

The Export Trade: The Law and Practice of International Trade by Clive M. Schmitthoff

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The Export Trade: The Law and Practice of International Trade (6th ed. 1975). By Clive M. Schmitthoff. Stevens, London, 1975. Pp. 461, \$19.65.

Reviewed by STANLEY J. MARCUSS*

This is an encyclopedic work which unfortunately does not live up to its billing. Anyone expecting, as the title suggests, to find "The Law and Practice of International Trade" in this volume will be disappointed.

The orientation is almost exclusively English. Subjects such as export documentation, market information for exporters, sales

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of goods, exclusive sales agreements, export credits, and exchange controls, to mention a few, are set in an English context. In the 19th century it may have been possible to learn the subject of international trade by reference to English law and practice alone, but the days of the Sceptered Isle's dominance of world trade are long past.

It is difficult to discern for whom this book is written. For the practitioner of international trade law, it lacks sufficient depth to provide the level of comprehension needed for effective representation of his client. For the businessman engaged in export trade, it is too long (461 pages) and covers too many technical subjects to be of much assistance in day-to-day business transactions. For the student of comparative law, the treatment of the law of other jurisdictions is too superficial to provide much enlightenment.

The book contains much that is elementary. It touches on basic principles of contract law such as offer and acceptance, which are familiar to first year American and English law students. The chapters on the rights of the buyer and seller, inspection of goods, express and implied warranties, and the like, are likewise familiar subjects to any American law student who has waded through the Uniform Commercial Code and any English law student who has mastered the Sale of Goods Act. Similarly, the chapter dealing with various aspects of the financing of exports will be familiar to anyone who has studied the law of negotiable instruments.

It is the failure to deal with these subjects in depth, to analyze typical trade situations and to suggest solutions to recurring problems, that imposes major limitations on the usefulness of this work. Constantly one feels frustration at coming up against complex issues and then being turned away by such admonitions from the author as, "The exporter is well-advised to ask his solicitors to frame general terms of business appropriate to his business and revise them from time to time" (p. 48). Such advice follows the author's uncontested observation that "the importance, for overseas sales, of well-drafted general terms of business can hardly be exaggerated" (p. 47). But if careful attention to such matters is so important — as it is — why doesn't the author lead us through the thicket?

One feels a similar frustration with the chapters which outline, but do not analyze, such important matters as f.o.b. and c.i.f. contracts, the rights of the buyer to inspect, accept, or reject

goods, the incidence of risk in an export transaction, and the various forms of payment and transfer of title, including negotiable bills of lading and letters of credit. Anyone interested in the export guidance which Professor Schmitthoff is so obviously qualified to give by virtue of his background, experience, and knowledge of the export trade, will find himself brought up short by the recurring prescription to "Get thee to a solicitor!" when difficult issues arise. Yet one picks up a five hundred page book on the export trade by an eminent author precisely because he wishes to draw upon the author's own wealth of experience and judgment.

To say this is not to suggest that the book is without merit. One of its most useful parts is Part Two, which deals with mechanisms for conducting sales abroad. Included are such important matters as exclusive sales agreements, agency arrangements, branch offices, subsidiaries, joint export organizations, restrictive trade practices, and the law of competition in the European community. The exporter interested in establishing an effective sales presence overseas needs to know the array of possibilities, and Professor Schmitthoff provides a useful service in cataloguing the variety of devices available. Here again, however, the orientation is almost exclusively English, and missing from the materials is any in-depth analysis of the advantages and disadvantages of one form of overseas operation over another. Here as elsewhere, the encyclopedic treatment prevails.

Chapter 17, for example, which deals with subsidiaries, "the favored form of modern export trading" (p. 168), only scratches the surface of this immensely complex area. Professor Schmitthoff acknowledges that "the incidence of taxation is one of the major considerations when a decision is taken whether to set up a subsidiary in a particular country" (p. 175). Yet the entire subject of taxation is covered in two paragraphs with such unilluminating observations as, "In some countries the revenue authorities use little discretion in the assessment and collection of taxes; in other foreign enterprise is treated apparently or actually preferentially because it is the policy of the country to attract foreign capital . . ." (p. 175). Missing is any discussion of such vital questions as the tax treatment of foreign source income, foreign tax credits, foreign use or property taxes, the point at which a taxable event may be deemed to occur, the measurement of taxable income under foreign law, the tax treat-

ment of joint venture earnings, and other tax matters of crucial importance in choosing the form of foreign organization.

Missing, too, is any discussion of restrictive foreign investment laws in a number of countries which offer significant trade opportunities. The recently enacted Canadian statute on foreign investment, for example, or the debate in the United States on the need for new foreign investment legislation, as well as the whole structure of restrictive Japanese investment laws which pose formidable barriers to the penetration of Japanese markets, are all matters of great significance to the businessman and his counsel interested in opportunities in some of the fastest growing markets in the world.

Indeed, even though this book is in its sixth edition, it is out of touch with some of the most significant current issues in international trade. Completely absent from the discussion of tariffs, for example, is any treatment of non-tariff barriers to trade, currently the subject of international trade negotiations in Geneva and often far more significant than tariffs as obstacles to trade. Absent, too, is any discussion of the U.S. Trade Act of 1974, which may have a significant impact on access to American markets and, on the basis of some early decisions by the U.S. International Trade Commission, has raised fears abroad that a wave of protectionist sentiment is sweeping the United States. At a time when the economies of the world are emerging from the worst depression since the Thirties, and when many are looking to the American market to help revive worldwide economic activity, the question of access to U.S. markets is of central importance to international trade. Perhaps this edition went to the press too early to permit treatment of this subject.

Similarly, the discussion of official British export credits through the Export Credits Guarantee Department (ECGD) omits mention of on-going negotiations among the governments of Western Europe, Japan, and the United States to limit the availability and terms of officially supported export credits. This is a matter of major concern in the United States, not only in the context of U.S.-Soviet trade where it has received prominent attention and has become entwined with the issues of detente and Jewish emigration from the Soviet Union, but elsewhere as well. Congress is casting an increasingly skeptical eye on the role of government-supported credits in international trade. The 1974 amendments to the Export-Import Bank Act, for example, placed new constraints on the availability of U.S. Export-Import

Bank Financing. The intense debate on that subject reflected an increasing awareness of the economic cost of below-market export credits and the disadvantages of international competition among governments to outdo each other in supplying low-cost credit to the export sector. The major creditor nations have already entered into a "gentlemen's agreement" to exercise restraint in making government export credits available. Current efforts to tighten that agreement will have a significant bearing on the availability of such credits for all export transactions, a matter of interest to anyone planning future trade strategy.

By the same token, efforts underway to reduce the scope of international controls imposed by the international export control Coordinating Committee (COCOM) on exports of high technology and other goods and services of potential military significance to the Soviet Union and Eastern Europe could greatly expand trade opportunities in that part of the world and elsewhere. Initiated by the United States in the aftermath of World War II in the confrontation climate of the Cold War, COCOM was an effort to deny the Soviet Union a wide variety of items of economic and military significance. With the loss of the U.S. monopoly of high technology exports, and with changing perceptions of the East-West struggle, the scope and force of COCOM is rapidly diminishing. It is also being undermined by intense commercial rivalry among companies in Europe, Japan, and the United States for a share of the Eastern bloc market. Exporters everywhere should be aware of these developments, for they have an important bearing on future trade opportunities. But, alas, Professor Schmitthoff's chapter on export controls gives no hint of these important developments.

For that matter the whole question of trade opportunities in Japan, Eastern Europe and the Soviet Union is largely ignored. There is, to be sure, a brief discussion of some of the unique problems associated with arbitration and litigation arising out of transactions in State-planned economies, but the issue of more immediate importance, namely, how to initiate and develop trade with the Soviet Union and Eastern Europe, is left untouched.

A book of this kind will probably be of greatest usefulness to the English practitioner already familiar with the export trade who wishes a checklist of important matters to review when structuring an export transaction. The breadth of topics covered provides a handy reference to matters which can easily be overlooked. (In that connection, more sample forms and suggested

contractual provisions would be useful.) The uninitiated, too, will find this volume helpful in suggesting the wide range of topics with which he must become familiar before undertaking comprehensive representation in matters of export. But for the person seeking to become expert in the general law and practice of international trade, Professor Schmitthoff provides only a tantalizing glimpse of this complicated and rapidly changing subject.

