

**PRACTICAL GLOBAL
FAMILY LAW**

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Practical Global Tort Litigation

United States, Germany, and Argentina

Andrew J. McClurg, Adem Koyuncu, Luis Eduardo Sprovieri

Practical Global Family Law

United States, China, and Italy

Janet Leach Richards, Chen Wei, Lorella dal Pezzo

PRACTICAL GLOBAL FAMILY LAW

UNITED STATES, CHINA, AND ITALY

Janet Leach Richards

Chen Wei

with Lei Wenbi, Pi Xijun, and Ran Qiyu

Lorella dal Pezzo

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To my family.

JLR



To my family.

CW



To my son Marco Giorgio.

LdP

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SERIES EDITOR'S PREFACE

The Contextual Approach Series (CAS) had its genesis at the Florida International University College of Law, South Florida's public law school, where I taught as a member of the founding faculty from 2002–06. The FIU College of Law is one of the most international of all U.S. law schools, drawing its students from many diverse cultures and nations. Uniquely, the FIU College of Law curriculum requires that all courses, including domestic law courses, include a comparative and/or international law component. Comparative law is the study of similarities and differences in the law and legal traditions of different nations. International law is the “law of nations.” It covers the entire field of both public and private transnational relationships.

To satisfy the comparative/international law requirement in my Torts and Products Liability courses, I searched long and hard for manageable, self-contained materials comparing the U.S. common law tort litigation system with tort systems of other countries. While the search turned up a large body of outstanding comparative law scholarship, only a sliver of it addressed tort law and litigation. A wider discovery was that most comparative law literature is historical, theoretical or thematic in nature. Not many materials attempt to explain how law “really works” in other countries as compared to the U.S. common law system.

One obvious explanation for this gap is the sheer enormity of the task. To say that comparing legal systems is difficult is euphemistic. Think how impossible it would be, for example, to “compare the law” of New York and Texas, then consider the proportions of comparing different legal systems of different countries. As a byproduct of this obstacle, comparative law coverage tends to be either very broad or very narrow. Survey-type materials offer wide geographic and subject matter coverage, but do not convey any sense of how law really functions in other countries. Analyses of specific topics give much greater depth, but the subject matter often has only narrow application.

Like many faculty members at the FIU College of Law, I tried both the macro and micro approaches to teaching comparative/international law in Torts and Products Liability, with underwhelming success. In Torts, I distrib-

uted a nifty chart attempting to compare common law and civil law systems in six pages, assigned a lengthy law review article about the Alien Tort Claims Act, and invited guest speakers such as the Chief Justice of the Costa Rica Supreme Court and a distinguished lawyer from Argentina. I made my Products Liability students do presentations about Latin American products liability law. All of these endeavors were interesting, but my students weren't learning much about comparative or international law. There had to be a balance between "Today we're going to compare the law of the entire world," and "Today we're going to explore interpretations of article 1(c)(ii) of the Convention on International Liability for Damage Caused by Space Objects." Feedback from students at FIU confirmed that my difficulties in trying to integrate comparative and international law were not unique.

It occurred to me that one way to strike a breadth-depth equilibrium and also help bring comparative law to life would be to *contextualize* it by applying the substantive and procedural law of different nations to the same set of case facts. A case-based approach offers unique advantages. Foremost, it gives students a contextual foundation to which they can attach what they're learning. Legal principles mean little in isolation from facts, which is a principal reason U.S. law students learn most subject matter by the "case method." Applying law to facts promotes analysis that is not only more focused, precise, and accurate, but more accessible and retainable. It is one thing to recite a general rule about, for example, the burden of proof in a given legal system, and quite another to unweave the intricacies of how proof burdens apply to a concrete set of facts.

Applying the law of different nations to a consistent fact pattern also serves to highlight both similarities and differences more dramatically than a purely expository approach. A case approach would not intuitively occur to lawyers in other legal systems, such as those following the civil law tradition, where lawyers are trained to think in terms of codes rather than cases, but a "problem approach"—essentially the same thing—probably would. Regardless of the system, lawyers around the world are engaged in the same task: solving legal problems, many of them universal in nature.

Thus, I came up with the idea for a series of comparative law books in different subject areas based on sets of problem facts designed to raise fundamental issues of law and policy at the heart of each respective subject—issues that all peoples in all nations and legal systems must face. Each book in the CAS compares how these issues would be addressed by the law of the U.S. and two other nations representing different legal systems and different regions of the world. To enhance the "on the ground" accuracy and perspective of the books, each series entry relies on "inside" experts in the particular subject area

from each of the three countries rather than on U.S.-trained comparative law experts. "As every comparatist knows," writes Mathias Reimann, "it is difficult, and sometimes outright impossible, for an outsider fully to understand the law of a foreign country." Mathias Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard*, 51 AM. J. COMP. L. 751, 755 (2003).

The first entry in the CAS was *Practical Global Tort Litigation: U.S., Germany, and Argentina* (2007), which I co-authored with Adem Koyuncu (Cologne, Germany) and Luis Sprovieri (Buenos Aires, Argentina). Currently, books are underway in a variety of subject areas involving many different countries.

Accessibility is a guiding principle of the CAS. The goal is to craft texts accessible to people without a prior background or expertise in comparative law, and which can be understood by readers lacking knowledge of any of the three legal systems discussed, including the U.S. CAS books are designed for any reader, in or outside the U.S., interested in learning about how the legal systems of different nations would attack, both procedurally and substantively, the same set of universal legal issues in a subject area as raised by the problem facts of the particular book. The books are structured to provide a true side-by-side comparison of the law, as applied, in the three countries.

The primary utilities of CAS books in law school are as supplemental texts in domestic law courses for professors who want to expose their students to a comparative legal perspective, or as primary or supplemental texts in comparative law courses or advanced courses in the particular subject.

The CAS is offered as a contribution to what should become a growing body of "contextual comparative law."

Andrew J. McClurg
Herbert Herff Chair of Excellence in Law
The University of Memphis
Cecil C. Humphreys School of Law

PRACTICAL GLOBAL FAMILY LAW

EDITOR'S PREFACE

It has been a wonderful learning experience to work on this book with my talented co-authors. I learned so much from the experience. I was surprised both at the similarities and the differences between our three countries.

Family Law is a difficult topic to cover from a U.S. perspective, as the law is heavily state oriented. Consequently, I have focused on the law in Tennessee and have tried to mention alternative approaches from other states, where appropriate.

I considered selecting marriage, adoption, domestic violence, and any number of other interesting topics for our fact pattern, but ultimately chose a simple divorce fact pattern, both for its simplicity and for its universal applicability.

I was tempted to choose a number of different countries for this text because family law seems to be so different in other parts of the world. I finally settled on China, because of its large population, vast history, communist influence, and civil law background; and Italy, because of its long history of not recognizing divorce, its membership in the E.U., and the influence of the Holy See.

In this book, we will follow Mario, an Italian-American, and Lily, a Chinese-American, as they seek to obtain a divorce in the U.S., China, and Italy, respectively.

This book is designed as a student reader, to provide a comparative family law experience for students in a basic family law class or a comparative law class.

The initial chapters draw heavily on the format of the original book in this series, giving a basic overview of common law and civil law, a bit of background about each country, and the facts on which our divorce is based.

The remaining chapters focus directly on the divorce itself, covering such topics as divorce procedure, grounds for divorce, child custody and visitation, child support, property division, spousal support, spousal agreements, appeals, and attorney fees.

Charts are inserted at the end of the substantive chapters to highlight and summarize the similarities and differences between the countries. The origi-

nal manuscripts from my co-authors have been edited to make the material more easily read and understood by American law students, while attempting to retain the voice of each author and the rich cultural differences of each country. In many instances, translations or definitions are supplied in parentheses to aid in this effort.

I hope you will enjoy reading this book and will gain a greater understanding and appreciation of comparative law in the process. I think the book demonstrates that we can certainly learn alternative ways to approach legal issues by studying the law of our global neighbors.

Janet Leach Richards
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In the U.S., Richards would first like to thank her friend and colleague, the Herbert Herff Chair of Excellence at the University of Memphis Cecil C. Humphreys School of Law, Professor Andrew J. McClurg, for initiating this comparative law series and inviting her to edit the Family Law book in the series. Writing a book like this is very much a collaborative effort and would not have been possible without the professional dedication and cooperation of her two co-authors, Professor Chen Wei and attorney Lorella del Pezzo. Richards was extremely fortunate to have Ms. Cong Ding, a Chinese citizen, as her research assistant. Ms. Ding was tireless in her efforts and precise and thorough in her research. In short, she was essential to the success of this project. Finally, an enormous debt must be acknowledged to Mrs. Linda Hayes who formatted all the chapters, more than once, and meticulously edited every page. The Plough Foundation provided support for this project through the author's Cecil C. Humphreys Professorship.

In China, while writing this book, Chen and her colleagues referred to many works, papers, social investigation reports, cases, and other proposed legislative materials written by distinguished Chinese experts, scholars, and lawyers, including Wu Changzhen, Yang Dawen, Wang Deyi, Xu Mingxian, Cao Yisun, Jiang Wei, Zeng Yi, Liu Shijie, Liu Yalin, Du Jun, Hu Kangsheng, Liang Shuwen, Wang Shengming, Sun Lihai, Rong Weiyi, Song Meiya, Xia Yinlan, Xie Jingjie, Chen Min, Wang Jing, Cui Li, Sun Xiaomei, Lv Guohua, Gu Xiulian, Wen Zhe, Song Jianchao, Sun Changshan, Ye Wenzhen, Lin Qingguo, and Jian Chun'an. They also consulted some published foreign laws translated by scholars such as Chen Mingxia, Xu Jihua, Luo Jiezhen, Chen Weizuo, and Qu Tao, etc. Wu Yu and other librarians in the library of Southwest University of Political Science and Law, China offered considerate services and assistance to them when they consulted some materials and borrowed related books. Professor Zhao Wanyi, the dean in the Civil and Commercial

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