Litigation of International Disputes in U.S. Courts by Ved P. Nanda and David K. Pansius

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Fortunate are those special few lawyers whose practice consists of truly international law. The reality is that such lofty work relating to the rights and duties of states in the international arena is limited to a few practitioners within government offices and a handful of international organizations.

Most lawyers, however, have an international aspect to their practice. While not strictly international law, counseling foreign clients as to the application of U.S. law or the structuring of an international securities, trade, or investment decision, raises real legal and practical problems beyond the purely domestic.

The complications created by foreign parties and interests are particularly pronounced in the area of litigation. The addition of a foreign defendant raises the stakes for each party. The costs, delays, and significance of the litigation increase as each party has to confront difficult issues of subject matter and personal jurisdiction, service of process, discovery, trial strategy, and enforcement of judicial remedies. Any attempt to apply U.S. law to conduct undertaken outside the United States raises the potential for the involvement of foreign states, and the escalation of a private dispute into an international confrontation between states.1

At the same time, the substantive and procedural law governing the conduct of such litigation is quite difficult to uncover and apply. There is no single source or reference to use. While the Federal Rules of Civil Procedure are the starting place for any civil proceeding, not every rule explicitly deals with a case involving an international dispute. A variety of matters are not covered by the Rules at all, but are covered by statutory provisions such as the Foreign Sov-

ereign Immunities Act. Certain matters concerning service of process and the
taking of evidence may also be governed by treaty provisions supplementing or
regulating U.S. law on the subject. Other issues have never been codified and
are part of the common law found in the decisions of the state and federal
courts.

Litigation of International Disputes in U.S. Courts comes very close to synthes­
izing these disparate elements into a single reference work. This one-volume
work is organized to examine international litigation in U.S. courts from the
filing of a complaint to the enforcement of a judgment. Of necessity, the
emphasis of the book is on the conduct of civil litigation in the federal courts,
with general principles or examples from state law added where possible. In
separate chapters, the authors address questions of personal jurisdiction, service
of process abroad, venue, forum non conveniens, extraterritorial juris­
diction (subject matter jurisdiction), extraterritorial discovery, forum selec­
tion and choice of law, sovereign immunity, pleading and proof of foreign law,
the act of state doctrine, recognition and enforcement of foreign judg­
ments and arbitral awards, and recognition and enforcement of U.S. judg­
ments and arbitral awards abroad.

Each chapter begins with a discussion of the general legal principles for the
topic, drawing on the holdings of the U.S. Supreme Court when available.
Following this discussion, the authors apply these principles to particular areas
of the law ranging from antitrust to contract actions.

This approach is the real strength of the book. The authors are savvy enough
to realize that the law is not applied in a vacuum, and that the attitudes of U.S.

3 See, e.g., Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,
4 For example, the doctrine of personal jurisdiction is covered by the decisions of state courts
concerning the application of state long-arm statutes. The federal decisions on the constitutional
limitations of minimum contacts and due process provides another example.
5 V. NANDA & D. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS (1986) [herein­
after Litigation].
6 Id. at ch. 1:1-52.
7 Id. at ch. 2:1-8.
8 Id. at ch. 3:1-9.
9 Id. at ch. 4:1-36.
10 Id. at ch. 5:1-56.
11 Id. at ch. 6:1-9.
12 Id. at ch. 7:1-34.
13 Id. at ch. 8:1-115.
14 Id. at ch. 9:1-15.
15 Id. at ch. 10:1-142.
16 Id. at ch. 11:1-19.
17 Id. at ch. 12:1-21.
and foreign courts and governments towards a particular lawsuit will often depend more on the substance of the lawsuit than on the black letter law itself.

By way of example, the case law concerning the extraterritorial application of U.S. antitrust law is quite different from the case law concerning the extraterritorial application of U.S. securities and other laws. An attorney who examines the general principles of U.S. and foreign law on extraterritoriality may find this an irreconcilable contradiction. In fact, there is often no contradiction at all, since many states simply object to the substance of U.S. antitrust law being applied to their nationals as opposed to a more lofty objection to extraterritoriality in principle.

The authors are wise to emphasize such practical considerations. The subject matter of the lawsuit is used as the analytical tool for reconciling the decisions of U.S. courts under the Act of State doctrine and the Foreign Sovereign Immunities Act. Reality is a powerful tool for reconciling seemingly contradictory legal principles. Too often the flexibility of the law and the importance of the factual setting of a lawsuit has been deemphasized in favor of wholly theoretical concerns by other commentators.

_Litigation of International Disputes in U.S. Courts_ does suffer from two significant but curable flaws. The first is organizational. The chapters are loosely ordered, following the progress of a lawsuit through the courts in only the most general way. This is compounded by the fact that there is a certain redundancy both within and between chapters. In addition, certain material, such as the classic federal decisions applying the U.S. antitrust laws to conduct outside the United States, appear to be in the wrong chapter altogether. The result is a lack of focus, with the result that the reader is left to drift through related material without strong direction.

The second shortcoming is more substantive in nature. There is a marked distinction in the level of care and detail in the treatment of particular subjects. The authors have done an exhaustive and detailed job in analyzing subject matter jurisdiction, the Foreign Sovereign Immunities Act, and the Act of State doctrine. While significant, these doctrines only establish the power and the discretion of the court to entertain a particular lawsuit.


20 See _supra_ notes 6–17.

21 For example, material on foreign sovereign immunity continually appears throughout the book.

The actual conduct and proof of an international dispute will more often depend on the lawyer's success in the discovery process. The authors' nine-page treatment of this topic is shockingly brief. It is neither accurate nor sufficient to note that "[a]lthough a number of cases have addressed the issue of extra-territorial discovery, each case is unique and probably of limited interest."23

There is an extensive body of law dating back nearly thirty years covering the obligations of a defendant in an international dispute under the discovery provisions of the Federal Rules of Civil Procedure, the penalties for noncompliance, and the effect of foreign blocking statutes.24 The series of cases dealing with the uranium cartels from the 1970s are a rich case study of how U.S. state and federal courts have coped with the recalcitrant foreign defendant in the discovery process.25 These cases are no more fact-specific than the other areas that the authors analyze. This area is of critical importance and deserves more comprehensive treatment.26

These problems, although significant, can be addressed as this volume evolves through later editions. The authors need not feel locked into the present structure and format. The authors should attempt to flesh out key issues, and continue to refine those areas already covered in order to focus the volume. In its present form, the book is a strong and scholarly reference. If it continues to grow and evolve in its coverage, it can be invaluable.

23 Id. at ch. 6:8-9.
26 The discussion of the enforcement of arbitral awards in the United States and the enforcement of U.S. judgments are also treated in summary fashion. In addition, issues relating to criminal litigation of international disputes are only sporadically discussed.