JOSEPH LOOKOFSKY KETILBJØRN HERTZ

Transnational Litigation and Commercial Arbitration

4TH EDITION

AN ANALYSIS OF AMERICAN, EUROPEAN, AND INTERNATIONAL LAW

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Joseph Lookofsky and Ketilbjørn Hertz

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PREFACE TO THE FOURTH EDITION (2016)

Lawyers engaged in transnational litigation and commercial arbitration cannot make do with any single set of national rules. In the age of globalization, the rules of private international law (in America: conflict of laws) are important to all of us. To understand how these PIL/conflicts rules function in practice, we lawyers must confront a complex mixture of local, regional and international law.

Most of the rules and cases presented in the Third (2011) Edition of *Transnational Litigation and Commercial Arbitration* are still 'good law.' In 2012, however, a 'recast' version of the Brussels Regulation on Jurisdiction and Judgments was adopted by the European Union, replacing the prior version as regards legal proceedings instituted on or after 10 January 2015. For this reason alone the time for a Fourth Edition has clearly arrived, but we also grasp this opportunity to account for recent key American developments, not least as regards new leading U.S. Supreme Court decisions regarding the exercise of adjudicatory jurisdiction in transnational contexts.

Since *Transnational Litigation* covers considerable territory – the applicable rules of international dispute resolution, including the application of PIL/conflicts rules by European and American courts as well as by arbitral tribunals – an update covering developments during the past 5 years required a considerable amount of work; as with the 3rd edition, we co-authors consider ourselves lucky to be able to share the burdens involved.

Like its three predecessors, this Fourth Edition of *Transnational Litigation* seeks to strike an acceptable transatlantic balance – not only between the presentation of relevant American and European legal rules, but also between traditional American (case book) and European (treatise) types of presentation. As in the previous editions, Chapters 2-6 each begin with a general introduction, followed by relevant case law presentations (paradigm facts, key issues, excerpts, etc.). These presentations are supplemented by additional notes and commentary with re-

spect to related case and statutory law. Although practical limitations do not permit a comprehensive treatment of all relevant American or European rules, we have attempted to include and organize enough material to bring home what we consider to be the main points – all the while keeping local, regional, global as well as comparative considerations in mind.

We have done our best to update and improve the Third Edition. As part of this process, we have removed errors and ambiguities which we (and our students) discovered during previous years. Since this Fourth Edition will inevitably contain new points which need clarification or revision, we kindly invite our readers to send their comments to the e-mail address below.

We extend our thanks to Nathalie Bidstrup Nielsen for her excellent assistance in helping us to update the Table of Cases and the Index.

Joseph Lookofsky (joseph.lookofsky@jur.ku.dk) and Ketilbjørn Hertz

Copenhagen, Denmark
Winter 2016

CHAPTER 1

THE SUBSTANCE AND PROCEDURE OF TRANSNATIONAL DISPUTES

1.1. INTRODUCTION

Substance: right result

Merchants and their lawyers rely on rules of law to provide a peaceful means for the resolution of commercial disputes. When plaintiff A sues defendant B, seeking (e.g.) damages for breach of a commercial obligation, the substantive rules of private and commercial law are designed to direct the decision-maker to the right result: whether A should be awarded damages – or not.

Obligations

In order to arrive at the right result in a commercial dispute, lawyers on the European continent often look to the law of Obligations – the same substantive field which Common lawyers usually subdivide into Contract and Tort.[1] In a dispute involving a contractual obligation, for example, lawyers consult the substantive rules which regulate contract formation and validity, the scope of promissory obligation, the remedies available for breach, etc. In a tort-related dispute, perhaps involving a manufacturer's liability for a defective product, the relevant substantive rules might set the standards for the defendant's exercise of due care,

1. The law of obligations comprises the rules concerning the creation and enforcement of private law claims generally. Seen in terms of the ways in which such claims arise, the field of obligations comprises (1) the law of contract, (2) the law of torts, that is the rules regarding liability for injurious acts of a delictual nature, and (3) the law of restitution, that is the rules regarding claims based on unjust enrichment. See (e.g., re. Danish law) Andersen & Lookofsky, *Lærebog i Obligationsret* (4th ed. 2015) Ch. 1. This central, uniting feature of Civilian and Scandinavian doctrine has no direct counterpart within the mainstream of traditional Common law legal analysis. In American and English law the subjects known as contracts, torts and restitution are often still perceived as separate disciplines. See Lookofsky, *Consequential Damages in Comparative Context* (1989) at 18-19.

etc. Having located the relevant rules of substance, the decision-maker will then apply those rules to the concrete facts, so as to reach a decision on the merits (a finding in favour of the party who has the law on his or her side).

Formal, procedural

Lawyers everywhere are also trained to distinguish between such result-oriented, substantive rules on the one hand, and formal and procedural rules on the other: whereas the substantive rules determine the winner and thus ultimately resolve the dispute, the formal and procedural rules determine the way in which the dispute-resolution game is played.[2]

Private, transnational

The main concern of this book is with this latter (formal and procedural) side. In particular, the present focus is on the special framework which governs the resolution of private transnational disputes – private disputes involving a foreign element, with special emphasis on transnational controversies substantively related to contract and tort.[3] In addition to private individuals and corporate entities, governments can also assume a private commercial role, and under modern principles of law, government entities which do are treated on a par with private commercial entities – both in national and transnational contexts.[4]

Typical paradigm

When business is transacted across national boundaries, special kinds of dispute-resolution problems are likely to arise. Consider the following model, a common situation typified by a set of paradigm facts:

2. The term 'procedure' refers to the *system of resolving* disputes, usually in a judicial (but also in an arbitral) forum. See (e.g.) Silberman, Stein & Wolf, *Civil Procedure* (4th ed. 2013) Ch. 1(A)(1). Neither procedural (e.g. jurisdictional) rules nor 'formal' choice-of-law rules serve to resolve the underlying claim.
3. The focus here is thus more narrow than that circumscribed (e.g.) by the EU (Brussels) Regulation on Jurisdiction and Judgments which applies to 'civil and commercial matters': see Chapter 2.2.1 *infra*. Regarding the enforcement of arbitral agreements and awards and the 'commercial' declaration under Article I(3) of the New York Convention, compare Chapter 6.2.4 *infra*. Other rule-sets relevant to transnational dispute resolution relate solely to contracts (e.g. the Rome I Regulation, Chapter 3.2.1 *infra*), to particular contracts (e.g. the Hague Convention on the Law Applicable to International Sales, Chapter 3.2.2 *infra*), to torts in general (e.g. the Rome II Regulation, Chapter 3.2.3 *infra*) or to particular torts (e.g. the Hague Convention on the Law Applicable to Products Liability, Chapter 3.2.4 *infra*).
4. In its corporate capacity the European Union assumes liability for contracts and non-contractual obligations. See Lasok, *Law & Institutions of the European Union* (7th ed. 2001) Ch. 2(B)(2). Under the American Foreign Sovereign Immunities Act (FSIA) foreign States and their agencies are not entitled to a grant of sovereign immunity by American courts, *inter alia*, where such State or entity 'has engaged in commercial activity having an adequate nexus to the United States': see sections 1605-1607 of the Act and (e.g.) the *Barkanic* case, excerpted *infra* in Chapter 3.3.3.

Plaintiff A in State X brings a suit in an X-court for damages against B who is domiciled in State Y.

Extraterritorial jurisdiction (to adjudicate)

The first "Private International Law" (PIL) issue likely to be raised in this situation is whether the X-court can exercise 'extraterritorial jurisdiction' (also referred to as *jurisdiction to adjudicate* the dispute) in relation to B.[5] The first PIL issue, in other words, is whether the X-court is 'competent' (has authority/power) to decide the case at all.[6]

Compare venue

Lawyers in Europe and America confront the problem of extraterritorial jurisdiction (to adjudicate against non-domiciliary defendants) with increasing regularity, and the transnational issue involved here is quite different from its national 'venue' analogue, where the question is which of two courts (X1 or X2) within the same State (X) should decide a given case.[7]

Central role

Quite apart from the contrast in (local vs. international) mechanics, the procedural issues in a transnational litigation often assume a more central role. If, for example, the foreign defendant B (domiciled in State Y) is held subject to the jurisdiction of a court in State X, the underlying substantive dispute may well end up being settled by the parties on the basis of that 'procedural' victory, since such a foreign defendant will often have good reason to avoid a true (substantive) fight to the end – in a foreign forum, in a foreign language, and quite possibly under foreign law.

Comparative issues

Because the present work takes account of the (sometimes very) different ways in which key PIL issues are resolved in European as well as American jurisdictions, it will often be natural for readers to compare and contrast these differing approaches. To make such comparisons easier, the PIL problems presented in this book are grouped under the following heads:

5. See <http://definitions.uslegal.com/e/extraterritorial-jurisdiction>: '*Extraterritorial jurisdiction* refers to a *court's ability to exercise power beyond its territorial limits*. For example [...] a legal provision that allows a state to exercise jurisdiction over an out-of-state defendant, provided that the prospective defendant has sufficient minimum contacts with the forum state. It can *also* refer to the legal *ability of a government* to exercise authority beyond its normal boundaries' (emphasis added here). See also *infra* with notes 13-14 and Chapter 2.5.1 *infra*, text with note 2.
6. So, 'extraterritorial jurisdiction' refers, *inter alia*, to 'the *power* of U.S. [or other] courts over *foreign defendants*.' See Colangelo, 'What is Extraterritorial Jurisdiction?' 99 *Cornell Law Review* 1303 (2014).
7. Regarding the distinction between jurisdiction and venue, see Chapter 2.1.1 *infra*.