# COMMERCIAL AND ECONOMIC LAW IN THE UNITED STATES

ANDRE FIEBIG







# Commercial and Economic Law in the United States

#### **Andre Fiebig**

This book was originally published as a monograph in the International Encyclopaedia of Laws/Commercial and Economic Law.

General Editor: Roger Blanpain Associate General Editor: Michele Colucci Volume Editors: Jules Stuyck, Evelyne Terryn



Published by: Kluwer Law International PO Box 316 2400 AH Alphen aan den Rijn The Netherlands Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by: Turpin Distribution Services Ltd. Stratton Business Park Pegasus Drive, Biggleswade Bedfordshire SG18 8TQ United Kingdom Email: kluwerlaw@turpin-distribution.com

DISCLAIMER: The material in this volume is in the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The editor and the contributing authors expressly disclaim all liability to any person with regard to anything done or omitted to be done, and with respect to the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No reader should act or refrain from acting on the basis of any matter contained in this volume without first obtaining professional advice regarding the particular facts and circumstances at issue. Any and all opinions expressed herein are those of the particular author and are not necessarily those of the editor or publisher of this volume.

Printed on acid-free paper.

ISBN 978-90-411-3910-8

This title is available on www.kluwerlawonline.com

© 2012, Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Email: permissions@kluwerlaw.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

The Author	2
List of Abbreviations	13
General Introduction	15
§1. General Background of the United States  I. Geography II. Demography III. Cultural Composition IV. Political System  A. Branches of Government B. Executive Branch C. Legislative Branch D. Judicial Branch E. Political Parties V. The Economic System VI. The Legal System A. Sources of Law B. The Doctrine of Stare Decisis C. Relationship between State and Federal Law D. Limited Power of Federal Government VII. Judicial System A. Federal Court System B. State Court System	15 15 15 16 16 16 17 17 17 18 18 19 20 20 21
Selected Bibliography	23
Part I. Commercial Law	25
Chapter 1. Concepts and Sources of Commercial Law	25
§1. THE DISTINCTION BETWEEN TORT AND CONTRACT LAW	25
\$2. Constitutional Law	25

§3. Statutory Law	26
§4. Common Law	26
§5. International Law	26
Chapter 2. The Economic Operators	27
§1. MERCHANTS	27
§2. NATURAL PERSONS  I. Persons II. Minors III. Aliens IV. Citizens V. Agents VI. Master and Servant VII. Independent Contractors VIII. Consumer	27 27 27 28 28 28 30 30 31
§3. LEGAL PERSONS  I. Sole Proprietorship  II. Partnerships  III. Corporations  IV. Limited Liability Companies	31 31 31 32 33
Chapter 3. Economic Institutions	34
§1. PRIVATE INSTITUTIONS  I. Trade Associations  II. Chambers of Commerce  III. Better Business Bureau	34 34 34
§2. PUBLIC INSTITUTIONS  I. Commercial Courts  II. Small Business Administration  III. Commercial Arbitration	34 34 35 35
Chapter 4. General Obligations of Economic Operators	37
§1. CORPORATE OBLIGATIONS  I. Incorporation  II. Doing Business  III. Annual Reporting	37 37 37 37
§2. Financial Reporting Obligations	38

6

Ch	apter 5. Business Assets, Goodwill, and Commercial	
	Property Rights	39
§1.	Business Assets	39
§2.	GOODWILL	39
§3.	INTELLECTUAL PROPERTY  I. Patents A. Legislation B. Substantive Requirements C. Procedural Requirements D. Rights of the Patentee E. Inventions by Employees F. Biotechnological Inventions  II. Design Patents  IV. Software V. Trademarks A. Legislation B. Definition C. Substantive Requirements D. Procedural Requirements E. Rights Conferred by Registration  VI. Copyright A. Substantive Requirements B. Rights C. Duration D. Compilations E. Work Made for Hire	41 41 41 42 43 44 45 46 46 47 47 48 49 50 50 51 52 52
	F. Registration G. Fair Use	53 53
§4.	Trade Names	53
§5.	TRADE DRESS AND PRODUCT DESIGNS	54
§6.	Domain Names	55
§7.	Know-How	55
§8.	CHIP PROTECTION	55
§9.	TRADE SECRET	56
Ch	apter 6. Bankruptcy and Related Institutions	58

§1.	Sources of Bankruptcy Law	58
§2.	OBJECTIVES OF BANKRUPTCY LAW	58
§3.	JURISDICTION IN BANKRUPTCY CASES	58
§4.	Venue	58
§5.	TYPES OF BANKRUPTCY PROTECTION	59
§6.	CHAPTER 7 BANKRUPTCIES	59
§7.	Chapters 11 & 13 Bankruptcies	60
§8.	CHAPTER 9 BANKRUPTCIES  I. Automatic Stay  II. Avoidance Actions  A. Preferences (§547 Bankruptcy Code)  B. Fraudulent Conveyances  III. Debtor's Discharge	61 62 62 62 62
§9.	ALTERNATIVES TO BANKRUPTCY I. Composition Agreements II. Assignment for the Benefit of Creditors III. Bulk Sales Laws	63 63 64
Ch	apter 7. Secured Transactions	66
Ch	apter 8. Negotiable Instruments	69
§1.	Types of Negotiable Instruments	69
§2.	Notes	69
§3.	Drafts	69
§4.	CHECKS	69
§5.	CERTIFICATE OF DEPOSIT	70
§6.	ISSUANCE OF NEGOTIABLE INSTRUMENTS	70
§7.	NEGOTIATION AND TRANSFER OF NEGOTIABLE INSTRUMENTS	70
§8.	Endorsement	71

	<b>Table of Contents</b>
Chapter 9. Documents of Title	72
Chapter 10. Letters of Credit	73
§1. Definition	73
§2. INDEPENDENCE PRINCIPLE	73
§3. ISSUANCE OF THE LETTER OF CREDIT	73
§4. Honoring the Letter of Credit	73
§5. Transfer of Letters of Credit	74
Chapter 11. Commercial Contracts	75
§1. GENERAL PRINCIPLES OF CONTRACT LAW	75
§2. Uniform Commercial Code	75
Chapter 12. Sale of Goods	76
§1. FORMATION  I. Offer and Acceptance II. Formal Requirements	76 76 76
§2. Performance	76
§3. DELEGATION AND ASSIGNMENT	77
§4. WARRANTIES  I. Implied Warranties  II. Express Warranties  III. Limitation of Warranties	77 77 78 78
§5. Delivery of Goods	78
§6. Inspection	79
§7. RISK OF LOSS	79
Part II. Economic Law	81
Chapter 1. General Principles	81

§1. ]	PRINCIPLES OF ECONOMIC LAW  I. Fundamental Rights of Those Engaged in Economic Activities II. Property Rights	81 81 82
§2. 1	Freedom of Contract	83
§3. <i>1</i>	ASSOCIATION	83
§4. ]	REGULATION OF BUSINESS ACTIVITIES	83
§5. 1	Means of Regulation	84
§6. 1	PRICE REGULATION	84
Cha	pter 2. Regulation of Commercial Activities	86
1	REGULATION OF BANKING ACTIVITIES  I. National Banks II. State Banks III. Bank Holding Companies IV. Savings and Loan Holding Companies V. Regulation of International Banking Activities	86 86 87 87 88
]	REGULATION OF EXCHANGES  I. Securities Exchanges  II. Insider Trading  III. Regulation of Investment Advisers  IV. Commodities Exchanges	89 89 90 91
	REGULATION OF FOREIGN INVESTMENT AND TRADE  I. National Security  II. Imports and Exports  A. Customs  1. Trade Remedies Laws  a. Antidumping  b. Subsidies and Countervailing Duties  c. Unfair Trade Practices  d. Section 301 Proceedings  B. Export Controls  1. Sanctions  2. Antiboycott  III. Foreign Corrupt Practices	93 93 94 94 95 96 96 97 97 98 98
Cha	pter 3. Competition	101
81	Antitrust Law	101

I. Sources of Antitrust Law	10
II. Restrictive Practices	10
A. Elements of Sherman Act Section 1 Infringement	10
B. Categories of Restrictive Practices	104
III. Monopolization and Attempted Monopolization	109
IV. Mergers and Acquisitions	111
V. Antitrust Immunities	112
VI. Enforcement	114
VII. Extraterritorial Jurisdiction	116
§2. Unfair Competition and Trade Practices	116
I. Unfair and Deceptive Trade Practices under the Federal Trade	
Commission Act	116
A. Federal Trade Commission Act	116
II. Interference with Contractual Relations	117
III. Price Misrepresentations	118
IV. Product Misrepresentations	118
V. Injurious Falsehood	119
VI. Deceptive Marketing	119
VII. Passing Off	120
VIII. Infringement of Marks and Trade Names	121
IX. Trademark Dilution	121
X. Appropriation of Trade Secrets	122
XI. Cybersquatting	122
§3. Dealer Termination	122
§4. Business Franchises	123
5 II Dealth and I Marketing Do	140
Chapter 4. State Regulation of the Conditions of Commercial	
Transactions	125
§1. PRICE AND SUPPLY REGULATION	125
	120
§2. Consumer Law	125
I. Enforcement Agencies	125
II. Safety of Goods	125
III. Sales Promotion and Commercial Practices	127
IV. Consumer Warranties	130
V. Duty of Good Faith	131
VI. Standardized Terms and Adhesion Contracts	131
VII. Unconscionability	131
VIII. Sales Below Cost	132
IX Packaging and Labeling	132

X.	Privacy Law	133
	A. Gramm-Leach-Bliley Financial Services Act	134
	B. Federal Trade Commission Act	134
	C. Cable Communications Policy Act	135
	D. Children's Online Privacy Protection Act	136
Index		137



## Commercial and Economic Law in the United States

#### **Andre Fiebig**

This book was originally published as a monograph in the International Encyclopaedia of Laws/Commercial and Economic Law.

General Editor: Roger Blanpain Associate General Editor: Michele Colucci Volume Editors: Jules Stuyck, Evelyne Terryn



Published by:

Kluwer Law International

PO Box 316

2400 AH Alphen aan den Rijn

The Netherlands

Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:

Aspen Publishers, Inc.

7201 McKinney Circle

Frederick, MD 21704

United States of America

Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd. Stratton Business Park

Pegasus Drive, Biggleswade

Bedfordshire SG18 8TO

United Kingdom

Email: kluwerlaw@turpin-distribution.com

DISCLAIMER: The material in this volume is in the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The editor and the contributing authors expressly disclaim all liability to any person with regard to anything done or omitted to be done, and with respect to the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No reader should act or refrain from acting on the basis of any matter contained in this volume without first obtaining professional advice regarding the particular facts and circumstances at issue. Any and all opinions expressed herein are those of the particular author and are not necessarily those of the editor or publisher of this volume.

Printed on acid-free paper.

ISBN 978-90-411-3910-8

This title is available on www.kluwerlawonline.com

© 2012, Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Email: permissions@kluwerlaw.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

#### The Author



Dr. Andre Fiebig (born August 29, 1964) studied law at IIT Chicago-Kent College of Law in Chicago (1986–1989). He received his Dr. iur. degree (in 1996) and his LL.M. degree (in 1993) both from the University of Tübingen.

Dr. Fiebig has been a member of the New York and Illinois bars since 1989. From 1989 to 1990 he served as a staff attorney for the U.S. Department of Energy in Washington, D.C. He is currently a partner in the law firm of Baker & McKenzie in Chicago. His practice focuses on international mergers and acquisitions and competition law.

Since 1997, Dr. Fiebig has served as an Adjunct Professor of the Law Faculty of Northwestern Law School in

Chicago. He is also a member of the faculty of The Center for International Business and Trade Law at the John Marshall Law School, and a member of the Advisory Board of the Institute for Consumer and Antitrust Studies at the Loyola University School of Law.

Dr. Fiebig has published numerous articles on various topics ranging from the recognition and enforcement of foreign judgments to the extraterritorial application of competition laws. One of his recent articles, A Role for the WTO in International Merger Control, published in the Northwestern Journal of International law and Business has attracted much attention in the context of the discussions relating to the globalization of competition law.

The author gratefully acknowledges the valuable research assistance of Jessica Oldani, the John Marshall Center for International Business and Trade Law, and Sam Stevenson.

The Author

The Author	
List of Abbreviations	13
General Introduction	15
§1. GENERAL BACKGROUND OF THE UNITED STATES  I. Geography II. Demography III. Cultural Composition IV. Political System  A. Branches of Government B. Executive Branch C. Legislative Branch D. Judicial Branch E. Political Parties V. The Economic System VI. The Legal System A. Sources of Law B. The Doctrine of Stare Decisis C. Relationship between State and Federal Law D. Limited Power of Federal Government VII. Judicial System A. Federal Court System B. State Court System	15 15 15 16 16 16 17 17 17 18 18 18 19 20 20 21
Selected Bibliography	23
Part I. Commercial Law	25
Chapter 1. Concepts and Sources of Commercial Law	25
§1. THE DISTINCTION BETWEEN TORT AND CONTRACT LAW	25
82 CONSTITUTIONAL LAW	25

§3. Statutory Law	26
§4. COMMON LAW	26
§5. International Law	26
Chapter 2. The Economic Operators	27
§1. MERCHANTS	27
§2. NATURAL PERSONS  I. Persons  II. Minors  III. Aliens  IV. Citizens  V. Agents  VI. Master and Servant  VII. Independent Contractors  VIII. Consumer	27 27 27 27 28 28 28 30 30 31
§3. LEGAL PERSONS  I. Sole Proprietorship  II. Partnerships  III. Corporations  IV. Limited Liability Companies	31 31 31 32 33
Chapter 3. Economic Institutions	34
§1. PRIVATE INSTITUTIONS  I. Trade Associations  II. Chambers of Commerce  III. Better Business Bureau	34 34 34
§2. PUBLIC INSTITUTIONS  I. Commercial Courts  II. Small Business Administration  III. Commercial Arbitration	34 34 35 35
Chapter 4. General Obligations of Economic Operators	37
§1. CORPORATE OBLIGATIONS  I. Incorporation  II. Doing Business  III. Annual Reporting	37 37 37 37
82. FINANCIAL REPORTING OBLIGATIONS	38