

TRANSNATIONAL LITIGATION:

— A Basic Primer —

RICHARD H. KREINDLER



OCEANA PUBLICATIONS, INC.

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FOREWORD

by

The Right Honourable the Lord Howe of Aberavon, C.H., Q.C.,

**Former Foreign Secretary & Deputy Prime Minister
of the United Kingdom**

Oklahoma, Tiananmen, Chernobyl, Intifada, Glasnost, CNN: Increasingly, we all share the same worldwide satellite-borne vocabulary. Trade, travel, tourism, television, technology—all these are competing with each other in the demolition of time and distance. And the most important of these is trade.

In the half century since World War II, politics and technology alike have been boosting rather than obstructing the growth of transnational business. Sometimes the obstacles for trade have been demolished by conscious political decision: in the European Union or in NAFTA, for example. Elsewhere the process has been triggered by near-revolutionary upheaval: with the displacement of Maoism by Deng Xiaoping's "socialist" marketplace, for example, or with the disintegration of the Soviet Empire. In most of the Asia Pacific region, however, it has been (in Keynes' words) the "animal spirits" of the entrepreneur that have been the main driving force for change. The ASEAN institutions have accompanied rather than promoted this explosion of economic activity.

The process continues to accelerate, with cross-frontier investment now growing even faster than trade. Victor Halberstadt has presented some of the facts about this astonishing change. In 1995 the worldwide flow of foreign direct investment reached a record high: investment inflow increased by 40% to an unprecedented US\$315 billion, worldwide. Developed countries were the main dynamos (and beneficiaries) of this explosion, themselves investing US\$270 billion and receiving US\$200 billion in 1995. But this spectacular growth of foreign direct investment in developed countries was accompanied by a huge rise in flows into developing countries as well, amounting in 1995 to US\$100 billion.

So we have grown used to the idea of a single world marketplace, not just for goods but for capital and cash as well—whisked across frontiers invisibly and, literally, at the speed of light. We think less often perhaps of the global marketplace of law and legal thinking that must accompany the growth in trade and investment. Yet inevitably there has been a corresponding increase in transitional disputes. So, too, the corresponding need for skill and guidance in avoiding and resolving such disputes has grown.

Multinational trade is inevitably multi-jurisdictional. So the choice of jurisdiction, and the ability to implement that choice, becomes increasingly important. Sometimes one has to create what is in effect a unique jurisdiction, through a tailor-made pattern of alternative dispute resolution. Sometimes even, in truly “adventurous” territories, one has almost literally to take one’s own law with one.

Legal practitioners need above all a practical approach to transnational disputes. The business of pursuing, or avoiding, litigation with a foreign component involves indispensable legal and procedural trappings and requirements. And that requires practical and practice-oriented experience of the pursuit or avoidance of such disputes. This present work responds to that practical challenge by bringing together for the first time:

- Both the obvious and the inscrutable aspects of transnational civil procedure in a variety of key trading nations and
- The strategic, tactical and practical choices which accompany such procedures.

This emphasis on “choices” reflects a major concern of practicing lawyers, in-house counsel and non-lawyer managerial staff alike, in knowing and anticipating the different paths which the avoidance or pursuit of an international litigation can take at each step of the process. Richard H. Kreindler, by highlighting this concept of choice, does justice not only to the efficient resolution of disputes that are unavoidable but—equally important—to the cost-effective avoidance or cessation of such disputes (and at an early stage wherever that is possible).

This marriage between legal and practical requirements is the central theme and inspiration of *Transnational Litigation: A Basic Primer*, and of the more extensive country-by-country analysis contained in *Transnational Litigation: A Practitioner’s Guide*, the two-volume treatise from which it derives. The totality of Richard Kreindler’s background and experience, as the Coordinator of Jones Day’s Europe/Middle East Dispute Resolution Practice Group, qualifies him ideally to decide exactly what is needed—and all too often missed—by the transnational practitioner. A lawyer who is American educated and trained, French-admitted and who has resided the last six years in Germany, he has had experience not only of these three key jurisdictions, but also of litigation issues in virtually every other region of the global economy. Along the way he has worked with leading litigation practitioners throughout the world and in many cases with the leading authority on the subject in the country in question.

The Primer is given a tight and regimented focus by Kreindler’s imposition of a specific order of issues. This approach, as influenced by Kreindler’s emphasis on substance, is not predominantly Anglo-American, continental European, or any other legal or business culture. It has been skilfully designed to bridge real or perceived “divides” in approach between and among Common law, Civil law and other legal traditions. The approach manages at the same time to do justice to the significance of the differences which do arise between one jurisdiction and another.

Kreindler’s approach is influenced not simply by his transnational litigation experience, but also by his extensive involvement in international arbitration under various bodies of law and rules and with other forms of “alternative dispute resolution”. The Primer does not attempt to address the intricacies of international arbitration in or affecting the countries covered. But its design and implementation is ever mindful of the lawyer’s and businessman’s need to know in advance what advantages and disadvantages a

contractual agreement to litigate disputes, as opposed to arbitration, might have in any given case.

To guide the lawyer's and businessman's strategic decisions, the Primer contains a substantive and practical overview of key distinguishing characteristics of the legal system, the structure of the courts, obtaining jurisdiction and choice of forum and the choice of law. Then, service of process domestically to commence a foreign action and service abroad to commence a domestic action receive particular attention. Commencement of suit, summary judgments and equivalent proceedings, and interim and conservatory relief follow next.

Of particular importance to many practitioners are the sections on the taking of witness and documentary evidence domestically in support of foreign actions as well as abroad in support of domestic actions. Here again the concept of tactical and strategic choice underlies each country discussion. Traditionally, far less attention has been paid to admissibility and presentation at the tribunal of evidence taken domestically or abroad. This Primer makes this problem one of its centrepieces before going on to address appeal and review of transnational judgments. The approach then focuses on damages, recognition and enforcement of foreign civil-commercial judgments, settlement and compromise of proceedings, sovereign immunity, and finally costs and fees.

This first edition of the Primer is an excellent companion to the larger Practitioner's Guide, which in its first edition (December 1997) encompasses some 20 countries, including many of the largest trading nations with the most significant litigation issues and developments. It is contemplated that a second edition will appear in the fullness of time, which will include additional such countries, including major trading nations which are not presently represented, along with updates of the current country chapters. Practitioners around the world welcome this skilfully crafted approach addressing a group of practical legal questions, which ever more frequently arise in the course of multinational trade.

London,
March 1998

ACKNOWLEDGMENTS

Transnational Litigation: A Basic Primer posed the stimulating challenge of achieving a different, more comprehensive and more practically oriented guidebook for cross-border litigation. Yet an equally great challenge was crafting such a work in the midst of the daily and hourly demands of a cross-border litigation practice. In this context, from the initial conception of the Primer, to the coordination of some three dozen leading litigators worldwide as Country chapter authors for the companion treatise *Transnational Litigation: A Practitioner's Guide*—the task proved to be a complex, multifaceted and voluminous effort.

This project was buttressed, motivated and assisted along the way by colleagues, assistants and others at Jones Day throughout the world. Partners, associates and staff in the Frankfurt office of Jones Day, notably my colleague Judith L. Holdsworth, provided assistance. Highly reputed litigation specialists outside of my firm provided advice, thereby lending the legitimacy and soundness of their experience to the work. Needless to say, my wife and son exhibited supreme patience and understanding throughout the conception and realization of the work.

Finally, I am pleased to confirm that future releases of this work are already underway in connection with the forthcoming second edition of the companion treatise which will additionally include, among other countries, Argentina, Belgium, China, Egypt, Hong Kong, Hungary, Kuwait, Mexico, the Netherlands, the Philippines, Saudi Arabia, Turkey, and the United Arab Emirates.

Richard H. Kreindler
Frankfurt, March 1998

AUTHOR BIOGRAPHY

RICHARD H. KREINDLER

Partner, Jones Day Reavis & Pogue, Frankfurt, Germany. Admitted New York; Paris Bar as Avocat; registered Germany as Rechtskundiger. Harvard University (B.A. cum laude); Ludwig-Maximilians University, Munich (Magister); Columbia University (J.D.).

Coordinator of the European/Middle East Disputes Practice of Jones Day. Prior practice in New York and Paris.

Specializes in commercial and construction arbitration before the International Chamber of Commerce, American Arbitration Association, Stockholm Chamber of Commerce and other arbitral institutions, as well as multijurisdictional aspects of U.S., European and Middle Eastern litigation. Languages include English, French, German and Russian.

Recent experience includes responsibility for 1991 Gulf Crisis claims to UN Compensation Commission of the Hashemite Kingdom of Jordan and of various corporate entities in U.S., Europe and Arabian Gulf; commercial and construction arbitrations in U.S., Europe, Middle East and Asia and related challenge and enforcement proceedings; municipal court actions in U.S., Germany, France, Switzerland and elsewhere; and service as arbitrator under ICC, Stockholm Chamber of Commerce and *ad hoc* Rules.

Member of various arbitration institution panels.

Corresponding Member, ICC Institute of International Business Law; Advisory Board, *World Arbitration and Mediation Report*; Editorial Board, *International Commercial Litigation*; International Correspondents Board, *Arbitration and Dispute Resolution Law Journal*; Editorial Board, *Arab Law Quarterly*; Editorial Board, *International Arbitration Law Review*; Conseil scientifique, *Revue de droit des affaires internationales/International Business Law Journal*; Country Correspondents Board, *International Litigation Quarterly*; Editorial Advisory Committee, *International Legal Materials*; Advisory Board, Institute for Transnational Arbitration; Arbitration Practice Subcommittee, Chartered Institute of Arbitrators; Arbitration Committee and Working Group on ICC Rules Revision, U.S. Council for International Business; European Advisory Committee, Center for Public Resources.

General Editor, *Transnational Litigation: A Practitioner's Guide* (2 Vols., 1997). Numerous other publications and lectures on international dispute avoidance and resolution in English, French and German. Adjunct Professor, University of Münster, Germany.

INTRODUCTION

Transnational Litigation: A Basic Primer intends to be a different, more comprehensive, and more practically-oriented concise companion for cross-border litigation. Aware of the increasing need for a work on this subject, Oceana Publications asked me to conceive a practitioner's guide which would satisfy the daily need of the litigator, business person and student for an accessible overview of recurring *practical issues* in dispute resolution based on practical experience in certain principal countries.

In taking up this challenge and trying to fill this vacuum, I have conceived a practitioner's guide which is meant to be equally accessible and useful to the seasoned litigator, the transactional attorney, the in-house lawyer, the nonlawyer merchant and the student alike. It is also meant to be equally approachable for the Anglo-American and the Continental European, the Arab and the Asian, the Latin American and the African working in English. *A Basic Primer* is meant to be consulted in conjunction with the more extensive two-volume country-by-country analysis in *Transnational Litigation: A Practitioner's Guide* (Kreindler with Holdsworth, Oceana 1997), which is to be expanded in a second edition in 1999.

Compromises and limitations of focus, coverage and length must be taken into account in any work of such scope. At the same time, there are two self-imposed goals, among others, used as a consistent compass.

The first was not to compromise on the degree of detail to be devoted to issues of substantive litigation practice and strategy, no matter how abstruse certain such issues might appear at first glance, if they were in fact of practical and recurring relevance. The second goal was not to compromise on seeking a framework and approach which was readily comprehensible to practitioners of vastly different, and sometimes conflicting, legal backgrounds and mentalities. This required self-discipline as to how a reader from one litigation tradition would react to and employ the description of a vastly different litigation tradition. More often than not, the main commonality between two legal traditions may be the mere fact that both the author and the reader can work with relative ease in the English language.

Thus the Japanese practitioner should feel equally at home with the Primer as the American, the Frenchman as the Saudi, the German as the Australian. This is nothing more than an accurate reflection of the increasingly cross-border nature of litigation, whether complex and "high-stakes" or not. It is also a reflection of the fact that practitioners and businessmen need to be aware of concepts and possibilities in litigation procedure and strategy in other countries which may not exist in their own system.

Accordingly, in the context of a practitioner's and student's primer, such matters as long-arm jurisdiction, minimum contacts, document discovery, motions to compel production of documents, punitive and treble damages and court-ordered mediation

may exist in a jurisdiction such as the United States but not, or not in the same way, in another jurisdiction such as Japan. In the context of a U.S.-Japanese litigation dispute, the U.S. practitioner and student need to know to what extent such matters can—or cannot—be “translated” to the Japanese environment and back again. And the Japanese practitioner and student must verify what such largely unfamiliar U.S.-linked issues mean for the litigation of the dispute either in the U.S. or at home in Japan. Here, my task, among others, is to ensure completeness, clarity and parallelism of discussion. It would be a disservice to readers from both such divergent backgrounds, no matter how seasoned and experienced each one might be, to assume that they have full knowledge of which characteristics of one system are or are not available in the other one.

Nor does one have to exaggerate the geographical distance to encounter such potential “gulfs” in understanding. Even within the European Union, e.g., in the context of a UK-German litigation dispute, the UK practitioner must make decisions based on choice. Thus, he must be aware of just how useful—or unuseful—such tools as security for costs, Mareva injunctions, Anton Piller orders, Order 14 and Order 29 procedures, etc. might be in a litigation with a German nexus or indeed in front of a German judge. By the same token, the German practitioner has choices. These should be based on an educated understanding of the extent to which his own “tools,” even employed in his own court, are useful or optimal where one of the parties is based in England, procedures are pending there, or enforcement of a German order or judgment may be sought in England.

This concept of “choice” is at the heart of my conception of the present primer. Accordingly, the analysis which follows is meant to highlight and elucidate the choices available at various stages of a transnational litigation. These choices may be analogized to “forks in the road” which the practitioner encounters in each and every phase of a litigation. These forks in the road are also encountered in decisions which need to be taken, where applicable, to avoid the commencement of a litigation in the first place. In this regard, the focus of the present work is not solely on dispute resolution, but also on dispute avoidance.

It is thus hoped that the present volume will serve as a useful, practice-oriented guide to the numerous forks in the road encountered when attempting to resolve, or avoid, a transnational dispute—in good faith and with attention to detail, professionalism, and efficiency.

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