Business Administration, New York University, in 1971, there have been significant changes in methods for financing investments, antitrust laws,

tax policy, and corporate takeover strategy. The 1971 version has been updated to cover these developments. It covers the "freeze-in" phenomenon (a corporate quasi-transaction to preclude shareholders from acting on a bona-fide offer that they receive from a would-be acquirer). This phenomenon is the opposite of a freeze-out or going private.

After a brief discussion of arbitrage and the "arbitrage community" of which the author is a member, there is an explanation of the various steps an arbitrageur takes in analyzing a "merger" arbitrage. The next three chapters illustrate the calculations involved in determining the return on capital in a host of situations arising both before and after 1971. The first of these chapters describes takeovers in which securities were offered for securities. The second describes the analysis of cash tender offers. In many of the situations discussed, however, a combination of shares and securities is offered. One of the speculative hazards in these situations is determining whether a tenderer is likely to receive cash or securities. The third chapter covers a miscellany of other risk arbitrage situations.

Return of capital on a per annum pre-tax basis, in the takeovers discussed in this study ranged from  $-286\%$  to  $+3755\%$ , with only one loss shown in the 21 cases discussed. The lowest positive return was  $32\%$ . The median return was  $182\%$ . No returns are given for takeovers that are aborted, however, and the returns illustrated in this study are clearly the returns to members of the arbitrage community and not to investors. The arbitrage community does not play by the same rules as the investor whose transaction costs are much higher and leverage is much smaller.

The monograph contains two appendices. The first illustrates the calculations involved in a sample of reorganization proposals.

Because many mergers and proposed takeovers are vulnerable to antitrust roadblocks, antitrust considerations are critical in risk arbitrage. The second appendix illustrates Department of Justice Merger Guidelines. The illustration is in the form of a flow chart and is very illuminating.

The arbitrage community plays a critical role in many takeovers. If the community finds a prospective merger promising, its members will take positions. They will search for the securities that the buyer needs. Anyone interested in how this community thinks and behaves would do well to read this monograph. Although excellent, the book is marred by numerous misprints and many of them occur in the illustrations. Nevertheless, the caliber of the study is excellent and the study is highly recommended.

Arnold W. Sametz, ed., *The Securities Activities of Commercial Banks* (Lexington, MA: Lexington Books, D.C. Heath & Co., 1981, ix, 191 pp.).

As a consequence of changes in the economic and technological environment, financial service firms have been expanding the array of services they

offer their clients and customers. This trend has resulted in a partial homogenization of financial institutions. Boundaries separating the activities of these institutions have become increasingly vague, a development not without friction. Banks must contend with a legislative framework which prohibits them from engaging in certain types of securities activities. Similarly, nonbanking institutions may not engage in certain activities, particularly deposit-taking, which are considered the exclusive province of banks. The boundary lines are hardly precise. At the fringes, there are cries of foul and claims of unequal regulation. Each type of institution has its own regulatory framework and each regulatory body has its own objective.

In October 1980, the Salomon Brothers Center for the Study of Financial Institutions of New York University assembled an illustrious panel to discuss the problems of the securities activities of banks. This book provides a comprehensive picture of the debate. The 35 participants included bankers, senior securities executives, two SEC commissioners, the Comptroller of the Currency, a Governor of the Federal Reserve System, the Superintendent of Banks of the State of New York, and other interested parties.

The discussion focused primarily on the strains generated by the Glass-Steagall Act and the general background of constraints. Banks' attempts to underwrite revenue bonds, engage in private placements, sell commercial paper, and engage in the mutual fund business (euphemistically called "com-mingled agency accounts") were identified as exacerbating factors.

The conference has been described as wide-ranging. It could as easily be described as lacking focus. Positions taken by the various participants were predictable as each side supplied its own evidence and denied the validity of the opposition's evidence. The purpose of the Glass-Steagall Act's constraints on securities activities was variously described as "to safeguard the 'soundness' of the banks" (Sametz, p. 5) and as a solution to the "shocking corruption in our banking system, a widespread repetition of old-fashioned standards of honesty and fair dealing in the creation and sale of securities, and a merciless exploitation of vicious possibilities of intricate corporate chicanery" (Karmel, quoting Pecora, p. 23).

One feels that time has caught up with the regulatory scheme and that the separating walls are crumbling, regardless of the regulations' merits. Many of the participants displayed an unfortunate lack of concern with the significance of these breaches to the ultimate power of the banks. Focusing upon the impact of weakening regulations within the framework of the existing banking structure has produced a failure to appreciate that regulations which have kept the banking system from becoming concentrated are also weakening. If restrictions on interstate banking continue to erode, the dismissal, by banking interest, of fears of augmenting the power of banks by permitting them to expand their securities activities must be viewed with a great deal of skepticism.

Edward S. Herman, *Corporate Control. Corporate Power* (Cambridge, MA: Cambridge University Press, 1981, xv, 432 pp.).

Professor Herman's book is indispensable to anyone with more than a passing interest in the control of corporations. This book began as a re-examination of the penetrating analysis of separation of ownership and control developed by Berle and Means a half century ago. The result is a thorough, perceptive, carefully reasoned, and documented study of the operational mode of big business in the United States. Professor Herman examines not only the control of corporations, but also the constraints imposed by financiers and government, and the goals, interconnections, and public policy implications of those constraints.

The book has several major themes: in this century the corporation has increasingly dominated economic life; the large corporation has remained autonomous despite attempts to harness it; management's direct control has increased; and corporations have become less personalized and loosely structured and more systematically organized. The final theme is that speculation on the effects of the shift in control to management, which varies from increased social responsibility to managerial self-aggrandizement, has been unbalanced. Professor Herman found that managerial and owner dominated firms have a similar matrix of objectives dominated by profits and profitable growth.

Professor Herman concludes that major policy issues relate less to performance and self-aggrandizement than to a number of external problems. These include the effective control of "the externalities of workplace and total environment" (p. 248); adjusting to the limits of growth; the accelerations of technological progress to offset the effects of the above two problems; the reduction in powers of governments in the face of multinational economic and financial integration and innovation; the control of inflation in the light of the above; the drain on world resources and international stability of the international arms race; and the alleviation of extreme poverty and increasing inequality between rich and poor countries.

He has argued carefully and cogently that "the assumption that managerial firms will acquiesce readily to social pressures or needs has no real support in fact or theory" (p. 264) and that "appeals and pressures by moral constituencies have had only slight effect on corporate behavior" (p. 277).

Given the author's selection of major policy issues, it is not surprising that the concluding chapter's review of suggested reforms focuses upon the ability of those reforms to create greater corporate responsibility. His assessment of the efficacy of disclosure, independent directors, and constituency or government representatives on boards is essentially negative.

While Professor Herman systematically examines the efficacy of financial and government control of corporations, he slights the darling of the



libertarians, the market. While he does not overlook that source of discipline, he does not systematically assess the limitations of the discipline resulting from the capabilities of the corporate universe to influence governments to alter the rules of the market game.

These shortcomings are relatively minor. The book is important as a study of corporate control even for those whose outlook and interests are somewhat narrower than those of Professor Herman. The study is highly recommended.