October 2007

Transnational Litigation in the United States: The Emergence of a New Field of Law (reviewing Gary B. Born & Peter B. Rutledge, International Civil Litigation in the United States (2007)).

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55 Am. J. Comp. L. ___ (forthcoming)

Research Paper No. 07-12

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Transnational Litigation in the United States: The Emergence of a New Field of Law


Reviewed by Samuel P. Baumgartner*

It is rare for a book review to focus on a case book; it is even rarer for a case book to be reviewed each time a new edition appears. Yet, this is precisely what has happened with International Civil Litigation (ICL), now in its fourth edition. The reason is simple: ICL is not merely a case book, although, on its face, it looks like one. From its first edition on, ICL has provided more background, more analysis, and more information about the case law in lower courts than is usual for an American-style case book. The result is a tome that has been as useful to scholars and practitioners as it has been to law students, influencing the thinking of many, both in the United States and abroad. But there is another reason why ICL is different from most case books. When the first edition appeared, it broke new ground. It was the first case book on transnational litigation in the United States, and the first reference work in this area with its level of analytical depth and breadth of coverage. Indeed, its thorough collection of cases and materials on issues

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2 The authors’ choice to combine a case book with the analytical apparatus of a treatise led some early reviewers to quibble that ICL was actually limited in its usefulness as a teaching tool; it told students too much. See, e.g., Bradley & Goldsmith, supra note 1, at 243; Zekoll, supra note 1, at 180-81. This may indeed be a problem if ICL the reference manual crowds out information that would be necessary for ICL the case book to be an effective educational tool (see Bradley and Goldsmith supra note 1, at 243), although the obvious omissions in this regard were remedied in later editions. However, I have always had difficulty with a teaching approach that holds back important information so that the nuances can be developed in class, or worse, avoided altogether. If the purpose is to help students think on their feet, perhaps this is something better taught in a first-year course than in an upper-level elective, where the focus should be on learning the substance. If the intention is to protect students from too much information in order to help them concentrate on the salient issues, it is an approach that favors some learning styles (primarily global auditory) over others. Cf. RITA DUNN & KENNETH DUNN, TEACHING SECONDARY STUDENTS THROUGH THEIR INDIVIDUAL LEARNING STYLES 3, 47 (1993) (distinguishing auditory learners, visual learners, kinesthetic learners and tactual learners with regard to perceptive facility as well as “global learners,” who need to understand a basic concept before moving on to complex ramifications from “analytic learners,” who learn step by step and in some depth from the outset). As a student, I found ICL to be superior to other case books precisely because it gave me a better sense of what is really happening in practice and because it allowed me to understand – on a second or third reading perhaps – important nuances and underlying currents.

3 For lack of a better way to measure impact, a Westlaw search turned up 427 law review articles and 20 U.S. court opinions referencing ICL. A similar search in HeinOnline’s database on international and non-U.S. periodicals published in English, which overlaps to some extent with Westlaw’s “journal” database, returned another 165 citations. This sort of search does not account for the many references to ICL in books, book chapters, foreign periodicals not published in English, and foreign court decisions.
not addressed in courses on civil procedure, conflict of laws, or international law,⁴ or that receive only limited treatment in those courses,⁵ made a significant contribution by itself. Thus, by thoroughly mapping the terrain, posing probing questions, and identifying recurrent patterns of response, ICL was able to do something few case books accomplish: It helped shape an evolving area of law.

Since the first edition of ICL, a considerable number of other case books, treatises, and practice manuals on transnational litigation have appeared in the United States. Cases with transnational elements have become ubiquitous, and an ever-growing number of practitioners are concentrating on cross-border litigation. Similar developments can be observed abroad. In England, for example, transnational litigation practice has evolved from an occasional occurrence of interest mostly to conflicts scholars to an important practical subject during the last 25 years.⁶ And in German-speaking Europe, where the subject has been studied as a distinct discipline for considerably longer,⁷ the increasingly rapid development of the law at the domestic as well as the European Community level has spawned new textbooks and frequent releases of new editions of those books.⁸ Thus, there is no question today that transnational litigation has become a distinct field in the sense that it “‘can … be justified by the heuristic needs of the profession.’”⁹ Moreover, it is clear that ICL has helped discipline scholarly thought in the area and has permitted those so inclined to pursue common themes, such as the role of the federal common law of foreign relations or the various notions of comity in different areas of transnational litigation.¹⁰ Whether there is something more to this new field, however, is a question I want to pursue in the remainder of this review. I intend to do so by taking a look at how transnational litigation in the United States has developed in recent years.

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⁴ See, e.g., pp. 540-62 (antisuit injunctions), 815-905 (service of process abroad), and 907-94 (transnational discovery).
⁵ See, e.g., pp. 219-344 (foreign sovereign immunity), 347-434 (forum non conveniens), 435-519 (forum selection agreements), 751-814 (act of state doctrine), and 1009-82 (recognition and enforcement of foreign judgments).
⁷ See, e.g., F. Meili, Das Internationale Civilprozessrecht (1906) (Switzerland); Erwin Riezler, Internationales Zivilprozessrecht (1949) (Germany); Gustav Walker, Streitfragen aus Dem Internationalen Civilprozessrechte (1897) (Austria).
¹⁰ See, e.g., Bradley & Goldsmith, supra note 1, at 239-40.
I. CHANGES IN TRANSNATIONAL LITIGATION

More than a decade has elapsed since the last edition of ICL came out. In this area, this seems like an eternity. The U.S. Supreme Court alone has in the interim rendered six decisions pertaining to transnational litigation,11 and a vast number of decisions have emanated from intermediate and lower courts in the United States. Mr. Born and, joining him for the first time in the fourth edition, Professor Rutledge have done a great job of working this new case law into the familiar framework of the third edition. Beyond that, they have extended the treatment of the Foreign Sovereign Immunities Act (pp. 219-344), including, among other things, a new section on the 1996 terrorism exception to immunity under the Act (pp. 333-44) and a section on serving process on foreign governments (p. 896-905). Moreover, they have added sections on deference to plaintiff’s choice of forum in the chapter on forum non conveniens (pp. 373-86) and on professional ethics in international arbitration, a timely topic (pp. 1140-53).

Considering these changes together with the new case law the authors have digested, it appears that most of the action in transnational litigation in recent years has been in the areas of personal jurisdiction, foreign sovereign immunity, the Alien Tort Claims Act, forum selection clauses, and forum non conveniens, tightly followed by the recognition of foreign judgments, and a bit farther behind, transnational discovery and the act of state doctrine, while less seems to have happened with regard to choice of law.12 Partly, this may have to do with a sense among the practicing bar that the relevant questions in some of these areas have been more clearly settled than in others and thus rarely justify further litigation. But it also supports the widely held impression that much of the action has been at the front end and back end of litigation.13 Thus, litigants are primarily fighting over where to litigate and – to a lesser extent – over whether a foreign judgment can be recognized and enforced in the United States because, as has been established empirically (for litigation in the United States at least), forum selection really


12 Another area with considerable activity in the United States has been international arbitration. However, I consider international arbitration a subject distinct from transnational litigation and thus leave it out of further consideration in this review. That is not to say, however, that I think that ICL’s chapter on arbitration should not be in the book. On the contrary, teaching the basics of international arbitration in a course on transnational litigation serves useful purposes, not the least of which are to provide students with a glimpse of the alternative increasingly trumping litigation in certain kinds of international transactions and to confront them with the very different approach the Supreme Court has taken to cases in international arbitration versus cases in transnational litigation.

does affect outcome.\textsuperscript{14} The recognizability of a foreign judgment, in turn, affects forum selection.\textsuperscript{15}

Other recent developments that are reflected in the fourth edition of ICL include the emergence of a second generation of litigation under the Alien Tort Claims Act that is directed against enterprises for aiding and abetting human rights violations rather than against foreign governments or individuals and the flourishing use of U.S. discovery in aid of foreign proceedings under 28 U.S.C. §1782. But there have also been developments that are not specifically covered in ICL: The increasing importance of pre-judgment relief in transnational disputes;\textsuperscript{16} the emergence of global class actions in the United States (i.e. class actions including large numbers of individuals from abroad in the plaintiff class),\textsuperscript{17} and an increasing perception of a new “judicial conflict” with the United States in Germany and perhaps elsewhere.\textsuperscript{18}


\textsuperscript{15} See LOUISE ELLEN TEITZ, TRANSNATIONAL LITIGATION 252-53 (1996): Enforcement and recognition of judgments, although chronologically the last concern in litigation, is one of the first considerations in initiating a lawsuit. Indeed, the ability to enforce a judgment and the potential for pre-judgment relief may ultimately control the initial decision of whether and where to sue.

At the very beginning of ICL, the authors appropriately call attention to the importance of forum selection and judgments recognition (p. 3).


\textsuperscript{18} See, e.g., Burkhard Hess, Aktuelle Brennpunkte des transatlantischen Justizkonflikts, 50 AKTIENGESELLSCHAFT 897 (2005) (discussing current issues of the transatlantic judicial conflict); Christoph G. Paulus, Abwehrstrategien gegen unberechtigte Klagen in den USA, 52 RECHT DER INTERNATIONALEN WIRTSCHAFT 258 (2006) (suggesting defense strategies against what the author considers unjustified lawsuits in the United States); Haimo Schack, Ein unnötiger transatlantischer Justizkonflikt: die internationale Zustellung und das Bundesverfassungsgericht, 51 AKTIENGESELLSCHAFT 823 (2006) (taking the German Constitutional Court to task for creating an unnecessary judicial conflict with its decision in the Bertelsmann case, in which the Court stayed the execution of a U.S. request for service under the Hague Service Convention, grounded partly on the Court’s perceived need to protect a German company from class action litigation in U.S. court); Rolf A. Schütze, Klagen vor US-amerikanischen Gerichten – Probleme und Abwehrstrategien, 51 RECHT DER INTERNATIONALEN WIRTSCHAFT 579 (2005) (discussing problems created by U.S. litigation and defense strategies against such litigation).
With respect to global class actions, one might argue that most of the transnational issues arising therein are no different from those in other cases. The authors cover both these issues and the relevant class action cases when discussing federal subject matter jurisdiction, personal jurisdiction, forum non conveniens, and the act of state doctrine. And even though there are issues that are unique to class action litigation, such as the question whether the likelihood of recognition of a judgment or settlement abroad in the case should affect the decision whether to certify a global class in the first place, explicating them might require too much of an introductory cast on aggregate litigation to be worth the candle in a case book that is already quite large.

The lack of a chapter, however brief, on transnational aspects of pre-judgment relief is a bit more difficult to explain. Here, too, the background in U.S. law is complex, involving not only federalism and separation of powers concerns, but questions arising from the merger of law and equity in the Federal Rules of Civil Procedure of 1938. Moreover, the Supreme Court, in a 1999 decision, held that Federal Rule of Civil Procedure 65 failed to provide an independent basis for federal courts to issue preliminary injunctions freezing foreign assets. Thus, the authors may have concluded that the complexity of the material may not be worth the extra pages. However, there is preliminary relief that is available in transnational cases in the United States. Such relief includes attachment and garnishment of assets located within the forum state and the issuance of injunctions with respect to persons subject to the personal jurisdiction of the court to the extent that such relief is necessary to secure final equitable relief. Some U.S. courts have even permitted the attachment of assets in the United States in support of litigation abroad. Moreover, the issues of federalism and separation of powers recur throughout the book and are already well developed by the authors. Finally, litigants in the United States may have powerful options abroad in this area: The English courts have fashioned preliminary injunctions freezing a defendant’s assets world-wide as well as concomitant disclosure orders requiring the defendant to divulge information on the assets covered by a freezing order. Both orders are available in aid of foreign proceedings. Similarly, a number of European jurisdictions permit their courts in cases

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20 See, e.g., Teitz, supra note 15, at 278-87 (providing such a chapter).


23 See, e.g., Securities & Exch. Comm’n v. Unifund SAL, 910 F.2d 1028, 1029 (2d Cir. 1990); In re Uranium Antitrust Litig., 617 F.2d 1248, 1258-60 (7th Cir. 1980).

24 527 U.S. 308 at 324-25 (distinguishing Deckert v. Independence Shares Corp., 311 U.S. 282 (1940)).


26 See, e.g., DICEY & MORRIS, supra note 16, at 185-88.
involving monetary claims to order the defendant to make “preliminary” payments. Today, such orders may be preliminary only in the sense that they are granted early, on the basis of limited evidence, and with a lower standard of proof. In practice, the granting of such preliminary relief often ends the case, further amplifying the importance of forum selection. Brief mention of these foreign approaches might be helpful to let students know what alternative options are available to (potential) litigants in the United States.

As for the renewed sense of a judicial conflict with the United States in Germany and elsewhere, readers may be forgiven for asking why anyone in the United States would want to spend time worrying about foreign rhetoric of a judicial conflict while trying to master the law of transnational litigation. Indeed, at this point in time, I would not expect a book like ICL to do more than mention the matter in passing so as to alert the reader to possible foreign reactions to certain U.S. decisions. However, I have found the in-depth study of an earlier episode in the U.S.-German judicial conflict relating to judicial cooperation and the recognition of judgments to be rather illuminating as to the factors that influence lawmaking for transnational litigation, both in the United States and abroad, as well as on the broader question of what sets transnational litigation apart from purely domestic litigation.

Perhaps the biggest story in the development of transnational litigation during the last two decades, however, remains the extent to which cross-border cases have grown to become a significant part of the litigation landscape in the United States and elsewhere. The question is: why? What is the reason for the recent increase of cases in, and lawmaking for, transnational litigation?

II. LESSONS FOR THE FIELD OF TRANSNATIONAL LITIGATION

The well rehearsed explanation is that the advent of globalization has increased exponentially the number of cross-border transactions and social interactions. As a result, trans-border litigation has increased as well. But I contend that there is more to the story: Litigants, especially repeat players in the global market place, expect their lawyers to do the best they can in securing a favorable outcome. Today, this means not only excellent advice and representation within a particular jurisdiction, but also sufficient knowledge about the advantages and disadvantages of litigating in foreign countries. As the importance of forum selection, discussed above, makes clear, this advice has to come early and in depth, from attorneys well versed in it. Moreover, transnational litigation is often complex, expensive, and therefore lucrative for the legal service market. Not surprisingly, then, top firms increasingly make sure they have attorneys who are familiar


29 See, e.g., Dasser, supra note 13, at 256.
with that turf. The result is that a growing but still select number of lawyers are conversant with the foreign alternatives to litigation in the United States as well as with the most attractive exit option – international arbitration – while most other attorneys, many litigants, and law reformers are not. Thus, we have identified the first feature that distinguishes transnational litigation from purely domestic litigation: Its effect is not only that some litigants receive superior advice and thus achieve better outcomes, but also that there is a group of litigants that is able to go elsewhere to influence legislative and, perhaps, executive action as well as to litigate and thus potentially to subvert the policies of domestic litigation procedure in ways not expected by lawmakers and judges.  

The second feature that sets transnational litigation apart from its domestic counterpart is quite simple: Foreign law (both procedural and substantive) is different. It is not just different in the sense that California law may be different from the law of Mississippi or Rhode Island. After all, rules developed in a separate country, with its own institutions, economy, culture, and jurisprudential history, present differences that go deeper than black letter rules.

Third, because of the quality and depth of differences in laws across countries, gaining knowledge about those foreign laws is difficult. Often, language provides the primary barrier. But even one who speaks the language of a foreign country is likely to encounter difficulty in locating the proper sources, let alone in appropriately evaluating them in light of the systemic function of the rules, their larger jurisprudential background, and the institutions set up to make and apply them. This brings the importance of the first feature of transnational litigation into clearer focus: Knowledge on this score provides those who have it with an often insurmountable advantage over those who do not. In domestic cases, on the other hand, judges and law reformers so inclined are usually able to obtain the information on the laws of other states of the United States that is necessary to make informed decisions.

Fourth, transnational litigation involves the jurisdictions of sovereign nations. Thus, much of the overarching structure that federal law (including federal constitutional law) and the federal government impose on the national level is missing, resulting in what international relations scholars dramatically call anarchy. Of course, international law has adopted some of the role of federal law on the international level, although its role remains rather limited in cross-border cases involving the United States. International treaties in particular promise both harmonization and better cooperation among nations in achieving their procedural policies if entered into with the necessary care and mutual cross-systemic education regarding the relevant domestic laws and institutions. Indeed many foreign countries, especially in Europe, have had a long

30 See Baumgartner, supra note 28, at 1361 & 1372-73.
32 For an analysis of the reasons behind the traditional U.S. approach of staying out of international treaties in this area, see SAMUEL P. BAUMGARTNER, THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS: TRANSATLANTIC LAWMAKING FOR TRANSNATIONAL LITIGATION 16-46 (2003).
33 See id. at 120-25.
history of negotiating treaties on issues of transnational litigation. The United States has recently taken the lead in one of these endeavors, resulting in the 2005 Hague Convention on Choice of Court Agreements, to which – although it is not yet in force – the authors call proper attention in the fourth edition of ICL.

Apart from the (potential) role played by international law in transnational litigation, there is another implication of the lack of an overarching international structure or government: Outcomes in transnational litigation are to some extent influenced by the relative power of the nations involved. At first blush, the contention that power politics plays a role in this area, which remains largely unrelated to the “high politics” of war and peace, may seem surprising. Yet, on closer inspection, it appears that courts and law reformers around the world are keenly aware of their country’s respective power when making decisions in cross-border cases. Why else would the courts and lawmakers of Switzerland, for example, be so meticulous about observing international law – including customary international law – and foreign sovereignty concerns when fashioning rules and decisions in transnational litigation, while the federal rulemakers and courts in the United States have been rather impatient with treaty interpretations and foreign sovereignty concerns that fail to converge with the procedural policies of the United States? More importantly from the U.S. perspective, consistent disregard of foreign sovereignty concerns – which themselves may be the result of differences in foreign procedural concepts – may be viewed abroad as the behavior of a powerful country trying to impose its values on others. The resulting resentment, in turn, provides fertile ground for groups and individuals to fill the information gap about U.S. procedure (feature two above) by disseminating as the truth the view of U.S. litigation practice usually held by proponents of tort reform. The result is a picture of the U.S. litigation landscape sadly lacking in perspective. That picture, together with resentment of U.S. power play, may end up hurting U.S. procedural interests when acted upon by foreign courts and law reformers, whether they pass blocking statutes, refuse to extend judicial cooperation or to recognize U.S. judgments, or attempt to turn treaty negotiations into venues for limiting U.S. jurisdictional power.

34 Id. at 47-67.
38 See, e.g., Baumgartner, supra note 28, at 1312-13, 1378 n.361.
39 Id. at 1344-53.
40 Id. at 1317-44.
Lawyers in transnational practice, as well as judges and law reformers, disregard these features of transnational litigation at their peril. Practicing lawyers need to know enough about foreign law to be able to tell when to contact local counsel and to communicate effectively with them in order to find the most advantageous forum for their clients and to litigate effectively there. Judges need to know enough to be able to make informed use of dueling expert opinions and to make enlightened policy choices. Law reformers, finally, need to have sufficient information about foreign procedural law to assess whether their efforts are likely to be successful in furthering their chosen process values. For this purpose, *ICL*, originally at the forefront of a new field, offers only limited help. Since its second edition, the book has contained useful introductions to the service of process and the taking of evidence in foreign countries as well as brief entries on the European Community’s Brussels Convention (now the Brussels I Regulation) on Jurisdiction and the Enforcement of Foreign Judgments in Civil and Commercial Matters and on foreign approaches to the recognition of U.S. judgments.\(^{42}\) The fourth edition also contains a few new references to foreign law, such as Latin American statutes designed to discourage forum non conveniens dismissals of U.S. litigation (pp. 414, 424-25). And the book has always briefly pointed to a number of ways in which civil litigation in the United States differs from litigation in other countries (pp. 3-4) (trial by jury, recovery of attorneys’ fees, discovery, size of damage awards, and expense and delay – at least as compared to some other countries). These readings provide welcome and necessary context.\(^{43}\) However, lawyers, judges, and law reformers working in transnational litigation will need to know considerably more.\(^{44}\)

First of all, they will need to be familiar with some of the black-letter rules abroad as well as the basic legal framework within which those rules operate. For this purpose, someone who needs to know roughly when litigation in a European country is possible will need to carefully read the Brussels Regulation (and the newly negotiated Lugano Convention for non-EC member states) and some of the seminal cases of the European Court of Justice interpreting it to get a basic feel for the Regulation’s jurisdictional provisions. For the same reason, it would be helpful for *ICL* briefly to sketch some of the

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\(^{42}\) The fourth edition helpfully reproduces the entire Brussels I Regulation in its documents supplement at 37-60. It also contains useful reminders that the Regulation contains provisions on lis pendens and related-actions-stays, and that the Regulation has recently been interpreted by the European Court of Justice to bar antisuit injunctions and forum non conveniens dismissals by national courts, even if the alternative forum is located outside the European Community (pp. 372, 538-39 & 559). The Regulation further contains a provision on jurisdiction to award preliminary relief, which the authors, unfortunately, chose not to cover. *See supra* text accompanying notes 20-27.

\(^{43}\) In a few instances, the authors of *ICL* use comparative references to suggest possible law reform (see, e.g., p. 539: “Should [the Brusselss I] Regulation … provide a model for U.S. courts confronting parallel foreign litigation?”), a tried-and-true use of comparative law materials. *See, e.g.,* RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW 3-21 (6th ed. 1998); ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1993).

\(^{44}\) Other texts on transnational litigation offer more or different comparative information than *ICL*. Professor Lowenfeld’s book in particular stands out with a significant proportion of foreign cases and other materials describing foreign procedural law. *See* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION (3d ed. 2006). However, this is not the place for a comparative review of the relative strengths and weaknesses of the various texts on transnational litigation in the United States on the market today. For an earlier such review see Linda S. Silberman, *International Litigation: A Teacher’s Guide*, 89 Am. J. Int’l L. 679 (1995).
forms of preliminary relief available elsewhere, at least to the extent such relief deviates considerably from what U.S. lawyers are used to at home.\textsuperscript{45}

But there is more. Procedural rules, more so even than other laws, are part of a functional and structural whole and must be understood in that context. Thus, for example, in deciding whether a particular foreign country represents an adequate alternative forum for purposes of a forum non conveniens dismissal of a U.S. class action, knowing that a country does not provide for class action litigation may be of only limited helpfulness. The court may also want to take into account whether some of the purposes helped by aggregation in the United States may be pursued more effectively through the legislature and by social norms in the alternative country, whether access to justice is furthered by looser standing requirements in that country’s administrative proceedings (thus allowing interested citizens to sue for the violation of various administrative regulations), and whether aggregation is available in public law litigation even if it is not available in private civil litigation.\textsuperscript{46} Similarly, it is only partly useful to know that most foreign legal systems provide for the losing party to pay the winner’s attorneys fees without taking into consideration that litigation costs in some of those foreign systems are significantly lower than they are in the United States.\textsuperscript{47} And it would be foolish to rely on a race to the courthouse under the mechanical lis pendens provision of Article 27 of the Brussels Regulation or identical domestic rules without taking into account the narrow definition of that provision’s requirement of “same cause of action” and the concomitant narrow scope of domestic res judicata rules in many European jurisdictions.\textsuperscript{48}

Finally, procedural rules tend to be closely embedded in a country’s institutions, traditions, and dominant social and jurisprudential preferences, all of which is indispensable in truly comprehending its procedural system.\textsuperscript{49} This is especially true for law reformers, who may want to know about the likely reaction abroad to specific policy choices made at home. For example, the perennial claims by foreign countries that service and discovery on their territory violate their sovereignty are rooted in traditional assumptions about the proper role of courts and in 19\textsuperscript{th}-century notions of territoriality that have remained firmly ingrained in European civil law thinking.\textsuperscript{50} Had the procedural reformers in the United States studied those assumptions more carefully when revising the Federal Rules of Civil Procedure in 1963, they would have realized that simply disregarding such sovereignty concerns as anachronistic and permitting service and discovery in violation of those concerns was bound to create trouble (i.e. judicial conflicts and thus unnecessary difficulties for U.S. litigants) down the road, particularly when the power disparity between the United States and other countries entered the

\textsuperscript{45} See supra text accompanying notes 20-27.

\textsuperscript{46} See, e.g., Baumgartner, supra note 19, at 311, 331-34, 348; Marco Verveij, Why Is the River Rhine Cleaner than the Great Lakes (Despite Looser Regulation)?, 34 LAW & SOC. REV. 1007 (2000).


\textsuperscript{48} See supra text accompanying note 38; BAUMGARTNER, supra note 32, at 48-53, 60-61.

\textsuperscript{49} See, e.g., Schack, supra note 18, at 823.

\textsuperscript{50} See supra text accompanying note 38; BAUMGARTNER, supra note 32, at 48-53, 60-61.
Similarly, deeper knowledge of other countries’ procedural systems may help Americans understand that too extensive a use of the equity features of U.S. procedure together with the exercise of political power to provide redress for foreign human rights violations may lead to deeper resentment abroad than Americans might expect. The long-term result may well be foreign hostility toward U.S. litigants, U.S. reform proposals, and the U.S. model of providing a domestic forum for foreign human rights claimants.

As this discussion makes clear, future specialists in transnational litigation will need significantly more comparative knowledge than is currently provided in a course on that subject. For teachers, this means that they may have to assign additional readings or, alternatively, rely on a separate course on comparative procedure. For scholars, there is considerable need for high-quality comparative research to contribute to more informed law-making in transnational litigation. This includes both research that thoroughly engages the underlying institutional and ideational background of particular procedural vehicles and scholarship that engages the rich repository of theoretical and empirical work in the cognate social science disciplines of international relations and comparative politics. Indeed, there is substantial need for more cross-country and individual-country empirical research on litigation procedure, whether descriptive or explanatory.

Transnational actors – I have focused on transnational litigants and their attorneys above – are as important in influencing the outcome of domestic legislative, administrative, and litigation processes as they are in forum selection. Thus, one would

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51 See Baumgartner, supra note 28, at 1346-48.
53 For a forthcoming text to use for either purpose, see OSCAR CHASE ET AL., CIVIL LITIGATION IN A GLOBAL CONTEXT (forthcoming 2007). Teachers may also partly rely on the increasing inclusion of comparative materials in widely used conflict of laws case books. See, e.g., ANDREAS F. LOWENFELD, CONFLICT OF LAWS: FEDERAL, STATE, AND INTERNATIONAL PERSPECTIVES (2d ed. 2002); SYMEON C. SYMEONGIDES, WENDY COLLINS PURDUE & ARTHUR T. VON MEHREN, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL (2d ed. 2003).
54 On the value of this type of comparative scholarship, see William Ewald, Comparative Jurisprudence (I): What Was it Like to Try a Rat?, 143 U. PA. L. REV. 1889 (1995).
55 On the importance of description in empirical scholarship, see GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, DESIGNING SOCIAL INQUIRY 34, 44-45, 178-79 (1994). See also id. at 44 (“In fields such as comparative politics or international relations, descriptive work is particularly important because there is a great deal we still need to know…”).
56 See supra text accompanying notes 29-30.
57 For a general argument that the interests of groups and individuals determine outcomes in international relations see Andrew Moravcsik, Taking Preferences Seriously: A Liberal Theory of International Politics, 51 INT’L ORG. 513 (1997); Anne-Marie Slaughter Burley, International Law and International Relations Theory: A Dual Agenda, 87 AM. J. INT’L L. 205, 226-37 (1993). Relying on this work, I have elsewhere suggested that transnational lawmaking may (but need not originally) represent an attempt to regulate the private endeavors of transnational actors. At the same time, transnational law is itself the result of individual and group preferences – within and outside of government – exerted either directly
expect a sizable portion of this future research to focus on access to courts, legislatures, and executives as well as on the design of domestic institutions more generally.

III. CONCLUSION

Two decades ago, Gary Born and David Westin published the first case book/treatise on transnational litigation in the United States. With their selection of topics, cases, questions, and superb analysis and their breadth and depth of treatment, they were able to influence the development of a new area of law. Later editions have continuously improved the book as both a teaching tool and a reference manual. The fourth edition, now authored by Mr. Born and Professor Rutledge, continues that tradition and thus should maintain the book’s considerable influence.

In the introduction to the first edition, the authors of ICL argued in 1989 that transnational litigation was or was about to become a distinct field of law. Since then, it has become clear that transnational litigation is indeed a field in the sense that its independent study has acquired considerable practical importance. Whether there is more to this field, however, is a much harder question. Professor Burbank, in an influential review of ICL, suggested that rather than being viewed as a distinct field of law, transnational (or international civil) litigation should be regarded

as part of a process of cross-fertilization in which (1) doctrine and techniques developed in the context of domestic cases are brought to bear on problems presented in international litigation, and (2) the increasingly international dimensions of litigation in our courts prompt changes in doctrine and techniques, which are then applied in domestic cases.

This analytical model nicely captures what I suspect judges and law reformers have been doing all along, both in the United States and abroad. It represents a congenial, efficient, and thus perhaps the best way to approach problems posed by cross-

through participation in the legislative, administrative, and litigation processes, or indirectly by engaging in transactional or litigation strategies designed to take advantage of, or frustrate, substantive or procedural policy. This process runs several ways. Frequently, more than one country attempts to regulate particular patterns of behavior with the result that state action needs to account for the preferences of other governments in the international system. Moreover, affected transnational actors have more than one government to address their grievances to. Thus, the policy decisions of one state may result in responsive governmental action both at home and abroad.

Baumgartner supra note 28, at 1361.


59 See supra text accompanying note 9.

60 Burbank, supra note 1, at 1459.

61 But see Silberman, supra note 9, at 1433:

[O]ne very important realization for [the Reporters of the American Law Institute’s proposed federal statute on the recognition and enforcement of foreign judgments] was that it was impossible to think about recognition and enforcement of foreign judgments without taking into account related aspects of international litigation, both in the United States and abroad.
border cases. However, I argue that this analytical model excludes important causal pathways through which transnational actors affect lawmaking for, and outcomes in, transnational litigation. Thus, judges and law reformers relying on that model without further analysis are bound to overlook important transnational ramifications of their work, leading to suboptimal lawmaking in the long run.62

As I have shown above, transnational litigation is different from domestic litigation in four distinct ways: (1) it involves widely different laws of other nations; (2) most attorneys, judges, and law reformers lack (adequate) knowledge about differences in those laws; (3) a limited number of transnational actors do possess such knowledge and thus have effective access to foreign litigation systems, legislatures, and executives; and (4) transnational litigation involves foreign nations and thus issues of sovereignty and relative state power.63 Despite these differences, there is considerable transnational interconnectedness in the lawmaking enterprise.64 Practicing attorneys, judges, and law reformers disregard these features at their peril. That in itself, I suggest, is sufficient reason to subject the distinct problems posed by cross-border proceedings to learned study. As part of that enterprise and in order to overcome the crucial lack of information of feature (2) above, I suggest that much comparative and empirical work remains to be done to better understand the effects of particular litigation strategies, decisions, and law reform proposals. Drawing from such work, ICL and other books on transnational litigation will need to include, or rely on, considerably more and deeper comparative material in the future so as adequately to educate the future generation of lawyers and law reformers.

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62 See Baumgartner, supra note 28, at 1361-84.
63 See supra text accompanying notes 29-41.
64 See supra note 57 and text accompanying notes 29-30. For further examples see Silberman supra note 9, at 1432-37.