

FUNDAMENTALS OF
TRANSNATIONAL
LITIGATION:
THE UNITED STATES, CANADA,
JAPAN, AND THE EUROPEAN
UNION
Second Edition

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FUNDAMENTALS OF TRANSNATIONAL LITIGATION: THE UNITED STATES, CANADA, JAPAN, AND THE EUROPEAN UNION

Second Edition

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Casebook ISBN: 978-1-6328-0237-8

Looseleaf ISBN: 978-1-6328-0236-1

eBook ISBN: 978-1-6328-0235-4

Library of Congress Cataloging-in-Publication Data

Haley, John Owen

Fundamentals of transnational litigation : the United States, Canada, Japan, and the European Union / John O. Haley, William R. Orthwein Professor of Law Emeritus, School of Law, Washington University in St. Louis; Professor of Law, School of Law, Vanderbilt University; Affiliate Professor of Law, School of Law, University of Washington. — Second Edition.

pages cm

Includes index.

ISBN 978-1-63280-237-8 (hardbound)

1. Conflict of laws--Civil procedure. 2. Civil procedure--United States . 3. Civil procedure--Canada. 4. Civil procedure--Japan. 5. Civil procedure--European Union countries. I. Title.

K7615.H35 2014

340.9--dc23

2014037486

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MATTHEW  BENDER

Dedication

Dedicated
to
Dan Fenno Henderson
(1921–2001)
&
Yasuhiro Fujita
(1935–2012)

Preface to Second Edition

Lawyers involved in litigation involving parties from two or more countries cannot be concerned solely with the relevant rules and standards that apply in only a single country. Parochial approaches do not suffice. By definition cross-border litigation requires lawyers to be cognizant of at least the basic differences in issues and approaches in other countries and legal systems. For lawyers involved — or may become involved — in such cross-border lawsuits in U.S. courts an awareness of the basic contrasts between U.S. law and the law in the most significant of the U.S. partners in trade — the European Union, Canada, China, Japan, Mexico, and Germany — has become increasingly imperative. These materials are designed first and foremost to meet that need. They thus focus primarily on three of the most significant in terms of volume of our trade partners — Canada, Japan, and the European Union — with references to Chinese, German, and Mexican law added as appropriate throughout.

The emphasis on Canadian law should require little explanation. Canada first provides an especially instructive comparative focus as our largest national trade partner thus potentially the most significant for cross-border civil and commercial litigation. Canadian approaches are also instructive in the contrast of Canada with the United States as a federal common law system. Study of Canadian law enables us to appreciate better the exceptional features of the United States law within the common law world.

The continued inclusion of Japan also remains amply justified. Japan's prominence among the industrial democracies with well-established legal systems remains unequalled as the world's third largest economy and, next to Canada, the United States' leading partner in terms of both trade and investment. These factors help to explain the prevalence of litigation between parties from both countries in both countries. For comparative purposes, Japan is also exemplary. As a unitary civil law system with basically similar if not identical approaches to other civil law jurisdictions for resolving common issues and problems of transnational litigation, Japan provides an ideal national comparative perspective.

Finally, no materials on the fundamental aspects of transnational litigation would be complete without at least a basic introduction to European law under the 1968 Brussels Convention, EU Regulation 44/2001, and, from 2015, Regulation (EU) No. 1215/2012. Those concerned with the harmonization of the rules for the recognition and enforcement of foreign country judgments in addition to the more mundane aspects of transnational litigation and international commercial arbitration must pay heed to developments in EU law.

The materials have a secondary but still equally important aim. As expressed in the Preface to the first edition, the initial, unpublished versions were developed between 1967 and 1971 by Dan Fenno Henderson and Yasuhiro Fujita for an advanced comparative law course in the University of Washington Asian Law Program. The course was designed to introduce law students from both the United States and Japan to fundamental issues that arise in transnational litigation between parties from each country. They were thus originally developed for a course in which students from across the Pacific — increasingly around the globe — would participate and share both their understandings of their own systems as well as their difficulty in comprehending the contrasting concepts

Preface to Second Edition

and underlying — often unstated — assumptions of their fellow students (and instructors) trained in others.

On an equally pedagogical note, the emphasis on judicial decisions and virtual exclusion of secondary sources is purposeful. Also as noted in the initial version, for purposes of case analysis and basic comprehension of potentially applicable legal rules and principles, lawyers today — especially those involved in transnational litigation — must become familiar with a variety of judicial decisions and their often idiosyncratic styles. Moreover, as these materials are intended to demonstrate, the legal rules and principles that apply today have been and will be continuously developed and articulated throughout the world in the context of adjudication and judicial decisions. These materials and the courses for which they have been prepared are premised on the proposition that detailed study of comparative case law has become globally essential to sound legal education.

Let me conclude with a special note of gratitude. The compilation of these materials would not have been possible without assistance of many individuals. Special thanks continue to be owed to Robert Britt and his colleagues at the University of Washington Gallagher Law Library for their on-going assistance. Appreciation must also be extended to Nancy C. Cummings and law librarians Wei Luo and Tove Kloving of the Washington University in St. Louis School of Law as well as Lindsey Ingham and Catherine Deane at the Vanderbilt Law School. Finally, these materials reflect the efforts and influence of literally hundreds of law students from across the United States and around the globe who studied from earlier versions. Needless to say, all of the errors and omission remain mine.

Table of Contents

Chapter 1	ADJUDICATORY JURISDICTION	1
I.	INTRODUCTION	1
II.	COMMON LAW APPROACHES — THE UNITED STATES	1
A.	Categories and Courts	1
B.	The Tradition	4
	<i>Pennoyer v. Neff</i>	4
	Questions	10
	<i>International Shoe Co. v. State of Washington, Office of</i>	
	<i>Unemployment Compensation and Placement</i>	11
	Questions	15
C.	The Legacy	15
1.	<i>Quasi in Rem</i> Jurisdiction	16
	<i>Shaffer v. Heitner</i>	16
	Questions and Problems	24
	<i>Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne</i>	
	<i>de Navigation</i>	27
	<i>Banco Ambrosiano, S.P.A. v. Artoc Bank & Trust Ltd.</i>	30
	Questions	33
2.	<i>In Rem</i> Jurisdiction: Marriage as the <i>Res</i>	33
	<i>In re the Marriage of Kimura</i>	33
	Questions and Problem	39
3.	<i>In Personam</i> Jurisdiction	40
	<i>Burnham v. Superior Court of California, County of Marin</i>	40
	Questions and Problem	45
D.	State Long-Arm Statutes	46
	California Code of Civil Procedure Act, § 410.10	46
	§ 410.10 Jurisdiction exercisable	46
	§ 410.40 Action arising out of contract providing for	
	application of California law	46
	New York Civil Practice Law and Rules §§ 301, 302	47
	§ 301. Jurisdiction over persons, property or status.	47
	§ 302. Person jurisdiction by acts of non-domicillaries	47
	Louisiana Rev. Stat. § 13:3201	48
	Questions	49
	Problem	49
	Question	49
	<i>Restatement (Third) Foreign Relations Law of the United States</i>	
	(1986)	50

Table of Contents

	§ 421. Jurisdiction to Adjudicate	50
	<i>World-Wide Volkswagen Corp. v. Woodson</i>	51
	Questions	58
	<i>Gruca v. Alpha Therapeutic Corporation and the Green Cross Corporation</i>	59
	Questions	67
	<i>Helicopteros Nacionales de Colombia v. Hall</i>	67
	Questions	71
	<i>Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County</i>	72
	Questions	80
	<i>Goodyear Dunlop Tires Operations S.A. v. Brown</i>	81
	Questions	86
	<i>J. McIntyre Machinery Ltd. v. Nicaastro</i>	87
	Questions	100
	<i>Daimler AG v. Bauman et al.</i>	100
	Questions and Problems	08
III.	COMMON LAW VARIATIONS — CANADA	109
	<i>Morguard Investments Ltd. v. de Savoye</i>	111
	Questions	124
	<i>B.C. Court Jurisdiction and Proceedings Transfer Act</i>	125
	<i>Club Resorts Ltd. v. Van Breda</i>	128
	<i>1991 Civil Code of Quebec</i>	130
	<i>Book X Title Three International Jurisdiction of Quebec Authorities</i>	130
	<i>Chapter I General Provisions</i>	130
	<i>Spar Aerospace Ltd. v. American Mobile Satellite Corp.</i>	131
	Questions and Problem	146
IV.	CIVIL LAW APPROACHES	146
V.	JAPAN	149
A.	General Forum: Domicile	149
	Code of Civil Procedure	149
	<i>Gotō v. Malaysia Airlines</i>	150
	Questions	152
	<i>CGI K.K. v. Advanced Connectek Co., Ltd.</i>	152
	Notes and Questions	154
	<i>Kōno v. Kōno</i>	154
	Questions	156
B.	Special Jurisdiction: Place of Performance	157
	Code of Civil Procedure	157
	<i>Nihon System Wear K.K. v. Kensuke Koo</i>	157

Table of Contents

	Questions and Note	159
	<i>K.K. Bungei Shunjū v. Miyata</i>	160
	Note and Questions	161
C.	Special Jurisdiction: Place of the Tort	161
	<i>Code of Civil Procedure</i>	161
	<i>ŌKuma v. The Boeing Company</i>	162
	Questions	165
	<i>K.K. Bungei Shunjū v. Miyata</i>	165
	Question	166
	<i>K.K. Tsuburaya Productions v. Chaiyo Film Co., Ltd.</i>	166
	Question	168
D.	Special Jurisdiction: Place of Property	168
	<i>Code of Civil Procedure</i>	168
	<i>Loustalot v. Admiral Sales Co. Ltd.</i>	169
	Note	172
	<i>Yasutomi v. United Netherlands Nav. Co.</i>	173
	Questions	175
	<i>Tsuburaya Productions K.K. v. Chaiyo Film Co., Ltd.</i>	175
	Questions	176
E.	Special Jurisdiction: Joint Defendants	176
	<i>Code of Civil Procedure</i>	176
	<i>Inoue v. Aviaco Airlines</i>	177
	Questions	180
VI.	EUROPEAN UNION	180
A.	Regulation (EU) No. 1215/2102 of the European Parliament and of the Council	180
	<i>Group Josi Reinsurance Company SA v. Universal General Insurance Company (UGIC)</i>	182
	Questions	185
B.	Joint Defendants	186
	<i>Athanasios Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst and Co. and Others</i>	187
	Questions	190
	<i>Roche Nederland BV and Others v. Frederick Primus, Milton Goldenberg</i>	190
C.	Excessive Jurisdiction	197
	<i>Thinat International S.A. v. Saudi Basic Industries Corporation</i>	198
	Review Problem	199

Table of Contents

Chapter 2	FOREIGN SOVEREIGN IMMUNITY AND RELATED ABSTENTION DOCTRINES	201
I.	COMMON LAW APPROACHES — UNITED STATES	201
A.	Foreign Sovereign Immunity	201
	<i>The Schooner Exchange v. McFaddon</i>	201
	Questions	204
	<i>The 1952 Tate Letter</i>	204
	Question	207
	<i>Foreign Sovereign Immunities Act of 1976</i>	208
	<i>Republic of Argentina and Banco Central de la Republica Argentina v. Weltover, Inc.</i>	208
	<i>Republic of Argentina, Petitioner v. NML Capital, Ltd.</i>	213
	Problems and Notes	215
B.	Act of State	217
	<i>Banco Nacional de Cuba v. Sabbatino</i>	217
	<i>Alfred Dunhill of London, Inc. v. Republic of Cuba</i>	235
	Problem and Questions	250
	<i>International Association of Machinists and Aerospace Workers (IAM) v. The Organization of the Petroleum Exporting Countries (OPEC)</i>	251
	Questions	258
	Questions and Problem	259
C.	Foreign Sovereign Compulsion	260
	<i>Interamerican Refining Corp. v. Texaco Maracaibo, Inc.</i>	260
	Problems and Questions	267
II.	FOREIGN SOVEREIGN IMMUNITY IN CANADA	268
	<i>Gouvernement de la République Démocratique du Congo v. Venne</i>	268
	Questions and Note	277
III.	FOREIGN SOVEREIGN IMMUNITY IN JAPAN	278
	<i>Tokyo Sanyō Bōeki K.K., et al. v. The Islamic Republic of Pakistan</i>	278
	Note	280
IV.	DOMESTIC STATE LIABILITY IN EAST ASIA AND THE EUROPEAN UNION	281
	<i>Nippon Hodo Company, Ltd. v. United States</i>	281
	Extended Note	286
V.	EUROPEAN UNION	292
	<i>Francovich and Bonifaci v. Italy</i>	292
	<i>Köbler v. Austria</i>	299
	Questions and Review Problems	312

Table of Contents

Chapter 3	PARALLEL LITIGATION	317
I.	THE PROBLEM	317
	<i>Marubeni America Co. v. Kansai Iron Works Ltd.</i>	318
	<i>Tōhō K.K. v. Hachitsuka</i>	321
	Questions	323
	Dan F. Henderson, <i>Introduction — U.S. Japanese Trade: Its</i>	
	<i>Scope and Legal Framework</i>	324
II.	COMMON LAW APPROACHES — UNITED STATES	326
A.	Forum Non Conveniens	326
	<i>Piper Aircraft Company v. Reyno</i>	326
	Questions	333
	<i>Sinochem International Co. Ltd. v. Malaysia International</i>	
	<i>Shipping Corp.</i>	333
	Questions	338
	<i>Nai-Chao v. The Boeing Company</i>	338
	Questions	350
	<i>Myers v. The Boeing Company</i>	350
	Questions	359
	<i>U.S.O. Corporation v. Mizuho Holding Company</i>	360
	Questions	364
B.	The Role of Experts	365
	<i>In re Union Carbide Corporation Gas Plant Disaster at Bhopal,</i>	
	<i>India in December, 1984</i>	365
	<i>Bodum USA, Inc. v. La Cafetiere, Inc.</i>	373
	Questions	383
C.	Stays and Anti-Suit Injunctions	384
	<i>Turner Entertainment Co. v. Degeto Film GmbH</i>	384
	Questions	395
	<i>Seattle Totems Hockey Club, Inc. v. National Hockey League</i>	395
	Questions	398
	<i>Kaepa, Inc. v. Achilles Corporation</i>	398
	Problem and Questions	405
III.	COMMON LAW APPROACHES — CANADA	406
A.	Forum Non Conveniens	406
	<i>Amchem Products Inc. v. British Columbia (Workers’</i>	
	<i>Compensation Board)</i>	406
	<i>Spar Aerospace Ltd. v. American Mobile Satellite Corp.</i>	411
	<i>Club Resorts Ltd. v. Van Breda</i>	416
	Questions	419
B.	Anti-Suit Injunctions	420
	<i>Amchem Products Inc. v. British Columbia (Workers’</i>	

Table of Contents

	<i>Compensation Board)</i>	420
	Questions	425
IV.	CIVIL LAW APPROACHES	425
A.	Japan	426
	<i>Mukoda v. The Boeing Co.</i>	426
	Note and Questions	429
	<i>Masaki Bussan K.K. v. Nanka Seimen Company</i>	430
	Questions	433
	<i>K.K. Family v. Miyahara</i>	434
	Questions	435
	Note and Question	436
	<i>K.K. Mizuho Bank v. U.S.O. Corporation and Matsuda</i>	436
	Problem and Questions	440
B.	European Union	441
	<i>Gubisch Maschinenfabrik KG v. Giulio Palumbo</i>	441
	Question	444
	<i>Mærsk Olie & Gas A/S v. Firma M. de Haan en W. de Boer</i>	445
	Questions	452
	<i>Owusu v. Jackson</i>	452
	Questions and Note	460
	Review Questions and Problems	460
Chapter 4		463
SERVICE OF PROCESS ABROAD		463
I.	INTRODUCTION	463
	<i>Convention on the Service Abroad of Judicial and Extrajudicial</i>	
	<i>Documents in Civil or Commercial Matters</i>	464
II.	UNITED STATES	466
A.	General	466
	<i>Volkswagenwerk Aktiengesellschaft v. Schlunk</i>	466
	Questions	472
B.	German Service in the United States Under the Service Convention	474
	<i>Ackermann v. Levine</i>	474
	Questions	480
C.	Service by Mail to Japanese Defendants	481
	<i>Shoei Kako Co., Ltd. v. Superior Court of the State of California</i>	
	<i>for the City and County of San Francisco</i>	481
	Questions	489
	<i>Suzuki Motor Co., Ltd. v. The Superior Court of San</i>	
	<i>Bernardino County</i>	489
	Questions	495
	<i>Bankston v. Toyota Motor Corporation</i>	495

Table of Contents

	Questions	497
	<i>Nuovo Pignone, SpA v. Storman Asia M/V</i>	500
	<i>Brockmeyer v. May</i>	503
	Question	509
III.	JAPAN	509
A.	General	509
	<i>Ueno v. Zavicha Blagojevic</i>	509
	<i>Hiroko Saeki Inc. v. Ozaki</i>	511
	Questions	512
B.	United States Consular Practice	512
	<i>Consular Convention Between Japan and the United States of America</i>	512
	Questions	514
	Review Problem	514
Chapter 5 TAKING OF EVIDENCE ABROAD		517
I.	INTRODUCTION	517
	<i>Convention on the Taking of Evidence Abroad in Civil or Commercial Matters</i>	518
	Note	520
II.	DISCOVERY ABROAD IN AID OF LITIGATION IN THE UNITED STATES	520
	<i>Société Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for the Southern District of Iowa</i>	520
	Questions	529
	<i>In re Westinghouse Electric Corporation Uranium Contracts Litigation</i>	530
	Questions and Note	537
	<i>Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee</i>	538
	Questions	546
	<i>Tiffany v. Forbse</i>	547
	<i>Republic of Argentina, Petitioner v. NML Capital, Ltd.</i>	559
	Questions	563
	Questions	564
	<i>United States Department of State, Japan Judicial Assistance</i>	566
	Questions	568
	<i>In the Circuit Court of the Third Circuit State of Hawaii</i>	569
III.	DISCOVERY IN THE UNITED STATES IN AID OF LITIGATION ABROAD	574
	28 U.S.C. § 1782	574
	Questions	575

Table of Contents

	<i>Intel Corporation v. Advanced Micro Devices, Inc.</i>	575
	Questions	585
	<i>Restatement (Third) of Foreign Relations Law § 442</i>	586
	Review Problem	587
Chapter 6	RECOGNITION AND ENFORCEMENT OF FOREIGN-COUNTRY JUDGMENTS AND ARBITRAL AWARDS	589
I.	RECOGNITION AND ENFORCEMENT OF FOREIGN-COUNTRY JUDGMENTS	590
A.	United States	590
	<i>Hilton v. Guyot</i>	590
	Questions	600
	<i>Ackermann v. Levine</i>	601
	Questions	605
	<i>Uniform Foreign-Country Judgments Recognition Act (2005)</i>	605
	<i>Section 4. Standards for Recognition of Foreign-Country Judgment</i>	607
	<i>Section 5. Personal Jurisdiction</i>	613
	<i>American Law Institute (ALI), Proposed Federal Foreign Judgments Recognition and Enforcement Act</i>	614
	<i>§ 5 Nonrecognition of a Foreign Judgment</i>	615
	<i>§ 6 Recognition and Enforcement of Foreign Judgments</i>	616
	<i>§ 7 Reciprocal Recognition and Enforcement of Foreign Judgments</i>	617
	Questions	617
	<i>Somportex Limited v. Philadelphia Chewing Gum Corporation</i>	618
	Questions	622
	<i>Koster v. Automark Industries, Incorporated</i>	623
	Questions	626
	<i>The Royal Bank of Canada v. Trentham Corporation</i>	626
	<i>The Royal Bank of Canada v. Trentham Corporation</i>	636
	Questions	639
	<i>Southwest Livestock and Trucking Company, Inc. v. Ramon</i>	640
	Questions	645
B.	Canada	645
	<i>Beals v. Saldanha</i>	650
	Questions	674
C.	Japan	675
	<i>Sadhwani v. Sadhwani</i>	675
	Questions and Note	681
	<i>Northcon I v. Mansei Kōgyō K. K.</i>	682

Table of Contents

	Note and Question	684
D.	European Union	685
	<i>Section 328 Recognition of foreign judgments</i>	686
	Questions and Note	687
II.	RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS	687
	<i>1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards</i>	687
A.	United States	688
	<i>Frontera Resources Azerbaijan Corporation v. State Oil Company of the Azerbaijan Republic</i>	689
	Questions	696
	<i>Diapulse Corporation of America v. Carba, Ltd.</i>	697
	Questions	700
	<i>Landegger v. Bayerische Hypotheken und Wechsel Bank</i>	700
	Questions	704
	<i>Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc.</i>	704
	Questions	712
B.	Canada	712
	<i>Yugraneft Corp. v. Rexx Management Corp.</i>	712
	Questions	726
C.	Japan	727
	<i>American President Lines, Ltd. v. Subra Kabushiki Kaisha</i>	727
	Question	731
	<i>Texaco Overseas Tankship Ltd. v. Okada Shipping Co., Ltd.</i>	731
	Questions	735
D.	European Union	735
	Review Problems	736
Chapter 7	CHOICE OF FORUM	737
I.	CHOICE OF COURT (PROROGATION) AGREEMENTS	737
	<i>Council Decision 2009/397/EC of 26 February 2009 on the Signing on Behalf of the European Community of the Convention on Choice of Court Agreements</i>	738
A.	United States	740
	<i>M/S Bremen and Unterweser Reederei, GmbH v. Zapata Off-Shore Company</i>	740
	Note	744
	<i>Professional Ins. Corp. v. Sutherland</i>	744
	Questions and Problem	747
B.	Canada	749

Table of Contents

	<i>Grecon Dinter Inc. v. J.R. Normand Inc.</i>	749
	Questions and Note	756
C.	Japan	757
	<i>Tokyo Marine and Fire Insurance Company v. Royal</i>	
	<i>Interocean Lines</i>	757
	Questions	761
D.	European Union	761
	<i>EC Council Regulation No. 44/2001 — Jurisdiction and</i>	
	<i>Enforcement of Judgments</i>	761
	Note and Question	762
	<i>Erich Gasser GmbH v. MISAT Srl</i>	762
	<i>Regulation (EU) No 1215/2012 of the European Parliament</i>	
	<i>and of the Council</i>	769
	Questions	772
II.	ARBITRATION AGREEMENTS	773
A.	United States	774
	<i>Scherk v. Alberto-Culver Co.</i>	774
	Questions	783
	<i>Mitsubishi Motors Corporation v. Soler</i>	
	<i>Chrysler-Plymouth, Inc.</i>	783
	Questions	794
	<i>U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., Ltd.</i>	794
	Questions	804
B.	Canada	804
	<i>Dell Computer Corp. v. Union des Consommateurs</i>	804
	Questions	837
	<i>Rogers Wireless Inc. v. Muroff</i>	837
	Questions	841
C.	Japan	842
	<i>Compania de Transportes der me Sociodato Anomia v.</i>	
	<i>Mataichi K.K.</i>	842
	Questions	843
	<i>K.K. Amerido Nihon v. Drew Chemical Corp.</i>	844
	Questions	848
D.	European Union	848
	<i>Allianz SpA Formerly Riunione Adriatica di Sicurtà SpA,</i>	
	<i>Generali Assicurazioni Generali SpA v. West Tankers Inc.</i>	848
	Question	854
	Review Problem	854

Table of Contents

Appendix A	CODE OF CIVIL PROCEDURE OF JAPAN	857
Appendix B	REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL	869
Table of Cases	TC-1
Index	I-1
