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Book Review

Removing the Obstacles to Extraterritorial Lawyering

Transnational Legal Practice in the EEC and the United States. By Linda S. Spedding. New York: Transnational Publishers, Inc., 1987, Pp. xxiv, 341. \$52.00

Reviewed by Michael C. Doland*

Many law students aspire to become "International Lawyers" with the promise of travelling the world and interpreting legal questions posed by clients of various cultures and languages. Law schools generally introduce the student to the field through the study of public international law and organizations. As very few law school graduates will ever work for institutions like the United Nations or the International Monetary Fund, especially in view of the tacit "national" quotas designed to encourage third world participation in these organizations, this may not necessarily be the most effective approach. Instead, a law school curriculum should emphasize private aspects of international law.

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Most lawyers practicing international law are involved with private international law,¹ which in the last decade has become known as "transnational law."² In recognition of the realities of practice, some law schools now offer courses in transnational commercial transactions and comparative law. Classes in international commercial transactions help train a law student for the bulk of the legal work that a lawyer is likely to perform for multi-national business clients; unfortunately, these classes generally do not educate the law student in dealing with the special needs of the individual foreign client or foreign-associated counsel. Classes in comparative law³ also do very little in a practical way to improve this situation. To gain a better understanding of what international commercial transactions entail, a law student should clerk for a foreign law firm during the summer. Such an experience simultaneously improves the student's language skills, heightens his sensitivities to the unique problems of the foreign client, and alerts him to the different professional practices of his foreign brethren. Even with such practical experience, law students and practitioners need sources like Ms. Spedding's book to guide them through the intricacies of practicing in foreign countries.

Linda S. Spedding's *Transnational Legal Practice in the EEC and the United States*,⁴ based on her doctoral thesis at the University of London, educates the law student and the practicing attorney in the prerequisites to, and the actual practice of, law in the nations of the European Economic Community (EEC). The book raises many in-

1. "The expression 'Private International Law' . . . [was] coined by Story in 1834 The chief criticism directed against its use is its tendency to confuse private international law with the law of nations or public international law, as it is usually called. There are obvious differences between the two. The latter primarily governs the relation between sovereign states and may perhaps be regarded as the common law of mankind in an early stage of development (footnote omitted); the former is designed to regulate disputes of a private nature, notwithstanding that one of the parties may be a sovereign state (footnote omitted)." P.M. NORTH, CHESHIRE'S PRIVATE INTERNATIONAL LAW 13 (9th ed. 1974). Public international law generally includes topics such as the law of war, the oceans, space, sovereign immunity, the act of state doctrine and entities such as the Overseas Private Investment Corporation, the organization of American States, the World Bank, the International Court of Justice at the Hague, and the International Center for the Settlement of Investment Disputes.

2. Transnational law may be defined as the study of legal transactions between nationals of two or more states. Letters of Credit, trade term definitions (C.I.F., F.O.B.) and international arbitrations are examples of topics included in the study of transnational law.

3. Comparative law is the study of the legal systems of two or more countries as a reflection of differing historical, political, economic and psychological differences of its citizens. Dispute resolution in China, where harmony and group decision are paramount, can be contrasted with American dispute resolution which is adversary in nature and is usually resolved by litigation or arbitration.

4. L. SPEDDING, *TRANSNATIONAL LEGAL PRACTICE IN THE EEC AND THE UNITED STATES* (1987).

triguing questions concerning the transnationalization of commercial transactions and specifically concerning the provision of legal services necessitated by transactions across national boundaries.⁵ Ms. Spedding's analysis eloquently synthesizes not only the distinct legal practices that exist throughout Europe, but also the practical and theoretical challenges facing European nations with the approach of 1992, the target date of European economic integration.

Chapter One sets forth a succinct background to the EEC and highlights the development of the EEC Treaty which evolved from its predecessors, the European Coal and Steel Community and the Euratom Treaties. Ms. Spedding points out that although the name of the EEC implies primarily economic objectives, the preamble of the EEC Treaty reflects the wider perspective of the drafters.⁶ In short, the preamble to the EEC treaty postulates an existing Pan-European history, culture, and sentiment, as well as promoting the four freedoms of movement: persons, services, goods, and capital.⁷

The "freedom of movement of persons" refers to the nationality of an individual as a criterion for traveling without special visa or other special permission or restriction. The "freedom of movement of services" refers to removing the requirement of nationality as a criterion for a license to practice a trade or profession across national boundaries. This would include the mutual recognition of diplomas, certificates, and other evidence of formal qualifications. Allowing an Italian attorney to travel to Paris to advise a French client on French law, even though the Italian attorney is not a member of the French bar, is an example of the freedom of movement of services. The final two freedoms relate to tearing down tariff barriers and removing limits on capital investments by foreigners.

The progressive realization of these four freedoms should eventually lead to the political and economic integration of Europe which are predicated upon the fundamental principle of nondiscrimination between nationals and non-nationals.⁸

5. Attorneys practicing in the United States will "follow the transaction" across state boundaries only if the transaction justifies the expense and time. The impetus to follow these transactions is greater in Europe due to the shorter travel distances and traditional language education.

6. L. SPEDDING, *supra* note 4, at 6-11. The preamble to the EEC treaty refers to removing the "barriers which divide Europe," strengthening "peace and liberty," and laying the foundations of an even closer union. *Id.* at 7 (quoting Treaty Establishing a European Economic Community, March 25, 1957, preamble, 298 U.N.T.S. 14 [hereinafter EEC Treaty]).

7. L. SPEDDING, *supra* note 4, at 6-11; see EEC Treaty, *supra* note 6.

8. See L. SPEDDING, *supra* note 4, at 23-38. Chapter 2 is a discussion of Article 7 of

Certain permitted exceptions to this principle of nondiscrimination are: public policy, security, and health;⁹ and the public service exception.¹⁰ These exceptions should not be surprising to any casual student of political science considering that exceptions to nondiscrimination have traditionally been the norm of national sovereignty.

The author next turns her attention to a discussion of the practical problems entailed in providing legal services under a regime providing for freedoms of movement of persons and services across national boundaries.¹¹ These emerging freedoms are discussed in light of the EEC Treaty concepts of "establishment" and "services."¹² After emphasizing the central role of attorneys in transnational commerce, the author defines and analyzes attorney practice and activities in each nation.¹³ Ms. Spedding selected England and Wales,¹⁴ France,¹⁵ the Federal Republic of Germany,¹⁶ and to a lesser extent Italy,¹⁷

the EEC Treaty and the principle of nondiscrimination because of nationality. It is important to distinguish between economic and noneconomic activities. The EEC treaty prohibits discrimination generally, but the Court of Justice of the European Economic Community will permit discrimination on noneconomic grounds for the protection of community interests and objectives. *Id.* at 29-30.

9. See *id.*, *supra* note 4, at 39-64. Chapter 3 examines the permitted exceptions and derogations for public policy, public security and public health. Public policy has no set definition; each nation separately develops its own notion. *Id.* at 46. Public security involves protecting society from its enemies. *Id.* Public health relates to entry into a host state upon first application and is limited to certain diseases and disabilities. *Id.* at 45-46.

10. See *id.*, *supra* note 4, at 65-86. Chapter 4 is entitled "The Public Service Exception: Articles 48(4) and 55(1)." Only nationals may be employed in public service. This chapter deals with the potential conflict that may arise when EEC nationals are consequently denied political rights while in the host state.

11. See *id.*, *supra* note 4, at 75-86 (Chapter 5 is entitled "The Concept of Establishment and Services in the Community").

12. The relevant EEC rules on Establishment and Services can be found in Title II, Part 2 of the Treaty. EEC Treaty, *supra* note 6, at 37-42. Chapter 2 of Title II (Articles 52 through 58) deals with Establishment. *Id.* at 37-40. Chapter 3 (Articles 59 through 66) addresses services. *Id.* at 40-42.

Article 52 defines establishment as the right to take up and pursue economic activities as self-employed persons and to form and manage companies. *Id.* at 37-38. Under Article 60, services include activities of an industrial, commercial, or craftsman nature and the activities of the professions provided for remuneration (law and medicine). *Id.* at 41.

13. See L. SPEDDING, *supra* note 4, at 87-168 (Chapter 6 is entitled "The Changing Function of the Legal Profession in Europe"). As the author initially notes, Europe has no single legal profession. *Id.* at 87.

14. See *id.* at 91-99. To aid in learning the difference between common and civil law, the author divides this treatment of England and Wales into the following categories: Professional Organization, Solicitors' and Barristers' Practices, Judges, Legal Education and Law Reform.

15. See *id.* at 99-108. The treatment of France is particularly interesting since, as the author notes on page 160, European Court of Justice procedure was originally based on a French civil law example. This section is divided into: Organization of the Courts, the Legal Profession and Practical Effects.

16. See *id.* at 108-113. The author included the Federal Republic of Germany for two reasons: its contribution to the nondiscrimination principle and for the unique practical and

Belgium,¹⁸ Luxembourg,¹⁹ and the Netherlands²⁰ to illustrate the different educational backgrounds, codes of ethics, fundamental principles of client confidentiality, and attorney specialization. A point of special interest is the different treatment accorded the "employed attorney"²¹ in several civil law countries. The use of "employed attorney" or "in-house" counsel by large multi-national corporations has vastly increased in recent years and the analysis of how each nation has attempted to accommodate this development is of significant interest. One subject which did not receive attention is the concept of "conflict of interest," which, in the experience of this reviewer, often arises in the transnational context.²²

Following her objective overview of the practices in several European member countries, the author analyzes the EEC treaty and the limited EEC case law. She reviews the pragmatic steps that various European nations have taken in order to achieve mutual recognition and dignity for attorneys who render legal services beyond the boundaries of the nation which first licensed them.²³ While somewhat theoretical at times, Ms. Spedding consistently attempts to reduce theory to practical application, thereby offering needed information for the practicing attorney as well as the law student.

In Chapter Nine,²⁴ the author discusses the current status of legal practice by foreign non-EEC attorneys in the European Economic Community and foreign attorneys in the United States. The author

theoretical features of lawyer training in the FRG. Recent Developments and the Legal Profession are both reviewed.

17. See *id.* at 114-115. The cursory treatment of Italy centers around Italian constitutional safeguards and the role of the legal professions in Italy.

18. See L. SPEDDING, *supra* note 4 at 115-118. As the capitol of Belgium is the center of the Community, the author on page 115 notes the practical interest it engenders.

19. See *id.* at 118. Luxembourg is noted for hosting the Court of Justice.

20. See *id.* at 118-119. The Netherlands is generally of interest in a study of legal professional services because of its two types of practitioners: the *advocat* and the *procureur*.

21. The "employed attorney"/"in-house" counsel differs from independent legal counsel since the former has only one client, his employer, and is compensated by a fixed salary and not at an hourly rate. The "in-house" counsel is frequently involved in planning the legal aspects of business strategy and his "independence" has been questioned in the United States. See generally *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (discussing the scope of corporate counsel's privilege against disclosure of confidential communications). See also Cal. Civ. Proc. Code § 2018(a) (a California state statute codifying the common law work product doctrine which protects an attorney's work from discovery by adversary parties).

22. But see L. SPEDDING, *supra* note 4, at 196-99 (presenting in full "The Declaration of Perugia on the Principles of Professional Conduct of the Bars and Law Societies of the European Community").

23. See *id.* at 185-200 (which provides a lengthy discussion of the EEC directive governing the provision of lawyer's services in the Community).

24. See *id.* at 201-239 (Chapter 9 is entitled "Foreign Legal Practice in the Community and the U.S.A.").

notes that while nationality is no longer a criterion in the EEC and constitutes a "suspect category" in the United States under the Supreme Court's *Griffiths* case,²⁵ numerous obstacles still remain. A practitioner can readily appreciate these obstacles by considering the difficulty American lawyers encounter when moving from state to state in the absence of national licensing, a binding national code of legal ethics, or a national disciplinary system. The practical problems that flow from implementing a philosophical decision against national discrimination and in favor of the four freedoms become apparent.

Finally, Ms. Spedding gives her interim assessment of the development of the freedom to provide transnational legal services among the EEC nations to date by setting forth both the challenges of the future and her suggestions.²⁶ These suggestions include increased professional communication, education, and the maintenance of goodwill based upon the stated goal of European integration. United States attorneys will not be directly affected by the liberalization of the EEC Treaty, or by the Lawyers Services Directive as it applies to the EEC countries. However, attorneys will find this book valuable both for its exposition of the issues involved and for its potential guidance to the growing number of lawyers uniting U.S. and Japanese clients.²⁷ The book reflects the central role that lawyers do play, and seek to play, in transnational commerce. It could readily serve as an excellent supplementary text to any law school course in private international law or comparative law and is of practical use to attorneys involved in transnational law.

25. See *id.* at 230. See *Application of Griffiths*, 413 U.S. 717, 729 (1973) (declaring a state law precluding resident aliens from admission to legal practice in the state unconstitutional).

26. See *id.* at 245 (the tenth and final chapter: "Interim Assessment").

27. See generally Cal. R. Ct. 988 (West 1988) (providing for the issuance of a Certificate of Registration as a Foreign Legal Consultant in California).