TRANSNATIONAL LITIGATION:

A Practitioner's Guide

John Fellas, General Editor

Volume 1

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Foreword

by

The Right Honourable the Lord Howe of Aberavon, C.H., Q.C.

Former Foreign Secretary & Deputy Prime Minister of the United Kingdom

Oklahoma, Tiananmen, Chernobyl, Intifada, Glasnost, CNN: Increasingly, we all share the same worldwide satellite-borne vocabulary. Trade, travel, tourism, television, technology—all these are competing with each other in the demolition of time and distance. And the most important of these is trade.

In the half century since World War II, politics and technology alike have been boosting rather than obstructing the growth of transnational business. Sometimes the obstacles for trade have been demolished by conscious political decision: in the European Union or in NAFTA, for example. Elsewhere the process has been triggered by near-revolutionary upheaval: with the displacement of Maosim by Deng Zioping's "socialist" marketplace, for example, of with the disintegration of the Soviet Empire. In most of the Asia Pacific region, however, it has been (in Keynes' words) the "animal spirits" of the entreprenuer that have been the main driving force for change. The ASEAN institutions have accompanied rather than promoted this explosion of economic activity.

The process continues to accelerate, with cross-frontier investment now growing even faster than trade. Victor Halberstadt has presented some of the facts about this astonishing change. In 1995 the worldwide flow of foreign direct investment reached a record high: investment inflow increased by 40% to an unprecedented US$315 billion, worldwide. Developed countries were the main dynamos (and beneficiaries) of this explosion, themselves investing US$270 billion and receiving US$200 billion in 1995. But this spectacular growth of foreign direct investment in developed countries was accompanied by a huge rise in flows into developing countries as well, amounting in 1995 to US$100 billion.

So we have grown used to the idea of a single world marketplace, not just for goods but for capital and cash as well—whisked across frontiers invisibly and, literally, at the speed of light. We think less often perhaps of the global marketplace of law and legal thinking that must accompany the growth in trade and investment. Yet inevitably there has been a corresponding increase in transnational disputes. So,

too, the corresponding need for skill and guidance in avoiding and resolving such disputes has grown. Multinational trade is inevitably multi-jurisdictional. So the choice of jurisdiction, and the ability to implement that choice, becomes increasingly important. Sometimes one has to create what is in effect a unique jurisdiction, through a tailor-made pattern of alternative dispute resolution. Sometime even, in truly "adventurous" territories, one has almost literally to take one's own law with one.

Legal practitioners need above all a practical approach to transnational disputes. The business of pursuing, or avoiding, litigation with a foreign component involves indispensable legal and procedural trappings and requirements. And that requires practical and practice-oriented experience of the pursuit or avoidance of such disputes. This present work responds to that practical challenge by bringing together for the first time:

- Both the obvious and the insrutable aspects of transnational civil procedure in a variety of key trading nations and
- The strategic, tactical and practical choices which accompany such procedures.

This emphasis on "choices" reflects a major concern of practicing lawyers, in-house counsel and non-lawyer managerial staff alike, in knowing and anticipating the different paths which the avoidance or pursuit of an international litigation can take at each step of the process. Richard H. Kreindler, by highlighting this concept of choice, does justice not only to the efficient resolution of diesputes that are unavoidable but—equally important—to the cost-effective avoidance or cessation of such disputes (and at an early stage wherever that is possible).

This marriage between legal and practical requirements is the central theme and inspiration of this treatise. The totality of Richard Kreindler's background and experience, as the Coordinator of Jones Day's Europe/Middle East Dispute Resolution Practice Group, qualifies him ideally to decide exactly what is needed—and all too often missed—by the transnational practitioner. A lawyer who is American educated and trained, French-admitted and who has resided the last five years in Germany, he has had experience not only of these three key jurisdictions, but also of litigation issues in virtually every other region of the global economy.

Along the way he has worked with leading litigation practitioners throughout the world and in many cases with the leading authority on the subject in the country in question. The impressive list of country authors, who have contributed different components of this book, results in large part from Kreindler's own experience. It reads like a "Who's Who" of leading dispute-practitioners throughout the world.

The treatise is given a tight and regimented focus by Kreindler's imposition of a specific order of issues, which each country author has thus been able to address in greater or lesser detail, depending upon the jurisdiction. This approach, as influenced by Kreindler's own close supervision of style with an emphasis on substance, is not predominantly Anglo-American, continental European, or any other legal or business culture. It has been skilfully designed to bridge real or perceived "divides" in approach between and among Common law, Civil law and other legal traditions. The approach manages at the same time to do justice to the significance of the differences which do arise between one jurisdiction and another.

The reader is not, however, left to pick his or her own way through these complexities. The way is made easier by the extensive general introduction—by Kreindler himself—which serves as a legal and practical overlay to the specific country discussions that follow. Kreindler's introductory chapter is an indispensable precursor to the benefits of each specific country chapter.

Kreindler's approach is influenced not simply by his transnational litigation experience, but also by his extensive involvement in international arbitration under various bodies of law and rules and with other forms of "alternative dispute resolution". The treatise does not attempt to address the intricacies of international arbitration in or affecting the countries covered. But its design and implementation is ever mindful of the lawyer's and businessman's need to know in advance what advantages and disadvantages a contractual agreement to litigate disputes, as opposed to arbitration, might have in any given case.

To guide the lawyer's and businessman's strategic decisions, the general introduction as well as each country chapter contains a substantive and practical overview of key distinguishing characteristics of the legal system, the structure of the courts, obtaining jurisdiction and choice of forum and the choice of law. Then, service of process domestically to commence a foreign action and service abroad to commence a domestic action receive particular attention. Commencement of suit, summary judgments and equivalent proceedings, and interim and conservatory relief follow next.

Of particular importance to many practitioners are the sections on the taking of witness and documentary evidence domestically in support of foreign actions as well as abroad in support of domestic actions. Here again is the concept of tactical and strategic choice underlies each country discussion. Traditionally, far less attention has been paid to admissibility and presentation at the tribunal of evidence taken domestically or abroad. This treatise makes this problem one of its centrepieces before going on to address appeal and review of transnational judgments. The approach then focuses on damages, rec-

ognition and enforcement of foreign civil-commerical judgments, settlement and compromise of proceedings, sovereign immunity, and finally costs and fees.

The first edition of the treatise includes some 20 countries, including many of the largest trading nations with the most significant litigation issues and developments. It is contemplated that a second edition will appear in the fullness of time, which will include additional such countries, including major trading nations which are not presently represented, along with updates of the current country chapters. Practitioners around the world welcome this skilfully crafted first approach by an accomplished editor and writers of established authority addressing a group of practical legal questions, which ever more frequently arise in the course of multinational trade.

London
September 1997

Avant-Propos

by

President Roland Dumas
Conseil Constitutionnel, Paris

The lightning speed in the development and maturity of transnational commerical relations has led to an equally swift and sometimes dizzying increase in the complexity of cross-border contract relationships, and in the disputes arising out of them. It is not surprising that with the growth of the global "neighborhood," there have been more and more legal differences within that neighborhood.

Of course, the greater complexity and interdependence of transnational litigation have posed challenges for the merchant, the company lawyer and the professional litigator. Individuals and entities seeking to do business across borders must be prepared to lead, or defend against, disputes in the municipal courts, as the case may be, across those borders. Parochial insistence on one's own court system may or may not be possible, or even desirable. And familiarity with the advantages and disadvantages of litigation in a foreign environment is imperative not just once a dispute arises, but at the beginning of the relationship when the contractual or other relationship is being spawned.

A participant and observer in the field of international relations on a diplomatic and a commerical level must appreciate and admire a bold and successful attempt, such as the present work, to come to grips with the manifold procedural, tactical and substantive issues of several legal systems at the same time. A veteran of the pragmatic side of transnational dealings must be doubly thankful for a successful effort, such as this handbook, to marry the theoretical with the practical, the abstract with the experiential, and according to a uniform set of strategic and substantive principles.

It is just this marriage between theoretical and practical, procedural and tactical which *Transnational Litigation: A Practitioner's Guide* achieves, and essentially for the first time in the English-language literature. It does so in a way which capitalizes on the Anglo-American roots and strengths of its Editor while deftly recognizing the differences and questions which arise when the Anglo-American litigator seeks to find his way in other court systems. By the same token, its approach also enables the Continental European, the Asian, the Latin American and the Arab alike to orient themselves quickly and practically in each other's and in the Anglo-Americand litigation culture. The versatility and appreciation for the practicality of this handbook

is to be lauded, and is a true contribution to the field.

I am confident that this handbook should, and will, find its way onto the selective bookshelf of any internationally active business person or lawyer who needs easily accessible—but also thoroughly conceived—background and guidance in the increasingly complex field of transnational litigation.

Paris
September 1997

Preface

The Importance of Transnational Litigation: A Japanese Perspective

by

Professor Norio Higuchi

Professor of Law
University of Tokyo, Japan

At the University of Tokyo Law Faculty, 600 out of 700 students typically enroll in my introductory class on Anglo-American law. I would like to believe that this is due to my teaching skill, but the simple, more plausible answer is that students are required to take one of a range of foreign law courses in order to graduate from our Law Department. This requirement in our curriculum is a reflection of Japanese legal history.

The Japanese legal system has developed under the influence of foreign laws. It was in the beginning of the Eighth Century that Japan established its public and penal lay system by borrowing from a Chinese model. After the Meiji Restoration in 1867, Japan modernized its legal system by studying European continental laws—German and French laws in particular—and became a Civil Law system. While some aspects of Anglo-American laws were studied a that time, influences from common law countries accelerated dramatically after World War II. Among the laws reformed since then are our Constitution, criminal procedure, labor laws, family law section of the Civil Code, anti-trust laws, corporate laws, securities laws and tax laws. The historical background of this century has resulted in a unique mixture of laws in our legal system. It has also profoundly influenced our legal mind-set; we are accustomed to thinking about any legal issues by taking into account foreign laws.

The relevance of the foregoing to Richard Kreindler's treatise is clear: Until recently our interest in foreign laws was largely restricted to two groups of people. The first were those involved in legislative drafting and interpretation, and the second were legal academics, who researched foreign laws as a matter of course before writing on domestic legal issues. Yet the practical and the academic interests rarely crossed paths.

However, we has seen a dramatic change recently. I will take the issue of punitive damages as an example. Punitive damages used to be

a favorite theme for discussion primarily among Anglo-American law scholars and some practitioners who argued that we should introduce punitive damages into our civil law remedies.

Yet current globalization of law has made punitive damages an interesting topic for a wider group of people. On the one hand, we have seen Japanese exporters and manufacturers face jury verdicts for large awards of punitive damages in American courts. This type of damages is so foreign to them that they have sought some explanation. On the other hand, the Japanese judiciary has itself recently been forced to deliver a judgment on punitive damages. In fact, a Tyokyo district court held in 1991 that it would recognize and allow execution of a judgment in California court to the extent that the California decision granted compensatory damages. It denied recognition of the punitive damages element as being contrary to public policy in Japan. The Tokyo High Court reached the same conclusion in 1993, but it grounded its decision on the view that punitive damages judgment could not be classified as a civil judgment under our Code of Civil Procedure. This case is currently on appeal to the Supreme Court and we await its decision.

Transnational litigation thus gives rise to an interesting, unique opportunity to reconsider our own conception of law. As I described earlier, Japan has been proud of its long history of comparative and foreign law interest. I doubt, however, that our tradition of interest in foreign laws has necessarily been checked or examined in a real and practical context. Litigation offers a chance to see how strong our comparative thinking is and to grapple with the role of law in accommodating better understandings of different legal traditions.

This practitioner's guide is therefore a valuable contribution to our thinking of the true meanings of globalization of law. Internationalization of law, however defined, is currently one of the most urgent challenges for Japanese law. With the help of this work, we can pursue our interest in transnational aspects of law in a deeper sense and it is in this spirit that I highly commend it to Japanese and non-Japanese readers alike.

Tokyo
September 1997

Acknowledgments

Transnational Litigation: A Practitioner's Guide posed the stimulating challenge of achieving a different, more comphrensive and more practically oriented guidebook for cross-border litigation. Yet and equally great challenge was crafting such a work in the midst of daily and hourly demands of a cross-border litigation practice. In this context, from the initial conception of the Guide, to the coordination of some three dozen leading litigators worldwide as Country chapter authors, all the way to the editing and rewriting of the work as a whole—the task proved to be a complex, multifaceted and voluminous effort.

This project was buttressed, motivated and assisted along the way by numerous colleagues, assistants and others each of whom made a contribution. Jones Day colleagues throughout the world not only authored certain chapters of the Guide, but also lent support and encouragement. Partners, associates and staff in the Frankfurt office of Jones Day provided assistance and guided the chapter on Germany to successful completion. Highly reputed litigation specialists outside of my firm consented to write particular country chapters, thereby lending the legitimacy and soundness of the experience to the work. Needless to say, my wife and son exhibited supreme patience and understanding throughout the conception and realization of the work, which all told spanned several months of largely weekend and late-evening work.

Ultimately, however, my gratitude is extended most heartily to Judith L. Holdsworth, my Frankfurt colleague. In view of the goal of making this guide accessible to litigators from a wide variety of backgrounds whose primary common trait was an ability to work in English, she combined in one person essential qualities for the completion of this First Edition: American background, English native fluency, German civil-law legal education, and Anglo-German law firm experience. However, it was her patience, professionalism, efficiency, and good humor which I valued most, and I am pleased to share this Guide with her.

Finally, I am pleased to confirm that a second release of this work is already underway, which will additionally include, among other countries, Argentina, Belgium, China, Egypt, Hong Kong, Hungary, Kuwait, Mexico, the Netherlands, Saudi Arabia, Turkey, and the United Arab Emirates.

Richard H. Kreindler
Frankfurt, July 1997

About the Editors

RICHARD H. KREINDLER
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Partner, Jones Day Reavis & Pogue, Frankfurt, Germany. Admitted New York; Paris Bar as Avocat; registered Germany as Rechtskundiger. Harvard University (B.A. cum laude); Ludwig-Maximilians University, Munich (Magister); Columbia University (J.D.).

Coordinator of the European/Middle East Disputes Practice of Jones Day. Prior practice in New York and Paris.

Specializes in commercial and construction arbitration before the International Chamber of Commerce, American Arbitration Association, Stockholm Chamber of Commerce and other arbitral institutions, as well as multijurisdictional aspects of U.S., European and Middle Eastern litigation. Languages include English, French, German and Russian.

Recent experience includes responsibility for 1991 Gulf Crisis claims to UN Compensation Commission of the Hashemite Kingdom of Jordan and of various corporate entities in U.S., Europe and Arabian Gulf; commercial and construction arbitrations in U.S., Europe, Middle East and Asia and related challenge and enforcement proceedings; municipal court actions in U.S., Germany, France, Switzerland and elsewhere; and service as arbitrator under ICC, Stockholm Chamber of Commerce and *ad hoc* Rules.

Member of various arbitration institution panels.

Corresponding Member, ICC Institute of International Business Law; Advisory Board, *World Arbitration and Mediation Report*; Editorial Board, *International Commercial Litigation*; International Correspondent for Middle East/Arabian Gulf, *Arbitration and Dispute Resolution Law Journal*; Germany Country Co-Correspondent, *International Litigation Quarterly*; Advisory Board, Institute for Transnational Arbitration; Arbitration Practice Subcommittee, Chartered Institute of Arbitrators; Arbitration Committee and Working Group on ICC Rules Revision, U.S. Council for International Business; European Advisory Committee, Center for Public Resources.

Numerous other publications and lectures on international dispute avoidance and resolution in English, French and German.

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Rechtsanwältin, Jones Day Reavis & Pogue, Frankfurt, Germany. Admitted Frankfurt, Germany. Heidelberg College (B.A.); University of the Saarland (First State Law Examinations); Law Clerk, Ministry of Justice, Saarbrücken, Germany (Second State Law Examinations).

Specializes in German private international law, international procedural law and arbitration, and German commercial law. Languages include English and German.

Recent experience includes participation in the submission of 1991 Gulf Crisis claims of the Hashemite Kingdom of Jordan to UN Compensation Commission; labor and commercial agency disputes before German courts; international disputes involving bank guarantees; research and assistance for arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce.

Prior to joining Jones Day, Lecturer (English legal language programs for German and European law students) and Research Assistant for Anglo-American and Commercial Law at the University of the Saarland and the University of Trier; Organizational Assistant for American law introductory courses in Saarbrücken and Trier.

Publications on significant developments in case law in the areas of international procedural law and private international law.

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