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PREFACE

As usual, there have been a significant number of important developments since the publication of the sixth edition. Among the developments that this supplement notes are the following.

The U.S. Supreme Court decided cases that further set the due process limits on personal jurisdiction.

The U.S. Congress has enacted laws that:

- make mandatory the nonrecognition of foreign libel judgments that are inconsistent with First Amendment protection of speech;
- partially undo the Supreme Court’s restriction on the extraterritorial reach of the Securities and Exchange Act.

State and federal courts decided cases that affect the topics dealt with in sixth edition.
Chapter 1
Suing Foreign Defendants

Section 1: Problems of In Personam and In Rem Jurisdiction

Insert page 15 in note 2:

Two boys from North Carolina were killed in a bus crash in France. The cause of crash was failure of a tire manufactured in Turkey by a subsidiary of Goodyear, a U.S. company. The parents of the boys sued Goodyear and three of its foreign subsidiaries in a North Carolina state court. Goodyear did not object to jurisdiction but its foreign subsidiaries did. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S.Ct. 2846 (2011), reversed the North Carolina state courts holding of jurisdiction over the foreign subsidiaries. The opinion stated: “A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.” The Supreme Court found that foreign subsidiaries did not continuous and systematic contacts with North Carolina.

Insert page 25 in note 3:

J. McIntyre Machinery, Ltd. v. Nicastro, 131 S.Ct. 2780 (2011), partly clarified whether IIA of Asahi is binding on lower courts. Part IIA “require[d] something more than that the defendant was aware of its product's entry into the forum State through the stream of commerce in order for the State to exert jurisdiction over the defendant.”

The defendant manufactured a machine in England. An independent distributor sold the machine to a New Jersey company, which employed the plaintiff. The plaintiff’s hand was damaged while he was using the machine.

Again the IIA requirement got four votes (Kennedy, joined by Roberts, Scalia, and Thomas). Justice Breyer joined by Justice Alito concurred in the judgment because the plaintiff had not shown “regular course of sales in” the forum. Justice Ginsburg joined by Justices Sotomayor and Kagan dissented.

Thus a defendant that puts a product into the steam of commerce has the “minimum contacts” required by due process with a forum that the product is regularly is sold in.

Section 2: Agreements to Litigate or Arbitrate Abroad

Insert page 91 in note 2(a):

Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84 (Tx. 2011) (holding valid an arbitration agreement for arbitration under the Texas General Arbitration Act and
providing the award may be judicially reviewed for reversible error):

Yet the Supreme Court, in holding that under the FAA the grounds for vacating, modifying, or correcting an arbitration award cannot be expanded beyond those listed in sections 10 and 11, did not discuss section 10(a)(4), which like section 171.088(a)(3)(A) of the TAA, provides for vacatur “where the arbitrators exceeded their powers”. The omission appears to us to undercut the Supreme Court's textual analysis. When parties have agreed that an arbitrator should not have authority to reach a decision based on reversible error—in other words, that an arbitrator should have no more power than a judge—a motion to vacate for such error as exceeding the arbitrator's authority is firmly grounded in the text of section 10.

Insert page 100 in paragraph 1;

In re Rubiola, 334 S.W.3d 220:222 (Tx. 2011): “We conclude that parties to an arbitration agreement may grant non-signatories the right to compel arbitration.”

**Section 4: Service of Process**

Insert page 152 in note 2:


This case involves an attempt to serve process on persons and business entities in Mexico via postal channels and email. We hold that such service is incompatible with Mexico's accession to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the “Hague Service Convention”), which provides that service of foreign judicial documents in Mexico must be made through Mexico's Ministry of Foreign Affairs.

Id. at 1027. The court vacated the trial court’s denial of defendants’ motion to dismiss for insufficiency of service and remanded for consideration of the plaintiffs’ contention that service may be made by serving defendants’ authorized agents in the United States.
Chapter 2

Suits by Foreign Plaintiffs

Section 1: Forum Shopping and Forum Non Conveniens

Insert page 240 in note 6:

Gutierrez v. Advanced Medical Optics, Inc., 640 F.3d 1025, (9th Cir. 2011). A federal district court granted defendant’s motion for a forum non conveniens dismissal of the Mexican plaintiffs’ product liability suit. When the plaintiffs filed suit in Mexico, the Mexican courts dismissed for lack of jurisdiction despite defendant’s consent to jurisdiction. The Ninth Circuit, 2-1, remanded the case to the district court:

On remand, the district court should consider appropriate evidence from the parties (remaining mindful that the burden of showing the availability of an alternative forum remains with the Defendant) and make findings of fact as to why the Mexican courts declined to take jurisdiction in this case. If the district court determines that the primary reason the Mexican courts declined to take jurisdiction of Plaintiffs' case was Plaintiffs' actions or inactions in the case, it retains discretion to again order dismissal, with appropriate conditions, if any.

On the other hand, if the district court determines that the Mexican courts declined to take jurisdiction of Plaintiffs' case because Defendant is not domiciled in Mexico and cannot submit to Mexico's jurisdiction, it would be an abuse of discretion for the district court to dismiss Plaintiffs' case based on forum non conveniens grounds.

What other reason might there be why the Mexican courts did not take jurisdiction?
Chapter 3

Recognition of Judgments

Section 3: The Uniform Act

Insert page 303 in note 3:

In August 2010 a federal statute made mandatory the nonrecognition of foreign libel judgments that were inconsistent with First Amendment protection of speech: 28 U.S.C.A. § 4102. Recognition of foreign defamation judgments

(a) First Amendment considerations.--
(1) In general.--Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that--
(A) the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located; or
(B) even if the defamation law applied in the foreign court's adjudication did not provide as much protection for freedom of speech and press as the first amendment to the Constitution of the United States and the constitution and law of the State, the party opposing recognition or enforcement of that foreign judgment would have been found liable for defamation by a domestic court applying the first amendment \[FN1\] to the Constitution of the United States and the constitution and law of the State in which the domestic court is located.
(2) Burden of establishing application of defamation laws.--The party seeking recognition or enforcement of the foreign judgment shall bear the burden of making the showings required under subparagraph (A) or (B).

(b) Jurisdictional considerations.--
(1) In general.--Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that the exercise of personal jurisdiction by the foreign court comported with the due process requirements that are imposed on domestic courts by the Constitution of the United States.
(2) Burden of establishing exercise of jurisdiction.--The party seeking recognition or enforcement of the foreign judgment shall bear the burden of making the showing that the foreign court's exercise of personal jurisdiction comported with the due process requirements that are imposed on domestic courts by the Constitution of the United States.
(c) Judgment against provider of interactive computer service.—[provides similar protection]
(d) Appearances not a bar.--An appearance by a party in a foreign court rendering a foreign judgment to which this section applies shall not deprive such party of the right to oppose the recognition or enforcement of the judgment under this section, or represent a waiver of any jurisdictional claims.
Chapter 5

Foreign Sovereign Immunity

Section 1: The Foreign Sovereign Immunities Act

Insert page 357 in note 16 after the second full paragraph:

On 23 December 2008, the Federal Republic of Germany instituted proceedings before the International Court of Justice in the Hague against the Italian Republic, alleging that: “In recent years, Italian judicial bodies have repeatedly disregarded the jurisdictional immunity of Germany as a sovereign State.” Germany further alleges that enforcement measures have already been taken against German assets in Italy in the form of a “judicial mortgage” on Villa Vigoni, the German-Italian centre of cultural exchange, has been recorded in the land register. In addition to the claims brought against it by Italian nationals, Germany also cites “attempts by Greek nationals to enforce in Italy a judgment obtained in Greece on account of a . . . massacre committed by German military units during their withdrawal in 1944.”

Insert page 364 in note 2:

Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1022 (9th Cir. en banc 2010), cert. denied, 131 S.Ct. ---- (2011) “On the issue of sovereign immunity, we conclude that § 1605(a)(3) does not require the foreign state against whom the claim is made to be the one that took the property.”

Section 2: Commercial or Governmental

Insert page 371 in note 3:

Westfield v. Federal Republic of Germany, 633 F.3d 409 (6th Cir. 2011) (intention to send an art collection to the United States did cause a direct effect in the U.S. when, before the owner transferred, the Nazis seized the art).

Section 3: Enforcing a Judgment

Insert page 402 in note 6:

Congress passed the Foreign Missions Act pursuant to which the U.S. State Department retroactively declared the Mission exempt from property taxes. The Second Circuit ordered the City’s action dismissed. The City of New York v. Permanent Mission of India to the United Nations, 618 F.3d 172 (2d Cir. 2010), cert. denied, 131 S.Ct---- (2011).

Insert page 402 as note 7:
7. Rubin v. The Islamic Republic of Iran, 637 F.3d 783, 798-799 (7th Cir. 2011): There is no question that the attachment immunity codified in § 1609 of the FSIA has a cost, and that cost is borne primarily by Americans who have been injured in tort or contract by foreign states or their agencies or instrumentalities. The FSIA embodies a judgment that our nation's foreign-policy interests justify this particular allocation of legal burdens and benefits. Accordingly, we conclude that under the FSIA a plaintiff seeking to attach the property of a foreign state in the United States must identify the specific property that is subject to attachment and plausibly allege that an exception to § 1609 attachment immunity applies. If the plaintiff does so, discovery in aid of execution is limited to the specific property the plaintiff has identified. The general-asset discovery order issued in this case is incompatible with the FSIA.
Chapter 6

Extraterritorial Application of Public Law

Section 1: Antitrust Law

Insert page 459 in note 2:

We conclude that the notifications required by art. 36 must be provided to foreign nationals on their arrest; and, if not provided, a challenge to the soundness of any conviction resulting therefore may be made in a motion for a new trial. The standard to be applied in such circumstances is the substantial risk of a miscarriage of justice standard, one that the defendant has not met in this case. We also affirm the judge's ruling that the defendant has failed to establish that there was no interpreter at the plea hearing.

Insert page 467 in note 2:


Section 2: Securities Law

Insert page 476 in note 1:

Congress acted quickly to undo Morrison’s restriction on the extraterritorial application of the Securities and Exchange Act in proceedings brought by the Securities Exchange Commission:

15 U.S.C. 78aa [effective July 22, 2010] (b) [Extraterritorial jurisdiction] The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this chapter involving—

(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or

(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States
Chapter 7

Civil Suits for Atrocities That Violate International Law

Section 1: The Alien Tort Claims Act

Insert page 495 in note 2:

Estate of Amergi v. Palestinian Authority, 611 F.3d 1350 (11th Cir. 2010), held that a murder by private actors does not violate international law.

Insert page 497 in note 3:

Sarei v. Rio Tinto, PLC, 625 F.3d 561 (9th Cir. en banc 2010), remanded the case to the trial judge to explore the possibility of mediation.

Insert page 499 in note 3:

In February 2011 the court in Ecuador rendered a $8.6 billion judgment against Chevron. Republic of Ecuador v. Chevron Corp., 638 F.3d 384 (2d Cir. 2011), affirmed a district court’s judgment allowing Chevron to arbitrate its claim that the litigation in Ecuador violated the Bilateral Investment Treaty between Ecuador and the United States. A district court enjoined the enforcement of the judgment and granted an expedited trail on racketeering charges against the Ecuadorian plaintiffs. Chevron Corp. v. Donziger, --- F.Supp.2d ----, 2011 WL 1747046 (S.D.N.Y. 2011).

Insert page 500 in note 3:

Bowoto v. Chevron Corp. 621 F.3d 1116 (9th Cir. 2010): Nigerians sued three American-based Chevron companies under the Alien Tort Statute and the Torture Victim Protection Act. The Ninth Circuit affirmed the district court’s dismissal of actions holding the Death on the Seas Act (46 U.S.C. §§ 30301-30308) preempts the ATS survival claims and the TVPA does not apply to corporations.

David Wallach, The Alien Tort Statute and the Limits of Individual Accountability in International Law, 46 Stan. J. Int’l L. 121, 165 (2010): the Alien Tort Statute should be limited to “small number of cases in which universal jurisdiction is permitted by international law. . . . . It is important to keep in mind, however, that restricting the scope of the ATS does not mean that lesser abuses will not be cognizable in United States courts. It means only that, in general, such claims will be governed by rules of decision derived from municipal law in accordance with normal conflict of law principles.”
Chapter 8

Damages Resulting from International Flights: The Montreal and Warsaw Conventions

Section 2: Defining Convention Terms and Determining Preemption

Insert page 552 in note 3:

Delta Air Lines, Inc. v. Chimet, S.P.A., 619 F.3d 288 (Third Cir. 2010), affirmed a forum non conveniens dismissal of a declaratory judgment action by a shipper under the Montreal Convention.

Insert page 558 in note 8:

The Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) authorizes pilots to restrain and deplane passengers whose conduct poses a danger. Eid v. Alaska Airlines, Inc., 621 F.3d 858 (9th Cir. 2010), cert. denied, 131 S.Ct. --- (2011), held that in exercising that authority the pilot act reasonably.
Chapter 9

International Child Abduction

Section 1: Duty to Return the Child

Insert page 581 in note 4:

Karpenko v. Leendertz, 619 F.3d 259 (3d Cir. 2010), held that a Pennsylvania state court that had granted custody to the mother and authorized her to live abroad with the child, had no jurisdiction to grant the father permission to remove the child from the Netherlands, where the child was habitually resident.