INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICE AND PLANNING

SIXTH EDITION

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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; and
- held when jurisdiction over the parent corporation yields jurisdiction over a foreign subsidiary.

The Supreme Court has also granted certiorari in two cases that present the issues of whether the Alien Tort Statute and the Torture Victim Protection Act apply only to natural persons.

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; and
- partially undo the Supreme Court's restriction on the extraterritorial reach of the Securities and Exchange Act.

The Court of Justice of the European Communities, in Grand Chamber, ruled when internet contacts confer personal jurisdiction.

The International Bar Association Council revised the IBA Rules on Taking of Evidence in International Arbitration**.**

State, federal, and foreign courts decided cases that affect the topics dealt with in the 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." Id. at 2851. The Supreme Court found that foreign subsidiaries did not have continuous and systematic contacts with North Carolina. The case also held that jurisdiction over the parent corporation did not yield jurisdiction over the parent's subsidiaries.

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 where that the product is regularly is sold.

Insert page 57 in Note:

Case C-585/08 (Celex No. 608J0585) Pammer v. Reederei Karl Schlüter GmbH & Co. KG, Court of Justice of the European Communities in Grand Chamber, [2010] E.C.R. xx, ruled:

"In order to determine whether a trader whose activity is presented on its website or on that of an intermediary can be considered to be 'directing' its activity to the Member State of the consumer's domicile, within the meaning of Article 15(1)(c) of Regulation No 44/2001 [the consumer can sue the other party to a contract in the consumer's domicile and the other party must sue the consumer in the consumer's domicile except pursuant to an agreement entered into after the dispute has arisen], it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them.

"The following matters, the list of which is not exhaustive, are capable of constituting evidence from which it may be concluded that the trader's activity is directed to the Member State of the consumer's domicile, namely the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether such evidence exists.

"On the other hand, the mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address and of other contact details, or of use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established." Ruling following ¶ 95.

Section 2: Agreements to Litigate or Arbitrate Abroad

Insert page 91 in note 2(a):

Cape Flattery Ltd. v. Titan Maritime, LLC, 647 F.3d 914 (9th Cir. 2011) (parties have the power to agree to arbitrate under the English Arbitration Act but federal arbitrability law applies to whether a tort claim is arbitral to "any dispute arising under this Agreement" and the tort claim is not arbitral).

Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84 (Tx. 2011), cert. denied, --- S.Ct. --- (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. ld. at 92-93.

Insert page 93 in note 2(h):

Zuckerman Spaeder, LLP v. Auffenberg, 646 F.3d 919, 924 (D.C. Cir. 2011) ("By this opinion we alert the bar in this Circuit that failure to invoke arbitration at the first available opportunity will presumptively extinguish a client's ability later to opt for arbitration"),

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.''

Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan, [2010] UKSC 46, 2010 WL 4276039 (U.K. Supreme Court 2010): Dallah had won an arbitration award in France against Pakistan. Dallah sued to enforce the award in the United Kingdom. Pakistan had not signed the arbitration agreement. The U.K. Supreme Court decided that under article V(1)(a) of the New York Convention French law governed whether Pakistan was bound by the award. The Court held that under French law the nonsignatory is bound by the arbitration agreement if the nonsignatory and the party asking for arbitration manifested consent to arbitration. The Court found no such manifestation and held that the arbitration award was not valid under French law.

Governement De Pakistan v. Société Dallah Real Estate and Tourism Holding Co., (Ct. App. Paris, Feb. 17, 2011), rejected the U.K. Court's reasoning and result denying Pakinston's motion to have the award annulled in France because it was a nonsignatory.

Insert page 101 in paragraph 3:

On 29 May 2010, the International Bar Association Council revised the IBA Rules on Taking of Evidence in International Arbitration. The web site of IBA lists the following as the key updates and revisions:

> An obligation on the tribunal to consult the parties at the earliest appropriate time with a view to agreeing on an efficient, economical and fair process for taking evidence. It also includes a non-exhaustive list of matters which such 'consultation' may address.

Greater guidance to the tribunal on how to address requests for documents or information maintained in electronic form – so-called 'e-disclosure'. Similarly, the revisions give greater guidance as to requests for documents in the possession of third parties.

Expansion of confidentiality protections respecting both documents produced pursuant to document requests and documents submitted by a party in support of its own case and documents introduced by third parties. Greater clarity respecting the contents of expert reports and in particular the requirement to describe the instructions given to the expert and a statement of his or her independence from the parties, legal advisers and tribunal; the revised IBA Rules also foresee the provision of evidence in reply to expert reports.

An obligation on witnesses to appear for oral testimony at a hearing only if their appearance has been requested by any party or the tribunal; the revised IBA Rules also provide for the use of videoconference or similar technology.
More specific guidance respecting issues of legal impediment or privilege, including the need to maintain fairness and equality particularly if the parties are subject to different legal or ethical rules.

Incorporation of an express requirement of good faith in taking evidence coupled with an empowerment of the tribunal to consider lack of good faith in the awarding of costs.

Deletion of the word 'commercial' from the title, in recognition of the potential equal application to 'non-commercial' arbitrations such as investment treaty-based disputes."

Section 4: Service of Process

Insert page 152 in note 2:

Cardona v. Kreamer, 235 P.3d 1026 (Ariz. 2010) (en banc):

> 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?

Insert page 242 in note 7:

But see Vicknair v. Phelps Dodge Industries, Inc.767 N.W.2d 171, (N.D. 2009) (if statute of limitations has run in another forum, it not an alternative available forum and a forum non conveniens dismissal cannot be granted).

Section 2: Erie, Reverse Erie, and Litigation Strategy

Insert page 257 in note 2:

Wells Fargo Bank, N.A. v. WMR e-PIN, LLC, 653 F.3d 702 (8th Cir. 2011), held that national banks, for diversity jurisdiction purposes, are not citizens of the state of their principal place of business but only citizens of the state where their main office is located, disagreeing with case from the Fifth and Seventh circuits.

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. 3057 (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 4:

Rubin v. The Islamic Republic of Iran, 637 F.3d 783 (7th Cir. 2011), held Iran's immunity from attachment and execution did not depend on an appearance. The district had granted judgment creditors' motion for a discovery of Iran's assets in the U.S. The Seventh Circuit held that order was inconsistent with the Foreign Sovereign Immunities Act.

NML Capital, Ltd. v. Banco Central De La República Argentina, 652 F.3d 172 (2d Cir. 2011): "We hold that [a central, bank's funds held for its own account] are immune from attachment."

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. 3056 (2011).

Chapter 6: Extraterritorial Application of Public Law

Section 1: Antitrust Law

Insert page 459 in note 2:

In *Garcia v. Texas*, 131 S.Ct. 2866 (2011), the U.S. Supreme Court, 5-4, refused to stay an execution while Congress was considering legislation that would implement *Avena* (see the first paragraph in note 2 on page 458).

> Commonwealth v. Gautreaux, 941 N.E.2d 616, 628 (Mass. 2011):
> 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 therefrom 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:

Till Schreiber, Private Antitrust Litigation in the European Union, 44 Int'l Lawyer 1157 (2010).

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:

Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011), held that the plaintiffs had not shown that the conditions of child labor violated customary international law and that corporations could be liable under the Alien Tort Claims Act.

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 Ltd., --- F.3d ----, 2011 WL 5041927 (9th Cir. en banc 2011), remanded for trial the genocide and war crimes claims. Holdings included that defendant could be liable for aiding and abetting the offences, that corporations were liable under the Alien Tort Statute, and that the district court did not abuse its discretion in not requiring the plaintiffs to exhaust their claims in New Guinea.

Insert page 498 in note 3:

Ali Shafi v. Palestinian Authority, 642 F.3d 1088 (D.C. Cir. 2011), dismissed claims of torture under the Alien Tort Statute against the Palestinian Authority and Palestinian Liberation Organization because torture required state action.

Ali v. Rumsfeld, 653 F.3d 702 (D.C. Cir. 2011): Afghan and Iraqi citizens sued the former Defense Secretary and three U.S. army officers under the Alien Tort Statute claiming they were tortured during incarceration. The D.C. Circuit, 2-1, upheld the district court's dismissal. The majority stated that U.S. officials were immune under the Westfall Act and the statute's exception, "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized" [28 U.S.C. § 2679(b)(2)(B)] does not apply because the ATS is jurisdictional and creates no new cause of action.

Vance v. Rumsfeld, 653 F.3d 591 (7th Cir. 2011) (American citizens who were detained in Iraq sufficiently alleged personal involvement of Secretary of Defense, who was not entitled to qualified immunity, in violation of their constitutional rights.)

Insert page 499 in note 3:

In February 2011, the court in Ecuador rendered a $18 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, 783 F.Supp.2d 713 (S.D.N.Y. 2011). The 2nd Circuit has vacated federal district court Judge Lewis A. Kaplan's preliminary injunction blocking worldwide enforcement of an $18 billion environmental judgment against Chevron in Ecuador, derailing a November trial on whether to make the injunction permanent. Chevron Corp. v. Naranjo, 2011 WL 4375022 (2d Cir. 2011).

Insert page 500 in note 3:

Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011), held 2-1, that the Alien Tort Statute does apply to corporations, but agreed the Torture Victim Protection Act does not. Exxon applied to D.C. Circuit to grant an en bank hearing and hold that the ATS does not apply to corporations.

The Supreme Court has granted certiorari in two cases that present the issues of whether the ATS and the Torture Victim Protection Act apply only to natural persons. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2011), cert. granted, --- S.Ct. ---- (2011) (NO. 10-1491 (the ATS does not apply to corporations). Mohamad v. Rajoub, 634 F.3d 604 (D.C. Cir. 2011), cert. granted,. --- S.Ct. ---- (2011) (NO. 10A1244, 11-88 (the TVPA applies only to natural persons).

Bowoto v. Chevron Corp. 621 F.3d 1116 (9th Cir. 2010), cert. filed, 10-11536 6/20/11 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 (3d 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. 2874 (2011), held that in exercising that authority the pilot acted 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.