
Book Reviews

Rönck, Rüdiger. *Technische Normen als Gestaltungsmittel des Europäischen Gemeinschaftsrechts: Zulässigkeit und Praktikabilität ihrer Rezeption zur Realisierung des Gemeinsamen Marktes*. Berlin: Duncker & Humblot, 1995. Pp. 312.

This book evaluates the feasibility and the constitutional implications of technical standards as a means to shape the internal market. Technical standards refer to those standards elaborated by national, European and international standardization institutions. With the removal of tariffs, the EC had to accept that non-tariff barriers to trade presented even more challenging obstacles for the then common market. It was precisely here that the interplay between economic policies and social policies became apparent. The elimination of non-tariff barriers to trade is not possible without intervening in social policies. This book deals with market integration through standard setting and market regulation through product safety law. In its analysis of their successes and failures it goes to the bottom line of European integration.

Rönck begins by recounting the history of EC policy in this area: the 1969 Programme, with its vertical harmonization to overcome different technical standards and regulations, which proved to be a failure; the new policy, introduced with the adoption of the notification directive 83/189 obliging Member States to inform the Commission not only on regulations but also on voluntary technical standards; and then the decisive 1985 New Approach to technical standards and regulations, which was based on four horizontal principles: (i) legislation was restricted to laying down mandatory requirements instead of detailed technical specification; (ii) the

mandatory requirements were to be concretized by technical standards elaborated by the European standardization institutions; (iii) these technical standards were of a non-binding nature; (iv) compliance with the voluntary standards guaranteed free access to the internal market. Requirements for cooperation between the Commission and CEN/CENELEC were laid down in the 1984 Memorandum of Agreement.

All this is not really new. Indeed, one may wonder whether it would have been useful to fully develop the relationship between the EC policy on technical standards and regulations and the European Single Act. Rönck underestimates its importance for the process of European constitution-building. He breaks down the sectorial relevance into fields where the Community legislator has *directly* linked the New Approach to different fields of law — such as technical product safety law, occupational health and safety, building and construction, information technology, foodstuffs, conformity assessment procedures, environmental and consumer protection — and to fields where the new approach can be only *indirectly* felt, such as public procurement, tort (product liability) law and contract law. The 1990 Global Concept of Conformity Assessment, the 1992 Directive on General Product Safety and the 1985 Directive on Product Liability are presented as means to implement the New Approach. I believe that Rönck is wrong. He does not fully consider that the subject-matter of his analysis is product safety regulation. The Commission and the Council started from the idea that a European product safety policy, based on strict product liability and voluntary technical standards elaborated under the New Approach, would suffice to balance out free trade and product safety. The adoption of the Product Safety Directive in 1992 must be understood as a partial failure of the original concept. It would then have

been necessary to analyse the Product Safety Directive's impact on and inter-relationship with the New Approach. The Global Concept on Conformity Assessment must be understood as the counterpart to the New Approach. It guarantees access to the internal market and any conformity assessment involves a value judgment on product safety.

The value of Rönck's book lies in his analysis of the New Approach-type directives. He recognizes their major deficiencies and concludes that they lack democratic accountability. His first argument is the *de facto* (not *de jure*) binding nature of technical standards, resulting from the presumption of compliance with mandatory requirements, privileges in conformity assessment, concretization of legitimate expectations in the product liability directive and public procurement. The point is not so much whether the arguments are convincing. In fact, they are not in terms of the question as to whether technical standards are regarded as binding by the courts in product liability cases. More important is his finding that the New Approach-type directives do not respect the key role attributed to the mandatory requirements. Theoretically, the mandatory requirements should guide the elaboration of technical standards and they should allow certification of compliance. In practice, these directives remain vague and leave the standard setting to the private European standardization institutions. It is no longer the European Parliament that makes the decision on where to draw the line between free trade and product safety. According to Rönck, the delegation of power does not respect the case law of the ECJ, nor can it be legitimized by the democratic nature of the standard-setting procedure under the Memorandum of Agreement.

Rönck's second argument is closely linked to the first. Secondary law has to be concrete, determined and transparent so that Member States know the rules they must implement and so that European citizens know their rights. Seen against this yardstick, the deficiencies are obvious. The mandatory requirements are said to be incomplete: relevant European standards to which the directives

refer are non-existent; the directives themselves refer to national technical standards, which entails an illegal re-delegation of power; the scope of application of the directives overlap; and, finally, the reference to standard formula in the New Approach-type directives presupposes a common European level of technical knowledge which does not yet exist. The less the directives are concrete, the less likely that subjective rights under the directives may emerge. Rönck, for instance, raises the question whether the New Approach-type directives deprive private individuals of a redress option.

The solution put forward by Rönck is bound to solve the democratic deficiencies of the new approach: the European Parliament should insist on mandatory requirements so as to avoid a hidden delegation of power and the standard-setting process should be reviewed. Mandatory requirements should contain the necessary value judgment of safety level, guide the standard-making procedure and fix the democratic requirements on the standard-setting procedure within the European standardization institutions. Contrary to present practice, a European product safety agency should be established, the task of which would be to review the adopted technical standards in order to guarantee that the procedural requirements have been respected and the public interest observed. This model follows that of the US Consumer Product Safety Commission whose powers are derived from the French review mechanism of *homologisation*.

Although I concur with most of the findings, I do not share Rönck's conclusions. He overestimates the role of the European Parliament and underestimates the role of private legal redress. Making the necessary value judgments presupposes an expertise that the European Parliament does not have. The most that the European Parliament may do and might do is to advocate for the adoption of a model directive or, even better, a model regulation in which the principles guiding the references to standards legislation are defined, including the rules which should govern the standard-making process. Challenging the

appropriateness of the New Approach means challenging European integration. The open process, the lack of European standards, the non-existent European state of the art characterize the European legal order as a constitution in process. The democratic deficit of the New Approach should be reduced by enhancing individual and collective rights of all parties concerned against deficient standard setting and against incomplete, unclear and insufficient New Approach-type directives.

University of Bamberg Hans-W. Micklitz

Lillich, Richard B. and Charles N. Brower (eds). *International Arbitration in the 21st Century: Towards 'Judicialisation' and Uniformity?* New York: Transnational Publishers, 1994.

This book deals with the all too classic saga of the ambivalent rapport between arbitration and state adjudication. International commercial arbitration emerged at the beginning of the 20th century as the young and disenfranchised sibling of national courts. Decidedly modern and rebellious, it sailed through the century parading itself as being technically superior to its sovereign relative: cheaper, faster, more confidential and less formal. As the century draws to a close, it turns out that arbitration is taking on its siblings' poor traits. Judicialized and preoccupied with uniformity, arbitration has become expensive, and rampant with pomp and ceremony. This book tells us what we need to know about this story — mostly written in the jubilant tone of a proud mother. It offers a comprehensive overview in ten articles, divided into four sections, where contributors trace the phenomena of 'judicialization' and 'uniformity' in contemporary arbitration practice. The overall picture is seen through the specific lenses of arbitration's procedural aspects, its governing law, and a review of its awards. It is particularly concerned to inform the reader on the extent to which these phenomena have been used and whether they ought to be promoted or restrained. All told, the verdict is overwhelmingly positive: arbi-

tration is becoming more judicialized, and there is no shame in that!

Throughout the book, judicialization manifests itself in two main forms. First, we see it in the shape of an increased judicial intervention in the arbitration process. Most contributors seem to argue that 'intervention' here ought to be experienced more as 'assistance', and should be appreciated as such. Court intervention promotes arbitration by supplying it with a much needed 'control system' when enforcing arbitral agreements, appointing arbitrators, reviewing awards, and so forth. Moreover, exhaustive surveys of transnational practices point towards a uniform global trend of restrained intervention. Second, arbitration is becoming more judicialized in the sense that it is conducted more frequently with the procedural intricacy and formality native to national adjudication. Here, the verdict starts off as rather ambivalent: whereas judicialization has meant greater safeguards to procedural fairness, it has also meant diminished flexibility, expediency and economy. One contributor proposes pre-hearing conferences, and another advocates fast-track arbitration, as ways to restore the balance between flexible procedures and predictable rules. But perhaps this book is at its most informative when mapping the 'creeping unification' that has coupled the judicialization of arbitration practice. Various surveys, some of them quite exhaustive, are presented of national, international and supranational treaties, institutions, court decisions and awards. Convergence is reported in the terminology, proceedings and grounds for enforcing and annulling arbitral awards. The New York Convention and UNCITRAL model-law influence are advanced as the heroes behind this movement. Whereas national variants and alleged redundancies (such as double judicial control) are observed, they are generally dismissed as rather 'academic' concerns of no practical significance. In doing so, I think the editors have performed an excellent job in providing us with quite an extensive overview of recent developments.

Now for the critical input. To indulge again in the 'sibling rivalry' analogy, the impression