BOOK REVIEWS
CHRONIQUE BIBLIOGRAPHIQUE

Gil Rémillard, *Le fédéralisme canadien*. Montréal: Québec-Amérique, 1983. Pp. 734 [49.95$]. Reviewed by Edward McWbinney, Q.C.*

On tbe Pending Renewal of the "Quebec Fact" in Canadian Federalism

On opening Professor Rémillard's new text on Canadian federalism and examining, first of all, its detailed Table of Contents, I was reminded of something I said back in 1967 regarding the existing "two solitudes" in Canadian legal education:

> [B]y and large, Canadian constitutional law, as taught in the English-speaking provinces, takes for granted a pre-existing constitutional order with a relatively stable, if not exactly static, pattern of institutional relationships between the different ethnic-cultural groups making up the society that the constitutional order is supposed to reflect. Otherwise the scientific legal emphasis upon the judicial process — specifically, upon the judicial process as developed in the section 91/section 92 B.N.A. Act dichotomy — becomes largely meaningless. I do not believe, however, that it can continue very much longer to be a viable political or intellectual legal approach in this socicty, where the very foundations of the constitutional order are under continuing re-examination and questioning as the fabric of constitutional society itself sometimes threatens to tear apart under the impact of biculturalism.[1]

My comments[2] were inspired by a semester of teaching Constitutional Law as Visiting Professor at the Faculty of Law of Laval University in the spring of 1967. I was intrigued to discover, at that time, how radically different the conception and scope of constitutional law courses were between English-speaking and French-speaking law schools in Canada.

The Anglo-Canadian approach to Constitutional Law was largely moulded in the 1950's and 1960's by Professor Bora Laskin's monumental casebook, *Canadian Constitutional Law*.[3] Professor Laskin taught Constitutional Law at the University of Toronto from 1949 until his appointment to the Ontario Court of Appeal in 1965, and, for most of that time, he taught it alone. It was only in 1963 that increased enrolment at the University of Toronto Law School and increased government funding permitted the dividing of the course between two different professors.[4] The casebook approach, which Laskin's method typified, was borrowed from the United States where, after

* Professor of Constitutional Law, Simon Fraser University.

[1] E. McWhinney, "The Nature of a Bicultural Constitutionalism" in *Ontario Advisory Committee on Confederation: Background Papers and Reports*, vol. 2 (1970) 50 at 51.

[2] These comments were originally made at a joint meeting of the Canadian Association of Comparative Law and the Association of Canadian Law Teachers as part of the Canadian Centennial Celebrations of 1967.

[3] B. Laskin, *Canadian Constitutional Law: Cases and Text on Distribution of Legislative Power*, 1st ed. (1951).

[4] Professor Laskin and, as it turned out, myself.

having been pioneered by Dean Langdell at Harvard in the 1890's, it came to dominate legal education in the 1920's. The casebook approach and the accompanying system of class instruction were organised around a collection of reported judicial decisions. The course materials provided bibliographic notes, but, by conscious editorial design, did not include any commentary or interpretation. The method of teaching was deliberately non-speculative and non-philosophical, in marked contrast to the older system of grand, magisterial lectures which it had displaced. Such an approach was typified by Laskin's immediate predecessor, the eloquent, Irish-born, and long-time Professor and Dean at the University of Toronto, W.P.M. Kennedy.

Laskin's casebook and his ninety hours of lectures on Constitutional Law each academic year were primarily organized around sections 91 and 92 of the British North America Act of 1867, with only fleeting reference to other sections, such as section 132. The essence of the Laskin teaching approach was the logical exegesis of sections 91 and 92, as viewed through the interstices of the authoritative judicial decisions of the Privy Council and Supreme Court of Canada. It was all very intensive and concentrated, and, in comparison with the standards of other Anglo-Canadian law professors who also employed the American-derived Socratic teaching method, it was superbly executed. But it was, at the same time, an intellectually narrow, even artificial, exercise, for it never questioned the basic *Grundnorm* of Canadian federalism and the Canadian constitutional polity as a whole. This was unexceptionable in the politically blander era of Canadian federalism which endured through to the end of the 1950's. The Laskin approach was almost exclusively preoccupied with constitutional legal technique and legal logic at the expense of constitutional policies; as a result, it carried the seeds of the political problems and constitutional "near-disasters" that plagued both Quebec and English Canada through the years of the "Quiet Revolution".

As Professor Jacques-Yvan Morin politely suggested to students at the University of Toronto Law School during debates on the constitution and federalism in the 1960's, for anglophone jurists to pose the question "What does Quebec want?" is itself an admission of failure. The art of constitutional problem-solving is to offer timely solutions, providing remedies before a situation has become pathological and politically out-of-hand. The thrust of Professor Morin's implied criticism of Anglo-Canadian constitutional attitudes and expectations was that a politically sophisticated system of constitutional law instrnction should be sufficiently broad in its intellectual range and sympathies to have foreseen and comprehended Quebec's emerging discontent with Canadian federalism. Such a system of instruction would have brought forward, by the *apogée* of the Quiet Revolution and while there was still time to canvass alternative constitutional solutions, Anglo-Canadian paradigms or models for a peaceful and consensual restructuring

of the principal institutions, processes and substantive ideas of Canadian federalism. This would have enabled civilised French-English dialogue and reciprocal exchange of views on the constitution before the end of the 1960's. Furthermore, a broader constitutional perspective might have prevented the pathological experience of Quebec's attempted secession and the ultimate acceptance of a flawed and incomplete constitutional solution which was achieved only at the cost of some deep, and probably lasting, political wounds.

These latter-day, mildy revisionist thoughts are prompted by an examination of Professor Rémillard's Table of Contents. Undoubtedly influenced by his great teacher and one of the seminal thinkers on Quebec's *rôle* in the Canadian polity, the late Professor Bonenfant of Laval University, Professor Rémillard's conceptual framework and design are ambitious and imaginative. The intellectual openings and sympathies are richly eclectic and rooted in comparative law readings. Part I, Chapter 1, is an extended scholarly excursus on the historical origins of Canadian federalism. Professor Rémillard addresses the various alternative projects for union or association before 1867, several foreign examples of federalism extant in 1867 (principally the Constitution of the United States and the pre-1874 Swiss model), and various doctrinal theories of federalism that were intellectually in vogue, or at least in circulation at the time.

I was a little disappointed with Part I, not so much in its actual execution as in my unfulfilled expectations. Theories of what the Founding Fathers of Canadian federalism intended in 1867 are at the core of the Anglo-Canadian critique of the Privy Council's "Provincial Rights"-oriented interpretation of the legislative competences under sections 91 and 92. Generally, the thesis of the dominant Anglo-Canadian scholars of the 1920's through to the 1950's — W.P.M. Kennedy, H.A. Smith, Vincent MacDonald, F.R. Scott, Raphael Tuck, Bora Laskin — posited that the Privy Council, under the intellectual leadership of Lord Watson and Lord Haldane from 1896 to the beginning of the 1930's, reached a "result which the historian knows to be untrue".[5] Is this generally accepted Anglo-Canadian indictment of the Privy Council still scientifically valid in the light of contemporary access to historical source materials? Or is it, more simply, something that is quite incapable of serious historical verification and doomed, therefore, to remain at the level of legal folklore as an element of legal faith and not of reason?

Part I, Chapters 2 and 3, complete the depiction of the development and formative influences of Canadian federalism by taking us into the stuff of the *Grundnorm* — the political-societal principles upon which the constitutional system is posited and in the light of which its norm-making is

[5] H.A. Smith, "Interpretation in English and Continental Law" (1927) 9 J. Comp. Leg. & Int'l L. 153 at 160.

carried out. Professor Rémillard discusses the military conquest of 1759-60 and the Royal Proclamation of 1763, the Quebec Act of 1774 and the Constitutional Act of 1791, and the political troubles of 1837-8 followed by the Union of 1840-1. This discussion sets the context for the debate concerning the legal nature and characterisation of the B.N.A. Act of 1867. Is it a compact (treaty) or a statute? If a compact, is it a compact between two Peoples (or Nations), or a contract between four parties (not being Peoples or Nations)? As either compact or simple statute, is the arrangement federal or only quasi-federal? All of this high theory must be related either to verified historical fact or to present-day sociological reality.[6]

I would have liked more analysis of the historical origins of "*Deux Nations*". Is this, as Professor Morin seems to suggest in his writings of the 1960's, a comparatively recent constitutional postulate dating from Henri Bourassa and the opening of the present century? If this is so, its political authority or its claims to innate political reasonableness as a constitutional premise of contemporary Canadian federalism would not necessarily be impaired. It would, however, undoubtedly facilitate more rational and unemotional debate between Anglo-Canadians as to the practical implications of "*Deux Nations*" for the restructuring of the federal constitution, either by way of direct constitutional amendment or by administrative practice.

The first one hundred seventy-seven pages of Professor Rémillard's book, or roughly one-third of the author's analytical text, are devoted to philosophical questions such as these. Such questions are at the core of the debate on the future of Canadian federalism which is currently taking place among francophone Quebecers: the "federalist" (federal Liberal) Quebecers who went to Ottawa with Mr. Trudeau; the "provincialist" (provincial Liberal) federalists under Jean Lesage, Robert Bourassa, Claude Ryan and, once again, Robert Bourassa; the older "provincialist", conservative (*Union nationale*) federalists, under Daniel Johnson and Jean-Jacques Bertrand; and the present-day *rassemblement* or *ralliement* of disparate political forces — conservative, liberal, social democrat — under the *Parti québécois* banner. We are now perhaps sufficiently removed, in point of time, from the interuecine conflicts among these wholly francophone political and intellectual forces to render historically detached and politically generous judgments. I once referred to the politically bloody exchanges of the late 1960's and early 1970's between francophone Quebecers in Ottawa and francophone Quebecers in Quebec City, as a modern, Canadian version of the French children's romance, *La guerre des boutons*. However, one of these francophone Quebecers in Ottawa suggested sagely that the better metaphor might be a Balkan War, fought without mercy or quarter on either side.

[6] And why not, since the *Grundnorm* in Kelsen's own thinking did not have to be static and unchanging, and jelled, once and for all time, at a certain point in history?

Looking back, however, one finds much more magnanimity, pragmatism, and political give-and-take than was publicly evident at the time those stormy political events were unfolding. There was a species of *de facto* accommodation, or peaceful coexistence between, for example, federal (bilingnal) language policies and Quebec ("priinacy of the French fact") language policies. Unnecessarily heavy-handed, bureaucratic approaches at both levels were replaced by an increasingly flexible administration of policies, thereby facilitating the accommodation. In addition, this softened the confrontational aspects of the "battle in the Courts" which, incidentally, never at any stage involved a direct, frontal assault by the Trudeau federal forces against the core of either Bourassa's Bill 22 or Lévesque's Bill 101.

In an historical-dialectical sense, these Quebec francophone factions, despite widely diverging interpretations of the course of Quebec history, were pursuing many of the same long-range goals with respect to the preservation and furtherance of the "French fact". Indeed, there were many different roads to Rome as became apparent with the unfolding of the "Quiet Revolution"; however, the common cultural heritage of all the political elites spawned by the "Quiet Revolution" remains an intellectually unifying factor.[7] This common bond has endured through to the present, new era of transition in Canadian constitutionalism inaugurated by the September, 1984, federal elections. A Quebec compromise regarding its *rôle* in a newly-defined Canadian federalism is timely; however, political events in Canada are unlikely to wait indefinitely for Quebec political leaders to make up their minds and produce a sufficient Quebec societal consensus. In any event, it is clear that the Supreme Court of Canada's ruling in the so-called Quebec "veto" case[8] is not the last political word, and does not foreclose any of Quebec's constitutional options within the larger federal polity. In retrospect, the Supreme Court ruling seems to have been both politically mischievous in its practical consequences and legally otiose or unnecessary. Supreme Courts in other federal systems, having more continuous political exposure and experience than our own, would almost certainly have applied canons of judicial self-restraint and declined to rule altogether on the basis that the issue involved had become moot with the enactment of the *Constitution Act* of 1982.

The balance of Professor Rémillard's analytical text covers material more familiar and available to Anglo-Canadian constitutional law students: the evolution of the B.N.A. Act of 1867 under the judicial interpretation of

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[7] As Gérard Pelletier elegantly demonstrates in his superb study of the philosophically fecund decade of the 1950's, *Les années d'impatience, 1950-1960* (1983).

[8] *Re A.G. Quebec and A.G. Canada* (1982), [1982] 2 S.C.R. 793, 140 D.L.R. (3d) 385.

the Privy Council and also by the Supreme Court of Canada;[9] the formal rules of constitutional-statutory construction applied by those tribunals, especially in regard to sections 91 and 92; and some problems of constitutional competences that are of past, present and potentially future interest to Quebec political leaders, namely natural resources and communications (principally radio, television and cinema). Professor Rémillard writes with political and intellectual detachment, perhaps even too much so. As a consequence, this part of his work, unlike the Quebec constitutional writing of the 1960's, lacks some colour and does not provide the general propositions that seek to unify otherwise disparate facts and point the way to the future.[10] It is a commentary upon Professor Rémillard's scholarly detachment that he maintains throughout a coolly scientific approach; but I would hope that in any future editions he would feel encouraged to venture some more critical, neo-Realist evaluations of the quality of intellectual performance involved in the decision-making, judicial and otherwise, under our federal constitution. What Professor Rémillard has done is to produce a superb collection and synthesis of the two, often artificially separated, historical-cultural and logical-analytical strands in Canadian constitutional interpretation. Since Professor Rémillard is, together with Gérald Beaudoin, an unequivocal "federalist" among the current class of outstanding francophone Quebec thinkers on the constitution, his work takes on a special importance for anglophone constitutionalists and constitutional law students concerned with the imaginative up-dating and rationalisation of our federal system. The significance of this undertaking should not be ignored by our new political leaders at the federal level, anglophone and francophone alike.

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[9] Professor Rémillard's text examines the judicial treatment of the B.N.A. Act both before and after 1949, the year of the abolition of appeals to the Privy Council.

[10] Quebec constitutional writers, such as Jacques-Yvan Morin, Claude Morin and Jacques Brossard were active and vocal in the 1960's.

Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law*. Littleton, Colorado: Fred B. Rothman & Co., 1983. Pp. xi, 195 [35$ US]. Reviewed by John Swan.*

Much recent scholarship on the topic of contracts has suggested that traditional rules have little relevance and are even antithetical to modern commercial arrangements.[1] Professor Trakman's book can, in one sense, be seen as a denial of this hypothesis. He argues that the development of modern commercial law and, in particular, the development of excuses for nonperformance, has undercut the sanctity of freedom of contract. He contends that the growth in the common law of an extended law of excuses for nonperformance is evidence of an increasing divergence between law and commercial needs. Professor Trakman believes that the law should develop to allow the original goals of the law merchant — a truly interuational law merchant — to become once again the touchstone for decisions regarding international contracts. In his opinion, the present law no longer enforces the agreements of the parties.

The book begins with a brief outline of the medieval law merchant's development and reception into the common law and other moderu legal systems. This is followed by a sliort description of the modern international law merchant. The first chapter concludes:

> The life of commercial law lies in the experience of merchants themselves. Commercial law is not an end in itself; rather, it is a means towards an end. It is *the* way towards continuous commerce in accordance with the design of the international community of merchants. The fact that merchants develop dissimilar practices and usages in their respective domestic trades does not prevent them from devising uniform practices in their international affairs. After all, their "contract", construed in the light of international practice, constitutes their common language and their own chosen means towards self-regulation. It embodies their mutual understandings, their *consensus ad idem*, and their expectations of one another. In this sense, the "law" of international trade is guided by a single unifying force — the agreement of the parties. This unifying force was the most dominant attribute of the medieval Law Merchant. This same unifying force should guide the international Law Merchant of the modern day.[2]

Professor Trakman develops his thesis through an analysis of international oil contracts. A questionnaire[3] was submitted to legal counsel employed by thirty-three major oil companies. The results of the questionnaire[4]

*Of the Faculty of Law, University of Toronto.

[1]See I. Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (1980).

[2]L.E. Trakman, *The Law Merchant: The Evolution of Commercial Law* (1983) at 44.

[3]Professor Trakman provides a copy of the questionnaire, but no extensive statistical analysis of the results; see Appendix E, *ibid.* at 131.

[4]There is some evidence that the response rate was low; see Appendix F, *ibid.* at 135.

disclosed that most contracts caused no problems in performance, and, of those that did, the majority were resolved without recourse to any kind of dispute resolution process. Of the disputes requiring formal resolution, 41 per cent were settled by arbitration while 59 per cent were resolved by a judicial body. Responses to the questionnaire disclosed that the resolution of disputes over non-performance[5] was affected by a number of variables, including the nature of the market and the respective market power of the seller and buyer. These responses also disclosed other concerns of the oil companies surveyed: choice of law, choice of forum, arbitration clauses and the use of standard forms of agreement. The final chapters of the book examine the performance of the common law courts in protecting freedom of contract and in developing a modern law merchant. Professor Trakman feels that the courts' performance in this respect has been less than satisfactory. He writes:

> Freedom from legal interference is a necessary feature of international business where contracts are freely concluded, expertly negotiated and skillfully drafted. For common law courts to do otherwise is to interfere with the autonomy of agreements. It is also to risk losing judicial business to other jurisdictions, to foreign courts and to arbitration associations.[6]

Any effort to investigate the relation between commercial practice and legal rules should be warmly encouraged. Unfortunately, Professor Trakman's attempt is curiously limited and artificial. It is limited by its focus on the approach of the common law courts (principally the English courts) to the problem of interpretation, especially as it applies to the issue of frustration. It is artificial because, as the above quotation indicates, Professor Trakman regards as a basis for concern the fact that the common law courts (again, the English courts?) might risk losing business to the courts and arbitration associations of other jurisdictions. Two questions are relevant to this concern. Why should the (English?) taxpayer provide a forum for the international trading community? Why should one assume that courts are more effective than arbitration tribunals in developing a modern law merchant? There is evidence, occasionally referred to by Professor Trakman, that arbitration is, in fact, preferred by international traders.

A principal criticism of the book stems from Professor Trakman's failure to present a complete analysis of the problem he has set for himself. He starts from the proposition that:

> As a legal concept, freedom to contract has signified the dominance of the libertarian notion of *laissez-faire* over government interventions in business. Evolving out of the economic theory of perfect competition and philosophical

[5]It is not clear if the term is an euphemism for breach or if it refers only to arguments based on frustration.

[6]Trakman, *supra*, note 2 at 102.

> conceptions of free will, the sanctification of the business process has matured into a central tenet of the law governing international trade. Merchants engaged in world trade are to be free to transact business across national boundaries with their own trade design.[7]

As a governing principle, *laissez-faire*, or freedom of contract, presents two significant problems. First, it provides no guidance for the interpretation of a contract. One can admit that parties should be free to make arrangements as they see fit; but adherence to this principle leaves one without any guidance as to the actual content of the agreement. Second, freedom of contract can never be fully accepted once it is realized that freedom for one side may mean anything but freedom for the other side. This unconscionability aspect may be comparatively unimportant in agreements between large, sophisticated, commercial parties; but, once those parties resort to the courts of a jurisdiction to resolve their differences, they will inevitably be subject to that jurisdiction's views of the permissible limits of freedom to contract. Anti-trust or restraint of trade laws are obvious examples of such limits.

With respect to the first of these problems, Professor Trakman states:

> Any attempt by courts of law to relieve merchants from assumed commitments infringes upon the expressed terms of business agreements. Any disregard of the negotiating and drafting abilities of contractors displaces the sanctity of their voluntary undertakings. The contract represents the manifestation of their mutual will. The expressed terms of the agreement reflect their nonperformance design. To excuse merchants from performance by mandate of law in such circumstances is to "unmake their contract". It is to impose the risk of nonperformance upon an unwitting promisee. It is to cause the "... breakdown of our faith in contract itself."[8]

I find it hard to believe that anyone still accepts the argument that contractual obligations are absolute. Surely, it is possible to argue that a contractual agreement does not allocate *all* risks, foreseeable and unforeseeable, to one side or the other. It would have been useful if Professor Trakman had supplied examples of where the courts have improperly provided one side with an excuse for nonperformance. Furthermore, it is unhelpful to find the argument put in terms of the will theory of contracts. The argument would have been more convincing if Professor Trakman had shown that the reasonable expectations of one side had been defeated, or ignored by a court's decision to provide the other side with an excuse for nonperformance.

The second threat to the achievement of the goal of freedom of contract also requires much more careful analysis. Professor Trakman's choice of the oil business as the example to illustrate his thesis that the modern law merchant fails to achieve the goal of freedom of contract is unfortunate.

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[7] *Ibid.* at ix.
[8] *Ibid.* at 70.

The events of the last ten years or so have demonstrated that oil is far too important to be left to the oil companies. Not only is the sale of much of the world's oil governed by the OPEC cartel, but many oil companies are state owned and, like Petro-Canada, are explicitly regarded as instruments of state policy. There are other more suitable areas of international trade that could have been explored. Charter-parties, for example, are likely to provide better examples of *laissez-faire* contracting, contracting largely unaffected by national concerns.[9]

Professor Trakman is caught in a dilemma. The real lesson of his anaylsis is that no particular rule or theory of law has much to do with the actual practices of oil companies. On the basis of his survey, 88 per cent of all contracts raise no disputes over performance. Approximately 9 per cent of all contracts are resolved by informal settlement.[10] These figures mean that more than 97 per cent of all agreements are never submitted to any formal dispute resolution process. Only 1.8 per cent go to court, while the rest go to arbitrators.

Unless it can be shown that a successful means of resolving this tiny proportion of cases will provide a firm, predictable and usable basis for settling the 12 per cent of all contracts that lead to disputes, then any analysis of what *courts* do is almost entirely irrelevant to the industry. Such an analysis may be useful in some carefully circumscribed areas of commercial activity. The approach is, however, particularly unsuitable in the case of frustration where decisions are highly dependent upon the facts of the individual case.

We would have a better basis for assessing the significance of what courts do if we knew the answers to some other questions. What, for example, is the role played by arbitrators? Professor Trakman observes that arbitration is often chosen by the parties. An arbitrator is usually chosen on the basis of his expertise and his intimate knowledge of the dispute. In this sense, an arbitrator functions very much like the old-style merchant adjudicator under the medieval law merchant, praised by Professor Trakman in Chapter 1 of the book. There are too few reports of litigated oil contracts to draw any conclusions about the scope for judicial fact-finding in such cases. However, in cases involving international charter-parties (including contracts for the carriage of oil), recent litigation before the House of Lords has, when the dispute concerns the two parties to the agreement, in every case but one,[11] been preceded by arbitration. The role of a court

[9]See, *e.g.*, *Shipping Act*, 1916, 46 U.S.C. §801, *Shipping Conferences Exemption Act*, S.C. 1978-79, c. 15.

[10]The discrepancy in the figures, arising from problems in the questionnaire, is acknowledged.

[11]This conclusion is based on a review of all decisions of the House of Lords reported in A.C. [1970]-[1982].

after arbitration is quite different from its role when there has been no prior arbitration. Consequently, the experience in the House of Lords is particularly relevant for Professor Trakman's purpose, since the English courts offer a forum for most international contracts. Professor Trakman focuses principally on the common law in the English courts referring only briefly to American decisions. However, if Paris, Rome, Tokyo or Hamburg offer as generous or popular an international forum, he should have considered the way in which those courts treat international contracts.

Another important question concerns the kinds of disputes that go to court. A decision as to whether or not a contract is frustrated by a certain event or has a particular meaning in a certain context is of limited general use. As a precedent, it provides a poor basis for prediction in cases involving different contracts and different circumstances. However, a decision as to whether or not a clause in general use in a particular industry or trade has a specific effect in a common factual situation is of far greater importance. For example, the judgment of Lord Diplock in *Federal Commerce and Navigation Co. Ltd* v. *Tradax Export S.A.*[12] regarding the "Baltimore berth grain charter", can be seen as establishing a reliable interpretation of a standard clause in that agreement. It is important, therefore, in assessing the significance of a legal decision to be aware of its nature and commercial importance. The mere fact that a court is engaged in a process of interpretation does not guarantee that the judgment will be significant.

A further issue arising from this question concerns the significance of other variables in the resolution of disputes over nonperformance. The nature of the market and the respective market power of the parties are two variables that were disclosed in comments received pursuant to the questionnaire, and they are referred to by Professor Trakman in his book. These variables would, of course, be precisely those which one might expect to determine the outcome of any dispute. It might make a difference to the outcome of a dispute if, for example, one of the parties is Exxon Corporation and the oil market is in a state of upheaval. Again, it would have been helpful had Professor Trakman investigated the nature and background of the disputes. A correlation can be shown between large and rapid changes in ocean freight rates and disputes over charter-parties — a finding that is no more remarkable than the correlation between the incidence of litigation over real estate deals and sharp changes in the price of real estate.

The consequence of this argument is that we can obtain very little information about the true role of the modern law merchant through the study of cases, especially cases going before courts. There is some evidence

[12](1977), [1978] A.C. 1, [1977] 2 All E.R. Rep. 849 [hereinafter *Federal Commerce*, cited to A.C.].

that arbitrators[13] are treating international contracts as "unlocalized" or "de-localized", arising against an international background and not a national one.[14] One important issue left unexamined by Professor Trakman is the extent of, and the method for, the localization of international contracts. The traditional function of the conflict of laws has been to provide such a localizing device. To the extent that contracts are truly international and unlocalized, the traditional aim of the law merchant is realized. An instruction such as that found in §6 of *Restatement II, Conflicts* is an attempt to treat international (and even inter-state) contracts as unlocalized. The unlocalized contract is not simply a notion that one might find expressed in a judgment of a court or an award of an arbitrator; instead, it is likely to be a notion which permeates the whole process of contracting in international trade. There is some evidence that nothing really turns on where a contract dispute is litigated; choice of law issues are conspicuously absent from many of the House of Lords cases referred to above. The rules, tests or standards for decision, at least for issues of interpretation or construction (including frustration), are likely to be the same throughout the world. Professor Trakman offers no support for the statement that "interdisciplinary studies highlight the divergent expectations of American, Japanese and Russian traders".[15] Such a statement is, I believe, implausible. Modern international trade is sufficiently extensive that the expectations of *all* traders must be the same, or so similar as to be indistinguishable, at least on the basis of the nationality of the trader.[16] Professor Trakman may be justified in stating that trade cannot occur if expectations are divergent. However, he must, at the very least, provide cogent evidence of systematic and long-term divergence. There is no evidence that the common law process or approach to international contracts is wholly antithetical to the goal of minimizing divergent expectations. There are, in fact, judicial statements[17] in the common law tradition that strongly support Professor Trakman's argument that "in promoting a modern law merchant, there is a need to sublimate national law biases in favour of multi-national interests".[18] I do not believe that his criticism of the common law judges[19] is borne out in an examination of the cases, notwithstanding what such an examination may disclose about a modern law merchant.

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[13]These are often arbitrators acting under the rules of the International Chamber of Commerce.

[14]A recent case, *Amin Rasheed Shipping Corp.* v. *Kuwait Insurance Co.* (1983), [1983] 3 W.L.R. 241, [1983] 2 All E.R. Rep. 884 (H.L.) has some interesting comments on this issue and, incidentally, on the willingness of the English courts to resolve international trading disputes.

[15]Trakman, *supra*, note 2 at 103.

[16]What are the expectations of multi-national firms like Exxon, Shell or British Petroleum?

[17]See *Federal Commerce, supra*, note 12 at 7-8, *per* Lord Diplock.

[18]Trakman, *supra*, note 2 at 102.

[19]*Ibid.* at 103.

Professor Trakman's book is an interesting study of a very important problem. His approach to the problem is flawed, however, by his decision to examine a particularly volatile industry and by his assumptions concerning the role of the law and the courts. We are left with the inference that the law of contracts, at least as it is traditionally understood, has little to say that is relevant to the international oil business. However, we are given no hard evidence to confirm or deny the validity of the hypothesis that is, at bottom, the principal issue in Professor Trakman's enquiry.