Book Review

Internationales Privatrecht: Eine Einführung in seine Grundlagen. By Hans Dölle. Second edition. Karlsruhe: Verlag C. F. Müller, 1972. Pp. xii, 138. DM. 14,50.

Grundriss des internationalen Privatrechts. By Alexander N. Makarov. Frankfort: Alfred Metzner Verlag, 1970. Pp. 202. DM. 19,80.

Internationales Privatrecht. By Gerhard Kegel. Third edition. Munich, C. H. Beck'sche Verlagsbuchhandlung, 1971. Pp. xxvi, 483. DM. 27,50.

Soergel-Siebert, Kommentar zum Bürgerlichen Gesetzbuch. Volume 7: *Einführungsgesetz.* By Gerhard Kegel. Tenth edition. Stuttgart, Berlin, Cologne and Mayence: Verlag W. Kohlhammer, 1970. Pp. xxxix, 952. DM. 176.

J. v. Staudingers Kommentar zum Bürgerlichen Gesetzbuch. Volume 6, Part 2, Number 1: *Internationales Privatrecht.* By Friedrich Korkisch, Günther Beitzke, Helmut Coing and Karl Firsching. Tenth and eleventh editions. Berlin: J. Schweitzer Verlag, 1970. Pp. viii, 292. DM. 60.

These works are only part, though a major part, of the recent and flourishing German literature on private international law.[1] Though it may be difficult to do justice to five of them in a single review, their appearance in such a short space of time does constitute an event worthy of notice. They are all by writers of high authority, they provide doctrinal sources which in some measure have been wanting in Germany since World War II, and they appear after a decade in which the basic principles of the discipline have been subject to challenge. In presenting them briefly, it may be possible to indicate the present state of the subject in a country which has contributed much to private international law.

I

The books themselves — three textbooks and two commentaries — present a wide variety of treatment. Professor Dölle, now emeritus Professor at the University of Hamburg and former Director of the Max-Planck Institute of Foreign and International Private Law, speaks of his small textbook as an "hors d'oeuvre" to the study of private international law. It is almost entirely devoted to the

[1] Mention should also be made of the two volumes of opinions or *Gutachten* published in 1971 by Professor Wengler as well as the three large volumes of *Gutachten* published in 1968, 1970 and 1971 by order of the German Council for Private International Law. Professor Firsching, already a contributor to the Staudinger commentary, is expected to publish a student textbook in the autumn of 1972.

General Part, or general theory of the subject, with only a nine page appendix dealing with the Special Part. Since it is intended principally for student use, frequent examples and changes of type are employed to accent the discussion. There are no footnotes and only the briefest of bibliographical references. The success of the book as a pedagogical instrument is evident from the rapid appearance of this second edition, the first having been published in 1968.

Like the work of Professor Dölle, that of Professor Makarov is largely drawn from his lectures on the subject and is also designed as a compact teaching instrument. It is more conversational in tone, more extensive in reference to doctrine and jurisprudence, and places the German law in a broader historical and comparative perspective. There are frequent references to East European sources and the Special Part is here accorded equal treatment with that of the General Part. Both of these works, through the experience and authority of their authors, escape the risk of superficiality which threatens any effort at simplification.

Professor Kegel's well established textbook is now in its third edition and has grown by more than a hundred pages since its first appearance in 1960, then the first German textbook to be written on the subject since the two volume work of Professor Raape appeared in 1938 and 1939.[2] This third edition is unchanged in organization and, like the work of Professor Dölle, makes extensive use of changes in type to attract wandering student attention. It contains, however, more information than normal student needs require, and is now accompanied by the author's counsel that those with little time should avoid all small print. Most of the information is of unquestionable practical utility — the table of treaties (which "sprout like mushrooms on the earth"), the new index entry referring to discussion in the text of reforms recently proposed by the German Council for Private International Law, the appendices relating to the international law of procedure, of expropriation, and of money and competition, and finally the extensive discussion of the Special Part. Only rarely does the reader have a faint sense of excessive detail, as with the discussion of the Antarctic tort[3] and the "derecho foral" of the Balearic Islands.[4] No apology is really necessary for the growing size of the book, however, since both style and presentation contribute to ease of use.

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[2] Raape, *Internationales Privatrecht.*

[3] Kegel, at p. 8.

[4] *Ibid.*, at p. 15.

The two final works are both in the form of commentaries, with short general introductions, to the 24 articles of the Introductory Law to the German Civil Code (*Einführungsgesetz*, EGBGB) which deal with private international law. Though only a portion of German private international law is thus codified, the commentaries, by frequent glosses, cover the entire subject and are exhaustive in their treatment. Professor Kegel's notes in the widely used Soergel-Siebert commentary are now nearly 800 pages in length, written with considerable economy of style and clearly intended for practitioners' use. The citation of jurisprudence is extensive (though in the Continental tradition no table of cases is provided) and German and foreign bibliographical material is profuse. By way of example, the bibliography relating to contractual obligations is 23 pages long. This is the third publication of Professor Kegel's work in the Soergel-Siebert commentary. His first contribution, published in 1955 and of much more modest proportions, gathered together the jurisprudence and doctrine since 1939.

The Staudinger commentary is the most prestigious and thorough of the commentaries to the German Civil Code. Because of its size and the difficulty experienced in keeping it up to date it is perhaps not as widely used as the smaller works, but there is no doubt that the present study, which will eventually constitute the second Part of Volume VI of the commentary, will be of great value.[5] Publication is proceeding as work progresses and the first instalment, here under review, contains a short introduction by Professor Korkisch as well as commentaries to articles 7 (capacity, by Professor Beitzke), 8 (protection of incapable adults, also by Professor Beitzke), 9 (absent persons, Professor Coing) and 11 (formalities, Professor Firsching). The discussion is even more exhaustive than that of Professor Kegel in the Soergel-Siebert commentary. In the four pages devoted simply to the name of the subject, for example, Professor Korkisch provides the names employed by, among others, Phillimore, Westlake, Hibbert, Gibb, Harrison and Baty. The completed volume will be long, thorough and authoritative. An earlier version, written by Professor Raape, appeared in 1931 as part of the ninth edition of Staudinger.

II

The foreign reader of these works cannot fail to be struck by particular features of German private international law. The subject as a whole, for example, is strictly and narrowly defined. Professor

[5] The first Part, to be published separately, deals with the remaining articles of the EGBGB.

Korkisch thus devotes a third of his introduction in the Staudinger commentary to a description of the "neighbouring areas" (comparative law, international uniform law, public international law and *Fremdenrecht* — the national rules dealing with foreign activity and the condition of aliens). Nationality is also excluded from the accepted notion of the subject, as is international procedure, which includes both jurisdiction and recognition of foreign judgments. The latter topics frequently appear by way of appendices, as is the case in Professor Kegel's textbook, or in the discussion of topics for which they are particularly important.[6] Theoretically, however, private international law deals only with choice of law.

It is a system "friendly" to renvoi, in its simple form, and five cases for its use are expressly provided for in article 27 of the EGBGB (capacity in general, capacity to marry, matrimonial property, divorce and successions).[7] The notion of capacity is narrowly defined and there are a large number of exceptions, other than renvoi, to the application of the theoretically competent national law. Delictual liability is governed by the *lex loci delicti*, with legislative exceptions limiting the recovery against German citizens for foreign torts to that allowed by German law,[8] and providing for the application of German law to foreign torts the parties to which are of German nationality.[9] Foreign law is law, not fact. There is no burden of proof as to its introduction and the court is free to inform itself as to content by whatever means it thinks fit — frequently through the publications and opinions of the many Institutes of Foreign Law which exist in Germany. It is, however, law with a difference, since its application is uncontrollable by the superior courts.

The notion of *ordre public* is infrequently employed, but a parallel technique can be seen in the important recent decision of the German Constitutional Court declaring unconstitutional, for violation of article 6, para. 1 of the German Basic Law guaranteeing freedom of marriage, the refusal of German officials to authorize the marriage of a Spanish subject with a German divorcee (divorced by a German court) on the ground that Spanish

[6] See Professor Makarov's discussion of divorce (pp. 152-161) and successions (pp. 185, 186).

[7] These are all areas in which the national law is competent in principle, which leads eventually to the application of German law where the party is domiciled in Germany and a national of a "domicile" country such as Canada.

[8] Article 12, EGBGB.

[9] Article 1, Ordinance of December 7, 1942. German doctrine favours the application of this principle to all delictual situations where the parties share the same national law.

law prohibits the marriage of Spanish citizens with divorced persons.[10] French courts in the same situation have resorted to French *ordre public* to validate the marriage,[11] but it seems doubtful, in view of the reservations of German doctrine,[12] that German constitutional law will henceforth operate in the area of private international law with the same frequency as the expanded French notion of *ordre public.*[13]

More generally, it is interesting to note the growing influence of the law of the European Common Market in this private law area. Professor Dölle finds good grounds to support the conclusion that the traditional submission of capacity to national law offends — in commercial matters at least — the prohibition of article 7 of the Treaty of Rome against discrimination on the ground of nationality.[14] There is also discussion as to whether the previously mentioned protection accorded by article 12 EGBGB to German nationals who commit foreign torts is compatible with the Rome Treaty,[15] as well as discussion of the notion of a European *ordre public.*[16] None of these works limit their research to German or European law, however, and the historical and comparative depth is always considerable. Professor Makarov, for example, presents the Canada Divorce Act in some detail to illustrate the application of the domicile principle to jurisdiction in divorce proceedings[17] and the pre-1968 Canadian practice of private bills of divorce is referred to by professor Kegel — though unfortunately as continuing practice.[18]

III

In spite of such demonstrated awareness of what seems to be all that has been written on the subject it must be said that contemporary German doctrine, as represented by these works,

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[10] BVerfG 31,58. See also Juenger, *The German Constitutional Court and the Conflict of Laws,* (1972), 20 Am. J. Comp. Law 290, and the series of articles relating to the decision, with an English summary, in (1972), 36 Rabels Z. 1-144.

[11] Aix, January 24, 1924, Clunet 1924.670: Trib. Seine, May 5, 1919, S. 1921.2.9.

[12] Kegel, at pp. 212, 293.

[13] Earlier decisions had refused to declare unconstitutional, for violation of the guaranteed equality of the sexes, preferences given to the personal law of the husband over that of the wife in matters of divorce and the personal effects of marriage.

[14] Dölle, at p. 8.

[15] Soergel-Kegel, Art. 30, para. 53.

[16] Dölle, at p. 106.

[17] Makarov, at p. 153.

[18] Kegel, at p. 335.

remains unswervingly attached to certain basic principles. All of the authors who expressly deal with the question agree, in familiar language, that private international law is that body of rules which indicate the legal system whose law is to be applied in the given case. It is *Verweisungsrecht* (indicative law) rather than *Entscheidungsrecht* (dispositive law). For Professors Dölle and Kegel, who are the most explicit, it is not the law which will lead to the just result which is to be designated (for who is to decide that?) but the law which is most spatially appropriate.[19] This is justice at the level of private international law, and such "conflicts justice" takes precedence over "material justice" — that which the man-in-the-street would be content to call simply "justice". Though the designated law denies the equality of the sexes, "conflicts justice" will be satisfied if the law having determined the respective rights of the spouses is that with which they are most genuinely connected. The determination of that law is, according to Professor Dölle, who adheres the most literally to the Savignian tradition, a matter of locating the seat or *Schwerpunkt* (centre of gravity) of the problem to be resolved.[20] This is the decisive consideration, which a simple weighing of public and private interests cannot displace. Professor Kegel, on the other hand, would avoid such "word pictures" and arrive at "conflicts justice" through the more concrete process of weighing the interests involved — those of the parties, of commerce, and of internal and external legal harmony.[21] In spite of such differences, however, there can be no doubt of the commitment of these authors to the jurisdiction-selecting process.

It must be admitted, moreover, that this process has become more refined in its homeland than elsewhere. To avoid the intolerable results to which it can sometimes lead, German doctrine has developed the notion of "adaptation" (*Angleichung* or *Anpassung*, depending on the author). To use an example of such "adaptation" given by Professor Dölle:[22] A German married couple acquire Swedish nationality. The husband dies intestate, leaving the wife and children. The succession is governed by Swedish successoral law, which accords the wife nothing, since the interests of wives in Sweden are generally protected by the provisions of the Swedish law of matrimonial regimes. The matrimonial regime is governed by German law, which again accords the wife nothing, since the

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[19] Dölle, at p. 1; Kegel, at p. 42.
[20] Dölle, at p. 47.
[21] Kegel, at p. 43.
[22] Dölle, at p. 84.

interests of wives in Germany are generally protected by German successoral law. By "adaptation" of these traditional rules Swedish law will be applied in its totality, both to the dissolution of the matrimonial regime and to the succession. In spite of Professor Dölle's admission of a certain sense of arbitrariness,[23] the use of such traditional choice of law rules, "adapted" when necessary, is preferred to more fluid methods of solution.

The theme of judicial certainty and predictability is thus perhaps the dominant one in all of the works. While recent discussion in the United States usually receives a brief mention — either in the historical or delictual sections — it is invariably accompanied by a caution against the unsettling effect of such techniques.[24] *Chaplin* v. *Boys*[25] is represented in Professor Kegel's M.R., in the Court of Appeal mention of the fact the decision was confirmed by the House of Lords, and the statement of Lord Wilberforce that "If one lesson emerges from the United States decisions it is that case to case decisions do not add up to a system of justice."[27] Recent French writings, particularly those of M. Francescakis on laws of "immediate application", generally receive only bibliographical mention. Professor Dölle concludes that it is doubtful if one can speak of a crisis in private international law since, in Europe at least, neither doctrine nor jurisprudence has displayed any noteworthy uncertainty over the basic principles of the subject.[28] For Professor Kegel, reform, not revolution, is required.[29]

Whatever reaction one may have to these basic attitudes — and this reviewer must confess to a certain unease with the repeated emphasis on "conflicts justice", a justice surely more satisfying to lawyers than to people — the quality of all of these writings must be acknowledged. In addition to technical competence and grasp of the subject, there is a constant effort to present the material in the manner most appropriate to the chosen audience. The works are thus not only valuable tools of teaching and research, but constitute a noteworthy reaffirmation of principles thought by many to be no longer valid.

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[23] *Ibid.*, at p. 85.

[24] *Ibid.*, at pp. 40, 41; Makarov, at pp. 43, 130; Kegel, at pp. 83, 276; Soergel-Kegel, article 12, para. 31.

[25] [1969] 3 W.L.R. 322 (H.L.).

textbook[26] by a quotation from the judgment of Lord Denning,

[26] Kegel, at p. 274.

[27] [1969] 3 W.L.R. 322, at p. 343.

[28] Dölle, at p. 40.

[29] Kegel, at p. 83.

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